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Summary

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Abbreviations and Acronyms

AAN	Order by National Court in Spain
AFSJ	Area of Freedom, Security and Justice
AN	*Audiencia Nacional* (National Court) in Spain
AP	*Audiencia Provincial* (Provincial Court) in Spain
appl./appls.	application/applications
Art.	Article
BOE	*Boletín Oficial del Estado* (Spanish Official Journal)
BOCG	*Boletín Oficial de las Cortes Generales (Official Journal of the Spanish Parliament)*
Cass	Italian Supreme Court
CE	*Constitución Española* (Spanish Constitution)
CFREU	Charter of Fundamental Rights of the European Union
CISA	Convention implementing the Schengen Agreement of 14 June 1985
CJEU	Court of Justice of the European Union
CPC	Criminal Procedure Code in Italy and Poland
DEIO	Directive on European Investigation Order
EAW	European Arrest Warrant
EAW FD	Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States
ECHR	European Court of Human Rights
ed./eds.	editor/editors
Eg	*exempli gratia*
Ex	according to
EEW	European Evidence Warrant
EIO	European Investigation Order

EJN	European Judicial Network
EU	European Union
EU CMLACM	Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000
FD	Framework Decision
ff/*et seq*	and the following
FGE	*Fiscalía General del Estado* (General Public Prosecutor's Office in Spain)
Ie	*id est*
ICCPR	International Covenant on Civil and Political Rights of 16 December 1966
IT	Information Technology
LECrim	*Ley de Enjuiciamiento Criminal* (Spanish Act on Criminal Procedure)
LD	Italian Legislative Decree
LO	*Ley Orgánica* (Organic Law)
LOEDE	Law 3/2003, of March 14th, on European Arrest Warrant and Surrender
LOPJ	*Ley Orgánica del Poder Judicial* (Act on the Judiciary)
LRM	Act 23/2014, of 20 November, on mutual recognition of judicial decisions in criminal matters criminal in the European Union (*Ley de reconocimiento mutuo de resoluciones penales en la Unión Europea*)
n./No	Number
OJ	Official Journal of the European Union
op. cit.	*opus citatum*
p.	Page
para.	paragraph (*fundamento jurídico*)
SAN	Judgement by National Court (Spain)
SAP	Judgement by Provincial Court (Spain)
STC	Judgement by Constitutional Court (Spain)
STS	Judgement by Supreme Court (Spain)
TC	*Tribunal Constitucional* (Constitutional Court in Spain)
TEU	Treaty on the European Union

TFEU	Treaty on the Functioning of the European Union
TS	*Tribunal Supremo* (Supreme Court in Spain)
vol.	Volume

Executive summary

The Report is aimed at comparing Italian, Spanish and Polish Reports on the implementation in each national systems of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014, regarding the European Investigation Order in criminal matters (hereinafter: DEIO). Following the entry into force of national legislations that have implemented the DEIO, each country involved in the current Project – Italy, Poland and Spain – has written its national Report following the common methodology established in WS1, *sub* D2.1. Where necessary, each State has taken into account practical experience in the field of another instrument of judicial cooperation, based on the principle of mutual recognition, such as the Framework Decision 2002/584/JHA, of 13 June 2002, on the European Arrest Warrant and the surrender procedure between Member States and related case law elaborated by the CJEU.

In comparing national legislations, the present Report addresses specific topics which are considered to be the most interesting and problematic ones in applying the EIO in all EU Member States, on the basis of the same methodology used in D2.1.

1. Introduction

The Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters is a new and comprehensive instrument aimed at the gathering of evidence located in another EU country. Indeed, the EIO is a 'judicial decision' issued or validated by the competent judicial authority of a Member State to have one or several specific investigative measure(s) carried out in another Member State to obtain evidence; the EIO may also be issued for obtaining evidence that is already in the possession of the competent authorities of the executing Member State (Art. 1, § 1). It does not cover the setting up of joint investigation teams and the gathering of evidence within such teams (Art. 3), a matter still regulated by the FD 2002/465/JHA of 13 June 2002, on joint investigation teams. Moreover, § 9 of the Explanatory Memorandum explains that the DEIO should not apply to cross-border surveillance as referred to in Article 40 of the Convention implementing the Schengen Agreement of 14 June 1985 (hereinafter: CISA).

As described in the Explanatory Memorandum, the Directive is based on the principle of mutual recognition, that is the cornerstone of judicial cooperation in criminal matters, but at the same time it takes into account the flexibility of the traditional mutual legal assistance mechanisms[1].

The deadline for transposition has expired on the 22nd of May 2017 and the process of implementation is concluded[2]. Luxembourg is the last country which implemented the Directive, while Denmark and Ireland are not bound by the Directive.

Regarding countries involved in the current Project, it should be mentioned that Italy has been the first to implement the Directive. Indeed, the Italian Government has transposed the Directive by means of the Italian Legislative Decree (hereinafter: LD) no. 108 of 21 June 2017[3], entered into force on 28 July 2017 and a few months later the transposition of

[1] See § 6 of the Explanatory Memorandum.
[2] On the status of implementation of Directive see: https://www.ejn-crimjust.europa.eu/ejn/EJN_StaticPage.aspx?Bread=10001. On practical and legal issues in the application of EIO see Eurojust, Meeting on the European Investigation Order, *Outcome Report*, December 2018.
[3] Published in *GU*, 13 July 2017, no. 162.

Directive, the Italian Ministry of Justice has published an Handbook[4] addressed to practitioners in order to solve, in a uniform manner, specific issues concerning the application of the new law.

Poland has transposed the Directive by the Law of 10 January 2018, amending the criminal procedure code and certain other laws, which came into force on 8 February 2018.

Lastly, Spain has implemented the Directive by the Law 3/2018, of 11 June[5], published on June 12th, 2018 in the Spanish Official Journal, amending the Act 23/2014, of 20 November, on mutual recognition of judicial decisions in criminal matters in the European Union (*Ley de reconocimiento mutuo de resoluciones penales en la Unión Europea*, hereinafter: LRM)[6], which shall substitute rules on European Evidence Warrant (EEW) set forth in Title X, Arts. 186 – 200; also general appropriate dispositions and Annexes shall be reformed.

2. Art. 34 DEIO and its meaning

One of the first and most pragmatic issue posed by the entry into force of DEIO was related to the interpretation of Art. 34 § 1 of DEIO, according to which from 22 May 2017 the Directive 'replaces' several instruments of judicial cooperation in criminal matters, applicable between Member States bound by this Directive, such as: the European Convention on Mutual Assistance in Criminal Matters of the Council of Europe of 20 April 1959 as well as its two Protocols; the CISA and the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (hereinafter: EU CMLACM) and its Protocol. All these instruments have been applied in Spain and Poland, while Italy did not apply the EU CMLACM until 22 of February 2018, when the Convention was implemented by LD no. 52 of 5 April 2017.

[4] Ministero della Giustizia, Dipartimento per gli affari di giustizia, *Circolare in tema di attuazione della direttiva 2014/41/UE relative all'ordine europeo di indagine penale – Manuale operativo*, 26 October 2017.
[5] BOE n. 142, 12.6.2018, p. 60161, available at https://www.boe.es/diario_boe/txt.php?id=BOE-A-2018-7831.
[6] BOE n. 282, 21.11.2014, p. 95437, available at https://www.boe.es/diario_boe/txt.php?id=BOE-A-2014-12029.

Moreover, the DEIO replaces, for Member States bound by the Directive, FD 2008/978/JHA on the European Evidence Warrant (hereinafter EEW), for obtaining objects, documents and data for use in proceedings in criminal matters of 18 December 2008, implemented by Spain[7] and Poland, but it has never been implemented by Italy and has been annulled by Regulation 2016/95 of the Parliament and Council of 20 January 2016 and also the provisions of FD 2003/577/JHA concerning orders freezing property or evidence of 22 July 2003, as far as freezing of evidence is concerned. This matter is now regulated by Article 32 of DEIO, named 'Provisional measures'. Therefore, the FD 2003/577/JHA is still in force for freezing orders for the purpose of subsequent confiscation[8], a matter that is not covered by the DEIO. It is to note that the DEIO does not either apply to confiscation regulated, at European level by FD 2006/783/JHA, on the application of the principle of mutual recognition to confiscation orders and by Directive 2014/42/EU[9], on the freezing and confiscation of instrumentalities and proceeds of crime.

Turning to the interpretation of Art. 34 § 1 DEIO, the text of both Italian and Spain law implementing the DEIO does not contain any provision relevant to transitional situations: however both countries have adopted the same solution. In Spain according to the opinion provided by the General Public Prosecutor's Office (*Fiscalía General del Estado*),[10] all existing conventions have maintained their application till the entry into force of the Spanish legislation implementing DEIO and are being employed even after the entry into force in Spain of the EIO with those Member States, which have not yet implemented the EIO. Also in Italy, following the teleological/pragmatic interpretation provided by the Italian desk of Eurojust and by the European Judicial Network (EJN), 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, as above mentioned: they

[7]Council FD 2003/577/JHA, Council FD 2008/978/JHA and Council FD 2002/584/JHA have been implemented in Spain under the comprehensive compilation done by Act 23/2014, of 20 November, on mutual recognition of judicial decisions in criminal matters in the European Union or LRM, which has derogated prior national legislation on the topic.

[8] In Italy the FD has been implemented by LD no. 35 of 15 February 2016.

[9] Spain has transposed Directive in Arts. 803 *ter* a – 803 *ter* Spanish Act on Criminal Procedure (*Ley de Enjuiciamiento Criminal*, henceforth LECrim) by Law 41/2015, of 5 October, on amendment of Act on Criminal Procedure for the speeding of criminal justice and the strengthening of procedural safeguards; Italy by Legislative Decree no. 202 of 29 October 2016.

[10] Opinion 1/17 on May 19th 2017 by Prosecution Unit of International cooperation, available at official website https://www.fiscal.es/fiscal/publico/ciudadano/gabinete_prensa/noticias.

will still be applied in situations where the DEIO is not applicable, such as for instance in relation to Denmark and Ireland, which as mentioned before are not bound by Directive, and also in relation to Member States that have not completely transposed the DEIO[11]. Such an interpretation would be in line with the aim of the Directive and with the application of the principle of interpretation in accordance with the contents of Directives, as developed by the CJEU[12].

3. SUBJECTS

3.1. The "judicial authority"

The first topic concerns subjects who can issue the EIO, defined by the DEIO as *'a judicial decision which has been issued or validated by a judicial authority of a Member State'* (Art. 1). In this regard it should be noted there are no significant differences among the three countries. In all of them the authority who can issue or validate the EIO is a "judicial" authority and any role is recognised by the administrative authority.

The meaning of the concept "judicial authority" depends on the structure of each normative procedural system. In Italy[13], during preliminary investigation – a stage dominated by the Public Prosecutor – an EIO can be issued by the Public Prosecutor and in the following stages by the judge who is proceeding, such as the judge of the preliminary hearing, the judge of the trial and also by the Court qualified for proceedings on preventive measures on assets (which is a Section of the Court with specific competences in this field). According to the Italian Law, the EIO cannot be issued by an administrative authority.

[11] Eurojust, *Note on the meaning of "corresponding provisions" and the applicable legal regime in case of delayed transposition of the EIO Directive*, p. 5, affirm that a majority of national authorities consulted were in favour of a pragmatic/teleological approach. A few national draft EIO laws prescribe the continued use of EU CMACM in relation to Member State that did not implement in time (draft laws in HU, RO and SK). French law which transposed EIO legislation prescribes the treatment of incoming MLA requests from Member States that have not yet transposed DEIO as if they were EIO (Article 5 of the Ordonnance of 1 December 2016).
[12] CJEU, 16 June 2005, *Pupino*, C-105/03.
[13] Italian Report, p. 11 ff.

In Poland[14], according to Art. 589w § 1 of the Criminal Procedure Code, the EIO may be issued by the court where the case is pending or by the Public Prosecutor who conducts the preparatory stage of the criminal proceedings. Also when the police conduct preparatory proceedings (Art. 311 § 2 CPC), may issue an EIO, but in this case the order, in line with the content of DEIO, has to be validated by the Public Prosecutor.

In Spain, the implementation of DEIO has changed the previous system regarding cooperation by the acknowledgment of a role also to the Public Prosecutor. Following the new Art. 187 (1) 2nd paragraph LRM, it has provided that issuing judicial authorities, jointly with Judges and Courts with knowledge of criminal proceeding where the EIO shall be adopted, shall be also '*the public prosecutors in the proceedings they direct, provided that the measure contained in the European investigation order is not a limitation of fundamental rights*'. Besides, Art. 187 (2) LRM institute the Prosecution Office as '*the appropriate authority in Spain to receive the European investigation orders issued by the appropriate authorities of other Member States*', therefore centralizing the reception of EIO in Spain.[15] It should be noted that the Public Prosecutor may issue or execute the EIO in Spain only when the measure requested does not entail restriction of fundamental rights, i.e., when it does not deal with a coercive measure. Should the Public Prosecutor receive an EIO that contains any coercive measure and which cannot be replaced by another measure, it will be sent by the Public Prosecutor to the judicial body for its recognition and execution'. The same proceedings apply when the issuing judicial authority '*expressly indicates*' that the measure must be enforced by a judicial body. Regarding authorities who can execute such coercive measures, Art. 187 (3) LRM, mentions the following: *Judges of the investigative or Minors of the place where the coercive measures must be carried out or subsidiary, where there is some other territorial connection with the crime, with the researched or with the victim; the Central Judge of the Investigative if the EIO was issued for a terrorist offense or another of the crimes, whose prosecution belongs to National Court; the Central Judges of the Criminal or of the Minors in the case of transfer to the issuing State of persons deprived of liberty in Spain.* Also in Italy, the Public Prosecutor who is the competent authority in order to execute an EIO (Art. 4 Italian LD), has to require the execution to the judge for preliminary

[14] Polish Report, p. 16 ff.
[15] Spanish Report, p. 19.

investigations where it is indicated by the foreign authority or according to national law the act has to be performed by a judge (Art. 5 Italian LD).

3.2.The role of defence

Regarding the exercise of defence rights, the text of Directive expressly grants the possibility to request the issuing of an EIO '*within the framework of applicable defence rights in conformity with national criminal procedure*' (Art. 1 § 3 DEIO) to the suspected, the accused and their lawyers. As underlined by scholars, although this provision is aimed at realizing the principle of equality of arms, it does not recognise an autonomous direct request of legal assistance to a foreign judicial authority. In Italy[16], 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. However, the competent judicial authority of the proceedings is not bound by the defence lawyer's request and the national legal system does not provide a remedy against refusal. Alongside the lack of a national remedy against the refusal to issue an EIO, another weakness of national legislation – although, in this regard, perfectly in line with the content of the Directive – is the consideration that a victim is not among the persons who may request the issuing of an EIO. Therefore, the victim could only submit a request to the Public Prosecutor who is not obliged to issue the EIO, or to give a formal explanation of his refusal, explanation that is required when the request is submitted by the defendant.

Also in Spain[17] the issuance of an EIO can be requested '*by a suspected or accused person, or by a lawyer on his behalf*', taking into account that according to Spanish criminal procedure model 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. The main difference,

[16] Italian Report, p. 13 ff.
[17] Polish Report, p. 20 ff.

in comparison with the Italian system, is that the resolution or order (*auto)* on the request of a defence can be appealed before the superior court (Court of Appeal or *Audiencia Provincial* if it is delivered by a single judge, ie, Judge of the Investigative) as any other according to Arts. 217 and 236 LECrim.

By virtue of implementation of DEIO, Poland has make a step forward the protection of defence in cross-border proceedings. Indeed, according to the new Art. 589w, an EIO may be issued *ex officio* or on request of a party to the proceedings (or by a party's attorney).

Regarding participation of a defence in the gathering of evidence abroad, in all the countries there are no significant rules. The reason for this lies in the fact that DEIO does not contain specific provisions on the participation of a defence lawyer or of private parties at the stage of execution[18]. In particular, according to Art. 29 of Italian LD, the Public Prosecutor or the judge who issued the EIO, subject to an agreement with the foreign authority, can participate in the execution of an EIO. A solution suggested to improve the equality of arms could be that the issuing authority may indicate the participation of the defence lawyer during the execution of an EIO, as a procedure to which the executing authority shall comply with (a possibility acknowledged by Art. 33 § 1 of the LD). However this solution is not fully satisfactory, since the participation of defence lawyers would depend, first of all, on a discretionary initiative of the issuing authority. Moreover, from the perspective of the executing State, this request is not mandatory. Indeed, when Italy is the executing authority, it could refuse the request to comply with the formalities and procedures expressly mentioned by the issuing authority – such as the participation of a defence – if these are deemed in contrast with its "principles of law" (Art. 4 § 2 does not contain the adjective "fundamental"). Even when Italy is the executing State, Article 8 of the Italian LD does not provide any participation of private parties.

Regarding Poland some problems have been underlined with regard to Art. 589zi § 1 and § 2 of the CPC aimed at implementing Art. 9 of the DEIO[19]. On the one hand, Art. 589zi § 1 CPC states that in execution of the EIO Polish authorities use Polish provisions, which means *prima facie* that a defence lawyer of the suspect/accused may be present during the action indicated in the EIO, such as the hearing of a witness. Provisions of CPC give the

[18] It is to underline that Article 4 of 1959 ECMACM provides the participation of an "interested person", so including "private parties".
[19] Polish Report, p. 18.

defence the right to be present during the actions in criminal proceedings. However, the actions indicated in the EIO will not be actions in criminal proceedings which are regulated by CPC (Art. 1).[20] The execution of the EIO is a proceedings subsidiary to the proceedings pending in the issuing State. Polish procedural norms regarding the right of the defence to be present during the actions in criminal proceedings cannot be related to the actions indicated in the EIO. This argumentation is strengthened by the wording of Art. 589zo § 1 CPC which implements Art. 9 § 4 of the DEIO. According to this provision, the authority of the issuing State may assist in the execution of the EIO in support to the competent Polish authorities if it does not contradict the fundamental principles of the Polish law or harm its essential national security interests. It means that the executing authority could refuse the participation of the issuing authority; *a fortiori* any right to participate can be acknowledged to the defence lawyer, therefore undermining the equality of harms.

4.TYPES OF PROCEEDINGS

Concerning types of proceedings for which the EIO can be issued (Art. 4 DEIO), in all the considered countries the EIO can be issued within a "criminal" proceedings[21], excluding the administrative proceedings. In Italy[22], Art. 27 § 1 of Italian LD mentions the Public Prosecutor or the judge, within "criminal" proceedings and within proceedings for the application of a preventive measure on assets. The wording of Article 27 makes it clear that the application of an EIO is strictly related to criminal proceedings and also to special proceedings regarding the application of prevention measures which are deemed as "criminal", with the consequence that an EIO cannot be issued by an administrative authority (such as CONSOB, i.e., the Italian Commission for Companies and Stock Exchange).

[20] Polish Report, p. 18.
[21] Within this notion in Italy it is also possible to include proceedings relevant to "administrative liability (i.e., *responsabilità amministrativa*) of legal persons", regulated by LD no. 231 of 8 June 2001, which are deemed as "criminal" proceedings. See Italian Report, p. 11.
[22] Italian Report, p. 18 ff.

The same happens in Poland and Spain, with differences related to specific authority of each system. In Poland[23] an EIO can be issued in criminal proceedings regarding a "criminal offence" or in proceedings concerning a fiscal criminal offense. Moreover, the act provides for a possibility of issuing an EIO with regard to petty offences foreseen in divisions XI and XIV of the Petty Offences Code (hereinafter: POC) which are road traffic petty offences and petty offences against property, respectively. The decision whether the act is an offence or a petty offence often depends on – for example – the value of the property or the consequences of a car accident. An EIO can also be issued in the procedure regarding fiscal petty offences, codified in the Fiscal Criminal Code (hereinafter: FCC). Also in proceedings regarding the responsibility of legal persons that have rather criminal connotations, it is possible to issue an EIO. Also Polish implementation excludes a possibility of issuing an EIO on grounds of administrative proceedings.

In Spain[24], having regard to the proportionality principle, it shall never be proportional to issue an EIO in the framework of proceedings for minor offenses and in other cases the final decision should take into account the penalty attached to the crime. As a general principle, it will be issued in the context of "criminal proceedings", a notion that includes several proceedings. Either in Spain DEIO has not been implemented where the possibility to issue an EIO by administrative authorities is provided, whose decision can be appealed before criminal jurisdiction (Art. 4 (a) DEIO), since there are not such proceedings in Spain.

5. THE CONCEPT OF COERCIVE MEASURES

The DEIO does not provide any definition of coercive measure, a weak point that is criticised in all the Reports. The only reference is provided for by the Explanatory Memorandum (§ 16) in which it is specified that non-coercive measures could be, for instance, such measures that do not infringe the right to privacy or the right to property, depending on national law.

[23] Polish Report, p. 19 ff.
[24] Spanish Report, p. 24.

Art. 9 § 5 of the Italian LD[25], in listing investigative measures which always have to be available under the law of the executing State, expressly mentions "*investigative measures that do not infringe the right to personal freedom and the right to the inviolability of home*". It means that, according to the Italian regulation, measures that infringe the right to personal freedom, such as inspections (Article 244 and 245 of the CPC) searches (Article 247 and ff of the CPC), seizures (Article 253 and ff of the CPC), forced collection of biological samples from living persons (Article 359-*bis* of the CPC) or that infringe the right to the inviolability of home, a right that is more limited than the right to privacy (interception of conversations in private places), are deemed as coercive measure. Consequently, the executing authority, when a coercive measure (such as one of those mentioned above) is requested, cannot resort to an investigative measure other than that provided for in the EIO where the measure indicated does not exist or would not be available in a similar domestic case; moreover, all grounds for refusal listed in Article 10 of the LD shall apply.

Regarding Spain[26], Art. 189 (1) LRM which provides requirements for the issuance of the EIO such as, '*the issuance of an European investigation order is necessary and proportionate for the purpose of the proceedings to which it is requested taking into account the rights of the investigated or defendant*' and '*that the requested investigative measure or measures, whose recognition or execution is intended to have been agreed in the Spanish criminal proceeding in which the European investigation order is issued*', does not contain any reference to coercive measures. In general, coercive investigative measures are adopted during pre-trial investigation with restriction of fundamental rights and are regulated in Title VIII (Arts. 545 – 588 *octies* LECrim) under the heading '*Of the investigative measures limiting the rights recognized in Article 18 Spanish Constitution',*[27].

As observed in the Spanish Report, this new regulation on criminal justice has 'paved the way' for the current implementation of DEIO in Spain.[28]

[25] Italian Report, p. 19.
[26] See Spanish Report, p. 26.
[27] Textually, '*1. The right to honour, to personal and family privacy and to the own image is guaranteed. 2. The home is inviolable. No entry or search may be made without the consent of the householder or a legal warrant, except in cases of flagrante delicto. 3. Secrecy of communications is guaranteed, particularly regarding postal, telegraphic and telephonic communications, except in the event of a court order. 4. The law shall restrict the use of data processing in order to guarantee the honour and personal and family privacy of citizens and the full exercise of their rights.*' See English version of Spanish Constitution available at http://www.lamoncloa.gob.es/lang/en/espana/leyfundamental/Paginas/index.aspx (last access on July 5th, 2018).
[28] See p. 26.

Indeed all coercive investigative measures here included constitute assumptions of the so-called 'pre-constituted evidence',[29] whose fundamental requirement is to be transferred to the oral trial phase from one of the means of proof legally contemplated with observance of the procedural guarantees provided in this stage (orality, immediacy, contradiction, publicity, defence, etc). In judicial practice usually this transfer takes place under the declaration of police forces, i.e. the officer or officers who have practised the concrete investigative measure, as witnesses according to Arts. 701 ff LECrim. Otherwise these investigative measures practiced during the pre-trial investigation shall not have any probative value according to Constitutional and Supreme Court case-law such as leading cases SSTC no. 150/1987, of 1 October, and no. 161/1990, of 19 October, and STS of 5 May 1988.[30]

The last condition established by Spanish procedural rules is the adoption of such coercive measures restricting fundamental rights during pre-trial investigation by judicial authority (i.e, the Judge of the Investigative), excepted the constitutional provision of *flagrante delicto*, whose concrete regulation is provided in the Act on Criminal Procedure. In these cases, the practice of concrete coercive measures by police forces shall be admissible under the condition of later judicial validation according to criminal procedure rules. Otherwise the exclusionary rule (*prueba ilícita*) shall be applied according to Art. 11 (1) Act on the Judiciary.[31]

Regulation of coercive measures in Spain is provided first of all in Arts. 545 – 588 *octies* LECrim with specific enumeration of concrete diligences such as the following ones: 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, gathering and recording of oral communications through the use of electronic devices, use of technical devices for tracking, locating and capturing the image, registering mass information storage devices and remote records on computer equipment

[29] Defined as '*documentary evidence, which may be practiced by the Judge of the Investigative and its collaborating staff (judicial police and public prosecutor) on unrepeatable facts, which cannot, through ordinary means of proof, be processed at the time of oral trial'*.

[30] All are available at official websites http://hj.tribunalconstitucional.es/ and http://www.poderjudicial.es/search/

[31] Textually, *'taking of evidence which has, either directly or indirectly, infringed fundamental rights or freedoms, shall be inadmissible'.* Spanish Act on the Judiciary (henceforth LOPJ) is regulated by LO 6/1985, of 1 July, BOE n. 157, 2.7.1985, p. 20632 ff, English version is available at http://www.poderjudicial.es/cgpj/es/Temas/Compendio-de-Derecho-Judicial/ (last access on July 5th, 2018).

(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 *quarter* 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).

Nevertheless, also other regulation provided in the Act on Criminal Procedure must be taken into account as far as other coercive measures can be adopted and they are more and more employed in judicial practice, also in cross-border proceedings with employment of prior Conventions.[32] It is the case of controlled deliveries (Art. 263 LECrim), covert investigation by officials (Art. 282 *bis* LECrim) and DNA analysis and corporal interventions (Art. 363.II LECrim). Lastly, even amendments on the Act on Criminal Procedure already mention further diligences, still their practice needs to contemplate specific non procedural regulation; they are the so-called 'alcoholemia test' introduced at the time in road regulation,[33] today provided in Art. 796 (1), rule 7 LECrim, and filming in public places,[34] also now contemplated in new Art. 588 *quinquies* (a) LECrim.

Within the Polish Report, the attention is focused on coercive measures *largo sensu*[35] also called measures for evidential purposes, which are e.g. search or telephone tapping and could be subject of an EIO and carried out by Polish authorities.

Art. 10 § 2 of the DEIO – regarding measures that have to be always available in the executing State – was implemented by Art. 589zi § 3 CPC, whose version is slightly different

[32] See Spanish Report, p. 28.

[33] Prior Art. 12 Law on Traffic, Motor vehicle circulation and Road safety approved by Legislative Royal Decree 339/1990, of 2 March, available at https://www.boe.es/buscar/act.php?id=BOE-A-1990-6396 (last access on July 5th, 2018) further implemented by Arts. 22 and 23 General Ruling on Circulation approved by Royal Decree 1428/2003, of 21 November BOE n. 306, 23.12.2003, p. 45684 ff, consolidated version available at https://www.boe.es/buscar/act.php?id=BOE-A-2003-23514 (last access on July 5th, 2018). Today it is contemplated under Art. 14 Law on Traffic, Motor vehicle circulation and Road safety approved by Legislative Royal Decree 6/2015, of 30 October, BOE n. 261, 31 October 2015, p. 103167 ff, available at https://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-11722 (last access on July 5th, 2018).

[34] See LO 4/1997, of 4 August, by which is regulated the use of video cameras by the Forces and Bodies of Security in public places, BOE n. 186, 5.8.199, p. 23824 ff, consolidated version available at https://www.boe.es/buscar/doc.php?id=BOE-A-1997-17574 (last access on July 5th, 2018).

[35] Polish Report, p. 21. According to the Report, coercive measures *stricto sensu* provided in division VI of CPC (art. 245-295 CPC) *inter alia* property collateral, writ of protection, interim detention, are generally not in the scope of the EIO.

than its draft[36]. In the first draft, Art. 589zi § 3 CPC stated that subsequent investigative actions had to be always available in the execution of the EIO and cannot be replaced by other actions: (1) obtaining of information or evidence which is already in the possession of the Polish authority if the information or evidence could have been obtained in accordance with the Polish law, (2) obtaining of information contained in databases and directly accessible by the executing authority (the court or the prosecutor), (3) a hearing of a person[37] on the territory of Poland, (4) any investigative measure not related to excessive interference in human rights of the persons involved, (5) the identification of persons holding a subscription of a specified phone number or IP address.

The measure listed in point 4 posed some problems, in the light of Polish constitutional provisions. Firstly, evidence demanded in the EIO which is already in the possession of the Polish authority may not have been obtained in accordance with the Polish law. Secondly, the condition based on the lack of relation to "*excessive interference in human rights*" was replaced by the condition which refers to the evidence which could be admissible, obtained and collected without granting a decision. Polish criminal proceedings have not this kind of evidence.

6.GROUNDS FOR NON-RECOGNITION OR NON-EXECUTION

6.1. The nature

General grounds for non-recognition or non-execution are listed in Article 11 DEIO, as optional. Other specific grounds for non-recognition are listed with regard to specific investigative measures. In Italy grounds for refusal mentioned in Article 11 DEIO 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.

[36] Polish Report, p. 21.
[37] Which means e.g.: witness, expert, victim, suspected or accused.

The same happens in Spain[38] where 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 as it is '*When the European investigation order refers to proceedings initiated by the competent authorities of other European Union Member States for the commission of acts classified as administrative infractions in their legal order if the decision may give rise to a proceeding before a jurisdictional body in the penal order and the measure is not authorized in accordance with the law of the executing State, for a similar internal case'.*

In Poland the situation is more complex since some grounds for refusal have been implemented as optional, while other are mandatory[39]. 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; the use of the investigative measure indicated in the EIO which is restricted under the Polish law to a list or category of offences or to offences punishable by a certain threshold, which does not include the offence covered by the EIO; investigative measure indicated in the EIO would not be authorised under the Polish law in proceedings in which an EIO has been issued, have been implemented as optional. With reference to specific investigative measures: lack of the consent of the suspected or accused person to being heard by videoconference or other audiovisual transmission (when EIO indicates hearing by videoconference or other audiovisual transmission); lack of the consent of the person in custody to a temporary transfer to the issuing State (when the EIO indicates a temporary transfer to the issuing State); where EIO indicates hearing of persons referred to in Art. 179[40] and 180 § 1[41] and § 2[42] CPC regarding the circumstances mentioned in these articles, are considered as optional.

[38] Spanish Report, p. 29.
[39] Polish Report, p. 27 f.
[40] 179 § 1 "*Persons obligated to preserve a State secret may be examined as to the circumstances to which this obligation extends only if released from the obligation to preserve such secret by an authorised superior*

6.2. The principle of proportionality

The principle of proportionality has been specifically addressed in the text of DEIO among the conditions for issuing and transmit an EIO. Indeed, Art. 6 provides that "*The issuing authority may only issue an EIO where (...): (a) the issuing of the EIO is necessary and proportionate for the purpose of the proceedings referred to in Article 4 taking into account the rights of the suspected or accused person (...)*". It also specifies that in each case the condition shall be assessed by the issuing authority (§ 2).

From the perspective of Polish implementation of DEIO[43], Art. 589x CPC provides that issuing the EIO is excluded if: (1) the interest of the administration of justice does not require it, and (2) the indicated evidence would not be gathered or obtained in a similar domestic case. Putting aside the latter condition, the former is a reiteration of the provision of art. 607b § 1 *in principio* CPC.

A matter of concern is the definition of the term "*interest of the administration of justice*" first used in CPC in provisions regarding the transfer of proceedings in criminal matters *inter alia* art. 591 § 1 and 592 § 3[44]. The difference of purposes between these two institutions (transfer of proceedings and evidence gathering) is an argument against the identical interpretation of the term "*interest of the administration of justice*". In relevant literature, quoted in the Report, is claimed that the assessment of the interest of the administration of justice should be based on circumstances such as: importance of the crime, expected penalty, personal situation of the accused or the character of the case.

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agency".179 § 2 "*Such a release may be refused only if the giving of evidence might result in serious damage to the State's interests*".179 § 3 "*The court or the state prosecutor may apply to the appropriate State central administration agency requesting that a witness be released from the obligation to preserve a secret*."

[41]"*Persons obligated to preserve an official secret, or secrets connected with their profession or office may refuse to testify as to the facts to which this obligation extends, unless they have been released by the court or the state prosecutor from the obligation to preserve such a secret".*

[42]"*Persons obligated to preserve secrets such as lawyers, physicians or journalists, may be examined as to the facts covered by these secrets, only when it is necessary for the benefit of the administration of justice, and the facts cannot be established on the basis of other evidence. The court shall decide on examination or permission for examination. This order of the court shall be subject to interlocutory appeal".*

[43] Polish Report, p.24.

[44]This term was in fact introduced by art. 531c of CPC of 1969 (which was waived in 1998 and replaced by CPC of 1997).

The interest of the administration of justice may be misleading because of several other reasons. On the one hand, one may ask to which administration of justice it refers. In the Polish doctrine, it is unquestioned that this condition refers to the Polish administration of justice. On the other hand, it seems controversial that only the Polish interests should be relevant in the context of cooperation in criminal matters within EU. What is also disputable is that in the justification of the project, it is written that the circumstances to be considered in the assessment of the interest of the administration of justice are *inter alia*: possible costs of the executing State or the costs which should be borne by Poland as an issuing State. The DEIO in art. 21 provides rules of bearing the costs of the execution of the EIO. According to the Authors of the Polish Report it does not seem appropriate to link a proportionality issue with the problem of costs. It is a different matter, also regulated by the Directive. Finally, in the field of evidence we technically cannot anticipate whether the evidence will be aggravating or exculpating for the suspect/accused in the issuing State, so the execution of an EIO cannot be considered as *a priori* negative for a suspect/accused.

Concerning the role of proportionality from the perspective of Italy[45], it should be noted that the Italian LD, under agreement with the issuing authority, has provided the recourse to an investigative measure other than that provided in the EIO and which would achieve the same result, also when the EIO is not proportionate (Art. 9 § 2). In this regard, Art. 7 defines the principle of proportionality. In particular, an EIO is not proportionate when a prejudice to the rights and liberties of a defendant, of a person under investigation or of other persons involved may result from its execution and the prejudice is not justified by investigation or evidentiary needs concerning the practical case, taking into account the seriousness of the offences and the penalty provided. The application by the executing authority of the principle of proportionality could be used as an additional safeguard for the protection of national rights of persons involved in criminal proceedings, where the measure requested is deemed as a coercive one. It is not an additional ground for refusal.

6.3. The notion of immunity

[45] See p. 21.

There are not significant differences between Poland[46] and Italy[47] concerning immunities and privileges as grounds for refusal the execution of an EIO. In both systems, there is not a specific regulation for immunities concerning the application of an EIO, but a reference to general rules. Regarding legal status and effects of immunities, the regulation is the same in relation to functional immunities – or immunities of substantive criminal law – in favor of members of the Parliament as well as the Head of the State, who are not punishable for crimes committed in all activities they perform within the scope of their functions. It is a partial immunity that does not cover crimes committed outside the exercise of their functions and that for the Head of the State, does not include crimes such as attempt to the Constitution or high treason.

There are differences between Poland and Italy with regard to immunities of internal public law. Indeed, within the Polish system a procedural immunity is provided in favor of judges and Public Prosecutors (defined by scholars as "material immunity") - it means that it is forbidden to start criminal proceedings without the consent of the appropriate disciplinary court, except in the event of a judge being found *in flagrante* delicto[48], a situation that does not find any correspondent provision within the Italian system. Further differences concern immunities recognised within the Polish system in favour of certain institutional subjects that we cannot find in the Italian system (e.g. Ombudsman,[49] Children's Ombudsman,[50] the Chairman,[51] vice-Chairman and Director General of the Supreme Chamber of Control and inspectors of the Supreme Chamber of Control within actions connected with their competences,[52] Chief Inspector of Personal Data Protection,[53] the Chairman of the Institute of National Remembrance – Commission for Prosecution of Crimes against the Polish Nation.[54]).

Concerning immunities of international law, while the Italian system recognises to diplomatic agents an absolute substantive and procedural immunity, the Polish system

[46] See p.29 ff.
[47] See p. 22.
[48] This exception seems to be excluded in the context of the transnational gathering of evidence.
[49] Art. 211 of the Polish Constitution.
[50] Art. 7 (2) of the Children's Ombudsman Act of 6 January 2000, The Journal of Laws of 2000, no. 6, item 69.
[51] Art. 18 of the Supreme Chamber of Control Act of 23 December 1994, The Journal of Laws 1995, no. 13, item 59.
[52] Art. 88 of the Supreme Chamber of Control Act.
[53] Art. 11 of the Personal Data Protection Act of 29 August 1997, The Journal of Laws of 1997, no. 133, item 833.
[54] Art. 14 of the Institute of National Remembrance – Commission for Prosecution of Crimes against the Polish Nation Act of 18 December 1998, The Journal of Laws of 1998, no. 155, item 1016.

provides a diplomatic immunity that seems to have an exclusively procedural character. It also covers the privilege not to testify in criminal proceedings (provided in Art. 581 CPC), unless they consent.

Referring to consular immunities (consular offices, consular agents), in Poland national rules integrate international rules. For instance, persons covered by consular immunity could be subject to arrest or preliminary detention if they are charged with the commission of a crime; the privilege not to testify in criminal proceedings (provided in Art. 581 CPC) only applies if the material circumstances relevant to their testimony or opinions, are connected with the performance by these persons of their official or professional functions, and with other functions, on the principle of reciprocity (Art. 582 § 1 CPC). By contrast, in Italy consular immunities are entirely regulated by international sources.

Taking into consideration also the Spanish system[55], it should be noted that this latter – as well as the Polish system – did not included immunities among grounds for refusal the EAW (while Italian law no. 69 of 2005, aimed at implementing FD EAW, provided in Art. 18 lett. u), the privilege of immunities recognized at national level as a ground for refusal the deliver). By contrast, it is now included in new Art. 32 (1) (d) LRM, not only in relation to EAW, but for all European instruments on mutual recognition of criminal decisions; this one textually provides that the Spanish judicial authorities shall not recognise and/or execute orders employing mutual recognition instruments '*where there is immunity preventing the enforcement of the judgement*'. In order to clarify the concept, requirements and characteristics of immunity LO 16/2015 of October 27, on privileges and immunities of foreign states, international organizations with headquarters or office in Spain and the international conferences and meetings held in Spain, should be analysed.[56]

These persons have the immunity of jurisdiction as well as the immunity of execution, because cannot *be sued or prosecuted by the courts of another State*' and their *property cannot be subject to coercive measures or enforcement of decisions issued by the courts of another State'*. Spanish law also recognises immunities of international law to diplomatic and consular agents. Among grounds for refusal the execution of an EIO, Spanish law as well as Polish law, recall internal rules that provides exceptions to the obligation to declare as witness by certain persons.

[55] See Spanish Report, p. 30.
[56] BOE n. 258, 28.10.2015, p. 101299 ff, available at https://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-11545 (last access on July 5th, 2018).

Also regarding this last issue – the extension of grounds for refusal the EIO to cases where the witness is not obliged to be heard or is protected by the secret – there are not significant differences among systems that recognise in the exempt to be heard as witnesses a ground for refusal the execution of an EIO (although in the Polish Report the exempt to be heard as witness is a characteristic of material/procedural immunity recognised to diplomatic agents and consuls).

Within Italian law, the lack of specific grounds of refusal based on the privilege, does not mean that the Italian judicial authority is obliged to execute an EIO concerning the hearing of a witness protected by a secret (such as a professional secret, a public service secret or a State secret, regulated by Articles 200 and ff of the CPC). These provisions belong to the category of "fundamental principles of law of the executing authority" to be deemed as a limit to the compliance with formalities and procedures expressly indicated by the issuing authority. In the same way it is a consequence of the interpretation of Art. 416 LECrim within the Spanish system.

6.4. The *Ne bis in idem* principle

At an European level, the principle is stated by both Art. 4 of the 7th Protocol to the ECHR and Art. 50 of the CFREU. According to the former, "*No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State*"; according to the latter, "*No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law*".

The Italian Constitution does not prohibit double jeopardy, although the Constitutional Court considers it a constitutionally protected value deriving both from the right to judicial protection, pursuant to Art. 24 Cost., and the principle of reasonable duration

of the proceedings, pursuant to Art. 111 Cost.[57] In Poland, the constitutional *status* of the *ne bis in idem* principle is questionable: there is no explicit norm in the Polish Constitution, but some authors believe that the *ne bis in idem* principle is a consequence of the rule of law (Art. 2 of the Polish Constitution) and human dignity (Art. 30 of the Polish Constitution)[58], and the judgements of the Polish Constitutional Court show that there is a constitutional basis for this principle, namely the above-mentioned Articles and Art. 45 (the right to a fair trial). Although not expressly enshrined in the Spanish Constitution, the nature as a fundamental right of the *ne bis in idem* principle was already underpinned by the STC no. 2/1981, of 30 January, based on Art. 25 CE, in view of the close link between *ne bis in idem* and the principle of legality in criminal and sanctioning matters. Over time, however, the Spanish Constitutional Court has been refining its doctrine to the point that, for example, SCT no. 2/2003, of 16 January, illustrates two different constitutional foundations regarding the exclusion of *ne bis in idem*: the established principle of legality pursuant to Art. 25 (1) CE[59] in respect of its material aspect (i.e., the right not to suffer a double penalty) and the right to effective judicial protection pursuant to Art. 24.1 CE[60] with respect to its procedural aspect (namely, with respect to the prohibition of double criminal proceedings or, more broadly, double criminal proceedings).

Basic contents of the principle in Italian CPC can be found under Art. 649, Art. 669, and Art. 739 of the Code of Criminal Procedure (CPC). According to Art. 649 "1. *The defendant who has been either acquitted or convicted by a final penal judgment cannot be subjected to another penal proceedings for the same deed, even though the deed is differently qualified as to the title, the degree or the circumstances* […]."Art. 669 CPC refers to the executive phase (following a court final judgement), and provides that, among many final judgments on the same facts against the same person: the choice should be made on the basis of the principle of *favor rei*. Art. 739 CPP regards the so-called international *ne bis in idem*. *Ne bis in idem* clause in Spain is provided in a general rule contained in Art. 32 (1) (a) LRM, which set forth that the Spanish judicial authorities shall not recognise and/or execute orders on employing mutual recognition instruments '*when a definitive, condemnatory or acquittal*

[57] Among others, see Corte Cost., 30.04.2008, n. 129.
[58] See Polish Report, p. 32.
[59] Textually, '*no one may be convicted or sentenced for actions or omissions which when committed did not constitute a criminal offence, misdemeanor or administrative offence under the law then in force*'.
[60] Textually, '*all persons have the right to obtain effective protection from the judges and the courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defence'*.

decision, has been pronounced in Spain or in another state other than that of the issuance, against the same person and in respect of the same facts, and its execution violates the principle non bis in idem in the terms provided by the laws and in international conventions and treaties in which Spain is a party and even when the convicted person was subsequently pardoned.' As far as the *ne bis in idem* principle is provided in a prior general rule, no specific mention is foreseen in relation to the EIO according to new Art. 207 (1) LRM.

Art. 11 (1) (d) DEIO provides as a ground for optional refusal of recognition or enforcement of the EIO the fact that it is contrary to the *ne bis in idem* principle. Such a narrow forecast should be interpreted in accordance with the explanations given in Recital 17 of the own DEIO. Explanations, which, as doctrine has emphasized,[61] should not go unnoticed by the national legal operator. Recital 17 in the DEIO Preamble states, on the one hand, '*The principle of ne bis in idem is a fundamental principle of law in the Union, as recognized by the Charter and developed by the case-law of the Court of Justice of the European Union. Therefore the executing authority should be entitled to refuse the execution of an EIO if its execution would be contrary to that principle*'; on the other hand, due '*to the preliminary nature of the procedures underlying an EIO, its execution should not be subject to refusal where it is aimed to establish whether a possible conflict with the ne bis in idem principle exists, or where the issuing authority has provided assurances that the evidence transferred as a result of the execution of the EIO would not be used to prosecute or impose a sanction on a person whose case has been finally disposed of in another Member State for the same facts*.' In relation to the latter, it is clear that DEIO establishes two exceptions to the refusal of recognition and enforcement of an EIO based on *ne bis in idem.* The first of these exceptions is supported by the necessity to ensure the practical effectiveness of this right by the issuing authority. The second one presupposes the non-infringement of *ne bis in idem* (although only in respect of proceedings and/or final decisions in the Member States), since the transfer of evidence is subject to the undertaking or guarantee provided in such meaning by the issuing authority.

At a national level, in Italy this ground has been transposed in Art. 10 § 1 lett. *d*, according to "*no recognition and execution of the investigation order is made, if the transmitted information indicates a violation of the prohibition to subject a person, already*

[61] See Spanish Report, footnote no. 98, p. 37.

definitively judged, to a new trial for the same facts". Because of this provision, in Italy the *ne bis in idem* is a mandatory ground of refusal of the EIO. The same applies to Poland, where *ne bis in idem* is a mandatory ground for non-recognition and non-execution of the EIO (art. 589zj § 1 (2) CPC). It is limited to decisions in criminal matters only, which have been granted in another EU State. It does not seem controversial – the analogous ground for refusal refers to the execution of the EAW (Art. 607p § 1 (2) CPC) and the notion of this condition should be understood in the similar way as in the CJEU judgements regarding functional interpretation of the art. 54 CISA[62] and art. 50 EU FRCh.[63] In the context of the execution of the EIO, it should be emphasized that only the decisions taken in criminal proceedings (in Poland or in other EU member States) are taken into account. In the past, the *ne bis in idem* principle was not a ground for refusal (either mandatory or optional) in any instrument of mutual legal assistance with an exception of the execution of letters rogatory for search or seizure of property.[64] There are no provisions in CPC which could provide for a possibility of evidencing the *ne bis in idem* principle in MLA or in the EIO. The importance of this ground for refusal seems to be exaggerated. If any person/institution has knowledge of previous pending criminal proceedings (within the EU) regarding the same person and the same act, they should disclose the information – first and foremost – to the authority which conducts criminal proceedings in the issuing state. In Spain, notwithstanding the mandatory wording of the Spanish Law, the judicial practice shows that the prohibition of *bis in idem* is not a ground on which the Spanish courts often resort to refuse recognition or enforcement of requests for cooperation from other Member States. Despite of recent implementation in Spain of DEIO, a change in this direction is unlikely. On the contrary, few are the cases in which the Spanish courts presumably deny the execution of an OEI on the basis of *ne bis in idem*. Such argument is based on the following two reasons: 1) The first reason is that Art. 11 (4) DOEI restricts the channel of query to the issuing authority when, in order to decide

[62] See e.g. CJEU Judgments: of 11 February 2003 in joined cases, *Hüseyin Gözütok i Klaus Brugge*, C-187/01 i C-385/01; of 9 April 2006, *Van Esbroeck*, C-436/04; of 28 September 2006 , *Van Straaten*, C-150/05; of 18 July 2007, *Kraaijenbrink*, C-367/05; of 18 July 2007, *Kretzinger*, C-288/05; of 11 December 2008, *Bourquain*, C-297/07; of 22 December 2008, *Turansky*, C-491/07; of 16 November 2010, *Mantello*, C-261/09.

[63] CJEU, Judgment of 27 May 2014, *Spasic*, C-129/14.

[64] Poland has given a reservation to art. 5 of the MLA Convention of 1959 and the execution of the letter rogatory regarding search or seizure a property is possible only if the rogatory letter referes to extraditable offence. Article 9 of the Extradition Convention of 1957 excludes granting extradition if final judgment has been passed by the competent authorities of the requested Party upon the person claimed in respect of the offence or offences for which extradition is requested. In other words, *ne bis in idem* is one of the factors of "extradibility" of the offence.

whether the refusal for this reason, the necessary information (e.g., if the administrative procedure or sanction has a *'criminal character'*, if '*same facts'* are faced, if the decision has definitively extinguished public action, if the so-called '*enforcement condition'* has been fulfilled) can reside in another State. 2) The second, although in order of importance may well be the first, is that it is extremely difficult for national courts to automatically identify *ne bis in idem*. The assessment of this ground will depend, therefore, on the suspect *ex parte* to make it clear, which, in turn, will require him/her, either to appear in the issuing State and to be aware of the referral of the EIO, or that the conditions contemplated in Art. 22 (1) LRM[65] are met so that Spanish courts can notify the EIO. Only then, as some authors point out,[66] the way will be paved to the Spanish judicial authorities in order to undertake the query referred to in Art. 14 (4) DEIO and, therefore, to refuse recognition or execution of the EIO for this reason.

6.5. The principle of territoriality

Regarding this principle legislation of three countries is not homogeneous. As said before, the Italian Legislator has not implemented this ground for refusal, although it was included in the law aimed at implementing FD EAW. According to the content of Handbook on EIO[67], issued by the Minister of Justice, in case of an EIO issued for an offence committed outside the territory of the issuing State and wholly or partially on the territory of the executing State, judicial authorities will apply the general condition based on the principle of double criminality, with its exceptions where the EIO has been issued for offences listed in Article 11 of the DEIO or for investigative acts mentioned in Article 10 § 2 of the DEIO. Differently, this ground for refusal has been implemented both in Poland and Spain, and it is justified as a consequence of a lack of harmonisation in substantive criminal matters.

[65] Textually, *'when the affected person has his domicile or residence in Spain and unless the foreign proceeding has been declared secret or his notification frustrates the purpose pursued, he will be notified the foreign orders, whose execution has been requested'.*
[66] See Spanish Report, p. 44, footnote n. 123.
[67] Italy, p. 30.

6.6. The human rights clause.

As said before, all the three countries have implemented the ground for refusal based on the human right clause as mandatory, a ground that has never been included in instruments that are expression of the mutual recognition principle, such as the FD EAW. The lack of previous reference to this clause make it difficult to foster how it will be applied.

In Poland[68], Art. 589zj § 1 (5) CPC, which is different to the content of DEIO, provides that the recognition and execution of a European Investigation Order will be refused if it would violate human and citizen's freedoms and rights. A similar mandatory ground for refusal has been implemented to the surrender procedure (Art. 607p § 1 (5) CPC) and it also refers to the classical extradition procedure (Art. 55 § 4 of the Polish Constitution). In the application of EAW, this provision has been interpreted in the sense that it must be based on concrete facts and circumstances, it cannot be a result of abstract considerations – it must take account of the specific procedural situation.[69] It cannot be the result of speculation either, or of lack of the confidence in the law enforcement agencies and the judiciary of another (issuing) Member State of the European Union.[70] A possibility of a violence of freedoms and rights is not sufficient, and the legislature requires a reliable assertion, or at least likelihood verging on the certainty that such an infringement will occur.[71]

As pointed out in the Italian Report the judicial authority[72], in the lack of any indication in the text of Directive, could refer to principles developed by the CJEU in a judgement related to the EAW,[73] whereas the Court has ruled that Article 1 § 3, Article 5 and Article 6 § 1 of the FD on EAW, as amended by FD 2009/299/JHA of 26 February 2009, shall be interpreted as meaning that, where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, the executing judicial authority shall determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned with an EAW, issued for the purposes of

[68] Polish Report, p. 35.
[69] Judgment of the Appeal Court in Cracow of 16 December 2015, sign. II AKz 466/15, Lex no. 1950469.
[70] Judgment of the Appeal Court in Katowice of 15 February 2017, sign. II AKz 77/17, Lex no. 2309515.
[71] Judgment of the Appeal Court in Rzeszów of 13 August 2013, sign. II AKz 159/13, Lex no. 1340415.
[72] Italy, p. 33.
[73] See CJEU, GC, 5 April 2016, *Aranyosi and Caldararu*, C-404/15 and C-659/15, § 94.

conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions for his/her detention in the issuing Member State, to a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, in the event of his/her surrender to that Member State. To that end, the executing judicial authority shall request that supplementary information is provided by the issuing judicial authority, which after seeking, if necessary, the assistance of the central authority or one of the central authorities of the issuing Member State, under Art. 7 of the FD, shall send that information within the time limit specified in the request. The executing judicial authority shall postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk. If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority shall decide whether the surrender procedure should be ended. By applying these principles in the context of the EIO, the executing judicial authority, when faced with evidence of the existence of such deficiencies that are objective, reliable, specific and properly updated, is bound to determine – *ex officio*, keeping into account the secrecy of preliminary investigation – if there are substantial grounds to believe that a real risk of violation of human rights exists.

In Spain[74], Spanish Courts have followed the interpretation of the CJEU in the Melloni case. Indeed the CJEU declared that if Member States would have this faculty, such one would imply *to 'doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision'*.[75] Therefore, the Report underlines the confidence of Spanish authorities in other systems as it is evident by the experience related to specific investigative measures such as international supervised delivery in Art. 12 EU CMLACM. Spanish authority checks up if the legislation of the State, where supervised delivery is put into practice, is fulfilled (*lex loci*). In a European judicial area, procedural actions in other Member States cannot be undermined by the Spanish legal system. In general, TS, as

[74] Spanish Report, p. 46 ff.
[75] CJEU, 26 February 2013, *Melloni*, C-399/11, § 63.

demonstrated by case law – as STS n. 1345/2005, of 14 October,[76] STS n. 886/2007, of 2 November,[77] or STS n. 630/2008, of 8 October[78] – shows a confident attitude in the Area of Freedom, Security and Justice. So the human right clause does not have a real chance to be applied as a ground for refusal the execution of an EIO.

7 LEGAL REMEDIES AT NATIONAL LEVEL

The Directive has provided that Member States shall ensure legal remedies equivalent to those available in a similar domestic case, and has specified that 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). In this regard, while Italy has introduced a specific rule, Poland and Spain make a reference to general legislation.

According to the Italian LD[79], the decree which recognises the EIO is communicated, by the secretary of the Public Prosecutor, to the lawyer of the person under investigation, following terms provided by the Italian law (Art. 4 § 4): where the act to perform is the interview of the person under investigation, the defence lawyer shall be informed at least twenty-four hours in advance (Art. 364 § 3 of the CPC). Where the measure requested is "a surprise" measure (such as a search or a seizure), the defence has the right to participate in the act, but not the right to be informed in advance. In such a case, the decree is communicated upon the performance of the act or immediately after (Art. 4 § 4). The knowledge of the decree – except in cases where a surprise measure is adopted, such as the interception of communications – is strictly related to the control against these acts. Indeed, within five days from the communication of the decree which recognises the EIO, a person

[76] STS, 14 October 2005, n. 1345 at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=1073029&links=%221345%2F2005%22&optimize=20051222&publicinterface=true (last access on July 6th, 2018).
[77] STS, 2 November 2007, n. 886 available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=2590778&links=%22886%2F2007%22&optimize=20071220&publicinterface=true (last access on July 6th, 2018).
[78] STS, 8 October 2008, n. 630 at available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=3420015&links=%22630%2F2008%22&optimize=20081127&publicinterface=true (last access on July 6th, 2018).
[79] See p. 34.

under investigation and his/her defence lawyer, can submit an "opposition" to the judge for preliminary investigations, who decides after hearing a Public Prosecutor. This "remedy" does not suspend the execution of the EIO and the transmission of results of the activities performed, but the Public Prosecutor could decide not to transmit the result of investigations if it would cause serious and irreversible damages to the person under investigation, to the accused or to the person interested by the act (Art. 13 § 4). No remedy is provided against the decision. Should the opposition be accepted, the decree is annulled, a decision that shall be communicated "immediately" to the requesting authority (Art. 6 § 4). Art. 13 § 6 provides that the EIO is not executed in the case that the decree of recognition is annulled: thus, avoiding problems concerning the utilization of evidence in the requesting State.

A more guaranteed mechanism is applied where the decree is related to the execution of a seizure aimed at evidence (Art. 13 § 7): in this case, the opposition to be submitted, in the absence of a specific rule, within five days, can be submitted by a person under investigation, a defendant, a person from whom proprieties have been seized and the person who has the right to the restitution. As regards the decision, the judge will decide *in camera*, following Art. 127 of the CPC (participation is not mandatory) and against the decision the recourse to the Italian Supreme Court is provided only for violation of law, by a Public Prosecutor and who is "interested", being this latter a very generic wording. The Court will decide, *in camera*, within thirty days starting from when it receives the recourse, which does not have any suspensive effect. A topic that is not clear is related to the identification of the lawyer who shall receive the communication of a decree: the text mentions the lawyer of the person under investigation, a person that could be appointed in the issuing State. In addition to difficulties in the communication to a foreign lawyer, the main problem is the access to the acts of the Italian proceedings: the foreign lawyer will need the assistance of a lawyer who practices in Italy, with the consent of the defendant, who will bear the related costs.

In general, in Poland[80], 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. For instance, in Polish criminal proceedings, complaints can be lodged for decisions concerning the search of a house or a person, seizure of property, surrender of correspondence, packages and lists of

[80] See p. 36.

communications, securing electronic data or exhibits introduced as evidence by those persons whose rights were infringed (Art. 236 CPC). Also an order allowing surveillance or telephone tapping is subject to interlocutory complaint. In the complaint, the person concerned with the order may request that both the grounds and the legality of the surveillance and telephone tapping be examined (Art. 240 CPC). This provision also applies to the surveillance and recording by technical means of the contents of other conversations or messages, including e-mail correspondence (Art. 241 CPC). Both provisions apply to the decision on issuing a EIO (Art. 589w § 4 CPC).

The decision of execution of the EIO cannot be challenged in Poland.

The position of the defence is difficult – the decisions regarding the above-mentioned investigative measures (*inter alia* telephone tapping and surveillance), indicated in the EIO, may be challenged only by persons concerned with the EIO (not necessarily defendants).

Provisions of CPC, which refer to destruction of evidence (which is useless for criminal proceedings), are limited to surveillance (also surveillance and recording through technical means of the content of other conversations or messages, including e-mail correspondence) or telephone tapping (Art. 238 § 3 and 4 CPC) and material collected for the purpose of elimination (detected traces, collection of fingerprints, oral tissue, hair, saliva, handwriting sample, smell, and taking of photographs or voice recordings of a person – Art. 192a § 1 CPC).

As a general rule, it is a Public Prosecutor who brings an indictment to the court (Art. 331 § 1 CPC). An indictment should contain a list of persons whose appearance is demanded by the Public Prosecutor and also a list of other evidentiary procedures, the conduct of which in the course of the main trial is demanded by the Public Prosecutor (Art. 333 § 1 CPC). This means that the Public Prosecutor is not obligated to request taking – before the court, at the trial stage – all the evidence obtained through preparatory proceedings (and of course also all the evidence obtained by the EIO). At the trial stage, it is in the interest of the accused to offer any evidence favourable to them. If this evidence is located in the Public Prosecutor's file the accused should request taking it before the court (Art. 167 CPC). The files of preparatory proceedings are sent to the court together with the indictment (Art. 334 § 1 CPC)

Also in Spain[81], not being Art. 14 DEIO specifically implemented, a reference to general provisions is necessary and in particular, to Art. 24 LRM which provides, textually,

[81] See p. 49.

'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'. In particular, Arts. 216 LECrim *et seq* must be applied, which foresee different types of legal remedies such as 'the reform appeal, appeal and complaint appeal' (*recurso de reforma, de apelación y de queja*). In case of an EIO issued by Order (*auto*) from the Judge of the Investigative or, if it is the case, Judge of Minors or Judge of Violence against Women, whose resolution can be appealed before the superior court (in concrete, Court of Appeal or *Audiencia Provincial*) as any other according to following Arts. 217 and 236 LECrim. The same solution must be adopted in relation to the execution of an EIO as far as the appropriate decision for it is also an order issued by the judicial authorities listed in Art. 187 (3) LRM above including Judges of the Investigative (also Violence against Women, who works in criminal matters as Judge of the Investigative for gender violence); by contrast, if an EIO is executed by Central Judges of the Investigative, Minors and/or Criminals the appropriate authority shall be the National Court.[82] Law 3/2018 introduced an important provision in new Art. 187 (3) (a) in relation to the competence of Judges of the Investigative and /or of Minors to be added to their territorial competence and to be added to such one related to the place '*where the investigative measures must be adopted*': *or, alternatively, where there is another territorial connection with the crime, with the accused or with the victim*'.

The EIO issued and/or executed by Public Prosecutor raises specific issues, taking into account that specific mention of legal remedies in the decisions issued by this authority is foreseen in Act on Criminal Procedure. Currently, in Spain the Public Prosecutor cannot adopt criminal decisions and the direction of the investigative stage and/or pre-trial investigation is still conducted by a judge and the Public Prosecutor (*fiscal)* in only in charge with the task of the public accusation. Moreover, it could be appropriate to incorporate the possibility to interpose legal remedies based on substantive reasons not only in the issuing State but also in the executing State.

Another possible incidental remedy in order to avoid the issuance of an EIO is the rule contemplated in the subsequent Art. 192 LRM relevant to the Spanish implementation on an EIO, following the general prescription contained in Art. 10 (1) DEIO. Such rule allows the Spanish issuing authority to remove, modify or complete an EIO *ex officio* if the

[82] See Art. 65 (5) LOPJ.

executing authority notifies that the result pursued by the EIO can be achieved by a less restrictive research measure or the requested investigation (principle of proportionality) or the measure does not exist in its law or is not provided for in a similar domestic case.

In relation with other possible incidental remedies to execute an EIO new Art. 207 (3) LRM can be mentioned which provides that '*before partial or total rejecting the recognition and enforcement of the EIO, the competent Spanish authority shall request the issuing authority to provide the necessary additional information and, where appropriate, remedy the defect in which it was committed*'. This one is a text similar to the still current Art. 198 (5) LRM related to EEW for the purpose of obtaining objects, documents and data for the use in proceedings in criminal matters. As well as, in compliance with the article above when Spanish authority is the issuing authority.

8 SPECIFIC INVESTIGATIVE MEASURES

Chapter IV of the DEIO under the heading '*Specific Provisions for certain investigative measures*' (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. Some of these measures resembles the ones already provided for under the EU CMLACM, such as interception of communications.

In particular, the Directive has included rules on: the temporary transfer of persons held in custody (to the issuing and the executing State (Arts. 22 and 23 DEIO); on the hearing by videoconference, other audiovisual transmission and telephone (Arts. 24 and 25 DEIO); measures aimed at obtaining information on banking and financial accounts and operations (Arts. 26 and 27), as well as certain measures implying the gathering of evidence in real time (Art. 28); covert investigations (Art. 29) and interception of communications (Arts. 30 and 31 DEIO). Although the Italian and Spanish Reports have focused on measures that might pose practical issues, such as the temporary transfer of persons held in custody (Spain) and information on bank accounts (Spain and Italy), the attention will be limited on interception

of communications, an investigative measure analysed in all Reports and deemed as the more problematic ones.

8.1. Interception of telecommunications

Interception of telecommunications is an investigative measure specifically provided in all three countries, although requirements for granting the interception of telephone communications varies among them, and it may occur that the interception requested would not be possible for investigating a similar domestic case. For instance, in Italy[83] (Art. 266 CPC) and Poland[84] (Art. 237 § 3 CPC) the interception of communications is admissible only for certain offences, listed in both criminal procedure codes. The list in Poland also refers to the surveillance and recording by technical means of the content of other conversations or messages, including e-mail correspondence (Art. 241 CPC) and in Italy to the interception of computer or electronic communications (Art. 266-*bis* CPC). In Spain[85], according to Art. 588 bis (a) LECrim, the guiding principles to intercept telephone and telematic communications, also to be extended to other technological measures are: the principles of specialty, suitability, exceptionality, necessity and proportionality of the measure, as interpreted by case-law.

There are also differences as regard to duration and prolongation of interceptions. In general, as highlighted in the Spanish Report[86], while the maximum length of the interception order is one month in Belgium, the Netherlands or Sweden, it can be granted for up to three months in Germany and Spain, and for four months in France and the Czech Republic. In Poland[87], surveillance (also surveillance and recording by technical means of the content of other conversations or messages, including e-mail correspondence) and telephone tapping may be imposed for a maximum period of three months, which may be extended in particularly justified cases for an additional period not exceeding three months (Art. 238 § 4 CPC, Art. 241 CPC). In Italy the duration of interception shall not exceed fifteen days, but the judge for preliminary investigations may extend it for a further period of fifteen days (Art.

[83] See p. 38.
[84] See p. 38
[85] See p. 55 ff.
[86] See p. 58.
[87] See p. 40.

267 § 2 CPC) [88]. There is not a maximum time limit for the prolongation of the measure, but the judicial control on the request aimed at extending the duration of interception represents a guarantee.

8.1.1. Interception with technical assistance

This kind of interception, also provided by the EU CMLACM, is regulated in Art. 30 DEIO. According to § 30 an EIO shall "*contain the following information:* (a) *information for the purpose of identifying the subject of the interception;* (b) *the desired duration of the interception; and* (c) *sufficient technical data, in particular the target identifier, to ensure that the EIO can be executed*". Moreover, the issuing authority shall indicate in the EIO the reasons why it considers the indicated investigative measure relevant for the purpose of the criminal proceedings concerned (§ 4). Regarding grounds for non-recognition or non-execution, beside the one enumerated in Article 11 DEIO, the execution of an EIO may also be refused where the investigative measure would not have been authorised in a similar domestic case. The executing State may subject its consent to any conditions which would be required in a similar domestic case (§ 5).

According to the Spanish Report[89], the interception of communications requested in an EIO may be refused if the measure does not exist, would '*not be available in a similar domestic case*' (Arts. 10 (5) DEIO and 11 (1) (h) DEIO as well as further Arts. 206 (3) and (5) LRM), or there are substantial grounds to believe that its execution '*would be incompatible with the executing State's obligation in accordance with Article 6 TEU and the Charter'* (Art. 11 (1) (f) DEIO and further Art. 207 (1) (d) LRM). Except cases in which the refusal is based on the non-existence of such measure that will never apply, the requirements for granting the interception of telephone communications varies greatly. With reference to the proportionality principle, there is also the issue on the possible substitution of the measure if the executing authority considers that the information needed could be obtained through less intrusive means than the interception of communications according to Art. 10 (3) DEIO and further to Art. 206 (2) LRM. If the substitution is not feasible or is not accepted by the

[88] See p. 38.
[89] See p. 57.

issuing authority, it could lead to the withdrawal of the EIO pursuant to Art. 10 (4) DEIO and further to Art. 206 (4) LRM), or to the refusal of the execution, under Art. 10 (5) DEIO and further to Art 206 (5) LRM.

The executing authority may also refuse the execution of the EIO if the requested investigative measure does not exist in the executing State. For instance, in Poland[90] there is no regulation on private interception of telecommunications (between private persons or in the working place) and thus Art. 10 (1) (a) DEIO as well as new Art. 206 (3) LRM should apply. In such case, the executing authority shall notify that such assistance cannot be provided and inform the issuing authority of the possibility of adopting a substitute measure that could serve for achieving, if not the same, at least similar results. Nevertheless, the executing authority shall not check before ordering the execution if the measure requested exists in the issuing country. This is a requirement to be complied with by the issuing authority and mutual trust applies here.

In the relation among Italy, Spain and Poland, the cause of denial of the measure not specifically contemplated in the DEIO could not be applied, which is based on the ground that the legal persons cannot be criminally prosecuted under is national laws; in all countries a criminal responsibility of legal persons exists.

In Italy[91], with reference to interceptions requested by a foreign authority, the Public Prosecutor who is competent for the recognition (Art. 23 § 1), has to assess the conditions provided by the Italian CPC, it means that Art. 266 regarding limits of admissibility and 267 regarding preconditions and types of decision have to be applied. Moreover, he has to assess that the following information is mentioned: the authority which is proceeding, the title which authorises interceptions with the indication of the offence, the technical data that is necessary for interception, the duration of the interception and, lastly, the reasons that make the activity requested necessary (Art. 23 § 2). This formula – as explained in the Explanatory Memorandum to the LD – has been deemed as more appropriate than the reasons why the indicated investigative measure is "relevant" for the purpose of the relevant criminal proceedings mentioned in Art. 30 § 4 of the Directive, as well as serious grounds (i.e., *gravi indizi*) for believing that a crime has been committed mentioned in Art. 267 of the CPC.[92]

[90] See p. 40.
[91] See p. 45.
[92] See Explanatory Memorandum, p. 16.

Once this assessment is concluded, the EIO is transmitted to the judge for preliminary investigation with the request to execute the order who can refuse the execution in addition to the ground for refusal referred to in Art. 10, also where the conditions provided for by the Italian regulation are not met (Art. 23 § 3).

8.1.2. Interception without technical assistance

While Poland and Spain have ratified the Convention on Mutual Assistance in Criminal Matters between the Member States of the EU, which contains specific rules on interception of telecommunications, making a distinction between interceptions that require technical assistance and interception that do not require such an assistance, it is not the case in Italy. As said before, Italy has implemented the EU CMLACM only by LD n. 52/2017. It means that until the entry into force of new legislation the interception made by the Italian authority through the recourse to routing[93] (i.e., *instradamento*), according to Italian case law[94], did not request the application of provisions on letters rogatory, since all the activities of interception, reception and registration of phone call was performed in Italy, while the letter rogatory was necessary for intervention abroad related to interceptions of conversations abroad or captured only by a foreign service provider.[95]

Following the entry into force of both legislation, the interception of telecommunications in another Member State that do not require technical assistance are subjected to a notification to the competent judicial authority of the State where the intercepted communication took place (Art. 20 of EU CMLACM and Art. 31 DEIO). The exact terms of Art. 31 § 1 DEIO read as follows: "*Where, for the purpose of carrying out an investigative measure, the interception of telecommunications is authorised by the competent authority of one Member State (the 'intercepting Member State') and the communication address of the subject of the interception specified in the interception order is being used on the territory of another Member State (the 'notified Member State') from which no technical assistance is needed to carry out the interception, the intercepting Member State shall notify the competent authority of the notified Member State of the interception*".

[93] Italy, p. 41.
[94] See Cass, IV, 5 April 2017, no. 46968.
[95] See Cass, I, 4 March 2009, P.C., Barbaro, no. 13972; Cass, VI, 12 December 2014, Nardella, no. 7634.

Such notification shall be done either prior to the interception if the location of the subject is known, or during or after the interception, when the authority issuing the interception order did not know such circumstance previously. Furthermore, the notified Member State "*may, in case where the interception would not be authorised in a similar domestic case, notify*" the "intercepting State" that the intercepted material cannot be used or be used only under certain conditions (Art. 31 § 3 DEIO). According to this provision the foreign judicial authority has to verify not only the admissibility of the interception in relation to the offence for which the Italian authority is conducting the investigation, but all the other conditions that legitimate the interception in that country. With this aim the form set out in Annex C (Art. 31 § 2 DEIO) is used, that provides expressly that the notification shall include "*all information necessary, including a description of the case, legal classification of the offence(s) and the applicable statutory provision/code, in order to enable the notified authority to assess, whether the interception would be authorised in a similar domestic case; and whether the material obtained can be used in legal proceedings*".

Once the notification is made in accordance with the procedure foreseen in the DEIO, it is for the notified State to decide whether the prohibition of the investigative measure applies and/or the use of the materials obtained by way of the telecommunications interception. In using this power, the notified State could for example ban the remote search of computers in its territory if such measure is not regulated in its national laws, as it is the case of Poland[96]; it could also prohibit the use of the materials intercepted. If the measure is foreseen in the laws of the relevant State, in order to assess if such measure could be adopted in a similar domestic case, the notified State shall check all the data related to the criminal investigation and see if any of the grounds for refusal would apply.

It is to say that in the context of an EIO, when Italy is acting as an executing State, following article 24 § 2 of LD no. 108/2017 has provided a more formal control[97]: the Italian judicial authority (i.e., the judge for preliminary investigations) has to assess only whether the interception concerns an offence for which the interception would be admitted in Italy. A

[96] See p. 40.
[97] See p. 46.

different implementation of this rule in other countries could jeopardise the application of this provision.

9 THE ADMISSIBILITY OF EVIDENCE OBTAINED THROUGH AN EIO

The DEIO does not establish any rule on the admissibility of evidence gathered abroad. In Poland[98] a relevant question refers to the admissibility of evidence collected by the police (outside the criminal proceedings). Where Poland is the executing authority, the possibility of executing EIOs which indicate typical operational reconnaissance, is explicitly provided, which are based on the Police Act of 1990[99] (art. 589zi § 5 CPC). The only ground for non-recognition and non-execution of an EIO which indicates such an action is the lack of a possibility of granting such an action in a similar domestic case. As underlined by the Authors of the Report, from the perspective of an individual, such solution could be used as a way to avoid the guarantees provided by CPC.

With reference to Italy[100], 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), which concerns all the documents the Court may have knowledge of (i.e., the documents the Court may read and use for the final decision).

In particular, it is provided that 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. According to the latter provision,

[98] See p. 41.
[99] Act of 6 April 1990 on the Police, The Journal of Laws of 1990, no. 30, item 179 with subsequent amendments.
[100] Italian Report, p. 49.

the possibility for the defence to take part to the act gathered through an EIO should be recognised, although as noted above this kind of participation is not expressly provided either by the Directive, or by the national law.

Art. 36 § 2 of the LD recalls Article 512 *bis* of the CPC also with regards to statements gathered through an EIO, during preliminary investigations by the Public Prosecutor or by the judge of the preliminary hearing, according to Art. 422 of the CPC. As underlined in the Italian Report, with reference to this provision, it should not be possible to read previous statement in the event that the foreign authority did not allow, without a reasonable ground, the participation of the Italian authority in the gathering of evidence.

Unfortunately, it seems possible according to Art. 29 of the LD[101], which allows the participation of the Italian judicial authority in the gathering of evidence under the condition of the "previous agreement" with the foreign authority that could oppose a refusal.

[101] Italian Report, p. 50.

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Cass, VI, 12 December 2014, no. 7634

Cass, IV, 5 April 2017, no. 46968

POLISH NATIONAL COURT

Judgment of the Appeal Court in Rzeszów of 13 August 2013, sign. II AKz 159/13, Lex no. 1340415

Judgment of the Appeal Court in Katowice of 15 February 2017, sign. II AKz 77/17, Lex no. 2309515.

SPANISH SUPREME COURT

STS, 14 October 2005, n. 1345

STS, 2 November 2007, n. 886

STS, 8 October 2008, n. 630

REPORT ON EIO

ITALY

Best practices for EUROpean COORDination on investigative measures and evidence gathering

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Abbreviations and Acronyms

Cass	Italian Supreme Court
CFREU	Charter of Fundamental Rights of the European Union
CISA	Convention implementing the Schengen Agreement of 14 June 1985
CJEU	Court of Justice of the European Union
CPC	Italian Criminal Procedure Code
DEIO	Directive on European Investigation Order
EAW	European Arrest Warrant
ECHR	European Convention on Human Rights
ECMACM	European Convention on Mutual Assistance in Criminal Matters of 20 April 1959
EctHR	European Court of Human Rights
Ed./eds.	Editor/editors
EIO	European Investigation Order
EU	European Union
EU CMLACM	Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000
FD	Framework Decision
It. Const.	Italian Constitution
LD	Italian Legislative Decree
Tribunal	Judge of first instance in Italy
TUE	Treaty on the European Union
UE	European Union

Executive Summary

This Report analyses the implementation in Italy of Directive 2014/41/EU of 3 April 2014, regarding the European Investigation Order in criminal matters, by the Italian Legislative Decree no. 108 of 21 June 2017, entered into force on 28 July 2017.

The Italian Report follows the common methodology established in WS1 in order to compile legislation, case law and reference related to Italy focusing on specific issues which are deemed as relevant in the application of this new instrument, aimed at gathering evidence located abroad. Following the entrance into force of the above mentioned Italian Legislative Decree, the Italian Minister of Justice has given practical instructions to the judicial authorities involved in the application of the DEIO, in order to avoid different interpretations of national rules. Specific reference is made to the European Arrest Warrant case law where the content of the Directive on the EIO is not sufficiently clear.

1. INTRODUCTION

1.1 The aim of the EIO

By means of the Italian Legislative Decree (hereinafter: LD) no. 108 of 21 June 2017[1], entered into force on 28 July 2017, the Italian Government has transposed the Directive 2014/41/EU of 3 April 2014[2], regarding the European Investigation Order in Criminal Matters (EIO), whose deadline expired on the 22nd of May 2017.

The LD is made up of 46 Articles. The text is divided into Titles. Title I contains rules on general provisions, definitions and protection of personal data. Title II is related to the procedure applicable where Italy is the executing authority, and also includes provisions related to specific investigative measures to be executed by the Italian authority (temporary transfer to the issuing State of persons held in custody; temporary transfer to Italy of persons held in custody in the issuing State; hearing by videoconference or other audio-visual transmissions; hearing by telephone conference; information and documents on bank; covert investigations; delay or omission related to arrest and seizure; interception of telecommunications; provisional measures). Title III contains provisions applicable when Italy is the issuing authority and also provisions for certain investigative measures issued by the Italian authority (temporary transfer of persons held in custody; temporary transfer of persons held in custody in other Member States; hearing by videoconference or other audio-visual transmissions; information on bank accounts and banking operations; covert investigations; request to delay or omit arrest or seizure; interception of telecommunications).

[1] Published in *GU*, 13 July 2017, no. 162. For a comment see M. Daniele, 'L'ordine europeo di indagine penale entra a regime. Prime riflessioni sul d.lgs. n. 108 del 2017', *www.penalecontemporaneo.it*, 28 July 2017; C. Ponti, 'Riforma dell'assistenza giudiziaria penale e tutela dei diritti fondamentali nell'ordinamento italiano. Dalla legge n. 149 del 2016 al recepimento della Direttiva 2014/41/UE', *www.lalegislazionepenale.eu*, 2 October 2017; M.R. Marchetti, 'Ricerca e acquisizione probatoria all'estero: l'ordine europeo di indagine', 2018, *Archivio penale*, speciale riforme.

[2] On the Directive see, among others, I. Armada, 'The European Investigation Order and the Lack of European Standards for the Gathering of Evidence. Is a Fundamental Rights-Based Refusal the Solution?', 2015, vol. 6, Issue 1, *NJEUCL*, p. 8 ff.; L. Bachmaier, 'Transnational Evidence: Towards the Transposition of the Directive 2014/41 Regarding the EIO', 2015, 2, *Eucrim*, p. 47 ff.; L. Bachmaier, "Cross-border Investigation of Tax Offences in the EU: Scope of Application and Grounds for Refusal of the European Investigation Order", 2017, 1, *EuCLR*, p. 46 ff.; T. Bene-L.Luparia-L. Marafioti (eds), *L'ordine europeo di indagine penale*, Giappichelli, 2016; M. Daniele, 'Evidence gathering in the realm of the European Investigation Order', 2015, vol. 6, Issue 2, *NJEUCL*, p. 179 ff.; M. Jimeno-Bulnes, 'Orden europea de investigaciòn en material penal', in M.J. Bulnes (ed), *Aproximaciòn legislative* versus *reconoscimiento mutuo en el desarrollo del espacio judicial europeo: una perspectiva multidisciplinar*, Bosch procesal, 2016, p. 151 ff.; 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', 2014, vol. 10, Issue 1, *ULR*, p.113 ff.

As is well known, the aim of the DEIO is to set up a comprehensive system for obtaining evidence in cases with a cross-border dimension, based on the principle of mutual recognition, but which also considers the flexibility of the traditional system of mutual legal assistance[3] (see § 6 of the Explanatory Memorandum). Indeed, following Article 34 § 1 of the DEIO, headed "Relations to other legal instruments, agreements and arrangements", from 22 May 2017, the DEIO replaces the "corresponding provisions" of normative instruments related to the gathering of evidence abroad, adopted both in the context of mutual legal assistance and under the mutual recognition principle.

In particular, with reference to the former, the DEIO replaces the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 (hereinafter: ECMACM), adopted by the Council of Europe – signed and ratified by Italy[4] – as well as its two additional Protocols of 17 March 1978 and of 8 November 2001, and the bilateral agreements concluded pursuant to Article 26 thereof; the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985[5] (hereinafter: CISA); the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000 (hereinafter: EU CMLACM) and its Protocol of 16 October 2001. With reference to the latter, the DEIO replaces, for Member States bound by this Directive, FD 2008/978/JHA[6], of 18 December 2008, never implemented by Italy and annulled by Regulation 2016/95 of the Parliament and Council of 20 January 2016 and the provisions of FD 2003/577/JHA, of 22 July 2003[7], as regards freezing of evidence.

[3] With reference to mutual assistance, see M.R. Marchetti, *L'assistenza giudiziaria internazionale*, Giuffré, 2005.

[4] Italy has ratified this Convention by law 23 February 1961, no. 215 and Protocol of 1978 by law 24 July 1985, no. 436.

[5] Italy has ratified the Convention implementing the Schengen Agreement by Law no. 388 of 30 September 1993.

[6] Criticism against this FD has been expressed by, among others, G. De Amicis, 'Limiti e prospettive del mandato europeo di ricerca della prova', in G. Grasso-L. Picotti-R. Sicurella (eds.), *L'evoluzione del diritto penale nei settori di interesse europeo alla luce del Trattato di Lisbona*, Giuffré, 2011, p. 475 ff.; R. Belfiore, 'Il mandato europeo di ricerca delle prove e l'assistenza giudiziaria nell'Unione europea', 2008 *Cass pen*., p. 3894 ff.; G. Daraio, 'La circolazione della prova nello spazio giudiziario europeo', in L. Kalb (ed.), *Studi in materia di cooperazione giudiziaria penale*, Giappichelli, 2013, p. 179.

[7] FD concerns freezing, while transfer of evidence is the object of a separate request, regulated, respectively, by instruments based on judicial assistance and by International cooperation regarding confiscation; moreover, it requires knowledge of the place where it is located evidence. On this topic see A Mangiaracina, 'L'esecuzione nell'U.E. dei provvedimenti di blocco dei beni e di sequestro', in M. Montagna (ed), *Sequestro e confisca*, Giappichelli, 2017, p. 553 ff.

1.2. Art. 34 of the DEIO and its meaning

On the basis of the above, Article 34 of the DEIO has triggered two important issues[8]. The first issue relates to the scope of the DEIO, in particular the meaning of the term "corresponding provisions". The second issue concerns the legal regime that should apply if one (or several) of the Member States have not transposed the Directive by the 22nd of May 2017. Both issues have consequences for practitioners in the field of free movement of evidence at a European Union level.

As regards the first issue, it is important to understand which "corresponding provisions" of the above mentioned instruments will be replaced. During the 38th EJN Regular meeting on 22 February 2017, the EJN Contact points were invited to express their views on which measures would have been excluded from the scope of the DEIO. It is clear, by the reading of Article 3 of the DEIO, that the setting up of a joint investigative team and the gathering of evidence within such a team is excluded from its scope, a matter still regulated by the FD 2002/465/JHA, implemented in Italy by the LD no. 34 of 15 February 2016[9]. Moreover, § 9 of the Explanatory Memorandum explains that the DEIO should not apply to cross-border surveillance as referred to in Article 40 of the Schengen Convention.

As regards the relationship between the DEIO and the EU CMACM, it has to be pointed out that, although the latter represented a significant step forward in the development of judicial cooperation in criminal matters, it has been implemented by Italy with a considerable delay, by the Legislative Decree no. 52 of 5 April 2017, issued a few months before the entry into force of national rules aimed at implementing the DEIO. It entered into force on 22 February 2018. This, notwithstanding the LD no. 52 of 2017 – as well as the EU CMACM – still produces legal effects within the national system. On the one hand, it will apply to judicial assistance relations with Member States that are not bounded by the DEIO[10], and with States

[8] Eurojust, *Note on the meaning of "corresponding provisions" and the applicable legal regime in case of delayed transposition of the EIO Directive*, 2 May 2017, p. 1.

[9] For a comment see L. Camaldo, 'Le squadre investigative comuni: la normative di attuazione dopo una lunga attesa (d.lgs. 15 febbraio 2016, n. 34)', in F. Ruggieri (ed), *Processo penale e regole europee: atti, diritti, soggetti e decisioni*, Giappichelli, 2017, p. 17 ff.

[10] Ireland and Denmark are not bound by Directive. Ireland has not ratified EU MLA Convention. See L. Camaldo, 'L'attuazione della Convenzione di Bruxelles del 2000: l'assistenza giudiziaria in materia penale assume una configurazione a "geografia variabile"', *www.penalecontemporaneo.it*, 19 July 2017.

that have signed the EU CMACM, but are not members of the European Union, such as Iceland and Norway.

On the other hand, a margin of application can be also recognised to LD no. 52 of 2017 in the relation with States that adhere to the Directive, for certain investigative acts that are not regulated by the DEIO[11], such as the sending and service of procedural documents[12]– unless it concerns the EIO itself or acts aimed at its execution[13] – and the spontaneous exchange of information between competent authorities[14].

As far as the spontaneous exchange of information, within criminal or administrative proceedings, LD no. 52 of 2017, with the aim to protect the sovereignty of the transmitting State, provides that it is up to the competent authority to establish the conditions on the use of information and acts transmitted. Moreover, the judicial authority which receives this information is obliged to respect the conditions imposed, according to the principle of speciality[15]. With reference to requests for assistance in proceedings for the application of administrative sanctions, these are received by the Ministry of Justice who, when the request does not compromise sovereignty, security and other essential interests of the State, transmits the request to the administrative authority (i.e., *Prefetto*) of the place where acts have to be collected, or if the place is not identified, to the administrative authority located in Rome. The administrative authority (i.e., *Prefetto*) can delegate the gathering of acts to the specific administrative office that has specific competence.

As noted above, the DEIO also replaces the FD 2003/577/JHA relevant to the freezing of evidence, a matter regulated, since 22 of May 2017, by Article 32, named "Provisional measures". This rule has been transposed, at national level, in Article 26 of the LD no. 108 of 2017. According to this provision, the executing authority shall decide on the EIO relevant to the *corpus delicti* and the material items related to the offence, within forty-eight hours from the receipt of the EIO and however without delay (§ 1). The main value of this provision – if compared with the text of the FD 2003/577/JHA – is that the executing authority shall transfer the evidence, under request of the issuing authority, in accordance with the procedure laid down in Article 12 of the LD, which means by direct transmission to the issuing authority .Therefore, the FD 2003/577/JHA is still in force for freezing orders for the purpose

[11] See Eurojust, *L'ordine di indagine europeo. Cosa è utile sapere? Domande e risposte*, written by Italian Desk of Eurojust, 2017, p. 8.
[12] Articles 5 and 6 LD no. 52 of 2017 (Article 5 EU CMACM).
[13] See Eurojust, *L'ordine di indagine europeo. Cosa è utile sapere? Domande e risposte*, p. 11.
[14] Article 9 LD no. 52 of 2017 (Article 7 EU EU CMACM).
[15] Article 9 of LD § 3 makes applicable rules provided by Article 78of the implementing provisions of the CPC.

of subsequent confiscation, a matter that is not covered by the DEIO. At national level it is regulated by LD no. 35 of 15 February 2016, that has implemented the FD 2003/577/JHA.

The DEIO does not either apply to confiscation (regulated, at national level, by Legislative Decree no. 137 of 7 August 2015[16], aimed at implementing the FD 2006/783/JHA, on the application of the principle of mutual recognition to confiscation orders), or to specific forms of confiscation introduced at national level by Legislative Decree no. 202 of 29 October 2016[17], aimed at implementing Directive 2014/42/EU, on the freezing and confiscation of instrumentalities and proceeds of crime.

Lastly, among the measures that remain valid, the transfer of criminal proceedings, regulated by Article 21 of the EU CMACM and by the CoE Convention 1972 on the Transfer of proceedings in criminal matters should be mentioned. [18]

The second issue concerns the legal regime that should apply in relationships with Member States that have not transposed the Directive by 22 May 2017[19]. In this regard, the text of the LD implementing the DEIO does not contain any provision relevant to transitional situations. Following the teleological/pragmatic interpretation provided by the Italian desk of Eurojust and by the European Judicial Network (EJN), the word "replaces" used in Article 34 of the DEIO does not entail the automatic abolition of all the previous normative instruments adopted in the field of judicial assistance, as above mentioned: they will still be applied in situations where the DEIO is not applicable, such as for instance in relation to Denmark and Ireland, and also in relation to Member States that have not completely transposed the DEIO[20]. Such an interpretation would be in line with the aim of the Directive and with the application of the principle of interpretation in accordance with the contents of Directives, as

[16] M. Montagna, 'Il d.lgs. 7 agosto 2015, n. 137: il principio del mutuo riconoscimento per le decisioni di confisca', 2016, no. 1, *Proc. pen. giust.*, p. 110 ff.

[17] F. Vergine, 'Il d.lgs. 29 ottobre 2016, n. 202: un ulteriore ampliamento della confisca di estrazione europea, tra le "solite" novità e i mancati adeguamenti', 2017, no. 3, *Proc. pen. giust.*, p. 504 ff.

[18] See Eurojust, *L'ordine di indagine europeo. Cosa è utile sapere? Domande e risposte*, p. 2; and also Ministero della Giustizia, Dipartimento per gli affari di giustizia, *Circolare in tema di attuazione della direttiva 2014/41/UE relative all'ordine europeo di indagine penale – Manuale operativo*, 26 October 2017, p. 10. Restitution of articles to third parties is regulated by Article 8 of EU CMACM.

[19] Among Member States that have implemented the DEIO, following data updated on 7 November 2017, there are, Italy: Belgium, Croatia, Estonia, Finland, France, Germany, Greece, Hungary, Latvia, Lithuania, Netherlands, Portugal, Slovakia and the United Kingdom. See *www.ejn* where there is a special section on the EIO.

[20] Eurojust, *Note on the meaning of "corresponding provisions" and the applicable legal regime in case of delayed transposition of the EIO Directive*, p. 5, affirm that a majority of national authorities consulted were in favour of a pragmatic/teleological approach. A few national draft EIO laws prescribe the continued use of EU CMACM in relation to Member State that did not implement in time (draft laws in HU, RO and SK). French law which transposed EIO legislation prescribes the treatment of incoming MLA requests from Member States that have not yet transposed DEIO as if they were EIO (Article 5 of the Ordonnance of 1 December 2016).

developed by the ECJ. It is clear from Article 35 § 1 of the DEIO, that requests of mutual assistance received before 22 May 2017, shall continue to be governed by existing instruments relating to mutual assistance in criminal matters. From the perspective of the Italian legislation this means that, for requests received before 28 July 2017 (date of the entrance into force of the DEIO), LD no. 52 of 2017 shall apply, in relation to States that have ratified the EU CMACM for investigative acts covered by this instrument and regarding freezing of evidence by LD no. 35 of 2016. Starting from the consideration that the latter LD does not provide any rules on the transfer of evidence, it is also necessary to apply the traditional instruments of cooperation for this aim.

According to Article 34 §§ 3 and 4 of the DEIO, "In addition to this Directive, Member States may conclude or continue to apply bilateral or multilateral agreements or arrangements with other Member States after 22 May 2017 only insofar as these make it possible to further strengthen the aim of this Directive (…)". Following such aim, a notification by Member States specifying existing agreements and arrangements which they wish to continue to apply is requested. It should be pointed out that Italy, following the above mentioned provisions, has notified the intention to continue to apply the following Agreements, limited to the law provisions that make it possible to strengthen the aims of the Directive and to contribute to further simplifying or facilitating the procedure for gathering evidence. Agreements which supplement the 1959 ECMACM and facilitate its application signed with Austria (Vienna, 20 February 1973) and with the Federal Republic of Germany (Rome, 24 October 1979).

2. SUBJECTS

2.1. The judicial authority

As regards the procedure to apply when Italy is the requesting State, it should be underlined that, according to the text of the LD, an EIO can be issued with respect to criminal proceedings –wording that should also include administrative proceedings related to the liability of legal persons (regulated by the Italian Legislative Decree no. 231 of 8 June 2001) – and to proceedings for the application of preventive measures on assets (such as seizure and confiscation). The latter is relevant to "special" proceedings, which are regulated, at national

level, by the Italian Law of 13 August 2010, no. 36[21] (Article 27 § 1), and it does not apply to proceedings for the application of personal preventive measures. As a general rule, during preliminary investigation an EIO can be issued by the Public Prosecutor[22] or by the judge who is proceeding, such as the judge for the preliminary hearing[23], the judge of the trial or the Court qualified for proceedings on preventive measures on assets (which is a Section of the Court with specific competences in this field). The judge will issue the EIO having heard the parties, a wide concept that also includes the victim of a crime or third parties (in case of proceedings on preventive measures on assets). According to the Italian Law, the EIO cannot be issued by an administrative authority.

With reference to proceedings for the application of preventive measures on assets, financial investigations concerning assets are regulated by Article 19 of the LD no. 159/2011 (the so called "Anti-Mafia Code"). Article 19 regulates the persons in charge to carry out investigations, investigative powers, functional to the proposition of the application of the preventive measure on assets. Investigations concerning assets, because of their complexity, are held in two phases. The first one is carried out by the holders of the power of proposal. Therefore, the investigation takes place at a time prior to the institution of prevention proceedings before the District Court for preventive measures. A second phase of the investigation takes place during the proceedings before the Court. In this phase, the investigative powers are attributed to the District Court itself which has *ex officio* powers to carry out the investigation. With reference to the legal nature of the investigations, the Italian

[21] "Special plan against the mafia and delegation to the Government on Anti-Mafia regulation". It has been recently modified by the Parliament, by the Italian Law no. 161 of 17 October 2017. With reference to seizure, the District Court for preventive measures orders, even *ex officio*, by a reasoned decision, the seizure of assets of which the person concerned appears to be, directly or indirectly, the possessor, when their value is disproportionate compared to the declared income or with their business or where, on the base on sufficient circumstantial evidence, there is reason to believe that they are the result of illegal activities or constitute their reuse (Article 20 Anti-Mafia Code). With reference to confiscation the District Court for preventive measures orders the confiscation of the property owned or in the disposal of the person (even thorough an intermediary), when the person cannot justify the licit origin of such property and when its value is disproportionate compared to the person's income (Article 24 Anti-Mafia Code).

[22] The Italian Law Decree no. 7 of 18 February 2015, converted by the Law no. 43 of 17 April 2015, no. 43 (i.e., Anti-Terrorism Decree), has amended Article 17 § 1 of the Anti-Mafia Code, including the anti–mafia and terrorism Prosecutor among the authorities who are competent to request the application of prevention measures on assets. The national anti-mafia and terrorism Prosecutor can exercise this power over the whole territory of the State. From a practical perspective, the attribution of jurisdiction to the national anti-mafia and terrorism Prosecutor aims at overcoming issues resulting from the difficulties in locating and selecting the competent territorial jurisdiction.

[23] According to Article 422 CPC, at this stage, if the judge of the preliminary hearing maintains the position not to decide on the basis of available elements, he may order the gathering of evidence considered to be decisive for the purposes of the judgement of no grounds to proceed. Evidence could also be gathered during preliminary investigation or during the preliminary hearing by means of the special evidentiary hearing regulated by Article 392 ff CPC.

Court of Cassation stated that prevention proceedings have a jurisdictional nature, even at the stage of the investigation. However, given the peculiar characteristics of prevention proceedings, only some of the procedural guarantees of the preliminary investigations will apply. The Italian Court of Cassation, therefore, asserts the full autonomy of prevention with respect to criminal proceedings, while confirming the judicial nature of the prevention procedure. Criminal proceedings have different purposes compared to prevention proceedings; consequently, the two procedures are autonomous and have different evidentiary standards. Criminal proceedings require evidence to prove criminal responsibility for a crime beyond reasonable doubt, prevention proceedings are instead independent from a finding of criminal liability and, having as a precondition the social dangerousness, shall be based on elements of lesser evidential force. The autonomy of the two procedures is based on the Law: preventive action can indeed be exercised regardless of the prosecution (Article 29 of the "Anti-Mafia Code").

2.2. The role of defence

In order to understand the equality of harms between parties, the provision included during negotiations in Article 1 § 3 of the DEIO, according to which 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" [24], had been accepted favourably. By implementing this rule, Italy has opted for a "minimal" solution, that does not satisfy the rights of defence. Indeed, according to Article 31 of the LD, 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. It means that such a request entails the disclosure of the defensive strategy before the official discovery takes place. Moreover, the competent judicial authority of the proceedings is not bound by the defence lawyer's request and the national legal system does not provide a remedy against refusal. The provision according to which if the request is refused, the Public Prosecutor adopts a reasoned order (Article 31 § 3) is certainly positive, while the judge issues a decision (i.e., *ordinanza*) after having heard the parties (Article 31 § 4). What is

[24] For critical remark on this point see R. Belfiore, 'The European Investigation Order in Criminal Matters: Developments in Evidence gathering across the EU', 2015 (5) *European Criminal Law Review,* no. 3, p. 321.

negative is that against both kinds of decisions no remedy is provided. In practice, there is not a significant difference with the procedure applicable to letters rogatory. Indeed, under the mutual legal assistance regime the defence lawyer wishing to collect evidence located in a foreign country, shall submit a formal request to the Public Prosecutor (during the preliminary investigation) or to the judge (during the trial), who will act through the instrument of letters rogatory[25]. The judicial authority could refuse to execute the request without a formal explanation, thus undermining the rights of the defence, especially when there are strong reasons to believe that the evidence requested would be in favour of the accused. From the Italian perspective, within mutual assistance proceedings, the defence does not have a proactive role in the collection of overseas evidence[26]. Defence lawyers cannot carry out investigations abroad, as is instead allowed in national cases, since the reform introduced by the Italian Law no. 397 of 7 December 2000. The Italian Supreme Court excluded this possibility on the assumption that Article 391 *bis* and the following CPC sets forth a comprehensive list of investigative tools acknowledged to the defence, a list that does not allow for direct investigations overseas. This conclusion gives rise to a disadvantage for the defence, considering that Public Prosecutors can activate the procedure of letter rogatory.

The performance of defence investigation activities abroad is not regulated in the LD implementing the DEIO: a matter specifically regulated at national level. Except for investigative acts that require the authorisation by a judge (such as the access to private places), the defence should be authorized to gather information abroad by consulting whoever is able to provide relevant information for the reconstruction of the facts, by means of an undocumented interview[27]. When a written statement is requested, it should be necessary to comply with the rules of the Italian CPC (Article 391 *ter*), and these rules should be complied with under penalty of exclusion from the trial. Should the person refuse to cooperate with the defence, the impossibility to apply national rules (Articles 391 *bis* §§ 10 and 11 of the CPC) [28] would make it necessary to resort to letters rogatory, with the above mentioned possibility of a refusal opposed by the Public Prosecutor or by the judge.

[25] See Cass, I, 29 May 2007, Kaneva and others, published in 2008 *RIDPP*, p. 1382 ff.
[26] S. Ruggeri, *Audi Alteram Partem in Criminal Proceedings*, Springer, 2017, p. 191.
[27] On this topic see F. Grifantini, 'Ordine europeo di indagine penale e investigazioni difensive', 2016, no. 6, *Proc. pen. giust.*, p. 5.
[28] According to § 9 when the person who is able to provide information relevant for the reconstruction of the facts has exercised the right to silence or not to render any statements, the Public Prosecutor, upon request of the lawyer, shall set the examination of such person within seven days of the request. As an alternative, according to § 11, the lawyer shall be entitled to request to proceed with the gathering of depositions or to the examination of

In the specific context of the EIO, a different procedure applies when the request of the defence concerns the issuing of a seizure. In this case, Article 368 of the CPC shall be applied: if the Public Prosecutor believes that the seizure requested by the person concerned – in this case the person under investigation, his/her lawyer – shall not be carried out, the latter shall forward the request, along with his opinion, to the judge for preliminary investigations.

Alongside the lack of a national remedy against the refusal to issue an EIO, another weakness of national legislation – although, in this regard, perfectly in line with the content of the Directive – is the consideration that a victim is not among the persons who may request the issuing of an EIO. Therefore, the victim could only submit a request to the Public Prosecutor who is not obliged to issue the EIO, or to give a formal explanation of his refusal.

A question strictly related to the right of defence is the participation of the lawyer of a person under investigation or accused or of private parties in the gathering of evidence abroad. In this regard, Article 29 of the LD provides that the Public Prosecutor – by agreement with the executing authority – can participate directly or through one or more investigating police authorities in the execution of the EIO. With this aim, the Public Prosecutor can also promote the setting up of a joint investigation team (the LD no. 34 of 2016 applies in this case). Moreover, the judge who issued the EIO may request the execution authority to participate in the execution of the EIO. Unfortunately, the above mentioned Article does not require the participation of a lawyer or of private parties:[29] a shortcoming underlined by scholars also with reference to the content of the DEIO. This underestimates the role of the defence in ensuring that foreign procedural formalities are properly applied.[30]

The absence of defence lawyers during the execution of an EIO may invalidate the whole execution procedure, i.e. the admissibility of evidence in the proceedings in the issuing Member States where the participation of a lawyer is an essential requirement under national law. Such is the case, for instance, where an oral evidence (such as a testimony) has to be gathered. In order to avoid this risk, the issuing authority may indicate the participation of the

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the person who exercised the above mentioned right, by means of a special evidentiary hearing (Article 392 § 1 CPC).

[29] It is to underline that Article 4 of 1959 ECMACM provides the participation of an "interested person", so including "private parties": M.R. Marchetti, 'Dalla Convenzione di Assistenza Giudiziaria in materia penale dell'Unione europea al mandato europeo di ricerca delle prove e all'ordine europeo di indagine penale', in T. Rafaraci (ed), *La cooperazione di polizia e giudiziaria in materia penale nell'Unione europea dopo il Trattato di Lisbona*, Giappichelli, 2011, p. 163.

[30] 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*, Springer, 2013, p. 301.

defence lawyer during the execution of an EIO, as a procedure to which the executing authority shall comply with (a possibility acknowledged by Article 33 § 1 of the LD). In such case, the fact that the participation of defence lawyers would depend on a discretionary decision of the issuing authority represents a problem; moreover, the indication of formalities and procedures to comply with in the execution of an EIO, is not compulsory for the executing authority, which could refuse the request if it is deemed in contrast with fundamental rights.

Even when Italy is the executing State, Article 8 of the Italian LD does not provide any participation of private parties. With reference to the executing authority, pursuant to Article 4 of the LD, it shall be the Public Prosecutor at the Court of the main city of the District where the requested activity shall be carried out. When the aim of the request for legal assistance is to carry out activities that need to be executed in various Districts, they shall be executed by the Public Prosecutor of the District where the higher number of activities shall be performed or, if their number is the same, the Public Prosecutor of the District where the most significant investigative measure has to be undertaken. When the issuing authority requests that the activity shall be carried out by a judge or when the requested activity shall be carried out by a judge pursuant to Italian law (such as an interception of communications), the Public Prosecutor shall acknowledge the investigation order and ask the judge for preliminary investigation to execute it.

3. TYPES OF PROCEEDINGS

With reference to types of proceedings for which the EIO can be issued, Article 4 of the DEIO includes a comprehensive list. A similar provision does not exist in the LD no. 108 of 2017 aimed at implementing the Directive, which does not expressly list types of proceedings for which the EIO can be issued. Two different perspectives can be adopted to give an answer: one related to the execution and the other to the issuing of an EIO. From the first perspective, reference should be made to the list of grounds for non-recognition or non-execution provided for by Article 10, which apply where Italy is the executing authority. Among these latter, Article 10 lett. f) of the LD 108/2017 should be considered, where it is stated that the request should be rejected if the conduct for which the EIO has been issued

does not constitute an offence under Italian law; thus, irrespective of the legal qualification of the conduct under the law of the issuing State. As a consequence, where Italy is the executing State, the recognition or execution will be refused if the EIO refers to a conduct that does not constitute an offence according to the Italian Criminal Code, although it is an offence in the issuing State, except for cases where it is mandatory to execute the EIO (Article 9 § 5 of LD 108/2017); or unless it is relevant to an offence listed in the categories for which the dual criminality requirement does not apply (Article 11 of the LD 108/2017). It should be noted that a similar ground for refusal is provided for in Article 7 § 1 of the Italian Law no. 69 of 22 April 2005, aimed at implementing the Framework Decision 2002/584/JHA on the EAW. A reference to the case law developed by the Italian Supreme Court with reference to the EAW is therefore useful. According to case law, it is sufficient that "the material offence is punishable as a crime in both Member States, being the differences (if any) relevant to the sanctioning treatment irrelevant, as well as the definition of the offence or other elements requested for the offence".[31] In short, the Italian Supreme Court has avoided a formalistic approach. While, Article 10 § 2 of the LD 108/2017 provides a derogation where the EIO concerns an offence in connection with taxes or duties, customs and exchange. In these cases, the execution of the request cannot be refused by the Italian authority given that the law does not require the same kind of tax or duty or does not contain tax, duty, customs and exchange regulation of the same kind of the law of the issuing State.

The dual criminality requirement does not apply in the field of taxes, duties and customs law. Moreover, this exception is reinforced by the derogation to the dual criminality requirement relevant to counterfeiting currency, including of the Euro (Article 11 lett. l) of the LD 108/2017) and forgery of means of payment (Article 11 lett. cc) of the LD 108/2017). From the perspective of the authority that can issue an EIO, Article 27 § 1 of Italian LD mentions, as noted before, the Public Prosecutor or the judge, within "criminal" proceedings and within proceedings for the application of a preventive measure on assets. According to Italian scholars and case law, proceedings for the application of preventive measures are to be deemed as "criminal" and subjected to the guarantees of jurisdiction.[32]

The wording of Article 27 makes it clear that according to our legislation, the application of an EIO is strictly related to criminal proceedings, with the consequence that an

[31] See Cass, VI, 3 May 2017, no. 22249; Cass, VI, 17 May 2012, no. 19406.
[32] See, among others, Cass, VI, 8 March 2016, no. 15979; Cass, I, 10 July 2015, no. 32492; Cass, V, 23 January 2014, no. 16311; Cass, V, 16 October 2008, no. 3278.

EIO cannot be issued by an administrative authority (such as CONSOB, i.e., the Italian Commission for Companies and Stock Exchange). Similarly, an Italian authority cannot execute an EIO that has not been requested by a judicial authority or that has not been validated by a judicial authority (Article 10 § 3 of the LD). With reference to proceedings where Italy is the issuing authority, an EIO can be issued also for criminal offences relevant to taxes or duties, customs and exchange, such offences being judged within criminal proceedings.

4. THE CONCEPT OF COERCIVE MEASURES

Following Article 1 § 1 of the DEIO, "an EIO is a judicial decision (…) to have one or several specific investigative measure(s) carried out in another Member State (…) to obtain evidence in accordance with this Directive". It also may be issued to obtain evidence that is already in the possession of the competent authorities of the executing State.

It should be noted that the DEIO does not define the concept of "investigative measure", [33] therefore it is questionable which measures, other than those listed in Chapter IV and implemented at national level, are covered by the text. Legal certainty and uniformity across the Member States would have required a clear definition on this point. This should be underlined given that the term "investigative measures" is a general one and potentially includes coercive measures, a wide expression which cannot be merely identified with measures that imply the use of coercive power.[34]Indeed, there are measures which do not involve the use of coercion, but interfere with fundamental rights[35] (for instance, this is in the case of interception of communications). These measures vary between Member States, and normally are the object of a specific regulation characterized by additional guarantees. For

[33] According to S. Peers 'The proposed European Investigation Order: Assault on human rights and national sovereignty', Statewatch, May 2010, p. 5, <http://www.statewatch.org/analyses/no-96-european-investigation-order.pdf> the restitution of property (mentioned in Article 8 of the EU CMACM) cannot be considered as investigative measures, plus a series of issues mentioned in Article 49 of the Schengen Convention: b) proceedings for claims for damages arising from wrongful prosecution or conviction; c) clemency proceedings; d) civil actions joined to criminal proceedings, as long as the Criminal Court has not yet taken a final decision in the criminal proceedings; e) in the service of judicial documents relating to the enforcement of a sentence or a preventive measure, the imposition of a fine or the payment of costs for proceedings; f) in respect of measures relating to the deferral of delivery or suspension of enforcement of a sentence or a preventive measure, to conditional release or to a stay or interruption of enforcement of a sentence or a preventive measure.

[34] On this kind of measures see S. Ruggeri, 'Investigative Powers Affecting Fundamental Rights And Principles For a Fair Transnational Procedure In Criminal Matters. A Proposal Of Mutual Integration in the Multicultural EU Area', 2012 *Crimen*, p. 148 ff.

[35] On this topic see K. Ligeti (ed.), *Towards a Prosecutor for the European Union*, vol.1, Hart Publishing, 2012.

instance, the 1959 Convention relevant to the request for assistance related to the search and seizure of property allowed for the requested State to make its assistance subject to the respect of the dual criminality requirement (Article 5 (1) (a)), which is not a general requirement of letters rogatory.

The DEIO does not provide a definition of coercive measure either. The only reference is provided for by the Explanatory Memorandum (§ 16) in which it is specified that non-coercive measures could be, for instance, such measures that do not infringe the right to privacy or the right to property, depending on national law.

Article 9 § 5 of the LD, in listing investigative measures which always have to be available under the law of the executing State, expressly mentions "investigative measures that do not infringe the right to personal freedom and the right to the inviolability of home". It means that, according to the Italian regulation, measures that infringe the right to personal freedom, such as inspections (Article 244 and 245 of the CPC) searches (Article 247 and ff of the CPC), seizures (Article 253 and ff of the CPC), forced collection of biological samples from living persons (Article 359-*bis* of the CPC) or that infringe the right to the inviolability of home, a right that is more limited than the right to privacy (interception of conversations in private places), are deemed as coercive measure. Consequently, the executing authority, in these cases, cannot resort to an investigative measure other than that provided for in the EIO where the measure indicated does not exist or would not be available in a similar domestic case; moreover, all grounds for refusal listed in Article 10 of the LD shall apply.

5. GROUNDS FOR NON-RECOGNITION OR NON EXECUTION

5.1.Mandatory nature

As regards the grounds for non-recognition or non-execution, these are listed as optional in Article 11 of the DEIO. The LD, by transposing the Directive, changed all these grounds as mandatory: in this regard, a referral for a preliminary ruling to the CJEU is expected. Moreover, a comparison between the text of the Directive and the LD reveals further differences, that will be analysed in more details. First of all, Article 10 § 1 lett. a), among the grounds for refusal, has included the case in which the EIO transmitted is not

complete or the information provided by the EIO is clearly wrong or not correspondent to the investigative act requested. In this case the executing authority shall inform the issuing authority immediately in order to complete or amend the EIO.

5.2. The principle of legality

The first ground for refusal provided at a national level is related to the impossibility for the executing authority to offer assistance for reasons based on the respect of the legality principle. From the perspective of the Directive (Article 10), "recourse to a different type of investigative measure", that is optional where the investigative measure selected by the executing authority would achieve the same result by less intrusive means than the investigative measure indicated in the EIO, becomes mandatory in two cases, aimed at avoiding the so-called *forum shopping*. Where: a) the investigative measure mentioned in the EIO does not exist under the law of the executing State; or b) would not be available in a similar domestic case. Where there is no other investigative measure which would have the same result as the investigative measure requested, the executing authority shall notify the issuing authority that it has not been possible to provide the assistance requested (Article 10 § 5). The LD has transposed this provision in Article 9 § 1.According to the Italian text, when the investigative measure does not exist under the law of the executing State or when the conditions imposed by the Italian law to perform the investigative measure requested do not exist – having translated in such a way the ambiguous term 'unavailability' – the Public Prosecutor, subject to communication with the issuing authority, may resort to different investigative measures that would achieve the same result. The impossibility to execute the request, according to this provision, is deemed as grounds for refusal, that is added to the grounds listed in the following Article 10 of the LD (Article 9 § 3, recalled in the *incipit* of Article 10 § 1).

It should be noted that this provision cannot be applied to a list of measures such as: a) the obtaining of records of evidence from other proceedings; b) the obtaining of information contained in databases directly accessible by the executing authority; c) the hearing of a

person who is able to provide useful information from a witness, an expert, a victim, a person under investigation or an accused who is in the territory of the executing State or; d) any measure which does not infringe personal freedom and the right to the inviolability of home; e) the identification of persons holding a subscription of a specified phone number or e-mail address or IP address. These investigative measures, which according to the DEIO belong to the category of non-coercive measures, shall always be available under the law of the executing State: neither is it possible to apply grounds for refusal mentioned in Article 10 lett. *f* of the LD, concerning the lack of double criminality requirement, where it is proceeding for one of the crimes listed in Article 11 if punishable in the issuing State, by a custodial sentence or a detention order for a maximum period of at least three years.

Before analysing other grounds for refusal, it should be noted that the LD, under agreement with the issuing authority, has provided the recourse to an investigative measure other than that provided in the EIO and which would achieve the same result, also when the EIO is not proportionate (Article 9 § 2). In this regard, Article 7 defines the principle of proportionality. In particular, an EIO is not proportionate when a prejudice to the rights and liberties of a defendant, of a person under investigation or of other persons involved may result from its execution and the prejudice is not justified by investigation or evidentiary needs concerning the practical case, taking into account the seriousness of the offences and the penalty provided. The application by the executing authority of the principle of proportionality could be used as an additional safeguard for the protection of national rights of persons involved in criminal proceedings, where the measure requested is deemed as a coercive one. It is not an additional ground for refusal.

5.3. The notion of immunity

Following the DEIO, among the grounds for non-recognition or execution of an EIO an immunity or a privilege under the law of the executing State are mentioned which makes it impossible to execute the EIO or rules on determination and limitation of criminal liability relating to freedom of the press and freedom of expression in other media (Article 11, § 1, lett. a). According to the DEIO, situations of conflict between the contents of the EIO and the protection of the liberty to express their own opinion should be taken into consideration, which cannot be balanced with investigations needs, and also cases in which a secret, the incompatibility to be heard as a witness can be opposed.

In the LD aimed at implementing the DEIO, not all the above mentioned grounds are listed among grounds for the non-recognition of the EIO. Within personal privileges, Article 10 § 1 lett. b) of the LD 138/2017 provides immunities recognised in Italy that limit or forbid the beginning or the prosecution of a criminal charge. The notion of immunity should be interpreted *stricto sensu*, as a, definitive or temporary, privilege against prosecution; as a personal condition that forbids or limits prosecution (immunity of Members of Parliament, Heads of the State or of the Government regulated by Criminal Law, Constitutional law, Public International Law).

In the cases in which, as in the case of Members of Parliament (Article 68 of the Italian Constitution), the law provides the preventive authorisation to perform certain investigation activities (i.e., *partial processual immunity*), until the authorization is granted, it is forbidden to order temporary detention or personal precautionary measures against the person for whom the authorisation is to be issued; neither can he be subjected to a body or home search, body inspection, formal identification, informal identification, line-up and interception of conversations or communications. The person concerned may be questioned only if he requests to be questioned (Article 343, no. 2) of the CPC).

In these cases, immunity is not really a ground for non-recognition of the EIO (pursuant to Article 10 lett. b) of the LD 138/2017), but a temporary prohibition to execute the EIO, until authorization to proceed is granted by the competent authority. Indeed, in this regard, Article 9 § 4 of the LD 138/2017 provides that if an authorization to proceed is necessary in order to perform the investigative act requested , the Public Prosecutor should promptly request such authorisation. It is possible to state that the immunities mentioned by Article 10 lett. b) of the LD, as grounds for the non-recognition or non-execution of the EIO are procedural immunities that totally forbid to proceed (the so called "total immunity", i.e., the Head of the Church, Heads of foreign States etc.), as well as "functional immunities", which exclude criminal liability for crimes committed while carrying out or because of their functions (i.e., Members of the European Parliament for opinions expressed because of their functions).

"Rules on determination and limitation of criminal liability relating to freedom of the press and freedom of expression in other media" are not mentioned, which make it impossible to execute the EIO. In this regard, among the grounds for refusal, the consideration that the *"offence is an expression of the right of association, of the press or other means of communication" (*Article 18 lett. d) of the Italian Law no. 69 of 22 April

2005, although this rule has never been applied) is expressly mentioned in the regulation aimed at implementing the FD EAW. According to the Explanatory Memorandum attached to the LD,[36] since the exercise of the freedom of expression is a clause of justification, the rules aimed at protecting the freedom of the press as well as the freedom of expression can be opposed as grounds for refusal following Article 10 § 1 lett. f).

The lack of specific grounds of refusal based on the privilege, does not mean that the Italian judicial authority is obliged to execute an EIO concerning the hearing of a witness protected by a secret (such as a professional secret, a public service secret or a State secret, regulated by Articles 200 and ff of the CPC). These provisions belong to the category of "fundamental principles of law of the executing authority" to be deemed as a limit to the compliance with formalities and procedures expressly indicated by the issuing authority.

5.4. The *ne bis in idem* principle.

At a European level, the principle is stated by both Article 4 of the 7th Protocol to the ECHR and Article 50 of the CFREU. According to the former, "No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State"; according to the latter, "No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law". The principle is also expressly stated in Article 649 of the Italian CPC, according to which "1. The defendant who has been either acquitted or convicted by a final penal judgement cannot be subjected to another penal proceedings for the same deed, even though the deed is differently qualified as to the title, the degree or the circumstances […]." (See also Articles 699 and 739 of the CPC [this latter regarding the so-called international *ne bis in idem*]).

In general, the application of the principle depends on four conditions: "(1) the person prosecuted or on whom the penalty is imposed is the same, (2) the acts being judged are the same (*idem*), (3) there are two sets of proceedings in which a penalty is imposed (*bis*) and (4) one of the two decisions is final" .[37]

[36] See Explanatory Memorandum, p. 6.

[37] See Opinion of Advocate General Campos Sánchez-Bordona, delivered on 12 September 2017, Case C-537/16, § 55.

As it will be clear from what follows, in the past years, the second but most of all the third of these conditions have undergone through strong interpretive stress, both at a European and at a national level.

5.4.1. The ECtHR case law

ECtHR – According to the ECtHR (dating, at least, from the decision in the case *Sergey Zolotukhin* v. *Russia*, 10.2.2009), the *idem* condition shall be interpreted as meaning *idem factum*: "identical facts or facts which were substantially the same." As a consequence, "It is therefore important, in the Court's eyes, to focus on those facts which constituted a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which shall be demonstrated in order to secure a conviction or institute criminal proceedings" [38]. Instead, it is not required, that the two proceedings concern exactly the same norm nor two norms having the same constitutive elements (*idem legem*).

As regards the *bis* condition, the ECtHR interprets it in line with its substantialistic view of the "*matière pénale*" [39], elaborated since its *Engel and Others* v. *the Netherlands* judgement, 8 June 1976, and then refined in other important judgements (such as *Jussila* v. *Finland*, 23 November 2006). According to this view, (*a*) "it is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and shall be examined in the light of the common denominator of the respective legislation of the various Contracting States." (*b*) "The very nature of the offence is a factor of greater importance" (*c*) "However, supervision by the Court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring" (*Engel and*

[38] ECtHR, 15 November 2016, *A. and B.* v. *Norway*, Appl. no. 24130/11 and 28758/11, § 34.
[39] See ECtHR, 10 February 2009, *Sergey Zolotukhin* v. *Russia*, Appl. no. 14939/03, § 53; ECtHR, 4 March 2014, *Grande Stevens* v. *Italy*, Appl. no. 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10, § 94; ECtHR, 15 November 2016, *A. and B.* v. *Norway*, § 107.

Others v. *the Netherlands*, § 82). "The second and third criteria are alternative and not necessarily cumulative. It is enough that the offence in question is by its nature to be regarded as criminal or that the offence renders the person liable to a penalty which by its nature and degree of severity belongs in the general criminal sphere. The relative lack of seriousness of the penalty cannot divest an offence of its inherently criminal character. This does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge" (*Jussila* v. *Finland*, § 31).

As a consequence, the ECtHR has stated, in the *Grande Stevens* v. *Italy* judgement, that the prohibition of *bis in idem* under Article 4 Prot. 7 is infringed when someone is subjected to criminal proceedings (and *a fortiori* when someone is subjected to a criminal punishment) after having already been subjected, for the same deed, to an administrative sanction of a substantively criminal nature.

Moreover, in the *A. and B.* v. *Norway* judgement (see also, more recently, *Jóhannesson and Others* v. *Iceland*, 18.5.2017), the Grand Chamber has qualified its previous approach by stating that criminal proceedings and administrative ones can coexist together– even in those cases in which the latter are, according to the *Engel* doctrine, of a substantive criminal nature – if between the two proceedings there is "a sufficiently close connection (…) in substance and in time" to consider that both sanctions are part of an overarching sanctioning system which can be said to be proportioned to the offence committed.

5.4.2. The CJEU case law

In the interpretation of art. 50 of the CFREU, the CJEU has apparently followed the ECtHR's substantialistic approach; *de facto*, however, this interpretation resulted in a stricter view of the *ne bis in idem* principle than that provided by the ECtHR.

In order to decide whether a given measure or proceedings have a criminal nature, the Court sticks, at least formally, to the ECtHR case law, by explicitly recalling the so-called *Engel* criteria (see, e.g., the Grand Chamber judgements in Case C-489/10, *Bonda* (§ 37) and in Case C-617/10, *Fransson* (§ 35)). Moreover, as regards specifically the *ne bis in idem* principle, the Court states that "Article 50 of the Charter does not preclude a Member State from imposing, for the same acts of non-compliance with declaration obligations in the field of VAT, a combination of tax penalties and criminal penalties. In order to ensure that all

VAT revenue is collected and, in so doing, that the financial interests of the European Union are protected, the Member States have freedom to choose the applicable penalties. These penalties may therefore take the form of administrative penalties, criminal penalties or a combination of the two. It is only if the tax penalty is criminal in nature for the purposes of Article 50 of the Charter and has become final that provision precludes criminal proceedings in respect of the same acts from being brought against the same person" (*Fransson*, § 34).

In the Court's view, however, "It is for the referring court to determine, in the light of those [i.e., *Engel*] criteria, whether the combining of tax penalties and criminal penalties that is provided for by national law should be examined in relation to the national standards as referred to in paragraph 29[40] of the present judgement, which could lead it, as the case may be, to regard their combination as contrary to those standards, as long as the remaining penalties are effective, proportionate and dissuasive" (§ 36).

Lastly, on 12 September 2017, in his Opinions in Cases C‑524/15, C‑537/16 and C‑596/16 and C‑597/16 (which are still pending and originate from two requests of preliminary ruling by the Italian Supreme Court and one by the Court of Bergamo), Advocate General Campos Sánchez-Bordona has interestingly argued that:

a) the interpretation of Article 50 CFREU should follow the same approach as that of the ECtHR, as regards both the *bis* and the *idem* conditions of the *ne bis in idem* principle (e.g., AG in C-537/16, §§ 52-66);

b) "Application of the Engel criteria to the main proceedings is the responsibility of the referring court, which is best placed to assess whether the administrative penalty on which it shall adjudicate is really criminal in nature" (§ 68);

c) "On that basis," as regards the specific cases for which the ruling was requested, "the most rational conclusion is that the Italian legislation on market abuse enables the same unlawful conduct to be punished twice in the form of an administrative (albeit criminal in substance) penalty and a criminal penalty, without establishing a clear procedural mechanism

[40] "Where a Court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised."

to prevent double prosecution and double punishment of the perpetrator of the acts. To that extent, it infringes the right of *ne bis in idem* protected by Article 50 of the Charter";

d) "Article 50 of the Charter is directly applicable" since "it confers on individuals' rights which the national courts shall protect"; indeed, "Article 50 of the Charter is a clear, precise and unconditional provision which grants all persons the right not to be tried or punished twice for the same offence. That right may, of course, be relied on directly by individuals before national courts, which are obliged to protect it. […] Furthermore, in accordance with Article 6 TEU, Article 50 of the Charter forms part of primary EU law and, as such, has primacy over provisions of secondary EU law and over provisions of the Member States. […] In case of conflict between national law and rights guaranteed by the Charter, a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of EU law is under a duty to give full effect to those provisions. Therefore, it shall, if necessary, refuse of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such a provision by legislative or other constitutional means. […] In the case of provisions that are incompatible with the right of *ne bis in idem*, protected by Article 50 of the Charter, the national court or the competent administrative authorities shall, therefore, stay the proceedings pending without any negative consequences for the person concerned who has already been tried or punished in other criminal proceedings or administrative proceedings of a criminal nature" (§§ 82-87).

5.4.3 The Italian case law

A) <u>Lower courts</u> –Italian lower courts (e.g., Court of Brindisi, 17.10.2014; Court of Asti, 10.4.2015; Court of Terni, 12.6.2015) have sometimes complied with the ECtHR's approach, by applying art. 649 of the CPC in cases in which the defendant in criminal proceedings had already been subjected to a formally administrative but substantially criminal sanction for the same deed.

B) <u>Corte di cassazione</u> – The Italian Supreme Court (i.e., *Corte di cassazione*), instead, has constantly stuck to a restrictive view of the *ne bis in idem* principle, strongly influenced by the principle *nullum crimen, nulla poena sine lege* (which requires that criminal norms be formally enacted and identified as such by the Parliament): according to

this view, the principle of double jeopardy is only violated in those cases in which both sanctions/proceedings, to which the same person is subjected for the same deed, are of a *formally* criminal nature (see, e.g., Cass, I, 17.12.2013, no. 19915, Gabetti; Cass, III, 14.1.2015, no. 31378, Ghidini; Cass, IV, 6.2.2015, no. 9168, Meligeni; Cass, III, 23.3.2015, no. 36350, Bertini; Cass, 4.6.2015, no. 26235, Friolo [concerning the application of preventive measures]; Cass, 22.6.2016, no. 25815, Scagnetti).

On the other hand, as regards the so-called international (or better, European) *ne bis in idem*, the Italian Supreme Court has recently stated that the principle in Article 50 CFREU shall be fully applied within the Italian law, also through recognition of the decisions taken by judges of other EU States. According to the Court this entails that every judge in all the EU States shall also be considered as judge of the EU itself, therefore obliged to comply directly with the principles and fundamental rights of the EU (Cass, VI, 15.11.2016, no. 54467).

C) <u>Constitutional Court</u> – There have been some cases in which the Italian Supreme Court or a Court have raised the doubt that art. 649 of the CPC, interpreted as giving relevance to formally criminal proceedings/sanctions only, may be unconstitutional because it conflicts with the ECTtHR's interpretation of Article 4 Prot. 7 ECHR, and thus indirectly conflicts with Article 117 § 1 of the Italian Constitution, which requires Italian law to comply with International obligations.

In its decision no. 102/2016, the Constitutional Court has found the above question to be inadmissible, because of the type of intervention that would be required in the specific case: merely declaring the unconstitutionality of Article 649 of the CPC insofar as it does not give relevance to proceedings/sanctions (which are formally administrative but substantially criminal), without establishing some kind of precedence or coordination between the two proceedings/sanctions, would create, according to the Court, a situation of uncertainty and haphazardness as to the type of sanction – administrative or criminal – that would in fact follow the commission of offences abstractly sanctioned by both a criminal and an administrative norm. Applying the first of the two sanctions –the criminal or the administrative one – would preclude the application of the other, without any possibility to establish in advance which of them would prevail in the case in which both proceedings – the criminal and the administrative – would be initiated. According to the Court, this kind of merely chronological prevalence would not be in line with the principles established by the ECtHR in *Grande Stevens*. Not to mention, the Court adds that a similar solution would

impinge on such fundamental principles as those of certainty and legality of criminal sanctions (Article 25 It. Const.) and of equality (Article 3 It. Const.), as well as on the principles of effectiveness, proportionality and dissuasiveness of sanctions protecting the interests of the EU, as established by the EUCJ in C-617/10, *Aklagaren v. Akerberg Fransson*.

However, in its decision no. 200/2016, the Constitutional Court stated that Article 649 of the CPC is unconstitutional since it conflicts with Article 4 Prot. 7 ECHR, and thus – indirectly – with Article 117 § 1 It. Const., insofar as it excludes that in the concept of *idem factum*, relevant to the principle of *ne bis in idem*, can also be included the case in which the two offences are different, but have been committed with one and the same action/omission (the so-called *concorso formale di reati*).

5.5. The principle of territoriality

A significant difference between the LD and the text of the Directive concerns the grounds for refusal based on the principle of territoriality. It is a traditional ground for refusal, also included in the FD EAW, and transposed by the Italian Law no. 69/2015, in Article 18 lett. p).

According to Article 11 § 1 lett. e) of the DEIO the recognition or execution "may" be refused if "the EIO relates to a criminal offence which is alleged to have been committed outside the territory of the issuing State and wholly or partially on the territory of the executing State, and the conduct in connection with which the EIO is issued is not an offence in the executing State". Given that an EIO is aimed at being applied to transnational crimes, this ground appears in contrast with the goal of this new instrument: the construction of a European judicial space in which evidence can circulate without restrictions.[41] In this regard, the choice made by our Government not to implement this ground for refusal seems correct, justified by the consideration related to the risk of denying assistance in case of terrorism offences, which are characterized by the punishment of conducts that are deemed as preliminary to the attempt. Moreover, in the light of Directive 2017/541 of 15 March 2017, on the fight against terrorism, to be implemented by Member States which contains several provisions that punish the conduct of terrorism in a preliminary state of their realization

[41] According to M. Caianiello, 'La nuova Direttiva UE sull'ordine europeo di indagine penale tra mutuo riconoscimento e ammissione reciproca delle prove', 2014 *Proc. pen. giust*., p. 8, the best route, in the absence of rules on the conflict of jurisdictions at the European level, should be to establish clear rules on the regulation of conflict of jurisdiction.

(preparatory acts). According to the Handbook on EIO, issued by the Minister of Justice, in case of an EIO issued for an offence committed outside the territory of the issuing State and wholly or partially on the territory of the executing State, judicial authorities will apply the general condition based on the principle of double criminality, with its exceptions where the EIO has been issued for offences listed in Article 11 of the DEIO or for investigative acts mentioned in Article 10 § 2 of the DEIO.

5.6 The human rights clause

At first, it should be pointed out that during the discussion on the Proposal for a DEIO, the debate focused on the introduction[42] of a ground for refusal based on the breach of fundamental human rights.[43] The text of the FD EAW does not include, among possible grounds for refusal, that the surrender of the requested person would violate his human rights (and nor does the text of the FD on the EEW). However, at a national level, in the United Kingdom a "human rights" clause is provided by section 21 of the Extradition Act 2003, which requires the judge to "decide whether a person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998" .[44] This rule gave the Supreme Court of the United Kingdom the possibility to refuse the execution of an EAW in a fraud case where delivering the requested person (a mother with five young children) would inflict damage on the children (in this decision the proportionality test was applied)[45]. By contrast, in another case, the Divisional Court[46] rejected the objection that Polish prison conditions were so bad that sending people to Poland would put them at risk of "inhuman and degrading treatment", thus infringing Article 3 ECHR.

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[42] Council doc. 12862/10, p. 7.

[43] See the Opinion of the European Union Agency for Fundamental Rights on the draft Directive regarding the European Investigation Order, p. 11 and p. 14; Justice, Briefing on the European Investigation Order for Council and Parliament, p. 14; Proposal for a European Investigation Order. Law Society of England and Wales preliminary remarks, June 2010, p. 6, <http://international.lawsociety.org.uk/files/LSEW%20Position-European%20Investigation%20Order%20-%20June%202010%20Final_0.pdf>, which also suggests to add the following categories: a) exclusion of evidence requests that could lead to the identification of informants; b) exclusion of information covered by legal professional privilege.

[44] C.Heard-D. Mansell, 'The European Arrest Warrant: the role of judges when human rights are at risk', 2011 *New Journal of European Criminal Law*, no. 2, p. 135, remind that the European Commission in its 2006 Report on the EAW stated that the possibility to refuse the execution of an EAW when human rights would be infringed "should be exceptional".

[45] See *H (H) v Deputy Prosecutor of Italian Republic (Genoa) and F-K v Polish Judicial Authority)*, [2012] UKSC 25.

[46] *Krolik v Regional Court in Czestochowa*, Poland [2012] EWHC 2357. On this decisions see J.R. Spencer, 'Extradition, The European Arrest Warrant and Human Rights', 2013 *Cambridge Law Journal*, pp. 250-253.

With reference to the DEIO, Article 1 § 3 states that the Directive "shall not have the effect of modifying the obligation to respect the fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty (…)" and § 18 of the Explanatory Memorandum refers to the respect of fundamental rights, such as other EU mutual recognition instruments. However, this cannot be considered as a sufficient safeguard at the European level, as is shown by the way in which the EAW[47] has been interpreted by the CJEU.

According to the view of the European Union Agency for Fundamental Rights (EU FRA) the introduction of a fundamental rights-based refusal ground "should ideally be complemented by explicit parameters. Such parameters could limit the refusal ground to circumstances where an EU Member State has a well-founded fear that the execution of an EIO would lead to a violation of fundamental rights of the individual concerned. In this way a fundamental rights-based refusal ground could serve as a safety-valve, facilitating EU Member States' compliance with fundamental rights obligations flowing from EU primary law without Member States having to deviate from EU secondary law". Following this suggestion, the text of the DEIO has provided a specific ground for refusal if: "there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the execution State's obligation in accordance with Article 6 TEU and the Charter" (Article 11 § 1 lett. f).[48] This means that there would be a real risk that the person's rights would be infringed by the execution of the measure requested. This provision should be read in conjunction with § 19 of the Explanatory report to the DEIO where it is stated that: "The creation of an area of freedom, security and justice within the Union is based on mutual confidence and a presumption of compliance by other Member States with Union law and, in particular, with fundamental rights. However, this presumption is rebuttable. Consequently, if there are substantial grounds for believing that the execution of an investigative measure indicated in the EIO would result in a breach of a fundamental right of the person concerned and that the executing State would disregard its obligations concerning the protection of fundamental rights recognized in the Charter, the execution of the EIO should be refused".

At a national level this ground has been transposed in Article 10 § 1 lett. *e*.

[47] CJEU, GC, 29 January 2013, *Radu*, C-396/11; CJEU, GC, 26 February 2013, *Melloni*, C-399/11.
[48] On the meaning of this clause see M. Daniele, 'La triangolazione delle garanzie processuali fra diritto dell'Unione europea, CEDU e sistemi nazionali', 2016 (4), *Diritto penale contemporaneo, Rivista trimestrale*, 48.

The EIO, as an investigative measure, can infringe the right to respect private and family life, protected by Article 8 of ECHR, and also other rights provided for by Articles 3, 5, 6, 10 and 13 ECHR. Practical question to solve are whether to legitimate the refusal to execute the EIO are only fundamental human rights[49] – such as the right to life or the prohibition of torture and inhuman and degrading treatment or penalty, protected by Articles 2 and 3 of the ECHR – or also rights which are not absolute. This question has a specific relevance in the context of the fight against international terrorism, since some States, applying Article 15 of the ECHR and, respecting absolute rights, have derogated to Conventional obligations.[50] Derogation is deemed as legitimate by the European Court under the condition that these limits are temporary, proportionate and not discriminatory.

Another issue to solve is whether the rule codifies the approach of the CJEU in relation to the EAW, where a specific ground for refusal based on human rights is not provided. As is well known in the "Melloni" case,[51] the Court did not accept the interpretation of Article 53 of the Charter adopted by the national Court, according to which this provision gives general authorisation to a Member State to apply the standard of protection of fundamental rights guaranteed by its Constitution when that standard is higher than that deriving from the Charter and, where necessary, to give priority to it over the application of provision of EU law. Such an interpretation would, in particular, allow a Member State to subject the execution of an EAW, relating to a conviction *in absentia*, to conditions making it compatible with rights recognised by the Constitution of that Member State, despite the fact that the condition in question is not provided for by Article 4 (a) of the FD 2002/584 (§ 56). Such an interpretation would undermine the principle of the primacy of EU law inasmuch it would allow a member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's Constitution (§ 58).

This judgement shows the tension between fundamental rights and the mutual recognition principle, resolved, in this case, in favour of the latter. This experience with the

[49] Following CJEU, GC, 5 April 2016, *Aranyosi e Caldararu*, C-404/15 and C-659/15, §§ 86-87, "Articles 1 and 4 of the Charter, and Article 3 ECHR, enshrine one of the fundamental values of the Union and its Member States. That is why in all circumstances, including those of the fight against terrorism and organised crimes, the ECHR prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned".

[50] ECtHR, April 2017, *Terrorism and the European Convention on Human Rights*, Factsheet-Terrorism and the ECHR.

[51] CJEU, GC, 26 February 2013, *Melloni*, C-399/11.

EAW, and its weakness, should be a starting point for avoiding the infringement of fundamental rights in the different context of evidence. If this is the case, it certainly represents a guarantee for individuals the possibility for the executing State not to comply with the formalities and procedures expressly indicated by the issuing authority if these are contrary to the fundamental principles of law of the executing State (Article 4 § 2 of the LD). Indeed, this provision is aimed at protecting the *ordre public* of the executing State.

With regards to the practical application of the ground for refusal based on respect of "human rights", the judicial authority, in the lack of any indication in the text of Directive, could refer to principles developed by the CJEU in a judgement related to the EAW,[52] whereas the Court has ruled that Article 1 § 3, Article 5 and Article 6 § 1 of the FD on EAW, as amended by FD 2009/299/JHA of 26 February 2009, shall be interpreted as meaning that, where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, the executing judicial authority shall determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned with an EAW, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions for his detention in the issuing Member State, to a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, in the event of his surrender to that Member State. To that end, the executing judicial authority shall request that supplementary information is provided by the issuing judicial authority, which after seeking, if necessary, the assistance of the central authority or one of the central authorities of the issuing Member State, under Article 7 of the FD, shall send that information within the time limit specified in the request. The executing judicial authority shall postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk. If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority shall decide whether the surrender procedure should be ended.

Applying these principles in the context of the EIO, the executing judicial authority, when faced with evidence of the existence of such deficiencies that are objective, reliable,

[52] See, again, CJEU, GC, 5 April 2016, *Aranyosi and Caldararu*, § 94.

specific and properly updated, is bound to determine – *ex officio*, keeping into account the secrecy of preliminary investigation – if there are substantial grounds to believe that there is a real risk of violation of human rights. The consultation between the issuing authority and the executing authority, before assuming a decision on the EIO (Article 6 § 2), in this case could be used to obtain supplementary information, aimed at putting the executing authority in the condition to assess if it is possible to comply or not with the request.

6. LEGAL REMEDIES AT NATIONAL LEVEL

According to the LD, the decree which recognises the EIO is communicated (the word 'served' would be more correct), by the secretary of the Public Prosecutor, to the lawyer of the person under investigation, following terms provided by the Italian law (Article 4 § 4): where the act to perform is the interview of the person under investigation, the defence lawyer shall be informed at least twenty-four hours in advance (Article 364 § 3 of the CPC). Where the measure requested is "a surprise" measure (such as a search or a seizure), the defence has the right to participate in the act but not the right to be informed in advance. In such a case, the decree is communicated upon the performance of the act or immediately after (Article 4 § 4). Following national rules, records of the actions carried out by the Public Prosecutor during which the lawyer is entitled to attend shall be filed with the Clerk's Office of the Public Prosecutor according to Article 366 § 1 of the CPC (Article 4 § 8), therefore the lawyer shall be entitled to examine and copy them within the following five days. Any communication is given to the lawyer in case of measures such as an interception, for which the Italian law does not provide any right to participate in the act by the defence. Consequently, it is not possible to submit an opposition before the judge for preliminary investigations.

The knowledge of the decree is strictly related to the control against these acts. With reference to the foregoing, the Directive has provided that Member States shall ensure legal remedies equivalent to those available in a similar domestic case, but has specified that the substantive reasons for issuing the EIO may be challenged only in an action brought in the issuing State (Article 14 § 2). In the absence of national instruments against investigative measures, the Italian Legislative Decree provides a system of minimum guarantees which do not sufficiently protect the right of third parties. Indeed, within five days from the

communication of the decree which recognises the EIO, a person under investigation and his defence lawyer, can submit an "opposition" to the judge for preliminary investigations, who decides after hearing a Public Prosecutor. As stated before, the communication of the decree to the person under investigation is not provided, notwithstanding this latter is among the persons who can propose the opposition. Moreover, this "remedy" does not suspend the execution of the EIO and the transmission of results of the activities performed, but the Public Prosecutor could decide to not transmit the result of investigations if it would cause serious and irreversible damages to the person under investigation, to the accused or to the person interested by the act (Article 13 § 4). No remedy is provided against the decision. Should the opposition be accepted, the decree is annulled, a decision that shall be communicated "immediately" to the requesting authority (Article 6 § 4). Article 13 § 6 provides that the EIO is not executed in the case that the decree of recognition is annulled: thus, avoiding problems concerning the utilization of evidence in the requesting State.

A more guaranteed mechanism is applied where the decree is related to the execution of a seizure aimed at evidence (Article 13 § 7): in this case, the opposition to be submitted, in the absence of a specific rule, within five days, can be submitted by a person under investigation, a defendant, a person from whom proprieties have been seizured and the person who has the right to the restitution. As regards the decision, the judge will decide *in camera*, following Article 127 of the CPC (participation is not mandatory) and against the decision the recourse to the Italian Supreme Court is provided only for violation of law, by a Public Prosecutor and who is "interested", being this latter a very generic wording. The Court will decide, *in camera*, within thirty days from when it receives the recourse, which does not have any suspensive effect.

A topic that is not clear is related to the identification of the lawyer who shall receive the communication of a decree: the text mentions the lawyer of the person under investigation, a person that could be appointed in the issuing State.[53] In addition to difficulties in the communication to a foreign lawyer, the main problem is the access to the acts of the Italian proceedings: the foreign lawyer will need the assistance of a lawyer who practices in Italy, with the consent of the defendant, who will bear the related costs.

[53] A. Mangiaracina, 'L'acquisizione "europea" della prova cambia volto: l'Italia attua la direttiva relativa all'ordine europeo di indagine penale', 2018 *Diritto penale e processo*, no. 2, p. 170.

7. SPECIFIC INVESTIGATIVE MEASURES

7.1. Information on bank accounts

With reference to Italy, it should be pointed out that, differently to other Member States, our Criminal Procedure Code makes a distinction between the gathering of documentary evidence and interception of communications.[54] As regards the first, Articles 253 *et seq.* of the CPC regulate seizures, including seizures in banks regulated by Article 255 of the CPC.

A specific provision also exists for the gathering of evidence in banks within the special proceedings for the application of a preventive measure, regulated by Article 19 of the Anti-Mafia Code. Investigations on assets can be carried out directly by the holders of the power of proposal or by delegation from the Italian Finance Police (i.e., *Guardia di Finanza*) or by the investigating police authority. The powers of the investigative bodies at the investigation stage include "the right to request any relevant information or document from the public administration, to any institution and undertaking, company deemed useful for the purpose of investigations" (§ 4). Subject to authorization of the Public Prosecutor or of the judge, the investigating police authority delegated by the Public Prosecutor, has the power to seize documentation, following the rules provided for by Articles 253, 254 and 255 of the CPC. Economic and financial investigations are not subject to any time limit; the law provides the time limit of five years only if the investigations are carried out in respect of the spouse, children and those who have lived with the person concerned (Article 19, § 3 of the Anti-Mafia Code).

As regarding the EIO issued for the gathering of information and documents in banks and other financial institutions it is executed by the Italian judicial authority following Articles 255 and 256 of the CPC, which apply for the seizure in a bank. According to the first provision, "documents, titles, securities, amounts of money deposited in current accounts and anything else held in banks, even if contained in safe deposit boxes, may be seized if the judicial authority has justifiable grounds to believe that they relate to the offence, even if they do not belong to the accused or are not registered in his name". As it is evident, the possibility of a seizure concerns not only documents held by a suspect or accused persons,

[54] M. Panzavolta, 'Ordine di indagine europeo e indagini bancarie: spunti di riflessione sul concetto di caso interno analogo e atto di indagine alternativo', in A. Di Pietro-M. Caianiello (eds.), *Indagini penali e amministrative in materia di frodi IVA e doganali*, Cacucci, 2016, p. 375.

but also by any other person in respect of whom such information is found necessary. According to case law, [55] in such case it is not necessary to serve the notice relevant to the right to defence (Article 369 *bis* of the CPC) to persons who hold the seizured document. According to the latter, the person referred to in Articles 200 and 201 of the CPC (persons subject to professional or public service secret) shall immediately deliver the documents and the documentary evidence to the requesting judicial authority, even the original ones if ordered to do so, as well as data, information and software, also by copying them in a suitable medium, and anything else they possess by virtue of their function, job, service, profession or art, except if they declare in writing that they are covered by either State, public service or professional secret. If the statement involves a public service or professional secret, the judicial authority shall proceed with the necessary assessment if it has reason to doubt the legitimacy of the said statement and it believes that it cannot proceed without gathering the documents, documentary evidence or objects referred to in § 1. If the statement is groundless, the judicial authority shall order its seizure. In the case of a State secret, if the evidence is essential for the decision of the case, the Court shall issue a judgement of non-prosecution due to the existence of the State secret.

The gathering of electronic flow of data in real time, from or towards banks and financial institutions, is executed by the Public Prosecutor, upon request, if it is necessary, to the judge for preliminary investigations, following Article 266 and ff, relevant to the interception of communications. The issuing authority shall indicate in the EIO why it considers the acts requested relevant for the criminal proceedings concerned. In this respect, the Italian judicial authority shall verify if there are specific conditions on admissibility, provided at a national level, for the interceptions (see below).

When Italy is the issuing authority (Article 40 of the LD) the request shall include information related to the relevance of acts for the relevant criminal proceedings and information which are useful for the identification of banks and financial institutions. As regards the gathering of evidence in real time, the LD does not include any specific provision. This since this activity is considered as a form of interception of computer or electronic communications, regulated by Article 266-*bis* of the CPC.

7.2. Interception of telecommunications: national provisions

[55] Cass, I, 7 July 1992, no. 3272.

As regards to interception of communications, before analysing the rules provided by the LD no. 108 of 2017, it can be useful to examine the general provisions at a national level. The Italian Code of Criminal Procedure allows interception of conversations or communications under certain applicable conditions. These conditions are: a) the offence of the proceedings shall be one falling under the provided list (very serious offences); b) there are serious grounds (i.e., *gravi indizi*) for believing that an offence among those listed has been committed; and c) the interception is absolutely essential for the purposes of investigations (Articles 266 and 267 of the CPC).

These conditions also apply to the interception of face-to-face conversations (Article 266 § 2) and the interception of computer or electronic communications, as expressly provided for by Article 266-*bis* of the CPC. As regards the interception of face-to-face conversations, if communications occur in places deemed as private, they may be intercepted only if there are justified reasons to believe that a criminal activity is happening there (Article 266 § 2).

The interception warrant is issued by the judge for preliminary investigation upon the application of the Public Prosecutor (Article 267 § 1). In case of urgency, if there are justified reasons to believe that any delay can seriously hamper the investigation, the Public Prosecutor shall order the interception by a reasoned order; however, this order has to be followed by a decision of the judge for preliminary investigation to be adopted by reasoned order within 48 hours. If the order of the Public Prosecutor is not validated within such a time limit, the interception shall not be continued and its results shall not be used (Article 267 § 2).

With reference to duration, interceptions shall not exceed 15 days, renewable by reasoned order for further periods of fifteen days, provided the preconditions referred to above are still met and upon the authorization of the judge for preliminary investigations.

A special regime has been introduced by the Italian legislator[56] for interceptions requested within proceedings "for organised crimes or crimes of threat committed by phone". In particular, three main derogations have been introduced to the ordinary regime. First, an interception can be authorised where there are sufficient (as against serious) grounds (i.e., *sufficienti indizi*) for believing that a crime has been committed. Second, interceptions only need to be necessary (rather than indispensable) for investigative purposes. Third, the

[56] See Article 13 of the Italian Legislative Decree no. 152 of 13 May 1991 converted in the law no. 203 of 12 July 1991, modified by Article 3-*bis* of the Italian Legislative Decree no. 133 of 8 June 1992, converted in the law no. 356 of 7 August 1992, and lastly, by Article 23 of the law no. 63 of 1 March 2001.

interception of communications in private places may be authorized also where there are no reasons to believe that a criminal activity is occurring there. Interceptions in these cases can last for up to forty days (rather than fifteen), renewable for a subsequent period of twenty days (rather than fifteen) when the reasons grounding the initial decision still subsist. No limits exist to the number of renewals available. In case of emergency, the renewal can be authorized by the Public Prosecutor and then validated by the judge, who has to verify the existence of urgent matters. Interceptions made without complying with the relevant conditions are invalid and cannot be used at trial. This is an important exclusionary rule in the Italian system.

Our system also regulates the preventive interception of telecommunication and electronic communication. This matter is regulated under Article 226 of the implementing provisions of the CPC, according to which interception is allowed for the prevention of very serious crimes, relating mainly to organized crime and terrorism offences. Article 226 § 1 differentiates the authorities legitimated to apply for an interception warrant in relation to the two categories of offences. The Ministry of the Interior and alternatively, on his mandate, the central bodies of the police forces, the '*questore*', the provincial commander of the *Carabinieri* and of the *Guardia di Finanza*, have general competence to apply for an interception of communications for both organised crime and terrorism offences. Whereas the director of the *Direzione Nazionale Antimafia* has a limited role in organised crime offences.

The warrant is issued by the local Public Prosecutor of the district in which the person to be put under surveillance is resident or where this place is not identified, of the place where investigative needs have emerged and the operations have to be executed. In order to allow for systematic scrutiny of the operations, the equipment to intercept the communications is physically located within the office of the Public Prosecutor. Nevertheless, the Prosecutor can also authorise the installation of the instruments in other suitable premises, and in such a circumstance this scrutiny no longer operates.

Operations can last for a maximum of forty days, subject to subsequent renewals of twenty days each, where the legal requirements still subsist (as pointed out by the Public Prosecutor in his written motivated application). Preventive interceptions shall end once a criminal activity becomes manifest. At this point, the file is transferred to the Public Prosecutor who may decide to trigger a judicial investigation. However, the law does not limit the number of available renewals.

A brief record of the operations carried out and the intercepted information shall be made available for scrutiny to the Public Prosecutor who authorised the activities within five days after their conclusion. Intercepted material and all copies, extracts and summaries which can be identified as the product of an interception shall be securely destroyed as soon as no longer needed for any of the authorised purposes.

The extension of preventive interception is, in principle, offset by the limit of its use. Information acquired by means of preventive interceptions is not admissible as evidence at trial. Article 226 § 5 specifies that preventive intercepted evidence cannot be used within the criminal proceedings, but only for investigative purposes: it is neither to be mentioned in investigative acts nor to be further disseminated by oral hearing or any other means. According to the Italian Supreme Court, this intercepted material cannot be used, for instance, as grounds to justify further preventive interceptions. On the other hand, it can be used as an element of a *notitia criminis* on the basis of which a Prosecutor can start an investigation[57]. In addition, although the intercepted material cannot ground any other act or investigative tool, it can lead the police to the development of further autonomous investigations. A few problems may occur in the use of the information gathered. Since the material is destroyed immediately after the end of the operations, the use of such information would be in the hands of the investigative authorities. This could easily lead to misunderstandings and misleading information. Thereby, it is certainly arguable that the priority given in this context to the protection of privacy and freedom of expression is disproportionate. The legislator could have nuanced the ban and provided for the partial admissibility of such evidence in specific cases. This is, for instance, the rationale underlying Article 191 of the CPC: illegally gathered evidence is not admissible at trial, which functions as a deterrent against illegal behaviour. According to some scholars, the complete inadmissibility of intercepted information makes its investigative purposes *de facto* void and useless. In particular, the specific ban on mentioning intercepted information in any investigative act could hamper further evidence gathering activity. This being said, however, it would probably not be desirable to permit material gathered for preventive purposes (under fewer safeguards) to be used, as such, as evidence in a criminal trial.

As a result of the political scandal following the discovery of a large amount of illegally intercepted material stored in personal files by secret service agents, significant

[57] See Cass, V, 29 October 1998, no. 4977; Cass, V, 10 November 2000, no. 11500.

changes were made in the use of intercepted material. Article 240 § 2 of the CPC, as updated in 2006, provides that the Public Prosecutor shall order the immediate classification and custody of any documentary evidence, media and documents concerning data and contents of conversations or communications related to telephone and electronic traffic, which were acquired or obtained illegally. Within forty-eight hours from the gathering of documentary evidence, the Public Prosecutor shall request the judge for the preliminary investigations to order its destruction. Within the following forty-eight hours, the judge for preliminary investigations, shall set the hearing, to be held within ten days, and if he asserts that the necessary preconditions are met, shall order the destruction of the material. Intercepted material that has been illegally obtained cannot be further used in criminal proceedings, even for investigative purposes. This comes from the long-established distinction in Italian law according to which the inadmissibility of certain findings at trial does not imply that they cannot be used for investigative purposes. The possession of illegally obtained interceptions is sanctioned with a term of imprisonment between six months and four years (from one to five years if the offence is committed by a public official).

7.2.1. Interceptions of conversations abroad.

The matter is regulated by a general principle: the recourse to letters rogatory is only necessary when interception is aimed at capturing conversations that take place abroad. The content of an interception, required applying Article 266 and ff. of the CPC can be used, on a phone located in the territory of the State, being irrelevant that the other phone is abroad.

According to Italian case law[58], the recourse to routing (i.e., *instradamento*) –which means conveying of a phone call departing from abroad to a place in Italy (*a fortiori* in case of a phone call abroad from Italy, conveyed through a service provider located in Italy) – does not imply any violation of provisions on letters rogatory, since all the activity of interception, reception and registration of phone call is performed in Italy, while the letter rogatory is necessary for intervention abroad related to interceptions of conversations abroad or captured only by a foreign service provider.[59] As regards to messaging, according to the Italian case law, the gathering of messaging, exchanged through the Blackberry system, does not require a letter rogatory when communications take place in Italy, nevertheless, in order to decode data associated to PIN codes, cooperation from the producer of the operative

[58] See Cass, IV, 5 April 2017, no. 46968.
[59] See Cass, I, 4 March 2009, P.C., Barbaro, no. 13972; Cass, VI, 12 December 2014, Nardella, no. 7634.

system located abroad is necessary. As regards to the gathering of e-mails, received or sent by the person under investigation, it is deemed as an activity of interception, regulated by Articles 266 and 266-*bis* of the CPC, independently by the system adopted by the investigating police authority (direct access or through Trojan)[60]. By applying these principles, the gathering through conveying of e-mail messages concerning an e-mail address handled by a foreign provider, has been deemed as legitimate. Moreover, e-mail messages not sent but stored in the "draft" folder of a personal account or in a different virtual space (such as Dropbox or Google drive) accessible by typing username and password, are electronic documents, pursuant to Article 234 of the CPC, than can be seizure when the access takes places through the insertion of a password, independently of the localization abroad of the provider. It has been excluded by the Italian Supreme Court that it represents correspondence regulated by Article 254 of the CPC or of electronic data held by providers that can be seizured according to Article 254 *bis* of the CPC.

7.2.2. The "Trojan horse"

The collection of digital evidence in Italy may also occur through the set up of the Trojan horse or simply Trojan (i.e., *captatore informatico* or *agente intrusore*) in the suspect's device by law enforcement agencies or third-parties acting upon request. Despite numerous legal cases having revealed its use, the issue has been regulated only by the recent Italian Legislative Decree of 29 December 2017, no. 216. Discussions upon such issue have become even more heated since the use of the Trojan has been linked with the topic of interception, a strongly divisive theme in Italy. The following short summary can be useful.

So far, the use of the Trojan for criminal investigation purposes has been regulated by Articles 189, 266 and 266 *bis* of the CPC. Article 266 *bis* of the CPC (Interception of computer communications or telecommunications) allows the interception of communications occurring between information systems in order to investigate serious crimes. On the other hand, Article 189 of the CPC (Evidence not covered by rules) states that, when a type of evidence is not regulated by law, as in the case of the evidence collected by the Trojan, the judge might use it in a trial only if it is suitable to verify the facts and if it does not compromise the moral freedom of a person. However, developments in the sophistication of malwares – the possibility of recording conversations and "intimate moments" through the

[60] Cass, IV, 28 June 2016, Grassi e altri, no. 40903, Rv. 266490.

activation of the microphone and the video-camera of the infected device, and the possibility of obtaining content data stored in the device and those flowing in and out – have fortified the need to regulate the Trojan's use.

In a first judgement the Italian Supreme Court[61] deemed as "invasive and unlawful," the acquisition of a device's content through the Trojan. Also referring to Article 8 of the ECHR, the Court argued that the activation of the video-camera and the microphone of the targeted device had exceeded national legislation, as the software performed an interception that was not restricted in time or location. To carry out such an "invasive interception", nonetheless, law enforcement should have sought prior approval by the judicial authority, specifying when and where the interception had to take place. In a following judgement, the Joint Divisions of the Italian Supreme Court,[62] partially revised the previous judgements introducing some cases in which the deployment of a Trojan could be allowed. The Court stated that it is possible to perform an interception with a Trojan to investigate serious offences, such as those connected to organized crime and terrorism, "within private residences", without prior consent by the judicial authority, and even if there is no certainty that the crime is being committed at the time of the interception. Furthermore, the decision separated the operational methods of hacking tools into two categories: 'online surveillance' and 'online search'. The former category relates to the interception of an information flow between devices (e.g., microphone, video, keyboard etc.) and the microprocessor of the target device. 'Online search' relates to copying the memory units of a computer system. Such decision created a lot of criticism. Whereas according to some scholars the judgement was "narrow-minded," as it was not fully and holistically evaluating the use of Trojan in criminal proceedings, others urged the Parliament to take an action to avoid leaving judges with the power to decide on the level of interference within citizens' privacy. Numerous law-making attempts have been taken aimed at regulating the use of the Trojan horse. Lastly, in the above mentioned Italian Legislative Decree on interceptions no. 216 of 2017, following the criteria established in Law no. 103 of 23 June 2017, there are new provisions on the interception of communications, also relevant to the use of Trojans. In cases provided by Article 266 of the CPC, the interception of face-to face communications can be performed through the insertion of a Trojan horse on a portable electronic device. As regards to proceedings related to the list of crimes mentioned in Article 51 § 3 *bis* and *quarter* of the CPC (such as organised crimes,

[61] Cass, VI, 26 May 2015, no. 27100.
[62] Cass, SU, 28 April 2016, no. 26889.

drug trafficking etc.), the interception of face-to-face communications through the Trojan is always possible.

7.2.3. The gathering of electronic documents

Article 234 *bis* of the CPC ("Gathering of electronic documents and data") is of particular relevance for the collection of digital evidence abroad, introduced in the Italian CPC by Law no. 43 of 17 April 2015. Such article states that the gathering of electronic documents and data stored abroad, is always admissible. If such documents are not publicly available, it is allowed upon consent of the lawful owner. This article is remarkably similar to Article 32 ("Trans-border access to stored computer data with consent or where publicly available") of the Budapest Convention on Cybercrime. Interestingly, Article 32 had not been incorporated into the Italian CPC at the time of the ratification of the Convention. As opposed to Article 32 of the Convention, Article 234 *bis* of the CPC refers to all crimes and not only to cybercrime. Some legal experts argue that, whereas the collection of publicly available data (for instance, public profiles on social networks, sites or blog contents, posts on forums etc.) generally occurs without prior consent, thus indirectly confirming well-established investigation procedures and techniques, the acquisition of non-publicly available data (accessible with authentication credentials or generally protected by cryptography), is more controversial, as it is not clear who the "legitimate owner" might be. Not knowing who the legitimate owner is nonetheless leaves many doors open, especially considering that more than one person could legitimately be asked to express consent on the data sought. Referring to the Italian Data Protection Code, some scholars suggest that the legitimate owner could be identified with the so-called "data controller". However, if the legislator sought to identify the legitimate owner with the data controller in Article 234 *bis* of the CPC, the decision-maker, defined in section 4 (1) of the Italian Data Protection Code as "any natural or legal person, public administration, body, association or other entity that is competent, also jointly with another data controller, to determine purposes and methods of the processing of personal data and the relevant means, including security matters" would have clearly referred to the Data Protection Code. Another solution is to pinpoint the legitimate owner from the terms of a contract that users approve when they start using service providers' services. In this case, if the contract foresees that the service provider is authorized to share the user's data under

certain conditions, the provider becomes the legitimate owner, and Italian authorities could avoid the activation of the MLAT procedure by directly requesting the data from the provider. As a practical example, in June 2015, during a case involving the suicide of a woman, the lawyer supervising the case requested, through Article 234 *bis* of the CPC, the data published on the public profile of a well-known service provider, whose account had been blocked by the woman before having committed suicide. The request was not accepted and the provider declared that the disclosure of such information without following the proper legal procedure was not allowed. A year after its introduction, it is not known whether the article has already been applied, therefore it might be too early to assess its value-added in obtaining digital evidence outside Italian jurisdiction.

7.2.4. The interceptions as implemented in Italy

By implementing the DEIO, the LD has maintained the distinction between interceptions with technical assistance of another Member State and interceptions from which no technical assistance is needed.[63]

In consideration of the foregoing, with reference to interceptions requested by a foreign authority, the Public Prosecutor is competent for the recognition (Article 23 § 1), in line with general rules. The Public Prosecutor has to assess the conditions provided by the Italian Criminal Procedure Code, it means that Articles 266 and 267 of the CPC have to be applied. Moreover, he has to assess that the following information is mentioned: the authority which is proceeding, the title which authorises interceptions with the indication of the offence, the technical data that is necessary for interception, the duration of the interception and, lastly, the reasons that make the activity requested necessary (Article 23 § 2). This formula – as explained in the Explanatory Memorandum to the LD – has been deemed as

[63] On this topic see L. Bachmaier, 'Mutual recognition and cross-border interception of communications: the way ahead for the European Investigation Order', in A. Weyembergh (ed.), *The needed balances in EU criminal law*, Hart Publishing, 2017, p. 324.

more appropriate than the reasons why the indicated investigative measure is "relevant" for the purpose of the relevant criminal proceedings mentioned in Article 30 § 4 of the Directive, as well as serious grounds (i.e., *gravi indizi*) for believing that a crime has been committed mentioned in Article 267 of the CPC.[64]

Once this assessment is concluded, the EIO is transmitted to the judge for preliminary investigation with the request to execute the order. However, execution is not automatic, as a further assessment by the judge for preliminary investigations is provided: he can refuse the execution in addition to the ground for refusal referred to in Article 10, also where the conditions provided for by the Italian regulation are not met (Article 23 § 3). In this case, the Public Prosecutor shall immediately inform the executing authority. As noted above any communication relevant to the recognition is given, in this case, to the lawyer of a person under investigation.

As regards to the execution of the EIO, subject to consultation with the issuing authority, it may be executed by: transmitting telecommunications immediately to the issuing State, intercepting, recording and subsequently transmitting the outcome of interception of telecommunications (Article 23 § 4). In both cases, at the moment of the request or later, the issuing authority may request a transcription, decoding or decrypting of the recording (Article 23 § 6).

Derogating to provision of § 4, should judicial authority gather communications among members of the Security Intelligence Department or of a security Intelligence services, the Public Prosecutor, before transmitting to the issuing authority results of interceptions, should adopt measures aimed at protecting the secret of the State, following the procedure provided for by Article 270-*bis* of the CPC.

Article 24 provides rules concerning the case where the foreign authority is intercepting a device, used by a person who is not in the territory of the Italian State, from which no technical assistance is needed in carrying out the interception. In this case it is necessary to notify the Italian authority, that could ban the use of interceptions. This represents a new provision for the Italian system[65]: it should prohibit the recourse to routing, admitted by the Italian case law. In particular, the Public Prosecutor does not exercise any kind of control, but has to transmit to the judge for preliminary investigations the notification related to the beginning of operations before the judicial authority of the State that is

[64] See Explanatory Memorandum, p. 16.
[65] Only because Italy has ratified the EU MLA Convention with delay.

proceeding (Article 24 § 1). The judge could order the interruption of the operations if interceptions have been requested in relation to an offence for which, according to national law, these are not permitted (Article 24 § 2): according to some scholars this rule[66] seems to recall only the conditions provided for by Articles 266 and 266 *bis* of the CPC, excluding other preconditions provided for by Article 267 of the CPC, as a direct application of the mutual recognition principle. The above mentioned analysis finds a basis in the text of Explanatory Memorandum[67] where it is affirmed that the judge has to ascertain that there is an offence for which the interception is possible.

In these cases, the judge communicates to the Public Prosecutor who, without delay, and at the latest within 96 hours following the receipt of the notification, notifies the judicial authority of the State that the interception is terminated, and that the material already intercepted may not be used. This is an exclusionary rule.[68] Should the State not offer indications, therefore recognising the legitimacy of the act, operations can continue: there is no specification regarding the limit of the time of duration.

As regards to the execution of an EIO aimed at gathering the so called "phone records" (tabulate), the Public Prosecutor will proceed with modalities provided for by Article 256 of the CPC.

7.2.5. Interceptions issued by the Italian authority

When Italy is the issuing State, the rules to apply are provided for by Articles 43, 44 and 45 that make a distinction between interception with technical assistance and interception for which no technical assistance is needed. The first Article regulates the interception of conversations or communications or of communication flows within computer or electronic systems, that require the technical assistance of the State, where the device or the system to control is in the territory of another Member State. According to § 2, the EIO issued by the Public Prosecutor shall contain the following elements: the judicial authority that has authorised interception, all the information useful for the identification of the person who uses the device or the system to control, the duration of the interception, technical data

[66] According to M. Daniele, 'L'ordine europeo di indagine penale entra a regime. Prime riflessioni sul d. lgs. n. 108 del 2017', p. 2, Article 24 § 2, as a special rule, does not specify that it works as a derogation to the general rule provided for by Article 9 §§ 1 and 3 that require respect for all the conditions provided for by *lex loci* .
[67] Explanatory Memorandum, p. 16.
[68] M. Daniele, *Intercettazioni ed indagini informatiche*, in R.E. Kostoris (ed.), *Manuale di procedura penale europea*, Giappichelli, 2017, p. 433.

deemed as necessary for interceptions, reasons why it considers the measure relevant. According to national rules, the previous authorisation by the judge for preliminary investigations is requested, which has to be mentioned in the EIO (Article 43 § 2 lett. a). Subject to the agreement of the executing authority, the Public Prosecutor can indicate if the EIO may be executed by immediately transmitting telecommunications to the issuing State or intercepting, recording and subsequently transmitting the outcome of interception of telecommunications to the issuing State. Such interchange is attributed to the Public Prosecutor who is competent, at a national level, to execute national interceptions. The Public Prosecutor may also request a transcription, decoding or decrypting of the recording (Article 43 § 4).

Article 44 requires that, before beginning interceptions, the Public Prosecutor informs the competent judicial authority of the Member State where the device or the system to control is located, although its assistance is not necessary. This case concerns the recourse to routing (i.e., *instradamento*), that following the entry into force of the LD should not be admitted[69], except in cases where the device is located in the territory of States that are not bounded by the DEIO as well as by EU CMLACM. The obligations to inform are preventive where the competent authority knows, at the time of ordering the interception, that the person under interception is on the territory of the notified Member State; successive, where during or after the interception it becomes aware that the entity subject to interception is on the territory of the notified Member State. In order to comply with this obligation it is used the form set out in Annex C (Article 31 (2) DEIO), that provides expressly that the notification shall include "all information necessary, including a description of the case, legal classification of the offence(s) and the applicable statutory provision/code, in order to enable the notified authority to assess, whether the interception would be authorised in a similar domestic case; and whether the material obtained can be used in legal proceedings". Interceptions shall be terminated when the judicial authority of the Member State, which received the information, communicates that these cannot be carried out. Results of interceptions can be used under the conditions established by the judicial authority of the Member State.

[69] R. G. Grassia, 'La disciplina delle intercettazioni: l'incidenza della direttiva 2014/41/UE sulla normativa italiana ed europea', in. T.Bene-L.Luparia-L.Marafioti (eds.), *L'ordine europeo di indagine. Criticità e prospettive*, Giappichelli, 2016, p. 209.

According to Article 45 of the LD, the Public Prosecutor or the judge who is proceeding can transmit the EIO with the aim of obtaining phone records or other information held by telecom operators. The EIO, among other elements, shall mention the offence for which the issuing authority is proceeding.

8. THE ADMISSIBILITY OF EVIDENCE OBTAINED THROUGH AN EIO

The EIO does not include rules on admissibility of evidence or evidentiary exclusionary rules, but as pointed out by scholars[70] it introduces several provisions that should facilitate the admissibility of evidence collected abroad. A solution to ensure the admissibility of evidence – as provided by the DEIO and implemented in Italy – is that the executing authority respects rules and formalities indicated by the issuing authority as much as possible: according to the LD, when Italy is the issuing authority the explicit indication of the rights and powers recognised by the law to parties and their defence lawyers is also provided (Article 33 § 1). Its purpose is to avoid that the evidence collected abroad becomes inadmissible because of non-compliance with the *lex fori*, while at the same time preventing the *lex fori* from being imposed in the executing State if does not comply with the basic principles of the latter.

The above mentioned provision has to be read in conjunction with Article 36 of the LD, which establishes the kind of investigative measures that are included in the file of trial (Article 431 of the CPC), which includes all the documents the Court may have knowledge of (i.e., the documents the Court may read and use for the decision).

In particular, by replying the provisions relevant to evidence taken abroad by means of letters rogatory,[71] it is provided that 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 Article 431 of the CPC without further conditions. In contrast, repeatable evidence gathered by means of an EIO (such as witness statements), can be included in the

[70] L. Bachmaier, 'Mutual recognition and cross-border interception of communications: the way ahead for the European Investigation Order', p. 324.

[71] According to the Italian Law no. 479 of 1999, it is provided that, documentary evidence gathered abroad, by means of an international letter rogatory, and minutes of unrepeatable acts carried out through the same procedure (lett. d), the minutes of the evidence other than those provided for in letter d) gathered abroad after an international letter rogatory to which the lawyers were allowed to assist and exercise their rights under Italian law (lett. F) are enclosed in the file of trial.

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. According to the latter provision, specific relevance should be recognized to acts gathered through the system of the so called "joint letters rogatory". This form of legal assistance has mainly taken place in Italy on the basis of the 1959 Council of Europe's Convention. However, the possibility of joint letters rogatory depends on the consent of the foreign country and only allows for the mere attendance of private parties (such as the defence lawyers) at the evidence-gathering, without any possibility of investigations conducted by the Italian authorities and without any law enforcement powers on foreign territory.

With reference to the foregoing a change in the case law of the Italian Supreme Court is expected. According to the case law developed by the Italian Supreme Court in relation to letters rogatory,[72] the inadmissibility of investigative acts gathered abroad in compliance with the *lex loci* is possible where there is a contrast among those modalities with mandatory rules of public order and morality that should not be identified with the set of rules provided by the Italian Criminal Procedure Code and, in particular, with rules related to the exercise of defence rights. A particular situation concerns the defendant's right to be involved in the taking of criminal evidence. For instance, the Supreme Court (Russo) deemed statements given abroad admissible at trial, even though the witness was examined only by the judicial authority without any *contradictorie*, if it is allowed by the *lex loci*.

A particular situation concerns the case of statements given in the pre-trial stage, by means of letter rogatory, by a person living abroad, statements that, despite being originally repeatable, have become non-repeatable in subsequent circumstances. Article 512 *bis* of the CPC allows for these statements to be read out only if the person examined, although summoned, did not appear in Court, and examination at trial is absolutely impossible. Italian Courts[73] have interpreted this condition in a strict sense, providing for the fact that evidence could not be obtained through letters rogatory with the defence's participation, on grounds unconnected to the accused's intent. However, the requirement of the impossibility of the witness examination in open Court should be viewed in objective terms. The Italian Supreme Court had the same view, allowing evidence to be read out if the foreign State did not consent to the hearing by means of letters rogatory. As underlined by scholars, this situation is not in line with the constitutional requirement of objective impossibility of the accused's

[72] Cass, SU, 25 February 2010, no. 15208, § 10.3.
[73] See Cass, SU, 25 November 2010, no. 27918.

participation, which calls on the Italian authorities to assess the grounds on which no confrontation could take place with the accuser.

Article 36 § 2 of the LD recalls Article 512 *bis* of the CPC also with regards to statements gathered through an EIO, during preliminary investigations by the Public Prosecutor or by the judge of the preliminary hearing, according to Article 422 of the CPC. Also with reference to this provision, a change in the interpretation made by the Italian Supreme Court[74] is expected, that legitimates the reading of a previous statement also in the event that the foreign authority did not allow, without a reasonable ground, the participation of the Italian authority in the gathering of evidence[75]. This doubt seems to find a confirmation in Article 29 of the LD, that allows participation of the Italian authority in the gathering of evidence under the condition of the "previous agreement" with the foreign authority that could oppose a refusal.

[74] See M. Daniele, *L'ordine europeo d'indagine penale entra a regime. Prime riflessioni sul d. lgs. n. 108 del 2017*, p. 3.
[75] Cass, SU, 25 November 2010, De Francesco.

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EUROPEAN UNION

Convention implementing the Schengen Agreement of 14 June 1985

Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union

Council FD of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA)

Council FD 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence

Council FD 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders

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Protocol (No) 19 to Treaties on the European Union and on the Functioning of the European Union

COUNCIL OF EUROPE

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REPORT ON EIO

POLAND

Best practices for EUROpean COORDination on investigative measures and evidence gathering

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1. List of Figures

2. Abbreviations and Acronyms

AFSJ	Area of Freedom, Security and Justice
Art.	Article
CFREU	Charter of Fundamental Rights of the European Union
CISA	Convention implementing the Schengen Agreement of 14 June 1985
CJEU	Court of Justice of the European Union
DEIO	Directive on European Investigation Order
EAW	European Arrest Warrant
EAW FWD	Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States
ECtHR	European Court of Human Rights
ed./eds.	editor/editors
EEW	European Evidence Warrant
EIO	European Investigation Order
EU	European Union
ff/*et seq*	and the following
ie	*id est*
ICCPR	International Covenant on Civil and Political Rights of 16 December 1966
MLA 2000	Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union established by Council Act of 29 May 2000
MS	Member State/s
n./No	Number
OJ	Official Journal of the European Union
op. cit.	*opus citatum*
p.	Page
para.	paragraph (*fundamento jurídico*)
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
vol.	Volume

1. Introduction

The cooperation of states in combating crime has always been based on the principle of full voluntariness and freedom to choose the scope of this cooperation and means to serve it. States rarely, if ever, felt obliged to define common interests, whose legal and institutional efforts should be protected by criminal law. Cooperation and assistance in criminal matters has always been a kind of *ultima ratio*. The international community therefore, reached for creation of a substantive criminal law based on common principles only ultimately. States have become implicit or explicit in a position that in the area of combating and counteracting crime, they ensure full self-sufficiency within the functioning of only national institutions and criminal codes and codes of criminal procedure, thus expressing the opinion that "all crimes have a local dimension"[1] and subordinating this principle to the choice of methods and scope of cooperation. Any formal decisions taken in the process of combating crime had a direct effect only on the territory of a given state, while from the point of view of other countries they remained virtually irrelevant, having no legal consequences. This was due to the recognized and relevant also to international criminal law principle of *par in parem non habet imperium*, which is the essence of a sovereign state that does not give in to anyone's will[2]. In fact, states never - in principle - tried to establish either by means of conventional methods or any other scope of its own criminal jurisdictions, which remained solely the domain of the sovereign[3]. One can try to enumerate many reasons for the "legal restraint" of states when

1 J. Kohler, *Internationales Strafrecht*, Stuttgart 1917, s. 15;A. Kapardis, *The European Arrest Warrant in Cyprus and Constitutional Concerns* (w:) P. Hofmański, A. Górski, *The European Arrest Warrant and its Implementation in the Member States of the European Union*, Warszawa 2008, s. 22. G. Gilbert, *Aspects of Extradition Law*, Nijhoff–Dodrecht 1991, s. 39–43; M. Hirst, *Jurisdiction and the Ambit of Criminal Law*, Oxford 2003, s. 3–6. H. Lammasch, *Auslieferungspflicht und Asylrecht*, Leipzig 1887, s. 450–468, L. von Bar, *Das Internationale Privat- und Strafrecht*, Hannover 1862, 509–510. F. von Martitz, *Internationale Rechtshilfe in Strafsachen*, Leipzig 1988, s. 50.

2 W.G. Vitzthum, *Begriff und Geltung des Völkerrechts* (w:) W.G. Vitzthum (Hrsg.), *Völkerrecht*, Berlin 2004, s. 25; I. Brownlie, *Principles of Public International Law*, Oxford 2008, s. 289–299; J.L. Brierly, *The Sovereign State Today* (w:) *The Basis of Obligation in International Law and Other Papers*, Oxford 1958, s. 348–358. M. Koskonniemi, *What is International Law for?* (w:) M.D. Evans, *International Law*, Oxford 2003, s. 94–97 T. Schweisfurth, *Völkerrecht*, Tybinga 2006, s. 14; F. von Liszt, M. Fleischmann, *Völkerrecht*, Berlin 1925, s. 94; M. Soerensen, *Manual of Public International Law*, London 1968, s. 13 i 253; A. Cassese, *International Law*, Oxford 2005, s. 49–51; W.K. Geck, *Hoheitsakte auf fremden Staatsgebiet* (w:) K. Strupp, H.J. Schlochauer (Hrsg.), *Wörterbuch des Völkerrechts*, Berlin 1960, s. 795.

3 Exeception, *Empfielt es sich, eine europäische Kompetenz für Strafgewaltskonflikte vorzusehen?*, http://www.uni-salzburg.at/pls/portal/docs/1/460066.PDF, s. 88-97. As to jurisdiction in general: P. Capps, M. Evans, S. Konstadinidis (eds.), *Asserting Jurisdiction. International and European Legal Perspectives*, Oxford–Portland–Oregon 2003, s. 3–15. C. Ryngaert, *Jurisdiction in International Law*, Oxford 2008, 42–83, as to criminal law, s. 75–76. M. Hirst, *Jurisdiction…*, s. 110–201, A. Eser, U. Sieber, H. Kreicker (eds.),

setting common rules for combating crime. From the unquestioned legal doctrine, according to which only states have *ius puniendi* (the law of punishment)[4], after being extremely important nowadays, in the context of development of cooperation in criminal matters in the European Union, the legal view resulting from this legal doctrine, according to which the creation of norms of law and the criminal process should belong to the sovereign who speaks his will in this matter through a democratic legislator (*nullum crimen sine lege parlamentaria*)[5], in the remaining scope, only as long as states agree to accept the

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National Prosecution of International Crimes, Berlin 2005; H. Fischer, C. Kress, S. Rolf Leder (eds.), *International and National Prosecution of Crimes under International Law. Current Developements*, Berlin 2004, w szczególności s. 843–859.

4 A. Zoll, *Die Europäisierung des Strafrechts aus der polnischen Sicht*, ZStW 2005, s. 749–750. H. Jescheck, *Die Internationale Rechtshilfe in Strafsachen in Europa*, ZStW 1954, s. 520 *idem*, *Die Strafgewalt übernationalen Gemeinschaften*, ZSTW 1953, s. 497, D. Oehler, *Der Europäische Binnenmarkt und sein wirtschaftsstrafrechtlicher Schutz* (w:) G. Arzt (Hrsg.) *Festschrift für Jürgen Baumann zum 70-ten Geburtstag*, Bielefeld 1993, s. 561. D. Oehler, *Internationales Strafrecht*, Bonn 1983, s. 128. H. Jung, H.-J. Schroth, *Das Strafrecht als Gegenstand der Rechtsangleichung*, GA 1983, s. 242–243; W. Held, *Europäische Kriminalpolitik* (w:) U. Sieber (Hrsg.), *Europäische Einigung und Europäisches Strafrecht*, Köln i in. 1993, s. 37, Weigend, *Strafrecht durch internationale Vereinbarungen*, ZSTW 1993, s. 785. U. Nellens, *Europäisierung des Strafverfahrens – Strafprozessrecht für Europa?*, ZSTW 1997, s. 727 O. Lagodny, *Auslieferung und Überstellung deutscher Staatsangehöriger*, ZRP 2000, s. 176, B. Hecker, *Europäische Strafrecht als Antwort auf transnationale Kriminalitat?* JA 2002, s. 729; S. Braum, *Aufbruch oder Abbruch europäischer Strafverteidigung?*, StV 2003, s. 576, differeltly, towards UE own competence, A. Cuerda, *Besitzt EU ein ius puniendi?* (w:) B. Schünemann (Hrsg.), *Bausteine des europäischen Wirtschaftstrafrechts, Madrid Symposium für K. Tiedemann*, Köln 1999, s. 377.

5 P. Hofmański, *Konstytucyjne problemy europejskiego nakazu aresztowania* (w:) P. Hofmański (red.), *Europejski nakaz aresztowania w teorii i praktyce państw członkowskich Unii Europejskiej*, Warszawa 2008, s. 60–65, o critically B. Schünemann: *Europäischer Haftbefehl und EU Verfassungsentwurf auf Schiefer Ebene*, ZRP 2003, s. 188–189; *Fortschritte und Fehltritte in der Europäisierung der Strafrechtspflege*, GA 2004, s. 193–209, zwłaszcza s. 200–202; *Europeizacja prawa karnego zagrożeniem dla demokratycznego państwa prawnego?*, Jurysta 2004, nr 7–8, s. 5–11 i 8; *Gefahren für den Rechtsstaat durch die Europäisierung der Strafrechtspflege?* (w:) E.W. Pływaczewski (red.), *Aktualne problemy prawa karnego i kryminologii*, Białystok 1998, s. 367–370; *Die parlamentarische Gesetzgebung als Lakai von Brussel? Zum Entwurf des Eurpäischen Heftbefehlgesetzes*, StV 2003, s. 531–533, zwłaszcza s. 552; *Implementacja europejskiego nakazu aresztowania w Polsce i Niemczech w porównaniu – szkic krytyczny z niemieckiego punktu widzenia* (w:) A.J. Szwarc, J.C. Joerden (red.), *Europeizacja prawa karnego w Polsce i Niemczech – podstawy konstytucyjnoprawne*, Poznań 2007, s. 274; *idem*, *Die Implementation des Europäischen Haftbefehls in Polen und Deutschland im Vergleich. Eine kritische Skizze aus deutscher Sicht* (w:) J.C. Joerden, A.J. Szwarc (Hrsg.), *Europäisierung des Strafrechts in Polen und Deutschland. Rechtsstaatliche Grundlagen*, Berlin 2007, s. 265–277. With approval J. Vogel, *Licht und Schatten im Alternativ-Entwurf Europäische Strafverfolgung*, ZStW 2004, s. 401. Critically P.A. Albrecht, *Die vergessene Freiheit – Strafrechtsprinzipien in der europäischen Sicherheitsdebate*, KritV 2003, 125–133, zwłaszcza s. 129–131; *Die vergessene Freiheit*, Berlin 2003, s. 44–45, a także *The Forgotten Freedom*, Berlin 2003, s. 44; P.A. Albrecht, S. Braum, *Deficiencies in the Development of European Criminal Law*, ELJ 1999, no. 3, s. 309; S. Braum w swojej obszernej pracy *Europäische Strafgesetzlichkeit*, Frankfurt am Main 2003, s. 404, 431–432, oraz *Europäisches Strafrecht im administratives Rechtsstil*, ZRP 2002, s. 508–514, zwłaszcza s. 510–512, K. Lüdderssen *Europäisierung des Strafrechts und gubernative Rechtssetzung*, GA 2003, s. 71–84.

commitment in this respect by some kind of admission or consent of their national parliaments or other bodies[6].

1.1. Classic instruments for cooperation in criminal matters

Classical legal assistance is based, in principle, on conventions adopted by sovereign states. Some of the states also accept the principle of "no assistance without a treaty", which means that without a ratified international treaty, such a state is neither obliged, nor even need to provide assistance in criminal matters in any form. The purpose of the analysis of classical legal aid instruments in criminal matters is to compare rules for the operation of these instruments to conventions and framework decisions of the Council of the European Union, which, according to EU political programs, are to be based on the principle of mutual recognition and the principle of mutual trust. The reason for their creation is the inefficiency of classic instruments and the long-term procedures based on them.

Classical inter-state legal aid in criminal matters is based on bilateral or multilateral international agreements and often operates on a reciprocal basis. In practice, this cooperation is stimulated by three international organizations: Council of Europe, UN and OSCE. At the same time, it should not forget about other regional cooperation systems, first of all the system of Nordic states and the Benelux countries. International agreements on legal aid, like any international agreements, apply in two aspects - internal and external. In this first, announcement of the international agreement in the Journal of Laws is the basic condition of its validity. In the second, the validity of an international agreement is a sufficient, provided by the international agreement itself, number of ratifications. The unratified international agreement on legal aid cannot be applied, but it is an obligation for the state which in the light of the principle *pacta sunt servanda* is obliged to perform it (this results from article 9 of the Constitution). Conventions concerning a wide range of legal aid are divided into indirect and direct conventions. The former require implementation into national law, and usually concern material and legal matters (these regulations do not, of course, constitute an institution of legal aid in the strict sense of the term). Self-executing conventions can be directly applied by the judicial authorities and concern mainly the broadly understood procedural problems and the matter of human rights. We touch in this brief description of the

6 Cf. *Oppenheim's International Law (Lauterpacht)*, London 1952, s. 812–824; I. Browline, *Principles…*, s. 611; H. Kelsen, *Principles of International Law*, New York i in. 1966, s. 490–494; D.P. O'Connel, *International Law*, London 1970, s. 220–228.

functioning of conventions the first important problem. Namely, as for validity of conventions in internal legal order, it is necessary to ratify it, and in the case of a framework decision as a form of implementation of its provisions into national legal systems, it is its implementation. The content of the framework decision is usually in the form of an ordinary law, whereas the convention is an autonomous, constitutional source of law, often self-executing. Its location in the system of sources of law is obvious, as it is constitutionally defined, whereas it seems that there is no universal, international law rule regarding the relationship between conventions on legal aid and national law. Establishing these relations depends to the greatest extent on the state, in particular its constitutional order. In the case of Poland, art. 615 of code of criminal procedure establishes, resulting also indirectly from the constitution, the principle of the primacy of the law of the on a statutory one. This applies formally to relationship of all laws to international conventions, including laws implementing EU *sui* law acts. Poland does not provide in its legislation the exclusivity principle of the treaty for the possibility of cooperation, and, unlike many other countries, there are no regulations in this respect at the statutory or constitutional level, (excluding art. 55 of the Constitution). In the case of non-treaty turnover in Poland, the principle of reciprocity does not become an absolute condition for cooperation, constituting only its optional premise (art. 615 para 3). As in the case of legal aid in criminal matters in the European Union, reciprocity should not be important in principle, so in the case of classical aid it is only of relative importance.

Within the Council of Europe, the main instrument of cooperation in criminal matters is the Council of Europe Convention on Legal Assistance in Criminal Matters of May 20, 1959 along with two additional protocols from March 17, 1978 and from September 8, 2001. In relation to Poland, the Convention entered into force on June 17, 1996, and the additional protocol entered into force (in relation to Poland) on February 1, 2004. At the beginning, it should be noted that this convention contains explicit derogating provisions. According to art. 26, it shall revoke, in respect of the territories to which it applies, provisions of treaties, conventions or bilateral agreements which regulate legal aid in criminal matters in relations between two contracting parties. However, this does not affect the bilateral agreements regarding the translation of applications and documents attached to them. Convention of the Council of Europe includes, in accordance with art. 1, the scope of offenses and tax offenses (by force of a first protocol??). Administrative authorities in the area of criminal administrative proceedings may apply these conventions only in so far as there is a possibility to appeal against their decisions to the court in criminal matters. The convention also does not

apply to military offenses that are not criminal offenses. This is due to the belief that military offenses are a field of crime with a typical "domestic" character. The scope of the Convention's operation excluded the enforcement of convictions, to which the separate and the Convention described below is devoted. The Convention provides in art. 2 only optional refusal to execute the application. This is the case when it concerns offenses recognized by the party summoned for political offenses. Refusal may then include offenses related to political offenses. An assistance in connection with tax offenses can be also refused. Execution of the application may also be refused if the requested party considers that the execution of the request could violate sovereignty, security, public order or other fundamental interests of the state (which is so-called public order clause).

The scope of the Convention further includes requests for legal aid (art. 3-6), delivery of letters and copies of court judgments (art. 7), participation of witnesses, experts and persons prosecuted (art. 8-12 of the Convention) and exchange of information from courts registers (art. 13 and 22).

According to art. 14 of the Convention, the application for legal aid should meet the following formal criteria: contain the designation of the authority that prepared the application, the subject and the basis of the application, if possible the identity and citizenship of the person concerned, the name and place of residence of the addressee, formulate a plea and contain a brief description of the state actual matter. The Convention contains certain regulations, requiring (but as an exception, not as a rule) the application of foreign law. However, this is only foreseen by the second additional protocol to the Convention. However, in the light of art. 8 of the Second Protocol, the preservation of the special form cannot take place if the execution of the application would be contrary to the basic principles of the legal order (as referred to in art. 8 of the Second Protocol, so perhaps only the second protocol provides for the export of law). Requests for legal assistance are provided by the judicial authorities of the requesting party through central authorities or directly. If a party requests the hearing of witnesses or experts under oath, this task should be specified in the application. The requested party is obliged to execute such a request if it does not contradict its law. The requested party shall notify the party calling only at its express request about the date and place of execution of the application. The participation of representatives of authorities or interested persons is also subject to the consent of the requested party. However, applications for admission to the requesting party should not be rejected if this avoids the occurrence of additional applications. Slightly different requirements give the Convention to the requisition letters regarding search or seizure of items. It is dependent on the condition of double

criminality (or only this application?); the offense underlying the application should be an extradition offense in the requested State, the execution of the requisition request should be consistent with the law of the requested party.

An extremely important regulation of the Convention is the issue of regulating the readiness of foreign protocols derived from legal assistance. This regulation corresponds to art. 587 of the code of criminal procedure. According to this article, minutes of inspection, interrogation of persons as witnesses, defendants, experts or minutes of other evidentiary acts, made by courts or prosecutors of foreign countries or bodies operating under their supervision, can be read out at the request of a Polish court or prosecutor on the basis of general principles set out in art. 398, 391 and 393 of the code of criminal procedure, if the manner of carrying out of the activities is not contrary to the principles of the legal order of the Republic of Poland (public order clause). On the basis of this norm, there was a dispute about the possibility of its functional interpretation. Both in the case-law and in the literature, it was claimed that this provision does not directly apply to protocols made at the request of a Polish court or prosecutor. Moreover, it is stated above all that this provision does not imply a ban on the use of materials not prepared at the request but obtained at the request of the Polish court or prosecutor, or before taking over the prosecution. It is important to note that obtaining this document may follow another legal basis. The problem of interpretation of art. 587 of the code of criminal procedure is one of the most important issues in the field of classical legal assistance in criminal matters. In particular, it concerns the understanding of the following *in fine* statement: "it is not contrary to the principles of the Polish legal system." There is no doubt that the problem of understanding this consistency extends or narrows the scope of reading such protocols, and at the same time is an important and beyond the scope of legal assistance discussions on the disclosure of evidence from abroad. First of all, the phrase "non-contradiction with the principles of the Polish legal system" (order public) may be interpreted in a literal or functional way. Undoubtedly, the notion of "non-contradiction with the principles of the Polish legal order' should be viewed through the prism of constitutional principles, most often also more detailed in the law. Contradiction with the principles of legal order will also occur if the taking of evidence is not compliant with absolute prohibitions of evidence and a hearing with the use of methods. This contradiction will also occur if the principle of procedural information is violated.

The Code of Criminal Procedure broadly, because also for the purposes of activities other than those provided for by the Council of Europe Convention on legal assistance in criminal matters, regulates the scope of legal assistance. According to art. 585 it may include

legal assistance - to the extent necessary - in particular: delivering letters to persons residing abroad or institutions established abroad, interviewing persons as accused persons, witnesses or experts, carrying out inspections and searching premises, other places and persons, seizing objects and issuing items abroad, summoning persons abroad for personal voluntary appearances in a court or a prosecutor in order to hear a witness or confrontation, as well as bringing persons deprived of liberty for this purpose, providing files and documents and information on criminal records of defendants, providing information about the law.

Therefore, the following conclusions can be drawn. Classical legal assistance is based on the principle of full voluntary cooperation. It is also cooperation that is not based in principle on any form of mutual recognition, in the sense that it only occasionally assumes the possibility of importing a foreign law. Certain changes of an innovative nature are only introduced by the second additional protocol to the Council of Europe Convention on legal assistance in criminal matters.

1.2. European evidence warrant

The European evidence warrant[7] (EEW) remained well ahead of the EAW in the sphere of projects as the founding of the Council of the European Union. It is only recently that it has acquired legal force at the European level. This peculiar paradox was a good example of defects, especially the lengthiness of the creation of the third pillar law, as well as the resistance of states against the implementation of certain cooperation institutions. The main objections of the states (Federal Republic of Germany) consisted in criticizing the too broad approach to the subject scope of the EEW. The subject of German criticism towards EEW focuses two seemingly mutually exclusive issues: the scope of the abolition of the double criminality principle and the lack of a common denominator of crimes to the detriment of the European Union, in the case of its existence, it would be virtually indisputable to use the EEW on these crimes.

EEW was a good example of using the small steps method in the context of the reform of the European criminal prosecution in the sense that it did not concern the majority of evidence possible to obtain in the criminal trial. The general definition of evidence in the framework decision may give rise to difficulties of interpretation (objects, documents and data), as they were general slogans rather than terms corresponding to the standards of legal

7 For example N. Kotzurek, *Gegenseitige Anerkennung und Schutzgarantien bei der europäischen Beweisanordnung*, ZIS 2006, s. 123–129; N. Gazeas, *Die Europäische Beweisanordnung – Ein weiterer Schritt in die falsche Richtung?*; ZRP 2005, s. 18–22; R. Belfiore, *Movement of Evidence in the EU: The Present Scenerio and Possibile Future Developements*, EJCCLCJ 2009, no. 17, s. 1–22.

definitions. Therefore, a closer determination of the nature of the evidence could have been subject to different interpretations in the Member States. According to the framework decision, EEW included items, documents and data. In addition, outside the scope of its operation, there were personal evidence, evidence from the human body (biological evidence), real-time data acquisition (eavesdropping, monitoring of bank accounts). EEW also did not include criminal records[8]. This means that evidence in the remaining scope had to be obtained by means of conventional methods, primarily provided for in the Convention of 2000 on legal assistance in criminal matters and in the European Convention on legal assistance in criminal matters of the Council of Europe and its two additional protocols. This meant issuing in criminal cases two separate decisions on legal aid, which in turn meant that even if it came into force in the current version of the EEW, it would not improve the legal aid mechanism and would not shorten it.

In the remaining scope, EEW introduced many significant changes to legal assistance in criminal matters. It provided, in principle, for the law of the issuing state to be applied, and what is a logical consequence thereof, the use of EEW only when the issuing state could obtain evidence in similar circumstances. The final version of the act, however, resigned from the *lex fori* principle to, in principle, *lex loci*. In the end, the wording of EEW in this respect seems to be difficult to precisely define with a compromise. Namely, the condition for the issue of an EEW is that objects, documents or data could be obtained in a similar case if they would be available in the issuing state, even if other procedures would then apply. This last sentence seems to approximate the principle of obtaining evidence to the *lex loci*.

Similarly, to the EAW, EEW was designed to mean more judicial cooperation than inter-state cooperation (direct transmission of orders between competent judicial authorities of EU Member States). EEW also provided for the principle of proportionality and necessity; its application was possible when it was necessary for the purpose of the proceedings and proportionate. EEW effectiveness was to ensure short deadlines and the obligation to provide evidence immediately.

The short description of this instrument indicates significant differences compared to classical legal aid in criminal matters. The following question should therefore be asked: To what extent was the EEW an instrument of mutual recognition? This question is relevant in the context of its successor, EIO.

8 2009/315/WSiSW (UE L 93 z 07.04.2009, s. 23–32).

EEW is difficult to consider as an instrument promoting the principle of mutual recognition of evidence. By this principle, I mean a situation where one piece of evidence would be *ipso facto* recognized by the criminal court of the other country, even if it were not possible under the law of that state[9]. In this sense, it means the export of foreign criminal procedure. EEW postulates the rules for obtaining evidence, which in my opinion are in fact a denial of the principle of mutual recognition and recognition of the reverse rule as obligatory. Undoubtedly, EEW is not an instrument of mutual recognition in the sense defined here. Moreover, the issuing court is required to make a specific a priori assessment of the evidence from abroad (the framework decision in the EEW case uses the wording "are likely to be admissible") and only later to issue a warrant. To a greater extent, the EEW construction reminds, although in a specific way, the principle of national treatment (non-discrimination). Analyzing another integration paradigm (the principle of harmonization) in the context of the EEW, it should be stated that the EEW does not introduce any rules as regards the approximation of criminal law orders in the evidential aspect. Being essentially an aid instrument, it also does not provide any indication as to the assessment of evidence or, even more so, the directives regarding its admissibility.

A separate analysis in the context of the principle of mutual recognition requires the issue of the enforceability of the decision to issue EEW. The content of the framework decision indicates that this provision (or other solution) must be in the absence of only optional grounds for refusal of recognition or execution as it were automatically performed, as there is no mandatory negative condition for the implementation of the EEW. In this, but only in this sense, EEW is an instrument of mutual recognition. Fulfilling the premises for mutual recognition, EEW is a challenge for the classically conceived paradigm of state sovereignty and thus deviates from the classical paradigm (principle) of *par im parem non habet imperium*. EEW, in contrast to the EAW, cannot actually be done for reasons other than the actual inability to perform it. Obviously, comparing the feasibility of both instruments is a problematic operation. It is a truism to say that they serve completely different purposes, they also potentially limit completely different legal rights. The grounds for verification of the EAW serve to make a decision on the issue of a person, and the decision on the subject of the EAW is not directly enforceable. This observation also proves the problematic application of the mutual recognition criteria to all instruments of cooperation in criminal matters in the EU.

9 Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, COM (2009) 624, s. 1–8.

The main additional objection that is questioned in the context of EEW construction is the potential imbalance by the institution of the principle of equality of arms in its broadest sense. First of all, the accusation will be used, although it is also not excluded that the evidence thus collected will be exculpatory evidence, especially if the EEW can be issued by a court. In any case, there may be substantial inequality in the collection of evidence on the defense side, as it is obvious that the accusation will not be able to do the right defense in this regard. Although this argument may be justified in the actual sense, such a solution does not prejudice any guarantees in the formal sense. It is worth mentioning that in order to overcome this inequality, the Alternative Project for European Criminal Prosecution proposes the establishment of the Eurodefensor institution[10]. This institution would primarily be used to facilitate easier access to information facilitating defense in cases of a cross-border nature.

At this point, it is also worth mentioning the proposed by the Hague Program and the fairly widely discussed principle of accessibility of information, because it can also be of procedural importance[11]. According to the Hague Program, this rule means that "throughout the Union, a law enforcement official in one Member State who needs information in order to perform his duties may obtain it from another Member State and that the law enforcement authority in that other Member State who has information, make them available for that purpose, taking into account the requirements of ongoing investigations in that country". This rule, if it is actually implemented, may seriously violate the constitutional right to self-determination in the field of information disposal. Its implementation will certainly bring a lot of questions about the system, but the analysis of political and criminal projects is not the goal of this study.

1.3. Convention of 2000 on legal assistance in criminal matters

10 See. A.J. Szwarc, *Eurodefensor – Unterstutzung der Verteidigung* (w:) B. Schünemann (Hrsg.), *Ein Gesamtkonzept…*, s. 181–191 J. Mitchell, s. 191–204.

11 V. Mistilegas, *Databases in the Area of Freedom, Security and Justice: Lessons for the Centralisation of Records and their Maximum Exchange* (w:) C. Stefanom, H. Xanthaki (eds.), *Towards a European Criminal Records*, Cambridge 2008, s. 326–332; M. Böse, *Der Grundsatz der Verfügbarkeit von Informationen in der Strafrechtlichen Zusammenarbeit der Europeaischen Union*, Göttingen 2007; *idem*, *Der Grundsatz der Verfügbarkeit von Infomationen in der strafrechtlichen Zusammenarbeit der EU*, EuZ 2007, H. 4, s. 62–66.

The solution in the field of improving legal assistance in criminal matters in the European Union, often called revolutionary, is the EU Convention of May 29, 2000 on legal assistance in criminal matters[12]. This convention, like most instruments of cooperation in criminal matters, based on the principle of mutual recognition, contains many solutions not used so far in legal transactions in criminal matters, hence its solutions are often described as revolutionary. The revolutionary solution lies primarily in the application - as a rule - of the law of the state calling for the implementation of the application for legal aid. It is therefore a solution similar to that in the case of EEW. The basic solution to improve cooperation is also far-reaching informalization of conclusions formulated on the basis of this convention. The Convention allows for other forms than written, provided that it is possible to ascertain their authenticity. These are forms such as fax or e-mail (exceptions to the simplifications of deliveries are provided in point 2 of art. 5). According to the Convention, it is also possible to formulate an oral application, provided that it is confirmed in writing. The principle of the Convention's operation, as in the case of the EAW and the EEW, is the organization of legal assistance directly by procedural authorities, bypassing central bodies (art. 6 point 1 of the Convention). Exceptions to this rule are requests for temporary transfer or transit and for issuing documents specified in art. 22 of the Convention. The Convention of 2000 is an instrument in a sense subsidiary to other bilateral and multilateral conventions on legal aid in criminal matters. At the same time, it provides for the need to apply more favorable solutions to other instruments of cooperation in criminal matters, it also extends the scope of proceedings in which it may be applicable (what do, following the pattern of the Convention, additional protocols to the aforementioned Convention on legal aid in criminal matters), enabling application of its provisions also to penal-administrative proceedings, as long as they do not close the way to criminal proceedings. As one of the first or even the first instruments for cooperation in criminal matters, the Convention also includes proceedings for criminal liability of collective entities.

The activities provided for by the Convention, called legal aid activities, have a much broader spectrum compared to the classical instruments of cooperation in criminal matters. And so, art. 7 of the Convention provides for spontaneous exchange of information. It is not a

12 M. Płachta, *Wzajemna pomoc prawna w Unii Europejskiej na podstawie Konwencji z 2000 roku*, SE 2003, nr 2, s. 91–106; *idem*, *Akt ustanawiający, zgodnie z art. 34 Traktatu o Unii Europejskiej, Konwencję o wzajemnej pomocy w sprawach karnych pomiędzy państwami członkowskimi w sprawach karnych. Komentarz* (w:) E. Zielińska (red.), *Prawo Unii Europejskiej…*, s. 83–119; S. Wesołowski, *Przechwytywanie przekazów telekomunikacyjnych na podstawie konwencji UE o wzajemnej pomocy prawnej między państwami członkowskimi Unii Europejskiej*, SE 2005, nr 2, s. 121–142; E. Denza, *The 2000 Convention on Mutual Assistance in Criminal Matters*, CMLR 2003, vol. 40, s. 1047–1074.

classic legal aid and takes place without a request, covering the entire scope of the Convention. Art. 8 regulates the submission of classic restitution requests, while point 2 provides for the non-return of items. Art. 9 provides for a classical institution for the temporary transfer of persons deprived of liberty for the purpose of investigations. Finally, a comprehensive art. 10 regulates the manner of making international hearings by means of videoconferencing. A novelty in the field of cooperation in criminal matters is the imposition of states, on the power of art. 12, of the obligation to admit in the territory of Member States bound by the Convention on controlled deliveries 'in extradited cases'. These deliveries are to take place in accordance with the law of the requested state, and the Convention does not provide for specific solutions in this regard. The related regulation is to enable the introduction, on the basis of art. 14 of the Convention, of the so-called undercover investigations, whereby the Convention requires that the law of the country in whose territory such an investigation is carried out applies. Contrary to controlled deliveries, the Convention does not impose an obligation on states - parties to introduce such a regulation.

Perhaps the most innovative solution introduced by the Convention is the extensive and multithreaded regulation regarding the interception of telecommunications (international wiretapping). It consists of three basic solutions regulated in art. 18-20. Article 18 regulates the activities of classical legal assistance in criminal matters in this regard, possible on the basis both of conventional solutions and as part of non-statutory legal transactions. The other two solutions, however, constitute a novelty, breaking out of the classical legal aid scheme, according to which state A performs action X at the request of state B. Article 19 requires Member States to provide information access to other countries not accessible from the territory of the intercepting state. Another article of the Convention concerns the interception of telecommunications transfers on the territory of another Member State without an appropriate request, and upon proper notification to the state - the place of interception for the interception. It seems to be currently the most innovative legal regulations in force, which is also the most debatable from the point of view of state sovereignty. The convention uses the phrase "interception order", leaving Member States the freedom to regulate the detailed regulation of such an order. At the same time both the content of art. 20, and to a lesser extent the wording "interception order" means that such a ruling of the criminal investigation body is in some way directly applicable on the territory of another Member State and does not require conversion (*exequatur*), which will be developed later in the reasoning. The state in which the interception takes place may, however, stipulate that the interception shall not be made as contrary to its law, giving the reasons for such decision in writing. It must be clearly

stated that if the interception state does not take any decision against the "interception notice", there is a specific presumption of consent. Although the Convention does not formulate specific solutions in this respect, it should be stated that the decisions regarding state security will most often speak for this decision. For these reasons, the solution was criticized both by the European Parliament as well as the United Kingdom. The Convention does not, however, resolve the use of evidence gathered against the opposition of the state - the place of interception. The assessment of the admissibility of this evidence is therefore a matter for the court which assesses that evidence. It should be noted that in Poland, as part of the application of this Convention, the subject scope of the procedural wiretapping provided for in art. 237 of the code of criminal proceeding. The Convention is a procedural instrument, not an operational instrument.

In the context of the Convention on legal aid in criminal matters, the problem of the relationship of this help to the disclosure of all legally protected secrets, in particular professional secrecy, is important. Issuing of documents covered by secrecy follows national law. However, the basic text of the Convention does not in any way resolve the collision presented here. Only the additional Protocol to the Convention recognizes in art. 70 that it cannot invoke a secret (banking) as a refusal to provide help. It should be noted that the relevant additional Protocol, like the Convention, applies only to certain Member States. Once again, the issue of how to regulate European cooperation in criminal matters becomes a fundamental problem. According to the judgment of the ECJ of May 3, 2007 *Advocaaten voor de Wereld* in the previous treaty state could also be regulated by an appropriate framework decision. This would mean that the problem of the transmission of documents covered by secrecy would be regulated entirely at European level, without the need to ratify the Convention, which would only make it applicable to certain Member States. Under the Treaty of Lisbon, such a solution would obviously have to be regulated by an EU directive under the ordinary legislative procedure.

2. Issues related to the implementation of the EIO

2.1. Subjects

According to art. 589w § 1 of the Criminal Procedure Code (hereinafter CPC), the EIO may be issued by the court where the case is pending or by the public prosecutor who conducts the

preparatory stage of the criminal proceedings.[13] The preparatory proceedings may also be conducted by the police (art. 311 § 2 CPC). According to art. 312 CPC, the competences of the police apply to Border Guard Board, Central Anticorruption Bureau, Internal Security Agency, National Tax Administration Office and Military Police Office, with regard to their objectives. The above-mentioned authorities may also issue the EIO, but the decision has to be validated by the public prosecutor (art. 589w § 2 CPC).

However, as a rule, the EIO may be issued in the pending proceedings. Polish implementation provides a possibility – for the Police – to issue the EIO in so called verifying proceedings (art. 307 CPC) i.e. proceedings before the decision to initiate or decline an investigation. The decision regarding the issuing of the EIO has to be validated by the public prosecutor (art. 589w § 2 CPC).

A EIO may be issued *ex officio* or on request of a party to the proceedings (or by a party's attorney).[14] The wording of art. 589w § 1 excludes a possibility of requesting a EIO for a suspect, i.e. a person who is not formally charged in preparatory proceedings.[15] What is important, the Polish legislator has not implemented the directive 2013/48/EU. However, art. 9 § 2 CPC states that *„parties and other persons directly interested may apply to public authorities for actions which may or have to be done ex officio*". Before the EIO was implemented, this provision constituted the only possibility for the defendant or the victim of applying for evidence collection abroad. A request based on art. 9 § 2 CPC is considered as an impulse for public authorities only, so that this kind of a request does not require a formal reaction of the public authorities.[16] It means that the provision of art. 589w § 1 CPC brings a

13 Criminal proceedings in Poland are divided into two „parts": the preparatory stage conducted by the public prosecutor office or the police, and the trial stage that starts when the public prosecutor brings an indictment to the court.

14 At the preparatory stage, only victims and suspects are parties (art. 299 § 1 CPC). At the trial stage, the parties are the public prosecutor, the accused, the subsidiary prosecutor (a victim or her/his legal successor) or the private prosecutor (in the cases regarding offences prosecuted on private accusation).

15 The debate about the definition and rights of the suspects is appreciable in the Polish literature; see e.g.: E. Skrętowicz, *Faktycznie podejrzany w polskim procesie karnym* (in:) P. Kruszyński (ed.), *Węzłowe zagadnienia procedury karnej. Księga ku czci Profesora Andrzeja Murzynowskiego*, t. 33, Warszawa 1997, p. 195; M. Klejnowska, *Osoba podejrzana w procesie karnym*, Prokurator 2003, no 2; A. Tęcza-Paciorek, *Pojęcie osoby podejrzanej i jej uprawnienia*, Prokuratura i Prawo 2011, no. 11, p. 77; R.A. Stefański, *Prawo do obrony osoby podejrzanej* (in:) T. Grzegorczyk, J. Izydorczyk, R. Olszewski (eds), *Z problematyki funkcji procesu karnego*, Warszawa 2013, p. 301; S.Steinborn, M.Wąsek-Wiaderek, *Moment uzyskania statusu biernej strony postępowania karnego z perspektywy konstytucyjnej i międzynarodowej*, (in:) B.Bieńkowska, H.Gajewska-Kraczkowska, M.Rogacka-Rzewnicka (eds), *Wokół gwarancji współczesnego procesu karnego. Księga Jubileuszowa Profesora Piotra Kruszyńskiego,* Warszawa 2015, p. 429-455.

16 M.Kurowski (in:) D.Świecki (ed.), *Code of Criminal Procedure. Commentary*, Warszawa 2015, p. 72.

positive change with regard to the position of defence in criminal proceedings with trans-border elements.[17]

The Polish implementation does not give the defence the right to participate in evidence collection abroad – this is a matter of provisions in the state where the EIO is executed. Problems could arise with regard to art. 589zi § 1 and § 2 of the CPC which are implementing art. 9 of the DEIO. On the one hand, art. 589zi § 1 CPC states that in execution of the EIO Polish authorities use Polish provisions, which means *prima facie* that a defence lawyer of the suspect/accused may be present during the action indicated in the EIO, e.g. hearing a witness. Provisions of CPC give the defence the right to be present during the actions in criminal proceedings. However, the actions indicated in the EIO will not be actions in criminal proceedings which are regulated by CPC (art. 1).[18] The execution of the EIO is a proceedings subsidiary to the proceedings pending in the issuing state. Polish procedural norms regarding the right of the defence to be present during the actions in criminal proceedings cannot be related to the actions indicated in the EIO. This argumentation is strengthened by the wording of art. 589zo § 1 CPC which implements art. 9 § 4 of the DEIO. According to this provision, the authority of the issuing state may assist in the execution of the EIO in support to the competent Polish authorities if it does not contradict the fundamental principles of the Polish law or harm its essential national security interests. It is hard to imagine that public authorities of the issuing state would have less power than e.g. the defence lawyer from the issuing state. In this context, concerns about possible infringements of the principle of equality of arms are justified.

2.2. Types of proceedings

The DEIO reiterates provisions known from previous instruments i.e. EU Convention 2000 and FD EEW, regarding its scope of application.

According to art. 1 of the Criminal Code (hereinafter: CC), criminal liability is imposed only on the person who commits the offense under the threat of punishment by the law in force at the time of its commission, the offence is socially harmful, and guilt at the time of

17 Concerns regarding the principle of equality of arms are not convincing in this context; see: R. Belfiore, *The European Investigation Order in Criminal Matters: Developments in Evidence-gathering across the EU*, European Criminal Law Review 2015, Heft 3, p. 322. It is hard to imagine that a request of the suspect/accused could be binding for a public authority. There is no such possibility in strictly domestic cases in Poland.

18 A.Bojańczyk, *Opinion prepared by the National Bar Association regarding project act implementing directive 2014/41/EU*, p. 14-15; available from: http://www.adwokatura.pl/projekty-legislacyjne/opinie-legislacyjne-nra/ (last access: 21.01.2018).

committing the offence can be attributed to the offender. Criminal proceedings is a proceedings developed *inter alia* for detection and determination of the criminal offense so the notion of the term „criminal offense" is strictly connected with the notion of „criminal proceedings". Only criminal court would convict for committing a criminal offense.

The Polish legal system distinguishes a criminal offense from a criminal fiscal offense. The latter is described in art. 1 of the Fiscal Criminal Code (hereinafter: FCC). Although its elements are generally the same as in general criminal law, the act has to *inter alia* match the type of crime as determined in a specific part, be illegal, and have a level of social harm which is more than negligible and faulty. Some differences are to be found in the FCC but – like in general criminal offenses – only a criminal court would convict for committing a fiscal criminal offense. The procedure – codified also in FCC – is based on the Criminal Procedure Code, respectively (art. 114 FCC). There is no doubt that in criminal proceedings regarding a fiscal criminal offense it is possible to issue the EIO.

Apart from criminal offenses and fiscal criminal offenses, the Polish criminal law system distinguishes petty offenses and fiscal petty offenses. The former are codified mainly in Petty Offences Code[19] (hereinafter: POC) and the latter mainly in the above-mentioned Fiscal Criminal Code.[20]

The procedure regarding petty offences is codified in the Petty Offences Procedure Code (hereinafter: POPC) where the provisions of the CPC shall apply only when POPC provides this possibility (art. 1 § 2 POPC). The Polish implementation act provides for a possibility of issuing a EIO only with regard to petty offences foreseen in divisions XI and XIV of the POC which are road traffic petty offences and petty offences against property, respectively. In the official justification of the project of the implementation act there was a right statement that at the beginning of the criminal proceedings the character of the act could not be completely clear.[21] The decision whether the act is an offence or a petty offence often depends on – for example – the value of the property or the consequences of a car accident.

19 Petty offences are not essentially different from criminal offences – the difference is often connected with the value of property or with the social harmfulness of the act.

20 Almost all the fiscal petty offenses are sub-types of fiscal offences, delimited either by the quantitative criterion (the value not exceeding 5 minimum monthly wages) or by the criterion of a «less serious case».

21 *Official justification of the project,* available at http://legislacja.rcl.gov.pl/docs//2/12296201/12420612/12420613/dokument297433.pdf) p. 3 (hereinafter: Official justification)

The procedure regarding fiscal petty offences is codified in FCC where – like in the case of fiscal criminal offenses – provisions of CPC shall also apply *mutatis mutandis* if the provisions of the FCC provide otherwise (art. 113 § 1 FCC). According to art. 113 § 3 (2), provisions of art. art. 18 § 1, art. 400 i art. 589a-589f, art. 590-607zc, art. 611g-611s and art. 615 of CPC do not apply. Provisions which are implementing the DEIO are not mentioned, so in this type of proceedings Polish authorities may also issue a EIO.

Polish proceedings regarding the responsibility of legal persons have rather criminal[22] connotations, even though the statute does not include the term „criminal".[23] In this proceedings, provisions of CPC shall apply *mutatis mutandis* (art. 22 ALCE). Only a criminal court has jurisdiction to prosecute a legal person (art. 24 ALCE). Undoubtfully, issuing a EIO is possible in this type of proceedings.

Polish implementation excludes a possibility of issuing a EIO on grounds of administrative proceedings. In fact, in Poland, there is no kind of proceedings brought by administrative authorities in respect of acts which are punishable under the Polish law as infringements of the rules of law where the decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters (art. 4b of the DEIO).[24]

2.3. Concept of coercive measure

Article 16 of the Preamble to the DEIO defines non coercive measures as "*measures that do not infringe the right to privacy or the right to property*, *depending on national law*". This definition is not satisfactory, neither on the EU level[25] nor on the national (Polish) level.

22 As rightly pointed out by A.Światłowski, liability of legal persons has a criminal character in a constitutional and conventional meaning but not in the meaning of the Polish Criminal Code; A.R. Światłowski, *Jedna czy wiele procedur karnych. Z zagadnień wewnętrznego zróżnicowania norm postępowania karnego rozpoznawczego*, Sopot 2008, p. 166. In Polish relevant literature prevails the belief that this kind of liability has a criminal character; see *Ibidem*.

23 Ustawa z dnia 28 października 2002 r. o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary, Dz.U. z 2004 r. Nr 171, poz. 1800 ze zm.; The 28th October 2002 Act on the Liability of Collective Entities for Acts Prohibited Under Penalty, Journal of Laws, No 88, item 553, with subsequent amendments (hereinafter: ALCE)

24 Such as German *Ordnungswidrigkeiten*.

25 See e.g.: 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. A Study in Memory of Vittorio Grevi and Giovanni Tranchina*, Heidelberg 2013, p. 295-296; S.Ruggeri, *Introduction to the Proposal of a European Investigation Order: Due Process Concerns and Open Issues* (in:) S.Ruggeri (ed.), *Transnational Evidence and Multicultural Inquiries in Europe. Developments in EU Legislation and New*

In the Polish doctrine, we can distinguish coercive measures *stricto sensu* provided in division VI of CPC[26] (art. 245-295 CPC) *inter alia* property collateral, writ of protection, interim detention. These measures are generally not in the scope of the EIO and it seems that literal collocations may be misleading. However, the Polish doctrine also distinguishes coercive measures *largo sensu*[27] which are e.g. search or telephone tapping. These measures are often called measures for evidential purposes.[28] They could be subject of a EIO and carried out by Polish authorities for sure.

Article 10 § 2 of the DEIO was implemented by art. 589zi § 3 CPC. The final version of the act is different than its draft. In the very beginning, art. 589zi § 3 CPC stated that following investigative actions always be available in the execution of the EIO and cannot be replaced by other actions: (1) obtaining of information or evidence which is already in the possession of the Polish authority if the information or evidence could have been obtained in accordance with the Polish law, (2) obtaining of information contained in databases and directly accessible by the executing authority (the court or the prosecutor), (3) a hearing of a person[29] on the territory of Poland, (4) any investigative measure not related to excessive interference in human rights of the persons involved, (5) the identification of persons holding a subscription of a specified phone number or IP address.

The above-mentioned investigative actions may be identified as non-coercive measures even though one of them («4») was controversial and hard to accept in the light of constitutional provisions. The condition based on the lack of relation to „excessive interference in human rights" was far from legal certainty. Legal certainty is a constitutional rule provided by art. 2 of the Polish Constitution[30] (the rule of law)[31]. This wording of art. 589zi § 3 (4) CPC may

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Challenges for Human Rights-Oriented Criminal Investigations in Cross-border Cases, Heidelberg 2014, p. 18-20; R.Belfiore, *The European Investigation Order in Criminal Matters: Developments in Evidence-gathering across the EU*, European Criminal Law Review 2015, No. 5, p. 320-321; A. Mangiaracina, *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 Review 2014, vol. 10, issue 1, p. 120.

26 This division is titled „Coercive measures" (środki przymusu).

27 C.Kulesza (in:) P.Kruszyński (ed.), E.Bieńkowska, C.Kulesza, P.Piszczek, Sz.Pawelec, *Wykład prawa karnego procesowego*, Białystok 2012, p. 274-275.

28 R.Ponikowski (in:) Z.Świda (ed.), R.Ponikowski, W.Posnow, *Postępowanie karne. Część ogólna*, Warszawa 2008, p. 400.

29 Which means e.g.: witness, expert, victim, suspected or accused.

30 The Constitution of the Republic of Poland of 2 April 1997, The Journal of Laws of 1997, no. 78, item 483 with subsequent amendments (hereinafter the Polish Constitution).

also be perceived as a violation of art. 47 of the Polish Constitution (right to privacy) with reference to art. 31 § 3 of the Polish Constitution (principle of proportionality). This condition was also important because of the wording of art. 589zj § 6 CPC which implements art. 11 § 2 of the DEIO and excluded a verification of the double criminality requirement to any conduct (even one outside the list in annex D).

The final version of art. 589zi § 3 CPC is slightly different from the version in the draft project. Firstly, evidence demanded in the EIO which is already in the possession of the Polish authority may not have been obtained in accordance with the Polish law. I believe this is a consequence of the controversial provision of art. 168a CPC[32] which refers to the evidence collected on the territory of Poland. Secondly, the condition based on the lack of relation to „excessive interference in human rights" was replaced by the condition which refers to the evidence which could be admissible, obtained and collected without granting a decision. We do not know such an evidence in Polish criminal proceedings.

2.4. The proportionality issue

The discussion about the proportionality issue in the context of judicial cooperation in criminal matters requires a clarification of the definitions and a synthetic explanation of „proportionality levels".[33]

At the general EU level, proportionality should be understood as a limit (with the principle of subsidiarity) of Union competences.[34] It is one of general principles of the EU law and it also refers to acts adopted in the AFSJ regarding judicial cooperation in criminal matters.

At the EU criminal law level, the proportionality principle prohibits excessive severity of penalties.[35]

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31 See i.e.: See i.e.: judgment of Constitutional Tribunal of 21 April 2009, sign. K 50/07, The Journal of Laws of 2009, no. 65, item 553, judgment of Constitutional Tribunal of 15 September 1999, sign. K 11/99, OTK 1999/6/116, judgment of Constitutional Tribunal of 14 December 1999, sign. SK 14/98, OTK 1999/7/163.

32 *„The evidence can not be considered as inadmissible only on the grounds that it was obtained in violation of the provisions of the proceedings or by means of an offense referred to in art. 1 the terms of criminal liability § 1 of the Criminal Code, unless the evidence was obtained in connection with the official's performance of official duties as a result of: murder, deliberate damage to health or imprisonment."*

33 See i.e.: T.Ostropolski, *The Principle of Proportionality under the European Arrest Warrant – with an excorsus on Poland*, New Journal of European Criminal Law 2014, vol. 5, issue 2, p. 169-171; L.Bachmaier-Winter, *The Role of Proportionality Principle in Cross-Border Investigations Involving Fundamental Rights* (in:) S. Ruggeri (ed.), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings. A Study in Memory of Vittorio Grevi and Giovanni Tranchina*, Heidelberg 2013, p. 88-91.

34 Art. 5 (1) and 5 (4) TEU.

The third level of proportionality is linked to EU judicial cooperation in criminal matters in horizontal aspect (cooperation between EU member states), *inter alia* the proportionality of judicial cooperation measures between EU Member States assessed in particular cases.[36]

The proportionality problem has become relevant in the AFSJ with regard to the surrender procedure based on FD 2002/584/JHA. When two systems coincide (continental, based on the legalism principle, and common-law, based on opportunity principle), essential practical problems may occur.[37] The former – provided by art. 10 § 1 CPC – obligates the Polish authorities to react to any offence through available measures, unless specific procedural bars are foreseen. This is the main reason why it is in Poland where in fact the largest number of EAWs has been issued. In 2013,[38] the Polish legislator has amended art. 607b CPC by one more condition for issuing a EAW, namely „*the interest of the administration of justice*". Statistics shows that it does not bring essential change.[39]

Problems which have arisen with the proportionality issue in the application of the EAW triggered a debate in the Council and in the European Parliament during the legislative process, and resulted in addition of a proportionality clause to FD EEW[40] and Directive 2014/41/EU.

According to art. 6 § 1 of the DEIO „*The issuing authority may only issue an EIO where the following conditions have been met: (a) the issuing of the EIO is necessary and proportionate for the purpose of the proceedings referred to in Article 4 taking into account the rights of the*

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35 Art. 49 (3) EU FRCh.

36 D.Helenius, *Mutual Recognition in Criminal Matters and the Principle of Proportionality: Effective Proportionality or Proportionate Effectiveness?*, New Journal of European Criminal Law 2014, vol. 5, issue 3, p. 351.

37 See i.e.: A. Lach, *Bariery w wykonywaniu w państwach common law europejskiego nakazu aresztowania wydanego w Polsce*, Przegląd Sądowy 2010, no. 3, p. 87-95; A.Górski, *ENA między zasadą proporcjonalności a zasadą legalizmu* (in:) B. Stańdo-Kawecka, K. Krajewski (eds.), *Problemy penologii i praw człowieka. Księga poświęcona pamięci Profesora Zbigniewa Hołdy*, Warszawa 2011, p. 168-172.

38 The Law of 27 September 2013 r. regarding amendments to the Code of Criminal Procedure, The Journal of Laws no 13, item 1247. This amendment entry into force of 1 July 2015.

39 Since 2006, Polish courts have issued following number of EAWs: 2006 – 2335, 2007 – 3479, 2008 – 4838, 2009 – 4844, 2010 – 3724, 2011 – 3792, 2012 – 3266, 2013 – 2776, 2014 – 2681, 2015 – 2428, 2016 (1st part) – 1159; https://danepubliczne.gov.pl/dataset/ena-stosowanie-europejskiego-nakazu-aresztowania-w-latach-2004-i-p-2016 (access: 20.08.2017).

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 Art. 7 EEW requires that the issuing authority checks: (1) if the evidence requested is „necessary and proportionate" for the purpose of Article 5 FD EEW; and (2) if the elements of evidence requested could be obtained under the law of the issuing state in a similar case, if they were available on its territory.

suspected or accused person; and (b) the investigative measure(s) indicated in the EIO could have been ordered under the same conditions in a similar domestic case".

The proportionality issue is not homogeneous, even with regard to the EIO only, and has – as rightly pointed out by S. Allegrezza – at least four aspects:

- the requested measure shall be proportioned to the crime under investigation, but due to the early stage in which usually investigative measures are required that reference has to be made only to the penalty provided by national criminal law of the issuing State, not to the penalty concretely applied,
- the consequences of the execution of the EIO for the individual have to be assessed for all the persons involved, not only the defendant,
- the requested measure shall be proportioned to the evidence to be collected,
- the requested measure shall be proportioned to the purpose of the proceedings as a whole[41].

Polish implementation of art. 6 § 1 DEIO is far from precise. Article 589x CPC provides that issuing the EIO is excluded if: (1) the interest of the administration of justice does not require it, and (2) the indicated evidence would not be gathered or obtained in a similar domestic case. The latter condition is obviously correct in the light of the wording and purposes of the directive. The former is a reiteration of the provision of art. 607b § 1 *in principio* CPC. In a justification of the draft project, there is a statement that the term „*interest of the administration of justice"* is well-established in the Polish doctrine with regard to its interpretation and there is a need of coherence with other provisions regarding international cooperation in criminal matters (art. 591-592, art. 592c-592d, art. 607b CPC) which also use the term „*interest of the administration of justice*".[42] There is also a statement that the term „proportionality" is not used in the CPC. What is more, according to the justification of the project, the term „*interest of the administration of justice*" should be verified for its usefulness for the EIO with regard to *inter alia* a possible extension of the proceeding time and possible costs of the EIO.

41 S.Allegrezza, *Collecting Criminal Evidence Across the European Union:The European Investigation Order Between Flexibility and Proportionality* (in:) S.Ruggeri (ed.), *Transnational Evidence and Multicultural Inquiries in Europe…*, p. 62.

42 *Official justification*, p. 5.

The term „*interest of the administration of justice*" was first used in CPC in provisions regarding the transfer of proceedings in criminal matters *inter alia* art. 591 § 1 and 592 § 3[43]. This provision applies to „classical" cooperation between the states with which Poland does not have an international agreement.[44] Traditionally, the transfer of criminal proceedings has been closely connected with extradition, and more particularly with the principle of non-extradition of nationals.[45] The obvious difference of purposes between these two institutions (transfer of proceedings and evidence gathering) is an argument against the identical interpretation of the term „*interest of the administration of justice*".

The term „*interest of the administration of justice*" is also used in CPC in art. 592c § 1 which implements art. 10 and 11 of FD 2009/948/JHA[46]. It is a condition for a transfer of proceedings from/to Poland and applies to the cooperation within EU. In relevant literature, S. Buczma and R. Kierzynka claim that the assessment of the interest of the administration of justice should be based on such circumstances as inter alia: importance of the crime, expected penalty, personal situation of the accused or the character of the case.[47] I believe that such circumstances only partly coincide with the criteria mentioned in the motive 9 of the preamble to the FD 2009/984/JHA[48].

Using the term „*interest of the administration of justice*" in provisions regarding the transfer of proceedings cannot be used as an argument for using the same term in provisions regarding transnational evidence gathering. The function of the transfer of criminal proceedings is to establish the most effective jurisdiction for prosecution and to prevent an

43 This term was in fact introduced by art. 531c of CPC of 1969 (which was waived in 1998 and replaced by CPC of 1997); E. Janczur, *Przejęcie i przekazanie ścigania karnego*, Prokuratura i Prawo 1999, no. 5, p. 63.

44 In the light of the art. 615 § 2 CPC provisions of CPC shall not be applicable if an international agreement to which the Republic of Poland is a party, resolves the matter otherwise.

45 L. Gardocki, *Transfer of Proceedings and Transfer of Prisoners as New Forms of International Co-operation* (in:) A.Eser, O.Lagodny (eds), *Principles and Procedures for a New Transnational Criminal Law*, Freiburg im Breisgau 1992, p. 318.

46 Art. 592c was introduced by the act of 31 August 2012 r; regarding amendments to Criminal Procedure Code, Journal of Laws 2012, idem 1091. This act enered into force on 17 October of 2012.

47 S. Buczma, R. Kierzynka, *Zapobieganie konfliktom jurysdykcyjnym i wzajemne uznawanie nieizolacyjnych środków zapobiegawczych – uwagi do nowelizacji kodeksu postępowania karnego z 31.08.2012 r.*, Europejski Przegląd Sądowy 2013, no. 1, p. 30.

48 These criteria are e.g.: the place where the major part of the criminality occurred, the place where the majority of the loss was sustained, the location of the suspected or accused person and possibilities of securing of their surrender or extradition to other jurisdictions, the nationality or residence of the suspected or accused person, significant interests of the suspected or accused person, significant interests of victims and witnesses, the admissibility of evidence or any delays that may occur.

individual from parallel investigations in two different states, for the same conduct. The function of transnational evidence gathering is to obtain evidence for the purpose of criminal proceedings. As far as the term „*interest of the administration of justice*" in the context of the transfer of criminal proceedings is rather clear, we cannot confirm the same for transnational evidence gathering.

The interest of the administration of justice may be misleading because of several other reasons. On the one hand, one may ask to which administration of justice it refers. In the Polish doctrine, it is unquestioned that this condition refers to the Polish administration of justice.[49] On the other hand, it seems controversial that only the Polish interests should be relevant in the context of cooperation in criminal matters within EU. What is also disputable is that in the justification of the project, we read that the circumstances to be considered in the assessment of the interest of the administration of justice are *inter alia*: possible costs of the executing state or the costs which should be borne by Poland as an issuing state. The costs of the issue was a subject of discussion with relation to the EAW where FD 2002/584/JHA does not include any provisions regarding this matter. Contrary to this, DEIO in art. 21 provides rules of bearing the costs of the execution of the EIO. It does not seem appropriate to link a proportionality issue with the problem of costs[50]. It is a different matter, regulated by the directive.

Finally, it should be noticed that in the field of evidence we technically cannot anticipate whether the evidence will be aggravating or exculpating for the suspect/accused in the issuing state. We can assume that many actions e.g. hearing of a witness or property seizure would bring different results. In other words, contrary to the surrender procedure, the execution of a EIO can not be considered as *a priori* negative for a suspect/accused. It also should be remembered that mutual legal assistance is often deemed as an alternative for issuing EAW[51] (mainly: service of documents on person staying abroad). If so, what should be an alternative for gathering evidence abroad?

49 See i.e.: A. Górski, A. Sakowicz (in:) A. Sakowicz (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa 2016, p. 681.

50 With regard to EAW see: *Ibid*., p. 682.

51 See: Council Document 17195/1/10, *Revised version of the European handbook on how to issue a European Arrest Warrant*, p. 14-15; M. Sotto Maior, *The Principle of Proportionality: Alternative Measures to the European Arrest Warrant* (in:) N.Keijzer, E.van Sliedregt (eds.), *European Arrest Warrant in Practice*, Hague 2009, p. 214.

I believe that these are the main reasons why in the case of issuing a EIO, the aspect of proportionality, however important, should be interpreted differently than in the procedure based on EAW. It is also an argument for a change in the wording of art. 589x CPC. I cannot see a problem in including a proportionality clause in the provisions implementing the DEIO. However – this is a truism – the practice of issuing EIOs in Poland will show how the term „interest of the administration of justice" is understood by Polish prosecutors and Polish courts.

2.5. Grounds for non-recognition or non-execution

The DEIO provides for a system of only optional grounds for non-recognition and non-execution. Contrary to the FD 2002/584/JHA, there are no mandatory grounds for non-recognition and non-execution. Many Member States interpret the provision containing optional grounds as only a „possibility of providing an optional ground", and not as the „obligation to provide an optional ground".[52] Although, this interpretation constricts the cooperation in criminal matters within EU and seems to be in opposition to the mutual recognition principle. Member States have certain margin of discretion with regard to this issue[53].

Polish implementation includes all of the optional grounds for non-recognition and non-execution but some of them – provided in art. 589zj § 1 CPC – are mandatory. i.e.:

- immunity or privilege[54],
- *ne bis in idem*[55],
- 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[56],

52 Ch. Janssens, *The Principle of Mutual Recognition in EU Law*, Oxford 2013, p. 213-214.

53 A. Suominen, *The Principle of Mutual Recognition in Cooperation in Criminal Matters*, Cambridge – Antwerp – Portland 2011, p. 304-306.

54 See chapter 2.5.1.

55 See chapter 2.5.2.

56 See chapter 2.5.4.

- the execution of the EIO, which indicates temporary transfer to the issuing State of persons held in custody, would prolong the detention of the person in custody.

Article 589zj § 2 CPC provides optional grounds for non-recognition and non-execution such as:

- lack of double criminality[57],
- territoriality[58],
- execution of the EIO would involve the use of classified information relating to specific intelligence activities,
- the use of the investigative measure indicated in the EIO is restricted under the Polish law to a list or category of offences or to offences punishable by a certain threshold, which does not include the offence covered by the EIO[59],
- the investigative measure indicated in the EIO would not be authorised under the Polish law in a proceedings in which a EIO has been issued,
- lack of the consent of the suspected or accused person to being heard by videoconference or other audiovisual transmission (when EIO indicates hearing by videoconference or other audiovisual transmission),
- lack of the consent of the person in custody to a temporary transfer to the issuing State (when the EIO indicates a temporary transfer to the issuing State)
- EIO indicates hearing of persons referred to in art. 179[60] and 180 § 1[61] and § 2[62] CPC regarding the circumstances mentioned in these articles.

57 It does not apply to offences listed within the categories of offences set out in art. 607w CPC and when the EIO concerns an offence in connection with taxes or duties, customs and the Polish law does not impose the same kind of tax or duty or does not contain a tax, duty, customs and exchange regulation of the same kind as the law of the issuing State, It also does not apply to investigative measures referred to in 589zi § 3 CPC (implemented art. 10 (2) of the DEIO) .

58 It does not apply when the EIO concerns an offence in connection with taxes or duties, customs and the Polish law does not impose the same kind of tax or duty or does not contain a tax, duty, customs and exchange regulation of the same kind as the law of the issuing State. See also chapter 2.5.3.

59 It does not apply to investigative measures referred to in 589zi § 3 CPC.

60 179 § 1 *„Persons obligated to preserve a State secret may be examined as to the circumstances to which this obligation extends only if released from the obligation to preserve such secret by an authorised superior agency*"

2.5.1. Immunities and priviliges

As rightly pointed out by M. Kusak, the EIO Directive does not provide any definition of what constitutes an immunity or privilege and leaves it to national law.[63]

It must be noticed that the present ground for refusal was not contained in EAW FWD. For this reason, no related case-law can be found in Poland as it was not contemplated in the surrender procedure either.

There is not any legal definition in polish legal system although the Polish doctrine has elaborated many definitions of immunity.[64] To present the core of these definitions it is relevant to categorize immunities in the light of the Polish criminal law. The most common categorization is based on the distinction between material and formal immunity. The former repeals the criminal conduct and may be characterised as a privilege of "non-liability"[65], the latter is a procedural obstacle which prohibits bringing a person (covered with this immunity) to criminal accountability.

Material immunity applies to Polish parliamentarians only (Deputies to the Sejm and Senators[66]), deputies to the European Parliament and the President of the Republic of Poland. With regard to parliamentarians and deputies to EP, it ensures protection of all activities that they perform within the scope of the parliamentary functions[67]. What is important, its

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179 § 2 *„Such a release may be refused only if the giving of evidence might result in serious damage to the State's interests*".

179 § 3 *„The court or the state prosecutor may apply to the appropriate State central administration agency requesting that a witness be released from the obligation to preserve a secret*."

61 *„Persons obligated to preserve an official secret, or secrets connected with their profession or office may refuse to testify as to the facts to which this obligation extends, unless they have been released by the court or the state prosecutor from the obligation to preserve such a secret".*

62 *„Persons obligated to preserve secrets such as lawyers, physicians or journalists, may be examined as to the facts covered by these secrets, only when it is necessary for the benefit of the administration of justice, and the facts cannot be established on the basis of other evidence. The court shall decide on examination or permission for examination. This order of the court shall be subject to interlocutory appeal".*

63 M. Kusak, *Mutual admissibility of evidence in criminal matters in the EU. A study of telephone tapping and house search*, Antwerpen | Apeldoorn | Portland 2016, p. 122-123.

64 Overview of the definitions: B. Janusz-Pohl, *Immunitety w polskim postępowaniu karnym*, Warszawa 2009, p. 22-26.

65 S.Waltoś, *Proces karny. Zarys systemu*, Warszawa 2009, p. 467.

66 Legislative power in the Republic of Poland is exercised by the Sejm and the Senate. The Sejm is composed of 460 Deputies and the Senate of 100 Senators.

67 Art. 105 § 1 of the Polish Constitution and art. 8-9 of the Protocol no. 7 (to the TfEU) On the priviliges and immunities of the European Union, OJ C 326, 26.10.2012, p. 266–272 (hereinafter: Protocol no. 7).

protection continues after the expiry of their parliamentary mandate. The President of the Republic of Poland – according to art. 145 § 1 of the Polish Constitution – may be held accountable for an infringement of the Constitution or statute, or for commission of an offence only before the Tribunal of State. Presidents' material immunity also continues after the expiry of his or her presidential mandate. Material immunity, with a limited extent, though[68], also applies to: advocates, legal advisors, counsellors of State Treasury Solicitors' Office, patent attorneys and public prosecutors.

From the perspective of the execution of the EIO the most relevant issue is to present bodies/authorities/persons to which formal immunity is granted by differentiated provisions.[69] The first group includes members of Parliament (deputies and senators)[70] and Polish deputies of the European Parliament[71]. Formal immunity encompasses a prohibition on bringing deputies, senators and deputies to the EP to criminal accountability without the consent of the Sejm or the Senate or the European Parliament.

The second group includes judges and prosecutors. Judicial immunity is one of the guarantees of judges' independence. A judge may only be detained and brought to justice with the consent of the appropriate disciplinary court, except in the event of a judge being found *in flagrante* delicto.[72] Only matters of great urgency are permissible without obtaining the prior consent of the disciplinary court.[73] Prosecutorial immunity, even though it does not have constitutional basis, seems to be similar.[74]

68 This extention is limited to conducts connected with freedom of expression (private insult or slander of a party), whilst performing professional duties.

69 It should be noticed that every material immunity has formal consequences, so every material immunity is a formal immunity but none of the formal immunities is a material immunity; B. Janusz- Pohl, *Immunitety…*, p. 35.

70 From the day of election until the day of the expiry of his or her mandate, a Deputy cannot be held criminally liable without the consent of the Sejm. Criminal proceedings instituted against a person before the day of his or her election shall be suspended on request of the National Assembly until the time of expiry of the mandate (Art. 105 § 1 – 3 of the Polish Constitution). The rules for Deputies are also applicable to Senators (art. 108 of the Polish Constitution).

71 art. 8-9 of the Protocol no. 7.

72 This exception seems to be excluded in the context of the transnational gathering of evidence.

73 Art. 181 of the Polish Constitution.

74 Art. 135 of the Prosecution Office Act of 28 January 2016, Dz.U.2016.0.17.

The third group includes central authorities with various competences such as: Ombudsman,[75] Children's Ombudsman,[76] the Chairman,[77] vice-Chairman and Director General of the Supreme Chamber of Control and inspectors of the Supreme Chamber of Control within actions connected with their competences,[78] Chief Inspector of Personal Data Protection,[79] the Chairman of the Institute of National Remembrance – Commission for Prosecution of Crimes against the Polish Nation.[80]

The fourth group, rooted in international law[81], includes the staff of diplomatic missions and consular offices of foreign states.

Diplomatic immunity is much broader than consular and applies to the heads of diplomatic missions of foreign states accredited in the Republic of Poland with members of their families (if they are members of their households), the diplomatic staff of such missions with members of their families (if they are members of their households), the administrative and technical staff of such missions with members of their families (if they are members of their households) and other persons granted diplomatic immunity pursuant to statutes, agreements, or universally acknowledged international custom (art. 578 CPC). The persons who are granted diplomatic immunity shall not be obligated to testify as witnesses or to appear as experts or interpreters; they may, however, be requested to give their consent to testify or to appear in the capacity of experts or interpreters (art. 581 CPC).

Consular immunity applies to the heads of consular offices and other consular officials of foreign states and other persons accorded similar status pursuant to agreements or universally acknowledged international custom (art. 579 § 1 CPC). Contrary to diplomats, the persons covered by consular immunity could be subject to arrest or preliminary detention if they are charged with the commission of a crime (art. 579 § 2 CPC). The privilege not to testify in

75 Art. 211 of the Polish Constitution.

76 Art. 7 (2) of the Children's Ombudsman Act of 6 January 2000, The Journal of Laws of 2000, no. 6, item 69.

77 Art. 18 of the Supreme Chamber of Control Act of 23 December 1994, The Journal of Laws 1995, no. 13, item 59.

78 Art. 88 of the Supreme Chamber of Control Act.

79 Art. 11 of the Personal Data Protection Act of 29 August 1997, The Journal of Laws of 1997, no. 133, item 833.

80 Art. 14 of the Institute of National Remembrance – Commission for Prosecution of Crimes against the Polish Nation Act of 18 December 1998, The Journal of Laws of 1998, no. 155, item 1016.

81 Poland is a party of the Vienna Convention on Diplomatic Relations of 18 April 1961 (the Journal of Laws of 1965, no. 37, item 232) and of the Vienna Convention on Consular Relations of of 24 April 1963 (the Journal of Laws of 1982, no. 13, item 98).

criminal proceedings (provided in art. 581 CPC) only applies to persons with consular immunity if the material circumstances which their testimony or opinions are to concern, are connected with the performance by these persons of their official or professional functions, and with other functions, on the principle of reciprocity (art. 582 § 1 CPC). Both persons with diplomatic and consular immunity shall not be obligated to surrender correspondence or documents connected with their functions (art. 582 § 2 CPC). A possibility of search of a property of the diplomatic mission or consular office premises requires a consent of the head of such a mission, the head of the consular office, or a person temporarily fulfilling this function, respectively (art. 583 § 1 and § 2 CPC).

Both diplomatic and consular immunity shall not be applied in the special case in which the sending State explicitly waives the immunity granted to the person referred to in these provisions (art. 580 § 1 CPC). The possibility of waiving the immunity also refers officials of international organisations who had been granted immunity (in that case the waiver must be effected by the appropriate international organisation).

2.5.2. *Ne bis in idem*

The constitutional status of the *ne bis in idem* principle is questionable. There is no explicit norm in the Polish Constitution which would provide for this principle. Some authors believe that the *ne bis in idem* principle is a consequence of the rule of law (art. 2 of the Polish Constitution) and human dignity (art. 30 of the Polish Constitution)[82]. In relevant literature, we may find the opposite opinion, too, namely that this principle has no constitutional incorporation.[83] The judgments of the Polish Constitutional Court related to this matter show that there is a constitutional basis for the *ne bis in idem* principle, namely the above-mentioned articles: 2 (rule of law), 30 (human dignity) and 45 (the right to a fair trial).

The most relevant issue is to define „*bis*" (which sanctions should be taken into account) and „*idem*" (whether it refers to the same act). In Poland, many acts may result in both tax-law sanctions and criminal sanctions or both administrative sanctions and criminal sanctions. In cases before Polish Constitutional Court, complainants claim that sanctions ordered in, for example, fiscal proceedings were *de facto* criminal sanctions and ordering another criminal

82 A.Sakowicz, *Zasada ne bis in idem w prawie karnym w ujęciu paneuropejskim*, Białystok 2011, p. 57-60.

83 M.Jackowski, *Konstytucjonalizacja zasady ne bis in idem w polskim porządku prawnym*, Przegląd Sejmowy 2011, no. 6, p. 95-96; M.Rogalski, *Przesłanka powagi rzeczy osądzonej w procesie karnym*, Kraków 2005, p. 57.

sanction (in fiscal-criminal proceedings) was a violation of the *ne bis in idem* principle.[84] Generally, we may say that there is no explicit norm which excludes a possibility of this type of „dual" sanctions. It must be emphasized that constitutional issues only refer to strictly internal cases. Outside the Schengen area, there is no general prohibition on the *ne bis in idem* principle applicable in crossborder situations.

Ne bis in idem is a mandatory ground for non-recognition and non-execution of the EIO (art. 589zj § 1 (2) CPC). Undoubtedly, it is limited to decisions in criminal matters only, which has been granted in another EU state. It does not seem controversial – the analogous ground for refusal refers to the execution of the EAW (art. 607p § 1 (2) CPC) and the notion of this condition should be understood in the similar way as in the ECJ judgments regarding functional interpretation of the art. 54 CISA[85] and art. 50 EU FRCh.[86]

In the context of the execution of the EIO, it should be emphasized that only the decisions made in criminal proceedings (in Poland or in other EU member state) are taken into account.

To the time of implementation of the EIO, the *ne bis in idem* principle was not a ground for refusal (neither mandatory nor optional) in any instrument of mutual legal assistance with an exception of the execution of letters rogatory for search or seizure of property.[87]

There are no provisions in CPC which could provide for a possibility of evidencing the *ne bis in idem* principle in MLA or in the EIO. The importance of this ground for refusal seems to be exaggerated. If any person/institution has knowledge about previous pending criminal proceedings (within EU) regarding the same person and the same act, they should pass the

84 See *inter alia*: judgement of the Constitutional Tribunal of 12 April 2011, sign. P 90/08, The Journal of Laws of 2011, No. 87, pos. 493; judgement of the Constitutional Tribunal of 21 April 2015, sign. P 40/13, The Journal of Laws 2015, pos. 601.

85 See e.g. ECJ Judgments: of 11 February 2003 in joined cases, *Hüseyin Gözütok i Klaus Brugge*, C-187/01 i C-385/01, [2003] ECR I-1345; of 9 April 2006 r., *Van Esbroeck*, C-436/04, [2006] ECR I-2333; of 28 September 2006 r., *Van Straaten*, C-150/05, [2006] ECR I-9327; of 18 July 2007 r, *Kraaijenbrink*, C-367/05, [2007] ECR I-6619; of 18 July 2007 r., *Kretzinger*, C-288/05, [2007] ECR I-644; of 11 December 2008 r., *Bourquain*, C-297/07, [2008] ECR I-9425; of 22 December 2008 r., *Turansky*, C-491/07, [2008] ECR I-11039; of 16 November 2010 r., *Mantello*, C-261/09, [2009] ECR I-6041.

86 ECJ Judgment of 27 May 2014, *Spasic*, C-129/14, OJ EU 2014 no. C.

87 Poland has given a reservation to art. 5 of the MLA Convention of 1959 and the execution of the letter rogatory regarding search or seizure a property is possible only if the rogatory letter referes to extradible offence. Article 9 of the Extradition Convention of 1957 excludes granting extradition if final judgment has been passed by the competent authorities of the requested Party upon the person claimed in respect of the offence or offences for which extradition is requested. In other words, *ne bis in idem* is on of the factors of „extradibility" of the offence.

information – first and foremost – to the authority which conducts criminal proceedings in the issuing state.

2.5.3. Territoriality

A Polish authority may refuse to execute a EIO if the act for which the EIO was granted had been partly or completely committed on the territory of the Republic of Poland or on a Polish vessel or aircraft, and it is not criminalized in the Polish law (art. 589zj § 2 (2) CPC). This optional ground for non-recognition and non-execution has not been applied in MLA instruments.

A territoriality clause in the EIO, provided in art. 11 (1e) of the DEIO, is a consequence of an analogous provision in other MR instruments, inter alia FD 2002/584/JHA. Article 4 (7a) of the FD 2002/584/JHA states that the executing judicial authority may refuse to execute the European arrest warrant if the European arrest warrant relates to offences which are regarded by the law of the executing Member State as committed in whole or in part on the territory of the executing Member State or in a place treated as such.

As pointed out by N. Keijzer, a ground for refusal based on territoriality, was closely linked to the partial abolition of the double criminality In a negotiations regarding the proposal of the FD 2002/584/JHA, requirement,[88] some Member States (Netherland, Belgium) expressed their concern about possible abuses, inter alia surrender to other Member States of persons who, for example, have carried out an abortion or euthanasia on the territory of these countries (where abortion and euthanasia are legal).[89]

In Poland, art. 7(1a) of the FD 2002/584/JHA was implemented in two ways. Regarding Polish citizens, the territoriality clause is a mandatory ground for refusal (art. 607p § 2 CPC and art. 55 § 2 (1) of the Polish Constitution). Territoriality with regard to non-Polish citizens constitutes only an optional ground for refusal (art. 607r § 1 (5) CPC). This solution seems to be in opposition to the principle of non-discrimination (art. 18 TfEU).

A ground for refusal based on territoriality principle does not bring essential problems for Polish courts which are obliged to verify whether this condition applies.[90] Verification of the

88 N.Keijzer, *Locus delicti exceptions* (in:) N.Keijzer, E.van Sliedregt (eds), *The European Arrest Warrant in Practice*, Hague 2009, p. 92-93.

89 *Ibidem.*

90 See e.g. judgment of Regional Court in Warsaw of 18 October 2010, sign. VIII Kop 160/10, Lex no. 1897719 or judgment of Appeal Court in Warsaw of 24 June 2010, sign. II AKz 415/10, Lex no. 1642960.

application of the territoriality principle is based on factual circumstances and the wording of art. 6 § 2 of the CC which states that a prohibited act shall be deemed as committed in the place where the perpetrator has acted or has omitted an action which they were under obligation to perform, or where the criminal consequence ensued or was intended by the perpetrator to ensue (the so called principle of ubiquity).

The relevance of the territoriality in the EIO seems to be less important than in the surrender procedure. It is hard to resist the impression that the decision on including this ground for refusal in the directive was not just wrong but ill-conceived. Transnational evidence gathering is not affecting human rights and the state sovereignty as deeply as does the surrender procedure.

2.5.4. Human rights clause

Poland has implemented human rights clause as a mandatory ground for refusal of the EIO (art. 589zj § 1 (5) CPC). This provision states that the recognition and execution of a European Investigation Order will be refused if it would violate human and citizen's freedoms and rights. It should be noticed that the wording of this article is different from the provision in art. 11 § 1 (f) of the directive which states that the execution of the EIO may be refused if 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.

The discussed ground for refusal has not been applied in MLA instruments so it is difficult to predict how it will be understood. However, a similar mandatory ground for refusal has been implemented to the surrender procedure (art. 607p § 1 (5) CPC) and it also refers to the classical extradition procedure (art. 55 § 4 of the Polish Constitution).[91]

The interpretation of this condition – given in the judgments regarding execution of the EAW – leads to the following conclusions: It must be based on concrete facts and circumstances, it cannot be a result of abstract considerations – it must take account of the specific procedural situation.[92] It cannot be the result of speculation either, or of lack of the confidence in the law enforcement agencies and the judiciary of another (issuing) Member State of the European

91 Including a human rights clause in the surrender procedure was criticized in the Polish doctrine as contrary to the provisions of FD 2002/584/JHA: B. Nita, *Ograniczenia ekstradycji po zmianie art. 55 Konstytucji RP a europejski nakaz aresztowania*, Przegląd Sejmowy 2008, no. 2, p. 111; P. Hofmański, *Konstytucyjne problemy europejskiego nakazu aresztowania* (in:) P. Hofmański (ed.), *Europejski nakaz aresztowania w teorii i praktyce państw członkowskich Unii Europejskiej*, Warszawa 2008, p. 69.

92 Judgment of the Appeal Court in Cracow of 16 December 2015, sign. II AKz 466/15, Lex no. 1950469.

Union.[93] A probability of a violence of freedoms and rights is not sufficient, and the legislature requires a reliable assertion, or at least a probability verging on certainty that such an infringement will occur.[94]

However, the execution of the EIO is essentially different from the execution of the EAW. Firstly, in the former procedure, it is not clear from which person's perspective (the suspected/accused in the issuing state or the person who lives at executing state at whom the investigative measures are directed?) should be taken into account. Secondly, the DEIO provides many guarantees, introduced for the first time in such an instrument, which surely can protect the interests of an individual. In this context, a decision on including a general human right clause in the instrument regarding transnational evidence gathering should be considered as a *superfluum*.

2.6. Legal remedies at national level

In general, decisions on issuing and executing of the EIO are not subject to appellate review by complaint. Introducing the possibility of challenging the decision to issue or execute a EIO would lead to unjustified diversity of situations compared with the evidence gathered with no cross-border aspect. Legal remedies – regarding both the issue and execution of the EIO – are possible only if they are possible in strictly domestic criminal proceedings.

In Polish criminal proceedings, complaints can be lodged for decisions concerning the search of a house or a person, seizure of property, surrender of correspondence, packages and lists of communications, securing electronic data or exhibits introduced as evidence by those persons whose rights were infringed (art. 236 CPC).

Also an order allowing surveillance or telephone tapping is subject to interlocutory complaint. In the complaint, the person concerned with the order may request that both the grounds and the legality of the surveillance and telephone tapping be examined (art. 240 CPC). This provision also applies to the surveillance and recording by technical means of the contents of other conversations or messages, including e-mail correspondence (art. 241 CPC). Both provisions apply to the decision on issuing a EIO (art. 589w § 4 CPC).

What is important, according to art. 239 § 1 CPC, a notification of the order allowing surveillance (also surveillance and recording by technical means of the content of other conversations or messages, including e-mail correspondence) and telephone tapping with

93 Judgment of the Appeal Court in Katowice of 15 February 2017, sign. II AKz 77/17, Lex no. 2309515.

94 Judgment of the Appeal Court in Rzeszów of 13 August 2013, sign. II AKz 159/13, Lex no. 1340415.

respect to the person concerned may be postponed for a period necessary to protect the interests of the case. The second paragraph of art. 239 CPC states that in preparatory proceedings, a notification must not be postponed further than until the conclusion of the proceedings. This provisions apply to the execution of the EIO (art. 589ze § 4 CPC). The decision of execution of the EIO cannot be challenged in Poland.

The position of the defence is difficult – the decisions regarding the above-mentioned investigative measures (*inter alia* telephone tapping and surveillance), indicated in the EIO, may be challenged only by persons concerned with the EIO (not necessarily defendants).

The procedure of the exclusion of the evidence is unknown in the Polish criminal procedure. Issues related to the admissibility of evidence gathered in another state are discussed in chapter 4.

Provisions of CPC, which refer to destroying of evidence (which is useless for criminal proceedings), are limited to surveillance (also surveillance and recording by technical means of the content of other conversations or messages, including e-mail correspondence) or telephone tapping (art. 238 § 3 and 4 CPC) and material collected for the purpose of elimination (detected traces, the collection of fingerprints, oral tissue, hair, saliva, handwriting sample, smell, and taking of photographs or voice recordings of a person – art. 192a § 1 CPC).

As a general rule, it is a public prosecutor who brings an indictment to the court (art. 331 § 1 CPC). An indictment should contain a list of persons whose appearance is demanded by the public prosecutor and also a list of other evidentiary procedures, the conduct of which in the course of the main trial is demanded by the public prosecutor (art. 333 § 1 CPC). This means that the public prosecutor is not obligated to request taking – before the court, at the trial stage – all the evidence obtained through preparatory proceedings (and of course also all the evidence obtained by the EIO). At the trial stage, it is in the interest of the accused to offer any evidence favourable to them. If this evidence is located in the public prosecutor's file the accused should request taking it before the court (art. 167 CPC). The files of preparatory proceedings are sent to the court together with the indictment (art. 334 § 1 CPC)

3. Specific investigative measures

3.2. Interception of telecommunications

Poland ratified the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union[95] so the provisions regarding interception of telecommunications are not new in the Polish legal system. Telecommunication transmission should be understood as *inter alia* phone calls, fax messages, e-mail messages, messages between internet communicators and other, followed by technical development[96].

In the case of the EIO issued for interception of telecommunications in the Member State art. 237 § 1 CPC applies, and provisions of the chapter 26 CPC apply respectively (art. 589w § 4 CPC). According to art. 237 § 1 CPC „*After the commencement of the proceedings, the court, on the request of the public prosecutor, may order the surveillance and recording of the content of telephone conversations by way of telephone tapping, in order to gather evidence for proceedings in progress or to prevent a perpetration of a new offence*". The wording of this article *prima facie* excludes the possibility of issuing a EIO before the criminal proceedings (at least at *in rem* stage) are started[97]. There is no provision in the CPC which obligates the Polish authorities – in a procedure of recognition and execution of the EIO – to verify whether the EIO that indicates interception of telecommunications was approved by the court in the issuing state. Although the EIO which indicates interception of telecommunications has to be recognized and executed by a Polish court.

Article 237 § 3 CPC states that the surveillance and telephone tapping is allowed only when the proceedings in progress or a justified concern that a new offence might be perpetrated pertain to:

- homicide,
- general endangerment to life and health or causing a disaster,
- trafficking in people,
- kidnapping,
- demanding ransom,
- hi-jacking of an aircraft or a sea vessel,

95 The Journal of Laws of 2007, no. 135, item 950.

96 S.Buczma (in:) A.Grzelak, M.Królikowski, A.Sakowicz (eds.), *Europejskie prawo karne*, Warszawa 2012, p. 617.

97 See art. art. 589zi § 5 CPC and art. 20c of the Police Act of 1990.

- armed robbery, aggravated theft and extortion,
- attacking the independence and territorial integrity of the State,
- attacking the constitutional order of the State or its supreme agencies or a unit of the Armed Forces of the Republic of Poland,
- espionage or disclosing a secret information classified as “confidential” or “strictly confidential”,
- amassing weapons, explosives or radioactive materials,
- forging and circulating counterfeit money, payment bills or instruments or transferable documents enabling the acquisition of money, goods, a load or a benefit in-kind or imposing an obligation to pay out capital, interest, share in profit or confirming participation in a company,
- manufacturing, processing, trafficking and smuggling drugs, their precursors, substitutes or psychotropic substances,
- organised crime,
- property of significant value,
- the use of violence or unlawful threats in connection with criminal proceedings,
- bribery and racketeering,
- pimping, procuring and forcing into prostitution,
- offences defined in Chapter XVI of the Criminal Code of 6 June 1997 (Journal of Laws No 88, item 553 as amended) and in Articles 5–8 of the Rome Statute of International Criminal Court, enacted in Rome on 17 July 1998 (Journal of Laws of 2003, No 78, item 708), hereinafter referred to as “the Statute”

This is the way of providing proportionality and necessity to this intrusive measures. This enumerated list also refers to the surveillance and recording by technical means of the content of other conversations or messages, including e-mail correspondence (art. 241 CPC).

The same criteria (enumerative list of offences) apply to interception of communications of legal persons and physical persons

Surveillance (also surveillance and recording by technical means of the content of other conversations or messages, including e-mail correspondence) and telephone tapping may be imposed for a maximum period of three months, which may be extended in particularly justified cases for an additional period not exceeding three months (art. 238 § 4 CPC, art. 241 CPC). This provisions applies both to the issue and execution of the EIO.

Service providers located in Poland do not provide data requested by a foreign judicial authority directly. However, offices and institutions conducting telecommunications activity, as well as telecommunications enterprises within the meaning of the Telecommunications Act of 16 July 2004, are obliged to facilitate the execution of a court's or public prosecutor's order concerning surveillance and telephone tapping and ensure the registration of the fact that such surveillance took place (art. 237 § 4 CPC).

In Poland, remote search of computers is not regulated[98]. The use of drones is also not authorized in the criminal investigation.

In the Polish legal system, there are no regulations regarding „private" interception of telecommunications (between private persons or in the working place). Article 47 of the Polish Constitution states that everyone shall have the right to legal protection of his or her private and family life, honour and good reputation and making decisions about their personal life. Limitations of this right are possible but they should be necessary and proportionate (art. 31 § 3 of the Polish Constitution).

The Polish criminal procedure makes no closed catalogue of evidence, so evidence (which means also data) collected in administrative proceedings may be used in criminal proceedings unless it is covered by a strictly inadmissibility of evidence.[99] If so, data collected in administrative proceedings in Poland may be transferred in execution of an EIO to a foreign authority if it had been used in Polish criminal proceedings (art. 589zi § 3 (1) CPC). Otherwise, it seems that there is no legal basis for such an action.

The last important issue regarding the interception of telecommunications concerns the operational reconnaissance. In the Polish legal system, the police and other authorities (*inter alia* Central Anticorruption Bureau, Internal Security Agency) have the power to conduct

98 A.Lach, *Przeszukanie na odległość systemu informatycznego*, Prokuratura i Prawo 2011, no. 9, p. 73-77.

99 P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego. Komentarz, t. I*, Warszawa 2004, s. 682.

many investigative actions before the criminal proceedings are started. According to art. 20c § 1 of the Police Act of 1990,[100] data that identify a telecommunications network subscriber, termination points of a network or telecommunications device, data about completed or attempted connections between specific telecommunications devices or network termination points, and the circumstances and type of the connection may be disclosed to the police and processed by the police only with the view to crime prevention or detection.

The problem of admissibility of evidence collected by the police (outside the criminal proceedings) in the Polish criminal proceedings seems too broad to be presented here[101]. From the perspective of the execution of the EIO (by Polish authorities), it must be noticed that Polish implementation explicitly provides a possibility of execution EIOs which indicate typical operational reconnaissance, based on i.e. Police Act of 1990[102] (art. 589zi § 5 CPC). The only ground for non-recognition and non-execution of a EIO which indicates such an action is the lack of a possibility of granting such an action in a similar domestic case. From the point of view of an individual, it seems that this solution may be used as an omission of the guarantees provided by CPC.

100 The Journal of Laws of 1990, no. 30, item 179 with subsequent amendments.

101 See i.e.: D.Szumiło-Kulczycka, *Czynności operacyjno-rozpoznawcze i ich relacje do procesu karnego*, Warszawa 2012, s. 350–370; A. Taracha, *Czynności operacyjno-rozpoznawcze aspekty kryminalistyczne i prawnodowodowe*, Lublin 2006, s. 219–257.

102 Act of 6 April 1990 on the Police, The Journal of Laws of 1990, no. 30, item 179 with subsequent amendments.

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- 18 July 2007 r., *Kretzinger*, C-288/05, [2007] ECR I-644;
- 11 December 2008 r., *Bourquain*, C-297/07, [2008] ECR I-9425;

- 22 December 2008 r., *Turansky*, C-491/07, [2008] ECR I-11039;
- 16 November 2010 r., *Mantello*, C-261/09, [2009] ECR I-6041;
- 27 May 2014, *Spasic*, C-129/14, OJ EU 2014 no. C;

CONSTITUTIONAL COURT

- Judgment of Constitutional Tribunal of 21 April 2009, sign. K 50/07, The Journal of Laws of 2009, no. 65, item 553;
- Judgment of Constitutional Tribunal of 15 September 1999, sign. K 11/99, OTK 1999/6/116;
- Judgment of Constitutional Tribunal of 14 December 1999, sign. SK 14/98, OTK 1999/7/163;
- Judgement of the Constitutional Tribunal of 12 April 2011, sign. P 90/08, The Journal of Laws of 2011, No. 87, pos. 493;
- Judgement of the Constitutional Tribunal of 21 April 2015, sign. P 40/13, The Journal of Laws 2015, pos. 601;

NATIONAL COURTS

- Judgment of Regional Court in Warsaw of 18 October 2010, sign. VIII Kop 160/10, Lex no. 1897719;

- Judgment of Appeal Court in Warsaw of 24 June 2010, sign. II AKz 415/10, Lex no. 1642960;
- Judgment of Appeal Court in Cracow of 16 December 2015, sign. II AKz 466/15, Lex no. 1950469;
- Judgment of Appeal Court in Katowice of 15 February 2017, sign. II AKz 77/17, Lex no. 2309515;
- Judgment of the Appeal Court in Rzeszów of 13 August 2013, sign. II AKz 159/13, Lex no. 1340415;

REPORT ON EIO

SPAIN

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Abbreviations and Acronyms

AFSJ	Area of Freedom, Security and Justice
AN	*Audiencia Nacional* (National Court)
AAN	Order by National Court
AFSJ	Area of Freedom, Security and Justice
AP	*Audiencia Provincial* (Provincial Court)
appl./appls.	application/applications
Art.	Article
BOE	*Boletín Oficial del Estado* (Spanish Official Journal)
BOCG	*Boletín Oficial de las Cortes Generales (Official Journal of the Spanish Parliament)*
CE	*Constitución Española* (Spanish Constitution)
CFREU	Charter of Fundamental Rights of the European Union
CISA	Convention implementing the Schengen Agreement of 14 June 1985
CJEU	Court of Justice of the European Union
DEIO	Directive on European Investigation Order
EAW	European Arrest Warrant
EAW FWD	Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States
ECHR	European Court of Human Rights
ed./eds.	editor/editors
Eg	*exempli gratia*
Ex	according to
EEW	European Evidence Warrant
EIO	European Investigation Order
EU	European Union

ff/*et seq*	and the following
FGE	*Fiscalía General del Estado* (General Public Prosecutor's Office)
Ie	*id est*
ICCPR	International Covenant on Civil and Political Rights of 16 December 1966
IT	Information Technology
LECrim	*Ley de Enjuiciamiento Criminal* (Spanish Act on Criminal Procedure)
LO	*Ley Orgánica* (Organic Law)
LOEDE	Law 3/2003, on March 14th, on European Arrest Warrant and Surrender
LOPJ	*Ley Orgánica del Poder Judicial* (Act on the Judiciary)
LRM	Act 23/2014, of 20 November, on mutual recognition of judicial decisions in criminal matters criminal in the European Union (*Ley de reconocimiento mutuo de resoluciones penales en la Unión Europea*)
MLA 2000	Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union established by Council Act of 29 May 2000
MS	Member State/s
n./No	Number
OJ	Official Journal of the European Union
op. cit.	*opus citatum*
p.	Page
para.	paragraph (*fundamento jurídico*)
SAN	Judgement by National Court
SAP	Judgement by Provincial Court
STC	Judgement by Constitutional Court
STS	Judgement by Supreme Court
TC	*Tribunal Constitucional* (Constitutional Court)
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TS	*Tribunal Supremo* (Supreme Court)
vol.	Volume

Executive summary

Present report foresees specifically implementation in Spain of the Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (henceforth DEIO)[1]. After more than a year, there is definitive regulation on the EIO in Spain; in fact, last June 12th, 2018[2] it was finally published in Spanish Official Journal (*Boletín Oficial del Estado*, henceforth BOE) the Law 3/2018, of 11 June[3], amending the Act 23/2014, of 20 November, on mutual recognition of judicial decisions in criminal matters in the European Union (*Ley de reconocimiento mutuo de resoluciones penales en la Unión Europea*, henceforth LRM)[4], which shall substitute prior regulation on European Evidence Warrant (EEW) established in Title X, Arts. 186 – 200; also general appropriate general dispositions and Annexes shall be reformed.

The Spanish report follows the common methodology established in WS1 in order to compile legislation, jurisprudence and references related to Spain according to specific topics, which are considered to be the most interesting and problematic ones in future implementation of the European Investigation Order in all EU Member States. In this context, Spanish legislation implementing other European instruments as well as case-law of the Spanish courts has been also taken into account. References will be made to the European arrest warrant and the surrender procedures between Member States (henceforth EAW) and its

[1] OJ L 130, 1.5.2014, p. 1. At the moment of writing, only a few of the Member States have not fulfilled the process of transposing the Directive into the domestic legal order; see information in last public document at the time number 5908/2/18 REV 2, JAI 76, COPEN 24, EUROJUST 11, EJN 6, information from General Secretariat of the Council to Delegations on the transposition of the Directive 2014/41/EU on the European Investigation Order, Brussels, 15 February 2018 available at http://www.consilium.europa.eu/register/en/content/out?&typ=ENTRY&i=ADV&DOC_ID=ST-5908-2018-REV-2 (last access on July 5th, 2018). Further documents ST 9738 2018 INIT and ST 9738 REV 1 published on 12 and 19 June 2018 are not public at the moment.

[2] Precisely, 33 years after Spanish adhesion to EU on June 12th, 1985 (BOE n. 1, 1.1.1986, p. 3, available at https://www.boe.es/buscar/doc.php?id=BOE-A-1986-1 (last access on July 5th, 2018).

[3] BOE n. 142, 12.6.2018, p. 60161, available at https://www.boe.es/diario_boe/txt.php?id=BOE-A-2018-7831 (last access on July 5th, 2018).

[4] BOE n. 282, 21.11.2014, p. 95437, available at https://www.boe.es/diario_boe/txt.php?id=BOE-A-2014-12029 (last access on July 5th, 2018). English version available at http://www.mjusticia.gob.es/cs/Satellite/Portal/es/servicios-ciudadano/documentacion-publicaciones/publicaciones/traducciones-derecho-espanol (last access on July 5th, 2018).

implementation in Spanish practice, being to most used instrument on judicial mutual recognition by Spanish courts.

Finally, specific references to the regulation of the Spanish criminal procedure as a whole will be made to provide the adequate contextual setting. Spanish legal literature has also been analysed in so far it is useful for understanding the present practice on transnational evidence in Spain and the challenges for the future implementation of the European Investigation Order in Spain.

1. INTRODUCTION

1.1 Legal background

As exposed, present research analyses Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters and its implementation specifically in Spain joint with the study of prior legislation and judicial practice. Also other national legislation implementing different European instruments shall be envisaged, such as Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence,[5] Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data in proceedings in criminal matters[6] and Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.[7] Last, a comparative view with implementation and judicial practice on Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (henceforth EAW FWD)[8] shall be also taken into account as long as it has been the most employed European instrument in Spain so far.[9]

[5] OJ L 196, 2.8.2003, p. 45.
[6] OJ L 350, 30.12.2008, p. 72.
[7] OJ L 127, 29.4.2014, p. 39.
[8] OJ L 190, 18.7.2002, p. 1 amended by Council Framework Decision 2009/299/JHA of 26 February 2009, OJ L 81, 27.3.2009 p. 24.
[9] See at the time M. JIMENO-BULNES, 'Spain and the European Arrest Warrant – The view of a 'key user', in E. Guild (ed.), *Constitutional challenges to the European Arrest Warrant*, Wolf Legal Publishers, 2006, p. 163 ff. and 'Spain and the EAW. Present and future', in E. Guild & L. Marin (eds.), *Still not resolved? Constitutional issues of the European Arrest Warrant*, Wolf Legal Publishers, 2009, p. 261 ff. In the context of EIO see L. BACHMAIER WINTER, 'Prueba transnacional en Europa: la directiva 2014/41 relativa a la Orden europea de investigación', 2015 (36) *Revista General de Derecho Europeo*, www.iustel.com and M. JIMENO BULNES, 'Orden europea de investigación en materia penal', in M. Jimeno Bulnes (ed.), *Aproximación legislativa versus reconocimiento mutuo en el desarrollo del espacio judicial europeo: una perspectiva multidisciplinar*, Bosch, 2016, p. 151 ff.; also L. BACHMAIER WINTER, 'Towards the transposition of Directive 2014/41 regarding the European Investigation Order in criminal matters', 2015 (2) *Eucrim*, p. 47 ff. And C. ARANGÜENA FANEGO, 'Orden europea de investigación próxima implementación en España del nuevo instrumento de atención de prueba penal transfronteriza', 2017 (58) *Revista de Derecho Comunitario Europeo*, p. 905 ff. in relation with Spanish implementación on EIO. In general, about EIO see for example T. BENE, L. LUPARIA and MARIAFIOTI (ed.), *L'ordine europeo d'indagine. Criticità e prospettive*, Giappichelli, 2016.

As indicated EIO is already implemented in Spain by the Law 3/2018, of 11 June but the implementation hasn't been on time. By contrast, Directive 2014/42/UE on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, which was approved on the same date as the DEIO –3 April 2014–, has been already transposed in Arts. 803 ter a – 803 ter Spanish Act on Criminal Procedure[10] (*Ley de Enjuiciamiento Criminal*, henceforth LECrim) by Law 41/2015, of 5 October, on amendment of Act on Criminal Procedure for the speeding of criminal justice and the strengthening of procedural safeguards.[11] Council FWD 2003/577/JHA, Council FWD 2008/978/JHA and Council FWD 2002/584/JHA are nowadays implemented in Spain under the comprehensive compilation done by prior Act 23/2014, of 20 November, on mutual recognition of judicial decisions in criminal matters in the European Union or LRM, which derogates prior national legislation on the topic.[12]

Spanish Law on EIO deletes the regulation of European Evidence Warrant in Title X (Arts. 186 – 200) prior LRM, according to the derogation by Regulation (EU) 2016/95 of the European Parliament and of the Council of 20 January 2016 repealing certain acts in the field of police cooperation and judicial cooperation in criminal matters.[13] Also the reform of general provisions on mutual recognition included in other rules of same Spanish Law on mutual recognition in criminal matters is necessary as they are such ones included in Preliminary Title (Arts. 1 - 6 LRM) and Title I (Arts. 7 – 33 LRM). Last, the Spanish Law implementing EIO has amended other dispositions on LRM related to the implementation of further European legislation.[14]

[10] BOE n. 260, 17.9.1882, p. 803 ff, available at http://www.boe.es/buscar/act.php?id=BOE-A-1882-6036&tn=2 (last access on July 5th, 2018).
[11] BOE n.239, 6.10.2015, p.90220 ff. available at https://www.boe.es/buscar/doc.php?id=BOE-A-2015-10726 (last access on July 5th, 2018). English version of Spanish Act on Criminal Procedure is available under payment at https://tiendaonline.mjusticia.gob.es/Tienda/mostrarDetallePublicaciones.action?idPublicacion=10751 (last access on July 5th, 2018).
[12] Law 3/2003, of 14 March, on European Arrest Warrant and Surrender (henceforth LOEDE) and Law 18/2006, of 5 June, for the effectiveness in the European Union of the resolutions of freezing and assurance of evidence in criminal proceedings according to Single Derogation provision LRM. By contrast, Council FWD 2008/978/JHA was never previously implemented till LRM.
[13] OJ L 26, 2.2.2016, p. 9.
[14] For example, Directives on procedural rights such as Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings and Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.

1.2 European conventions

Art. 34 (1) DEIO provides the replacement of several European conventions by EIO from 22 May 2017. These European conventions have been employed in Spain until the recent entry into force of the Spanish EIO new law. Such has been the opinion provided by the General Public Prosecutor's Office in Spain (*Fiscalía General del Estado*, henceforth FGE),[15] which established the employment of existing conventions in all rogatory letters and EIO requests issued by Member States till the entry into force of the Spanish legislation implementing EIO. Same existing conventions are being employed even after the entry into force in Spain of the EIO with those Member States, who have not yet implemented the EIO. Nevertheless, it is here expressly indicated how execution of such requests on judicial cooperation employing classic conventions must follow the spirit and principles of the DEIO according to the principle of conformity interpretation established by the Court of Justice of European Union (henceforth CJEU) case-law.[16]

European conventions as listed under Art. 34 (1) DEIO are the European Convention on Mutual Assistance in Criminal Matters of the Council of Europe of 20 April 1959[17] as well as its two protocols;[18] Convention implementing the Schengen Agreement of 14 June 1985 (henceforth CISA)[19] and Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (henceforth MLA)[20] and its protocol.[21] All of them

[15] Opinion 1/17 on May 19th 2017 by Prosecution Unit of International cooperation, available at official website https://www.fiscal.es/fiscal/publico/ciudadano/gabinete_prensa/noticias (last access on July 5th, 2018). See specifically R. MORÁN MARTINEZ, "La orden europea de investigación desde la perspectiva practica" en M. Jimeno Bulnes (ed.) and R. Miguel Barrio (coord.) *Espacio judicial europeo y proceso penal*, Tecnos, 2018, forthcoming.

[16] See especially judgement on 16 June 2005, *Pupino*, C-105/03, available at official website https://curia.europa.eu/jcms/jcms/j_6/en/

[17] ETS n. 030, available at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/030 (last access on July 5th, 2018).

[18] Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, ETS No. 099, and Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, ETS No. 182, available at https://www.coe.int/en/web/conventions/full-list (last access on July 5th, 2018).

[19] Signed on 19 June 1990, OJ L 239, 22.9.2000, p. 19, today considered Schengen *acquis integrated* into the framework of the European Union according to Protocol (No) 19 to Treaties on the European Union and on the Functioning of the European Union, OJ C 115, 9.5.2008, p. 290.

[20] Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on the European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000/C 197/01), OJ C 197, 12.7.2000, p. 1.

have been applied in Spain according to judicial practice together with specific European instruments on judicial cooperation such as EAW and orders of freezing property or evidence prior enounced as well as others. These new ones are specifically Council FWD 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties[22] and Council FWD 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders.[23]

Prior the European Convention of 20 April 1959 signed within the framework of the Council of Europe (MLA Convention 1959) operated as essential rule regarding the gathering of evidence in criminal matters in another Member State till the enforcement of MLA 2000 on August 23rd, 2005.[24] That was the case of Spain as any other Member States of EU.

First, in relation with the application of the European MLA Convention of 1959, where some recent case-law can still be found such as Judgement by Supreme Court (henceforth STS) n. 116/2017, of 23 February, in which Spanish Supreme Court (henceforth TS) states the principle of non-inquiry with respect to the lawfulness of the judicial activities in other Member States of European Unión.[25] Another example it is STS n. 1521/2002, of 25 September, where TS declared '*within the framework of the European Union, defined as an area of freedom, security and justice, in which common action among the Member States in the field of police and judicial cooperation in criminal matters is essential (...), not to carry out controls on the value of those carried out by the judicial authorities of the various countries of the Union, nor less than their adequacy to the Spanish legislation when they*

[21] Protocol established by the Council in accordance with Article 34 of the Treaty on the European Union to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 326, 21.11.2001, p. 2.
[22] OJ L 76, 22.3.2005, p. 16, prior implemented in Spain by Law 1/2008, of 4 December, today abrogated by Law 23/2014.
[23] OJ L 328, 24.11.2006, p. 59, initially implemented in Spain by Law 4/2010, of 10 March, also abrogated by LRM.
[24] See L. BACHMAIER WINTER, 'European investigation order for obtaining evidence in the criminal proceedings. Study of the proposal for a European directive', 2010 (9*) Zeitschrift für Internationale Strafrechtsdogmatik*, p. 580 ff, at p. 581; also S. ALLEGREZZA, 'Critical remarks on the Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility', 2010 (9) *Zeitschrift für Internationale Strafrechtsdogmatik*, p. 569 ff. More extensively R. BELFIORE, 'The European Investigation Order in criminal matters: developments in evidence-gathering across the EU', 2015 (5) *European Criminal Law Review*, n. 3, p. 312 ff and, specifically, 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', 2014 (10) *Utrecht Law Review*, n. 1, p. 113 ff, at p. 115.
[25] STS, 23 February 2017, n. 116, available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=7944729&links=comisi%C3%B3n%20Y%20rogatoria%20%22116%2F2017%22&optimize=20170227&publicinterface=true (last access on July 5th, 2018).

have been carried out in the framework of a rogatory letter and therefore in accordance with article 3 of the European Convention on Mutual Assistance in Criminal Matters'.[26] Also in STS n. 340/2000, of 3 March, it is stated that '*the incorporation in criminal proceedings processed in Spain of evidence carried out abroad in the framework of the European Convention on Mutual Assistance (...) does not imply that such evidence must be submitted to the sieve of its conformity with the Spanish rules*' as far as according to the European Convention on Mutual Assistance 1959 it is the *lex loci*, which is used.[27] Last, STS n. 947/2001, of 18 May, where Supreme Court concluded that '*it is not for the Spanish judicial authority to verify the chain of legality by the officials of the countries indicated, and in particular the compliance by the Dutch authorities with the legality of that country nor less subject to the contrast of the Spanish legislation*'.[28]

It is here interesting to quote STS n. 733/2013, of 10 October, where the TS mentioned prior case-law enounced in STS n. 312/2012, of 24 April, in which maintained '*the Court of Appeal has not assessed a police report as stated in the ground but a rogatory letter sent to the Portuguese judicial authorities and which occupy several volumes, 15, and 16, in addition to other folios of the procedure, which includes the result of the intervention of the substance, the warning of the arrival of the sailboat and the investigations carried out. This rogatory letter is obtained from documentation made by the body of instruction in the Republic of Portugal, the Public Prosecutor, which certifies the incidents that are required by the Spanish judicial instruction. In this regard, we note that this cooperation between Member States of the European Union have their own content, starting with the Convention on Mutual Assistance in Criminal Matters of 29 May 2000, and the Agreements which are merged to complement and to which the art. 1 of the aforementioned agreement, authorizing the member states to forward the required documentation directly. The Council Framework Convention 2008/978/JAI of the Council also provides for the direct transfer of documentation between judicial bodies of the Union countries from the European Judicial*

[26] STS, 25 September 2002, n. 1521, legal basis para. 1.IX, available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=2948920&links=comisi%C3%B3n%20Y%20rogatoria%20%221521%2F2002%20%22&optimize=20031203&publicinterface=true (last access on July 5th, 2018). All translations are personal by authors.

[27] STS, 3 March 2000, n. 340, legal basis para. 3.IV, available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=3173148&links=%22340%2F2000%22&optimize=20030830&publicinterface=true (last access on July 5th, 2018).

[28] STS, 18 May 2001, n. 947, legal basis para. 2.IV, available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=3203608&links=%22947%2F2001%22&optimize=20030808&publicinterface=true (last access on July 5th, 2018).

Network and the Convention between the Kingdom of Spain and the Portuguese Republic on judicial cooperation in matters Criminal and civil, of November 19, 1997, with the provision that it exposes to the needs of documentary legalization and translations of letters and commissions'.[29] Also TS mentioned here prior case-law such as STS n. 1281/2006, on December 27th, in which declared that '*in the framework of the European Union, defined as an area of freedom, security and justice, in which common action between Member States in the field of police and judicial cooperation in criminal matters is an essential piece, according to art. 29 of the Treaty on European Union in the consolidated version of Maastricht, it is not possible to carry out a check on the value of those made before the judicial authorities of the various countries of the Union, nor less that they are in line with Spanish legislation, of a Rogatory Letter and therefore in accordance with article 3 of the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 - October 17, 1982.*' (para 19.V).

Earlier Spanish judgments applying the European Convention on Mutual Assistance 1959 are STS n. 13/1995, of 19 January, in relation to rogatory letter completed by Germany; STS n. 974/1996, of 9 December, where it is expressly proclaimed that '*in the area of the judicial area there is not distinction to be made as to the guarantees of impartiality of one or value of the acts before them practiced in form*' in relation to rogatory letter from the Swedish authorities; STS n. 340/2000, of 3 March, which in line with the previous ones confirms the doctrine that the incorporation in criminal proceedings processed in Spain of evidence carried out abroad in the framework of the European Convention on Mutual Assistance 1959 does not imply that such evidence must be subjected to the of its conformity with the Spanish rules; STS n. 1450/99, of 18 November, in relation to the rogatory letter completed by the French authorities.

With regard to the Convention implementing the Schengen Agreement of 14 June 1985 (CISA), the Spanish Supreme Court has made use of it, for instance, in STS n. 18/2016, of 26 January, in which specified '*in the field of European Union law, there is a repeated recognition of the guarantee of the ne bis in idem principle on a transnational basis: (a) as a general principle of EU law in the field of competition law; (B) Article 54 CAAS (Convention*

[29] STS, 10 October 2013, n. 733, legal basis para. 19.VII, available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=6856345&links=%22733%2F2013%22&optimize=20131014&publicinterface=true (last access on July 5th, 2018).

implementing the Schengen Agreement), for signatory States to the Convention; C) in various Instruments of Judicial Cooperation and Mutual Recognition, for the area of freedom, security and justice; And (d) Article 50 of the Charter of Fundamental Rights of the European Union (CFREU), which is applicable when Union and also in national procedures if their action is carried out within the scope of the Law of the Union (CJEU 26 February 2013, Akerberg Fransson, C-617/10)'.[30] Also in STS n. 641/2015, of 29 October, TS concerns about a telephone interceptions in the framework of an investigation between Spain and Italy. TS highlighted '*the initial decision in this respect was preceded by a document from the Italian liaison magistrate in Spain, which sent a rogatory letter from the Office of the Prosecutor of Bologna, under the provisions of the European Convention on Mutual Assistance in Criminal Matters, done at Strasbourg on 20 April 1959, and the Agreement implementing the Schengen Agreement, in which telephone interceptions were requested to complete the ongoing investigations in that country, in relation to an organization that could be dedicated to the trafficking of narcotic drugs on a large scale, destined to the illegal markets of Italy and Spain'*.[31]

On its behalf, Constitutional Court (henceforth TC) has mentioned in some case-law the European Convention on Mutual Assistance and its Protocols. For instance, in STC n. 281/2006, of 9 October, in which TC concluded that, '*consequently, even if the urgency of the case so requires or the current technical possibilities allow for more agile and less formal forms of application, this does not prevent international standards from providing for further documentation of the application, and should include this minimum data will serve as a guarantee to the individual that the request comes from an official authority of a State party to one of the international conventions on legal assistance, or the European Union, and not from other States outside these international conventions'*.[32] Also in STC n. 17/2013, of 31

[30] STS, 26 January 2016, n. 18, legal basis para. 8.I, available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=7597833&links=Convenio%20de%20aplicaci%C3%B3n%20del%20Acuerdo%20de%20Schengen&optimize=20160212&publicinterface=true (last access on July 5th, 2018).

[31] STS, 29 October 2015, n. 641, legal basis para. 1.II, available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=7518779&links=Convenio%20de%20aplicaci%C3%B3n%20del%20Acuerdo%20de%20Schengen&optimize=20151113&publicinterface=true (last access on July 5th, 2018).

[32] STC, 9 October 2006, n. 281, legal basis para. 5.III, available at http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/5883#complete_resolucion&completa (last access on July 5th, 2018).

January,[33] and STC n. 236/2007, of 7 November,[34] there is reference to the Convention implementing the Schengen Agreement or CISA.

The role of the National Court (henceforth AN) in the investigation, prosecution and trial of serious crimes with cross-borders elements is crucial. For instance in Order (*auto*) n. 300/2016, of 3 December,[35] AN mentioned the three related legal instrument as they are the European Convention on Mutual Assistance in Criminal Matters of the Council of Europe of 20 April 1959, the Convention implementing the Schengen Agreement of 14 June 1985 and Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000. In fact, according to the last official report existing at the time,[36] the Criminal Chamber of the National Court received a total of 148 extradition and EAW requests; also 56 extradition and EAW proceedings were pending in 2015 as well as 166 finished in 2016 and still 32 cases were pending at December 31st, 2016.

2. SUBJECTS

2.1 Judicial authority

As far as the EIO is *'a judicial decision which has been issued or validated by a judicial authority of a Member State'* (Art. 1 DEIO) in Spain such judicial decision only could be

[33] STC, 31 January 2013, n. 17, available at http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/23272#complete_resolucion&completa (last access on July 5th, 2018).

[34] STC, 7 November 2007, n. 236, available at http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/6203#complete_resolucion&completa (last access on July 5th, 2018).

[35] AAN, 13 December 2016, n. 300, available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=AN&reference=7908434&links=Convenio%20de%20asistencia%20judicial%20en%20materia%20penal%20entre%20los%20Estados%20miembros%20de%20la%20Uni%C3%B3n.%20Europea%2C&optimize=20170113&publicinterface=true (last access on July 5th, 2018).

[36] See Memory of National Court for the year 2016 at http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Audiencia-Nacional/Actividad-de-la-AN/Memoria-de-la-AN/Audiencia-Nacional---Memoria-2016 (last access on July 5th, 2018) at p. 154.

adopted and/or 'validated' by a judge or a court according to the Spanish criminal procedure model, classified as mixed-inquisitorial.[37]

In Spain the direction of the investigative stage and/or pre-trial investigation is still conducted by a judge, generally the Investigating Judge (*Juzgado de Instrucción*)[38] with exception of the Judge of Violence against Women, who only deals with the investigation of causes related to gender violence.[39] Public prosecutor (*fiscal)* in only charged with the task of the public accusation to be shared with the private and popular accusation (Art. 101 LECrim)[40] and joint with the civil action (Arts. 100 and 108 LECrim) if it is the case. In sum, none prosecutorial party, private or public, could be initially in Spain issue and/or validate the EIO.[41]

According to prior premises, issuing and executing authorities in Spain such as defined in Arts. 2 DEIO initially only could be judicial authorities according to restrictive definition, ie, judges and courts. Here also the existing regulation in Spain on the EAW is useful providing that '*the appropriate judicial authority in order to issue a EAW is the judge or court hearing the case'* (Art. 35 (1) LRM) as well as '*the appropriate executing judicial authority in order to execute a EAW shall be the Central Judge of the Investigative belonging to National Court'* and the Central Judge of Minors if the EAW is related to a minor (up to 14 and under 18 years old in Spain) according to Art. 35 (2) LRM.

As said, usually shall be the Investigative Judge in Spain the appropriate judicial authority in order to issue an EIO as well as Judge of Violence against Women acting as investigative judge in criminal causes. But also it could be such EIO delivered by the Judge of the Criminal

[37] See discussion in M. JIMENO-BULNES, 'American procedure in a European context', 2013 (21) *Cardozo Journal of International and Comparative Law*, n. 2, p. 409 ff.
[38] See generally on Spanish criminal procedure F. GASCÓN INCHAUSTI and M.L. VILLAMARÍN LÓPEZ, 'Criminal procedure in Spain', in R. Vogler and B. Huber (eds.), *Criminal procedure in Europe*, Duncker & Humblot, 2008, p. 541 ff. Also specifically L. BACHMAIER WINTER and A. DEL MORAL GARCÍA, *Criminal Law in Spain*, Wolters Kluwer, 2012, p. 205 ff.
[39] See M. JIMENO BULNES, 'Jurisdicción y competencia en material de violencia de género: los Juzgados de Violencia sobre la Mujer. Problemática a la luz de su experiencia', 2009 (1-2) *Justicia*, p. 157 ff.
[40] In Spain it is allowed the private prosecution by victims and citizens according to Art. 125 CE. See J. PÉREZ GIL, 'Private interests seeking punishment: prosecution brought by private individuals and groups in Spain', 2003 (25) *Law & Policy*, n. 3, p. 151 ff.
[41] See M. AGUILERA MORALES, 'El exhorto europeo de investigación: a la búsqueda de la eficacia y la protección de los derechos fundamentales en las investigaciones penales transfronterizas', 2012 *Boletín del Ministerio de Justicia*, n. 2145, available at http://www.mjusticia.es/bmj, at p. 10.

and even Provincial Court according to their judicial competence[42] if the issuing of EIO takes place along the trial as far as '*the EIO may also issued for obtaining **evidence** that is already in the possession of the competent authorities of the executing State*' (Art. 1 DEIO). Nevertheless, it is agreed that main purpose of new European instrument is the practice of investigative measures abroad along the pre-trial investigation stage;[43] for this reason EIO shall be usually issued by the Judge of the Investigative in Spain.

By contrast, the Law 3/2018 has chosen an extensive interpretation of judicial authority according to the spirit of prior European conventions such as Convention of Council of Europe 1959 and MLA 2000.[44] In this context new Art. 187 (1) 2nd paragraph LRM provides that issuing judicial authorities, joint with Judges and Courts with knowledge of criminal proceeding where the EIO shall be adopted, shall be also '*the public prosecutors in the proceedings they direct, provided that the measure contained in the European investigation order is not a limitation of fundamental rights*'. Besides, Art. 187 (2) LRM institute the Prosecution Office as '*the appropriate authority in Spain to receive the European investigation orders issued by the appropriate authorities of other Member States*' centralizing the reception of EIO in Spain.[45]

But public prosecutor only shall be able to execute the EIO in Spain, again, when such one does not entail restriction of fundamental rights, ie, when it does not deal with a coercive measure.[46] Otherwise, if '*the EIO contains any coercive measure and cannot be replaced by another measure does not restrict those rights, it will be sent by the public prosecutor to the judicial body for its recognition and execution'*. Same proceeding shall take place when the issuing judicial authority '*expressly indicates*' that the measure must be enforced by a judicial

[42] Crimes up to 5 years of imprisonment or any other penalty in the case of Judges of the Criminal; in other cases, judicial competence belongs to Provincial Court. See F. GASCÓN INCHAUSTI and M.L. VILLAMARÍN LÓPEZ, op. cit., at p. 553.
[43] See A.L. MARTÍN GARCÍA and L. BUJOSA VADELL, *La obtención de prueba en materia penal en la Unión Europea*, Atelier, 2016, at p. 118.
[44] See Declaration in relation to Art. 24 Convention 1959 contained in a Note verbale from the permanent representation of Spain, dated 9 June 2011, modified by Note verbale dated on 12 December 2014, available at https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/030/declarations (last access on July 5th, 2018).
[45] See criticism exposed in CGPJ report at p. 24, point 73 and ff. By the contrast, favourable opinion on defence of this centralised reception of EIO is maintained by General Prosecution Office as far as it is coherent with an automatic system of recording international requests: see MORÁN MARTINEZ, op. cit., p. 6.
[46] See *infra* 4. Concept of coercive measure.

body. Last, also the concrete judicial bodies to execute such coercive measures are numerated in further Art. 187 (3) LRM: *Judges of the investigative or Minors of the place where the coercive measures must be carried out or subsidiary, where there is some other territorial connection with the crime, with the researched or with the victim.; the Central Judge of the Investigative if the EIO was issued for a terrorist offense or another of the crimes, whose prosecution belongs to National Court; the Central Judges of the Criminal or of the Minors in the case of transfer to the issuing State of persons deprived of liberty in Spain.*

2.2 Other subjects

In Spain parties in criminal procedure can propose the adoption of investigative measures involving prosecution and defence side according to the principle of equality of arms existing at pre-trial and trial stages.[47] In this context, from the prosecution side such proposal can be made by not only by public prosecutor but also by private and popular ones if they participate in the concrete criminal proceeding.[48] Also the issuance of an EIO can be requested '*by a suspected or accused person, or by a lawyer on his behalf*' as it is expressly provided in Art. 1 (3) DEIO, taken into account that according to Spanish criminal procedure model such request means just a proposal but not a proper standing[49] as far as, as said, director of pre-trial investigation is only the appropriate judicial authority, ie, Judge of the Investigative. In this sense the EIO appears to be, not only a mutual recognition instrument on behalf of prosecution as it is generally stated, but also on behalf of defence.[50]

In relation with specific participation by suspect and his/her lawyer in the issuance of EIO it can be exposed how they are considered proper parties with full rights since the beginning of

[47] See R. BELFIORE, 'Riflessioni a margine della Direttiva sull'ordine europeo d'indagine penale', 2015 (9) *Cassazione penale*, p. 3288 ff, at p. 3294.
[48] See A. TINOCO PASTRANA, 'L'ordine europeo d'indagine penale', 2017 (2) *Processo penale e giustizia*, p. 346 ff, at p. 349.
[49] Some authors in Spain argue on behalf of a proper standing in general terms also for parties on criminal procedure according to Art. 1 DEIO such as E. MARTINEZ GARCÍA, *La orden europea de investigación. Actos de investigación, ilicitud de la prueba y cooperación judicial transfronteriza*, Tirant lo Blanch, 2016, at p. 53. To our personal opinion they only have a sort of 'proposal standing' (*Vorlageberechtigung*) and no real standing is provided for EIO at least in Spain as far as judicial decision only deriving from judicial authority such as judge and court is necessary according to Art. 1 DEIO.
[50] See C. ARANGÜENA FANEGO, op. cit., pp. 925-926.

criminal proceeding in Spain. Nevertheless, despite of the justification of such provision in the European rule in order to balance the rights of accusation and defence in relation with the EIO,[51] it is not always easy to maintain the equality of arms in criminal proceedings, especially during the pre-trial investigation as far as the effectiveness of some investigative measures needs the limitation of fundamental rights of defendant.[52] In this context, the suspect and his/her defence lawyer can request the EIO as the prosecutorial parties, taken into account that it is a faculty[53] but not a duty as well as such request does not either is compulsory for judicial authority, whose resolution or order (*auto)* can be appealed before the superior court (Court of Appeal or *Audiencia Provincial* if it is pronounced by singular judge, ie, Judge of the Investigative) as any other according to Arts. 217 and 236 LECrim.

In Spain defence rights are provided in Art. 118 LECrim recently amended due to the implementation of the Directives on procedural rights in criminal proceedings.[54] In this line the defendant is granted following fundamental rights: the right to interpretation and translation, to be informed of facts and accusation as well as the right to legal assistance and

[51] See L. BACHMAIER WINTER, 'Transnational evidence…', op. cit., at p. 50.

[52] On the topic, R. GARCIMARTÍN MONTERO, 'The European Investigation Order and the respect of fundamental rights in criminal investigations', 2017 (1) *Eucrim*, p. 45 ff. Also E. MARTINEZ GARCÍA, 'La orden de investigación europea. Las futuras complejidades previsibles en la implementación de la Directiva en España', 2014 *La Ley Penal*, n. 106, available at http://revistas.laley.es, at p. 5. In general on the AFSJ see M. AGUILERA MORALES, 'Justicia penal y Unión Europea: un breve balance en clave de derechos', 2016 (8883), December 16th, *Diario La Ley*, http://diariolaley.laley.es

[53] Suspect can request but not obligate; see J. BURGOS LADRÓN DE GUEVARA, 'La orden europea de investigación penal en España: aplicación y contenido. Posible relación con la orden de protección', 2015 December 7th, *Diario La Ley*, n. 6840, and 2016 December 7th, *Diario La Ley*, n. 8669, available at http://diairiolaley.laley.es, at p. 4.

[54] LO 5/2015, of 27 April, by modifying the Act on Criminal Procedure and the Act 6/1985, of 1 July, on the Judiciary to implement Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ L 280, 26.10.2010, p. 1) and Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings (OJ L 142, 1.6.2012, p. 1), BOE n. 101, 28.04.2015, p.36559 ff available at https://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-4605 (last access on July 5th, 2018); LO 13/2015, of 5 October, by modifying the Act on Criminal for the strengthening of procedural guarantees and the regulation of technological investigative measures, which implements 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 in European Arrest warrant 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 (OJ L 294, 6.11.2013, p. 1), BOE n. 239, 6.10.2015, p. 90192 ff available at https://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-10725 (last access on July 5th, 2018). At the time of writing no more implementation of further Directives on procedural rights have taken place such as Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ L 65, 11.3.2016, p. 1), Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (OJ L 132, 21.5.2016, p. 1) and Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (OJ L 297, 4.11.2016, p. 1).

to communicate to third persons according to the implemented directives, not only during the pre-trial investigation and the trial itself but also along the preliminary phase before the police[55] (ie, procedural rights in police station) according to Art. 520 LECrim also amended. Accordingly Recital 15 of DOEI is fully complied with.[56]

3. TYPES OF PROCEEDINGS

3.1 Criminal proceedings

In Spain initially EIO could be adopted in whole criminal proceedings, ordinary and special ones according to Art. 4 (a) DOEI as far as no further specification is foreseen in further Art. 186 (1) LRM.[57] The Spanish Act on Criminal Procedure (1882) contemplates three ordinary criminal proceedings in order to deal generally with all criminal causes, which division is established depending on the severity of the penalty provided in Criminal Code.[58] They are the ordinary proceeding for serious crimes (*proceso ordinario por delitos graves*) when

[55] That is the case of police questioning practised before the pre-trial investigation as pre-procedural stage; see M. JIMENO BULNES, 'La Directiva 2013/48/UE del Parlamento europeo y del Consejo de 22 de octubre de 2013 sobre los derechos de asistencia letrada y comunicación en el proceso penal: ¿realidad al fin?', 2014 (48), *Revista de Derecho Comunitario Europeo*, p. 443 ff, at p. 461; also L. BACHMAIER WINTER, 'The EU Directive on the right to access to a lawyer: a critical assessment', in S. Ruggeri (ed.), *Human rights in European Criminal Law*, Springer, 2015, p. 111 ff, 119.

[56] Textually, '*the Directive should be implemented taking into account Directives 2010/64/EU, 2012/13/EU and 2013/48/EU of the European Parliament and of the Council, which concern procedural rights in criminal proceedings*'.

[57] Textually, '*the European investigation order is a criminal decision, which has been issued or validated by appropriate authority of a Member State of the EU, with a view to carrying out one or more investigative measures in another Member State, the purpose of which is to obtain evidence for use in criminal proceedings. As well as it is possible to issue an European Investigation Order in order to the submission of evidence or investigative measures that already have been under the power of the competent authorities of the Member state of Execution. It will be considered to be valid in Spain in the acts of investigation realized by the State of execution, providing that they should not contradict the fundamental principles of the Spanish legal system or the procedural guarantees recognized in it*'.

[58] LO 10/1995, of 22 November, on Criminal Code, BOE n. 281, 24.11.1995, p. 33987 ff available at https://www.boe.es/diario_boe/txt.php?id=BOE-A-1995-25444 (last access on July 5th, 2018), English version is available under payment at http://www.mjusticia.gob.es/cs/Satellite/Portal/es/servicios-ciudadano/documentacion-publicaciones/publicaciones/traducciones-derecho-espanol (last access on July 5th, 2018).

penalty is greater than 9 years of deprivation of liberty, abbreviated proceeding (*procedimiento abreviado*) when deprivation of liberty does not exceed 9 years or of a different nature, in both cases according to prescription contained in Art. 757 LECrim; last one is the new proceeding for minor offenses (*procedimiento por delitos leves*, in substitution of the prior *juicio de faltas*)[59] enumerated in Art. 962 LECrim.

Also, as indicated, there are several special criminal proceedings;[60] probably the most current one can be the fast-track proceedings (*procedimiento para el enjuiciamiento rápido de determinados delitos* according to Arts. 795 ff LECrim) as well as some new ones have been recently introduced such as the process for acceptance of decree (*proceso por aceptación de decreto* according to Arts. 803 bis a ff LECrim) and the process for intervention of third parties affected by confiscation and the autonomous confiscation proceeding (*intervención de terceros afectados por el decomiso y del procedimiento de decomiso autónomo* according to Arts. 803 ter a ff LECrim) implementing the Directive 2014/42/UE as prior said.[61] By contrast, other special criminal proceedings are regulated in specific legislation such as the jury proceedings (*procedimiento para las causas ante el Tribunal del Jurado*) regulated in Organic Law (henceforth LO) 5/1995, of 22 May, on Jury Court,[62] and juvenile criminal procedure (*proceso penal de menores*) according to LO 5/2000, of 12 January, by which regulates the criminal responsibility of minors,[63] joint with criminal proceeding in order to provide the passive extradition according to Law 4/1985, of 21 March, on Passive Extradition.[64]

Nevertheless, it must be taken into account that the issuance of EIO must also fulfil conditions established in Art. 6 DEIO and now Art. 189 LRM such as the '*proportionality*,

[59] Amendment by Final Disposition 2 (8) LO 1/2015, on March 30, reforming the LO 10/1995, of 22 November, on Criminal Code, BOE n. 77, 31.03.2015, p. 27061, available at https://www.boe.es/buscar/act.php?id=BOE-A-2015-3439 (last access on July 5th, 2018).

[60] See in English language F. GASCÓN INCHAUSTI & M.L. VILLAMARÍN LÓPEZ, op. cit., at p. 622 ff taking into account that further amendments on Act on Criminal Procedure Act have taken place and new criminal proceedings have been also introduced. More recently, see L. BACHMAIER WINTER & A. DEL MORAL GARCÍA, op. cit., at p. 284 ff. .

[61] Both of them introduced by Law 41/2015, on October 5th, on amendment of Act on Criminal Procedure for the speeding of criminal justice and the strengthening of procedural safeguards, cit.

[62] BOE n. 122, 23.05.1995, p. 15001 ff, available at https://www.boe.es/buscar/doc.php?id=BOE-A-1995-12095 (last access on April 30th, 2018). See specifically M. JIMENO-BULNES, 'Lay participation in Spain: the jury system', 2004 (14) *International Criminal Justice Review,* p. 164 ff and 'Jury selection and jury trial in Spain: between theory and practice', 2011 (86), *Chicago-Kent Law Review,* n. 2, p. 585 ff.

[63] BOE n. 11, 13.01.2000, p. 1422 ff available at https://www.boe.es/buscar/doc.php?id=BOE-A-2000-641 (last access on April 30th, 2018) .

[64] BOE n. 73, 26.03.1985, p. 7842 ff available at https://www.boe.es/buscar/doc.php?id=BOE-A-1985-4816 (access on April 30th, 2018).

necessity and lawfulness'[65] although no further guidelines are indicated (nor does it establish a punitive minimum threshold), especially in relation with the proportionality test, which for sure is the most complicated condition to be evaluated.[66] In this context, in Spain it shall never be proportional to issue an EIO in the framework of a proceeding for minor offenses for sure and in other cases the final decision should take into account the penalty attached to the crime. Here the comparison with EAW provisions could be useful[67] and examples on its application can be found in case-law.[68]

[65] L. BACHMAIER WINTER, 'Transnational evidence…', op. cit., at p. 51. See also F. FALATO, 'La proporzione innova il tradizionale approccio al tema della prova: luci ed ombre della nuova cultura probatoria promossa dall'ordine europeo d'indagine penale', 2018 (1) *Archivio penale*, p. 1 ff; also a behalf of a more proportionated investigation A. MANGIARACINA, 'La orden europea de investigación desde la perspectiva europea', in M. Jimeno Bulnes and R. Miguel Barrío, op. cit., forthcoming.

[66] See specifically L. BACHMAIER WINTER, 'The role of the proportionality principle in cross-border investigations involving fundamental rights' in S. Ruggeri, op. cit., p. 85 ff; also same author especially addressed to EIO, L. BACHMAIER WINTER, 'La orden europea de investigación y el principio de proporcionalidad', 2011 (25) *Revista General de Derecho Europeo*, http://www.iustel.com

[67] To be remembered, 'acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months' according to Art. 2 (1) EAW FWD, which is reproduced in Art. 47 (2) LRM in Spain. See M. JIMENO-BULNES, 'The enforcement of the European Arrest Warrant: a comparison between Spain and the UK', 2007 (15) *European Journal of Crime, Criminal Law and Criminal Justice*, n. 3-4, p. 263 ff, at p. 277 ff.

[68] See for example the following cases where Spain executes an EAW issued by France: AAN, 18 April 2016, n. 55, available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=AN&reference=7650397&links=orden%20europea%20de%20detencion%20Y%20entrega&optimize=20160427&publicinterface=true (last access on July 5th, 2018) where crimes are participation in a criminal organization and illicit trafficking in weapons, munitions and explosives and STS, 9 March 2017, n. 149, available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=7963033&links=comisi%C3%B3n%20rogatoria%20orden%20europea&optimize=20170317&publicinterface=true (last access on July 5th, 2018), where crimes are participation in a criminal organization and murder.
Other case-law where Spain issues an EAW are for example AAN, 11 November 2015, n. 208, available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=AN&reference=7528699&links=orden%20europea%20de%20detencion%20Y%20entrega&optimize=20151123&publicinterface=true (last access on July 5th, 2018) and AAN, 5 October 2015, n. 185, available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=AN&reference=7506379&links=orden%20europea%20de%20detencion%20Y%20entrega&optimize=20151030&publicinterface=true (last access on July 5th, 2018); in both cases EAW is executed by France and crimes are terrorism and participation in a criminal organization. Also for example AAN, 23 October 2015, n. 201 available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=AN&reference=7525125&links=orden%20europea%20de%20detencion%20Y%20entrega&optimize=20151119&publicinterface=true (last access on July 5th, 2018), where EAW is executed by UK and crimes are terrorism and participation in a criminal organization.
Other case-law where Spain issues an EAW are for example STS, 6 March 2018, n. 108, available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=8322175&links=orden%20europea%20de%20detencion%20y%20entrega%20europea&optimize=20180316&publicinterface=true (last access on July 5th, 2018).

3.2 Administrative proceedings

Unfortunately, despite of criticism[69] against the extension of the possibility to issue an EIO by administrative authorities, whose decision can be appealed before criminal jurisdiction, such provision is included in present Art. 4 (a) DEIO, which has been implemented in Spain by Art. 186 (2) LRM.[70] In Spain there are no such proceedings, thus this provision have not impact in the Spanish implementation of the EIO. In fact, new Art. 207 (1) (e) LRM establishes as one ground for non-recognition or non-execution '*the conduct for which the EIO has been issued does not constitute an offence under the Spanish Law and is not include in the categories of offences referred to the first paragraph of the Article 20,*[71] *provided that the penalty or security measure in the issuing State for the offence to which the European investigation order refers was at least three years'* according to Art. 11 (1) (g) DEIO*;* also further Art. 207 (1) (g) '*When the European investigation order refers to proceedings initiated by the competent authorities of other European Union Member States for the commission of acts classified as administrative infractions under the national law of the issuing State when the decision may give rise to proceedings before a court having jurisdiction in criminal matters, and the measure was not authorized, under the law of the executing State, for a similar internal case'* according to Art. 11 (1) (c) DEIO.

[69] See eg D. SAYERS, *The European Investigation Order. Travelling without a 'roadmap'*, Centre for European Policy Studies (CEPS), 2011, available at http://www.ceps.eu, at p. 9. In Spain, see R. MORÁN MARTINEZ, op. cit, p.10, arguing that the issuance and execution of mutual recognition instruments in the framework of administrative proceeding provokes the collapse of the judicial cooperation system.

[70] Textually, the bill implementing the EIO in Spain '*the European investigation order may refer to proceedings instituted by the appropriate authorities of other EU Member States both administrative and judicial proceedings, for the commission of acts classified as administrative offences in the legal system, where the decision may give rise to proceedings before a court in the Criminal Law*'.

[71] Art. 20 LRM refers to the list of offences where there is not the double criminality test according to Annex D of DEIO.

4. CONCEPT OF COERCIVE MEASURE

4.1 Definition

Neither European rule on regulation of the EIO nor Spanish Act on Criminal Procedure provides a specific definition on coercive measures. In fact Art. 10 DEIO only contemplates the case and conditions for substitution of any specific investigative measure such as requested by the issuing Member States when it does not exist or it is not available in the executing Member State.[72] Further Art. 189 (1) LRM related to implementation on EIO in Spain only provides requirements for the issuance of the EIO such as, '*the issuance of an European investigation order is necessary and proportionate for the purpose of the proceeding to which it is requested taking into account the rights of the investigated or defendant*' and '*that the requested investigative measure or measures, whose recognition or execution is intended to have been agreed in the Spanish criminal proceeding in which the European investigation order is issued*'. According to these provisions, no specific reference to coercive measures is done, neither in European nor Spanish rules.

In Spain usually coercive investigative measures are considered such ones adopted during pre-trial investigation with restriction of fundamental rights as they are nowadays regulated in Title VIII (Arts. 545 – 588 octies LECrim) under the rubric '*Of the investigative measures limiting the rights recognized in Article 18 Spanish Constitution*',[73] which has been recently introduced under LO 13/2005, of 5 October, on modification of the Act on Criminal Procedure for the strengthening of procedural guarantees and regulation of technological investigative measures. Undoubtedly, this new regulation on criminal justice has 'paved the way' for the current implementation of DEIO in Spain.[74]

[72] See specifically L. BACHMAIER WINTER, 'Transnational evidence', op. cit., at p. 53.
[73] Textually, '*1. The right to honour, to personal and family privacy and to the own image is guaranteed. 2. The home is inviolable. No entry or search may be made without the consent of the householder or a legal warrant, except in cases of flagrante delicto. 3. Secrecy of communications is guaranteed, particularly regarding postal, telegraphic and telephonic communications, except in the event of a court order. 4. The law shall restrict the use of data processing in order to guarantee the honour and personal and family privacy of citizens and the full exercise of their rights.*' See English version of Spanish Constitution available at http://www.lamoncloa.gob.es/lang/en/espana/leyfundamental/Paginas/index.aspx (last access on July 5th, 2018).
[74] See M. JIMENO BULNES, 'Orden europea de investigación en materia penal', op. cit., at p. 192. Precisely, at the time of writing, it is pending before the CJEU, the resolution of a preliminary reference promoted by the Provincial Court of Tarragona, *Ministerio Fiscal*, C-207/16, which conclusions by Advocate General Saugmandsgaard are available at

Essentially all coercive investigative measures here included constitute assumptions of the so-called 'pre-constituted evidence',[75] whose fundamental requirement is to be transferred to the oral trial phase from one of the means of proof legally contemplated with observance of the procedural guarantees in this stage provided (orality, immediacy, contradiction, publicity, defence…). In judicial practice usually this transfer takes place under the declaration of police forces, in concrete, the officer or officers who have practised the concrete investigative measure, as witnesses according to Arts. 701 ff LECrim. Otherwise these investigative measures practiced during the pre-trial investigation shall not have any probative value according to constitutional and Supreme Court case-law such as leading cases SSTC n. 150/1987, of 1 October, and n. 161/1990, of 19 October, and STS of 5 May 1988.[76]

Last condition established generally by Spanish procedural rules is the adoption of such coercive measures restricting fundamental rights during pre-trial investigation by judicial authority (ie, the Judge of the Investigative), excepted the constitutional provision of *flagrante delicto*, whose concrete regulation is provided in the Act on Criminal Procedure. In these cases, it shall be admissible the practice of concrete coercive measures by police forces under the condition of later judicial validation according to criminal procedure rules. Otherwise the exclusionary rule (*prueba ilícita*) shall be applied according to Art. 11 (1) Act on the Judiciary.[77]

4.2 Coercive measures

http://curia.europa.eu/juris/document/document.jsf?text=&docid=201707&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=149181 (last access on July 5th, 2018)

[75] Defined as '*documentary evidence, which may be practiced by the Judge of the Investigative and its collaborating staff (judicial police and public prosecutor) on unrepeatable facts, which cannot, through ordinary means of proof, be processed at the time of oral trial*'; see V. GIMENO SENDRA, *Manual de Derecho Procesal penal*, Ediciones Jurídicas Castillo de Luna, 2015, at p. 363.

[76] Respectively available at official websites http://hj.tribunalconstitucional.es/ and http://www.poderjudicial.es/search/ See comments on such and other case-law at the time by J. BURGOS LADRÓN DE GUEVARA, *El valor probatorio de las diligencias sumariales en el proceso penal español*, Civitas, 1992, at p. 32 ff.

[77] Textually, '*taking of evidence which has, either directly or indirectly, infringed fundamental rights or freedoms, shall be inadmissible*'. Spanish Act on the Judiciary (henceforth LOPJ) is regulated by LO 6/1985, of 1 July, BOE n. 157, 2.7.1985, p. 20632 ff, English version is available at http://www.poderjudicial.es/cgpj/es/Temas/Compendio-de-Derecho-Judicial/ (last access on July 5th, 2018).

As indicated, main regulation of coercive measures in Spain is provided in Arts. 545 – 588 octies LECrim with specific enumeration of concrete diligences such as the following ones: Of search and seizures in closed place (Arts. 545 - 572 LECrim); Of the register of books and papers (Arts. 573 - 578 LECrim); Of the warrant and opening of written and telegraphic correspondence (Arts. 579 - 588 LECrim); Provisions common to the interception of telephone and telematic communications, gathering and recording of oral communications through the use of electronic devices, the use of technical devices for tracking, locating and capturing the image, registering mass information storage devices and remote records on computer equipment (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 quarter 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).

Nevertheless, also other regulation provided in Act on Criminal Procedure must be taken into account as far as other coercive measures can be adopted and they are more and more employed in judicial practice, also in cross-border causes with employment of prior Conventions.[78] It is the case of controlled deliveries (Art. 263 LECrim), covert investigation by officials (Art. 282 bis LECrim) and DNA analysis and corporal interventions (Art. 363.II LECrim). Last, even amendments on Act on Criminal Procedure already mention further diligences, still their practice need to contemplate specific non procedural regulation; they are the so-called 'alcoholemia test' introduced at the time in road regulation,[79] today provided in

[78] See examples in R. MORÁN MARTINEZ, 'Obtención y utilización de la prueba transnacional', 2010 (30) *Revista de Derecho Penal*, p. 79 ff, at p. 92 ff; also 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', 2011 (24) *Revista General de Derecho Europeo*, htto://www.iustel.com, at p. 16 ff. In international panorama see G. VERMEULEN, W. DE BONDT and Y. VAN DAMME, *EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence?* IRPC series, vol. 37, Maklu, 2010, p. 51 ff.

[79] Prior Art. 12 Law on Traffic, Motor vehicle circulation and Road safety approved by Legislative Royal Decree 339/1990, of 2 March, available at https://www.boe.es/buscar/act.php?id=BOE-A-1990-6396 (last access on July 5th, 2018) further implemented by Arts. 22 and 23 General Ruling on Circulation approved by Royal Decree 1428/2003, of 21 November BOE n. 306, 23.12.2003, p. 45684 ff, consolidated version available at https://www.boe.es/buscar/act.php?id=BOE-A-2003-23514 (last access on July 5th, 2018). Today it is contemplated under Art. 14 Law on Traffic, Motor vehicle circulation and Road safety approved by Legislative

Art. 796 (1), rule 7 LECrim, and filming in public places,[80] also now contemplated in new Art. 588 quinquies (a) LECrim.

5. GROUNDS FOR NON-RECOGNITION OR NON-EXECUTION

5.1 Mandatory or optional nature?

By contrast to EAW provisions[81] Art. 11 DEIO only provides grounds for EIO refusal of optional nature in order to give more flexibility[82] to the new instrument in order to be implemented by Member States. Nevertheless in Spain new Art. 207 LRM provides only mandatory grounds for refusal, which are those ones indicated in Arts. 11 (1) a) b), c), d) f), g) and h) DEIO. Other mandatory and optional grounds for refusal are contained in Art. 32 LMR, which numerates general grounds for refusal to be applied in all European instruments on mutual recognition[83] and whose remission is expressly contemplated in prior Art. 207 (1) LRM.

Specifically further Art. 207 (1) (a) LRM implements Art. 11 (1) a) DEIO providing the non-recognition and non-execution; '*when there is a procedural privilege, which makes it impossible to execute the European investigation order or there are rules on the*

Royal Decree 6/2015, of 30 October, BOE n. 261, 31 October 2015, p. 103167 ff, available at https://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-11722 (last access on July 5th, 2018).

[80] See LO 4/1997, of 4 August, by which is regulated the use of video cameras by the Forces and Bodies of Security in public places, BOE n. 186, 5.8.199, p. 23824 ff, consolidated version available at https://www.boe.es/buscar/doc.php?id=BOE-A-1997-17574 (last access on July 5th, 2018).

[81] Arts. 3 and 4 EAW FWD, which appropriate comment on national case-law shall be here done.

[82] See specifically L. BACHMAIER WINTER, 'The Proposal for a Directive on the European Investigation Order and the grounds for refusal: a critical assessment', in S. Ruggieri (ed.), *Transnational evidence and multicultural inquiries in Europe. Developments in EU legislation and new challenges for Human Rights-oriented criminal investigations in cross-border cases*, Springer, 2014, p. 71 ff, at p. 75.

[83] These are the respect to the principle of *non bis in idem* (Art. 32.1.a) LRM), competence of the Spanish judicial authority (Art. 32.1.b) LRM), imperfection of the certificate appended to the request (Art. 32.1.c) LRM), immunity (Art. 32.1.d) LRM), Acts, which do not constitute an offence under the Spanish law in case of not application of Art. 20.1 or in paragraph second and the sanction was a pecuniary consequence (Art. 32.2 LRM), and the case when the facts are considered committed in Spain according to the principle of territoriality (Art. 32.3 LRM).

determination and limitation of criminal liability relating to freedom of the press and freedom of expression in other media, which make it impossible for the competent Spanish authority to execute the European investigation order'; further Art. 207 (1) (b) implements Art. 11 (1) (b) DEIO establishing '*when the execution would harm essential national security interests, jeopardise the source of information or involve the use of classified information relating to specific intelligence activities'*; further Art. 207 (1) (c) LRM implements Art. 11 (1) (e) DEIO providing the non-recognition and non-execution '*when the order relates to facts, which have been committed outside the territory of the issuing state and wholly or partially on the Spanish territory, and the conduct in connection with which the European investigation order is issued is not an offence in Spain*'; further Art. 207 (1) (d) LRM implements Art. 11 (1) (f) DEIO according to which Spain shall deny the recognition and execution of the EIO '*when there are substantial grounds to believe that the execution of the investigative measure indicated in the European investigation order is incompatible with the Spanish State's obligations in accordance with Article 6 TEU and the Charter'*; also Art. 207 (1) (e) LRM implements Art. 11 (1) (g) DEIO providing the non-recognition and the non-execution of EIO '*when the conduct for which the European investigation order has been issued does not constitute an offence under the Spanish Law and is not include in the categories of offences referred in the first paragraph of the Article 20, provided that is punishable in the issuing State for a maximum period of at least three years'* as prior indicated; following Art. 207 (1) (f) LRM implements Art.11 (h) DEIO *'When the use of the investigation measure indicated in the European investigation order is limited, under Spanish law, to a list or category of offenses, or to crimes punishable by penalties from a certain threshold which does not include the offence covered by the European investigation order'*; last, accordingly with the non provision of EIO for administrative proceedings in Spain, new Art. 207 (1) (g) foresees a specific ground of refusal not contemplated under Art. 11 (1) DEIO as it is '*When the European investigation order refers to proceedings initiated by the competent authorities of other European Union Member States for the commission of acts classified as administrative infractions in their legal order if the decision may give rise to a proceeding before a jurisdictional body in the penal order and the measure is not authorized in accordance with the law of the executing State, for a similar internal case'.*

5.2 Immunity or privilege

5.2.1 General considerations

According to Recital 20 DEOI '*there is no common definition of what constitutes an immunity or privilege in Union law*' as far as '*the precise definition of these terms is therefore left to national law, which may include protections which apply to medical and legal professions, but should not be interpreted in a way to counter the obligation to abolish certain grounds for refusal as set out in the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union. This may also include, even though they are not necessarily considered as privilege or immunity, rules relating to freedom of the press and freedom of expression in other media*'.

It must be remembered that present ground for EIO refusal was not contained in EAW FWD, for this reason no case-law in Spain because of it can be found as far as it was not either contemplated in previous Spanish EAW rule. By contrast, it is now included in new Art. 32 (1) (d) LRM, not only in relation to EAW, but for all European instruments on mutual recognition of criminal decisions; this one textually provides that the Spanish judicial authorities shall not recognise and/or execute orders on employing mutual recognition instruments '*where there is immunity preventing the enforcement of the judgement*'. Also it is included a specific provision in Art. 31 LRM under the rubric of '*Request for waiver of immunities*', which contemplates a specific proceeding in order to ask for the '*lifting of said privilege*' by the Spanish judicial authority to appropriate Spanish or foreign authority.

From the Spanish perspective, according to Art. 56 (3) Spanish Constitution, only '*the person of the King is inviolable and shall not be held accountable*' at a whole. Also there are some persons, who have a sort of privilege of jurisdiction because, either they are judged by a superior court (usually Supreme Court)[84] or even it is necessary further requirements in order to prosecute them. Last one it is the case of delegates and senators because, besides the

[84] This is the case of deputies and senators according to Art. 71 (3) CE as well as the President and other members of the Government according to Art. 102 (1) CE. Further enumeration is provided in Art. 57 (2) and (3) Act on Criminal Procedure, eg, presidents of congress and senate, president of Supreme Court and General Council of Judiciary Branch, president of Constitutional Court.

prosecution before the Supreme Court, the authorization of respective House shall necessary as prior formal condition.[85]

To clarify the concept, requirements and characteristics of immunity it should be analysed the LO 16/2015, October 27, on privileges and immunities of foreign states, international organizations with headquarters or office in Spain and the international conferences and meetings held in Spain.[86] This specific law addresses to harmonize the immunity institute in as an instrument to improve the legal security principle according to statement specifically provided in Explanatory Memorandum.[87]

Specifically, LO 16/2015 regulates privileges and immunities of the Head of State, the Head of Government and the Foreign Minister of the foreign State (Title II), the State's immunity from warships and State ships and aircrafts (Title III), statute of the visiting military (Title IV), privileges and immunities of international organizations with headquarters or office in Spain (Title V) and privileges and immunities applicable to international conferences and meetings (Title VI). Also its article 3 extends the scope to A) The diplomatic missions, consular offices and special missions of a State; B) International organizations and persons affiliated to them; C) Aerospace and space objects owned or operated by a State.

Here it can be stressed following definitions in relation with several kind immunities. In concrete Art. 2 (a) and (b) makes difference between the immunity of jurisdiction as '*the prerogative of a State, organization or person not to be sued or prosecuted by the courts of another State*' and the immunity of execution as '*a prerogative by which a State, organization or person and its property cannot be subject to coercive measures or enforcement of decisions issued by the courts of another State'*.

In this context, it is also necessary to mention the exceptions to the obligation to declare as witness by certain persons. Art. 416 LECrim refers to relatives of the accused until the second civil grade, lawyer of the defendant with regard to the facts that he had entrusted to him in his capacity as defence lawyer, translators and interpreters of the conversations and communications between the accused and the persons mentioned to in the previous section, in

[85] In fact, Art. 750 ff LECrim regulates a special criminal proceeding when it is prosecuted a senator or Member of the Congress; such authorization is necessary except they be arrested in the event of '*flagrante delicto'* according to Art. 71 (2) CE, although information to respective House must be provided before 24 hours.
[86] BOE n. 258, 28.10.2015, p. 101299 ff, available at https://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-11545 (last access on July 5th, 2018).
[87] See para 2.VII.

relation to the facts to which their translation or interpretation refers. Nevertheless, this rule has an exception in the case in which '*the crime has extreme gravity because it threatens the security of the State, the public tranquillity or the sacred person of the King or his successor'* according to Art. 418 LECrim.

Moreover, Art. 417 LECrim states the prohibition of the coercion to declare as witness for '*1) the ecclesiastics and ministers of dissident cults, on the facts that will be revealed to them in the exercise of the functions of their ministry*; *2) civil servants, both civil and military, of whatever kind they may be, when they cannot to declare without breach of the secrecy which, by reason of their duties, they are obliged to keep, or when, by virtue of due obedience, they are not authorized by their hierarchical superior to render a statement to be asked; 3) the physically or morally disabled person.*

Also as further professionals involved in legal proceedings it can be added here the clause referred to the professional secret of mediators, which is provided by Art. 15 (2) Law 4/2015, April 27, on the standing of victims of crime[88]; this rule declares that '*mediators and other professionals, who participate in the mediation procedure, will be subject to professional secrecy in relation to the facts and manifestations that they had known in the exercise of their function'*. Last, Art.588 ter (e) LECrim states the obligation to collaborate and the secret of the information by '*providers of telecommunications services, providers of access to a telecommunications network or information society services and any person, who in any way contributes to facilitating communications';* in concrete Art. 588 ter (e) (2) LECrim obligates all these professionals '*to keep secret about the activities required by the authorities'*. Same rule is contained in Art. 588 septies (b) LECrim as well as it is required in the regulation of other technological investigative measures.[89]

In the same terms, Art.10 LO 15/1999, December 13, on Protection of Personal Data[90] establishes that, '*the person responsible for the file and those who participate at any stage of the processing of personal data are bound to the professional secrecy and have the duty to*

[88] BOE n. 101, 28.4.1015, p.27216 ff, available at https://www.boe.es/buscar/act.php?id=BOE-A-2015-4606 (last access on April 30th, 2018). English version is also available under payment at http://www.mjusticia.gob.es/cs/Satellite/Portal/es/servicios-ciudadano/documentacion-publicaciones/publicaciones/traducciones-derecho-espanol (last access on July 5th, 2018).
[89] Eg Art.588 ter (e), Art.588 ter (e) (2) and Art.588 septies (b) LECrim
[90] BOE n. 298, 14.12.1999, p. 43088 ff, available at https://www.boe.es/buscar/doc.php?id=BOE-A-1999-23750 (last access on July 5th, 2018).

keep them; such obligations will continue even after finalizing their relations with the owner of the file or, if appropriate, with the person in charge of it'.

In relation to state secrecy, Art. 14 Law 19/2013, December 9, on transparency, access to public information and good governance[91] provides different grounds in order to limit the access to information when it causes harm for instance to '*a) national security, b) defence of state, c) external relations, d) public security, g) administrative functions of monitoring, inspection and control or h) economic and commercial interests*'.

Related to bank secrecy, Art. 6 (1) Law 13/1994, June 1, on Autonomy of the Bank of Spain[92] declares that '*the members of its governing bodies and the personnel of the Bank of Spain shall keep secrecy, even after when they cease of their functions, of all information of a confidential nature that they have known because of the exercise of their position*'. However, further Art. 6 (2) of same rule specifies that '*the duty of secrecy is understood without prejudice to the monetary policy information obligations imposed on the Bank of Spain by Article 10 of this Law and of the specific provisions that, pursuant to the Directives of the European Community in the matter of credit institutions, regulate the obligation of secrecy of the supervisory authorities'*.

More specifically, Art. 24 Law 10/2010, April 28, on the prevention of money laundering and the financing of terrorism[93] contains an exception to the general prohibition of disclosure of bank information in relation with the communication of such information to '*the competent authorities, including centralized prevention bodies, or disclosure for police reasons in the framework of a criminal investigation*'. This exception turns into an obligation of collaboration with the Commission for the Prevention of Money Laundering and Monetary Offenses according to Arts. 18 and 21 of same law.

In order to preserve the defence rights of the accused defence lawyers are not included in this obligation of collaboration according to Art. 22 Law 10/2010. However, this current

[91] BOE n. 295, 10.12.2013, p. 97922 ff, available at https://www.boe.es/buscar/doc.php?id=BOE-A-2013-12887 (last access on July 5th, 2018).
[92] BOE n. 131, 2.6.1994, p. 17400 ff, available at https://www.boe.es/buscar/doc.php?id=BOE-A-1994-12553 (last access on July 5th, 2018).
[93] BOE n. 103, 29.4.2010, p. 37458 ff, available at https://www.boe.es/buscar/act.php?id=BOE-A-2010-6737 (last access on July 5th, 2018). This law implements in Spain Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing joint with Commission Directive 2006/70/EC of 1 August 2006 laying down implementing measures for prior Directive as regards the definition of 'politically exposed person'.

regulation in Spain it should be amended after implementation of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.[94] In concrete, Recital 9 of the Preamble establishes as exception of such professional secrecy for defence lawyers when '*the legal professional is taking part in money laundering or terrorist financing, the legal advice is provided for the purposes of money laundering or terrorist financing, or the legal professional knows that the client is seeking legal advice for the purposes of money laundering or terrorist financing*'.

5.2.2 Case-law

Due to the still recent approval of the new law on mutual recognition of criminal decisions in the EU, at the moment there is not much case-law on the topic related to the enforcement of European instruments on mutual recognition. But, just in case be useful, there is some Spanish case-law in relation to the definition of this immunity or privilege of jurisdiction according to case-law in relation to International Law such as STC n. 107/1992, July 1, in which TC clarified that '*the immunity regime of foreign states is not contrary to the right to effective judicial protection enshrined in art. 24.1 C.E. (…) although there is no such incompatibility between absolute or relative immunity from execution of foreign States before our Courts with art. 24.1 EC, an undue extension or extension by the ordinary courts of the area that can be attributed to the immunity of execution of foreign States in the current international law entails a violation of the right to effective judicial protection of the performer because it involves restricting without reason, the possibilities of the individual to obtain the effectiveness of the judgment, without any rule imposing an exception to such effectiveness (…). At European level, mention should be made of the European Convention on State Immunity and its Additional Protocol, done at Basel on 16 May 1972, at the initiative of the Council of Europe. Although few States are in force and although Spain is not part of it yet, it is also very indicative. In respect of enforcement immunity, the Convention distinguishes between a general regime and an optional regime for States parties. The*

[94] OJ L 141, 5.6.2015, p. 73. By the way, according to Art. 67 (1) '*Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 26 June 2017*', in the case of Spain expired period without implementation.

general regime enshrines the rule of absolute immunity for the execution of the foreign State, without prejudice to the State having the obligation former agreement to give effect to the Sentence rendered. The voluntary regime to which States parties can voluntarily submit themselves, which provides for the relativity of enforcement immunity, by allowing, in a general manner, that judgments are executed on goods used exclusively for industrial or commercial activities carried on by the foreign State in the same way Than a private person'.[95]

Same constitutional judgement also details the historical evolution of the concept of immunity '*from the traditional absolute rule of immunity of jurisdiction, founded on the equal sovereignty of the States that expressed the adage par in imperem imperium non habet, the international order has evolved throughout this century towards the crystallization of a relative rule of immunity, which empowers the national courts to exercise jurisdiction over acts of the foreign State that have not been carried out under empire but subject to the ordinary rules of private traffic. The distinction between acts iure imperii and acts iure gestionis, however complex it may be in concrete cases and however diverse their development in the practice of States and in international codifications. It has taken a step as a general international norm. This is without prejudice to the existence of other types of immunity of an absolute or quasi-absolute character in the international system, such as diplomatic and consular personnel or the inviolability of diplomatic and consular premises and their property. It should be noted at this point that immunities of the foreign State and other immunities of international law (especially diplomatic and consular) should not be confused or identified.'*[96]

Years later, in STC n. 140/1995, September 28, the Spanish Constitutional Court concluded that *'the courts have selected and interpreted, in a reasonable and not arbitrary manner, the legal precept applicable to the case. And the subsequent examination has led to the conclusion that the immunity of the Diplomatic Agent of the civil jurisdiction of the Spanish Courts, as an obstacle or limit of access to the domestic jurisdiction that derives from art. 21.1 L.O.P.J. in relation to art. 31.1 of the 1961 Vienna Convention, is constitutionally*

[95] STC, 1 July 1992, n. 107, para. 3.I and 4.II,, available at http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/1994 (last access on July 5th, 2018).
[96] STC, 1 July 1992, cit.

legitimate and its result is not disproportionate in relation to the content of the fundamental right that art. 24.1C.E. recognises'.[97]

Also Supreme Court in Spain decides on the topic of immunity. In this context STS June, 22nd 2009, confirms the legality of the freezing ordered by a court related to a VAT refunds to the United States of America to indemnities for unfair dismissal of two workers of his consulate. Similarly the STS June, 13th 2005 accepted the absolute immunity of current accounts of embassies and consulates, including when they were mixed accounts dedicated both to their own actions and to another kind of performances.[98] More recently ATS n. 7305/2016, July 11,[99] refers to the immunity of an Advocate General of the Court of Justice of the EU as well as ATS n. 3059/2015, May 4, analyzes the immunity of a member of European Parliament.[100]

5.3 *Ne bis in idem* principle

5.3.1 General considerations

Art. 11 (1) (d) DEIO provides as a ground for optional refusal of recognition or enforcement of the EIO the fact that it is contrary to the *ne bis in idem* (or *non bis in idem*) principle.[101] Such a narrow forecast should be interpreted in accordance with the explanations given in Recital 17 of the own DOEI. Explanations, which, as the most specialized doctrine has

[97] STC, 28 September 1995, n. 140, para. 11, available at http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/2994#complete_resolucion&completa (last access on July 5th, 2018).

[98] See J. MARTÍN Y PÉREZ DE NANCLARES (ed.), *La Ley Orgánica 16/2015 sobre privilegios e inmunidades: gestación y contenido*, 2016 (55) *Cuadernos de la* Escuela Diplomática available at http://www.exteriores.gob.es/Portal/es/Ministerio/EscuelaDiplomatica/Documents/cuaderno_55_para%20web.pdf (last access on July 5th, 2018).

[99] ATS, 11 July 2016, n. 7305 available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=7747425&links=inmunidad&optimize=20160801&publicinterface=true (last access on July 5th, 2018).

[100] ATS, 4 May 2015, n. 3059, available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=7378385&links=inmunidad&optimize=20150514&publicinterface=true (last access on July 5th, 2018).

[101] See M. JIMENO BULNES, 'El principio de *non bis in idem* en la orden de detención europea: régimen legal y tratamiento jurisprudencial' in A. de la Oliva Santos, M. Aguilera Morales and I. Cubillo López (eds.), *La Justicia y la Carta de Derechos Fundamentales de la Unión Europea*, Colex, 2008, p. 275 ff, at p. 275 in relation with etymological question.

emphasized,[102] should not go unnoticed by the national legal operator. The Recital 17 in the DEIO Preamble states, on the one hand, '*The principle of ne bis in idem is a fundamental principle of law in the Union, as recognized by the Charter and developed by the case-law of the Court of Justice of the European Union. Therefore the executing authority should be entitled to refuse the execution of an EIO if its execution would be contrary to that principle*'; on the other hand, due '*to the preliminary nature of the procedures underlying an EIO, its execution should not be subject to refusal where it is aimed to establish whether a possible conflict with the ne bis in idem principle exists, or where the issuing authority has provided assurances that the evidence transferred as a result of the execution of the EIO would not be used to prosecute or impose a sanction on a person whose case has been finally disposed of in another Member State for the same facts.*'

In relation to the latter, it is clear that DEIO establishes two exceptions to the refusal of recognition and enforcement of an EIO based on *non bis in idem*. The first of these exceptions is supported by the very need to ensure the practical effectiveness of this right by the issuing authority. The second presupposes the non-infringement of *non bis in idem* (although only in respect of proceedings and/or final decisions in the Member States), since the transfer of evidence is subject to the undertaking or guarantee provided in such meaning by the issuing authority.

Less obvious is what underlies that reference to *non bis in idem* as a fundamental principle of Union Law,[103] as it recognizes the Charter of Fundamental Rights of the European Union (henceforth the Charter or CFREU) and develops the CJEU case-law. And this reference is, indeed, to the doctrine coined from Luxembourg on the scope and meaning of *non bis in idem*. Hence, with a view to specifying when - or not - this ground for refusal, it is necessary to know in detail this doctrine.

5.3.2 CJEU case-law and Spanish courts

[102] C. RODRÍGUEZ-MEDEL NIETO, *Obtención y admisibilidad en España de la prueba penal transfronteriza. De las comisiones rogatorias a la orden europea de investigación*, Aranzadi, 2016, at pp. 425 and 426.
[103] See specifically M. AGUILERA MORALES, 'El ne bis in idem: un derecho fundamental en el ámbito de la Unión Europea', 2006 (20) *Civitas: Revista española de Derecho europeo*, p. 479 ff. Also in general J. A. E. VERVAELE, 'The transnational *ne bis in idem* principle in the EU. Mutual recognition and equivalent protection of human rights', 2005 (1) *Utrecht Law Review*, n. 2, p. 100 ff.

The prohibition of incurring *bis in idem* is configured as a right whose scope and meaning have been outlined by the Court of Justice of the EU in a progressive manner and not entirely coincident with the content that the Spanish courts tie to this fundamental right internally. The lack of coincidence starts precisely from its nature as a fundamental right; although not expressly enshrined in the Spanish Constitution, this nature was already sustained by the STC n. 2/1981, of 30 January, based on Art. 25 CE, in view of the close link between n*on bis in idem* and the principle of legality in criminal and sanctioning matters. Over time, however, the Spanish Constitutional Court has been refining its doctrine to the point that, for example, SCT n. 2/2003, of 16 January, illustrates two different constitutional foundations regarding the interdiction of *non bis in idem*: The established principle of legality *ex* Art. 25 (1) CE[104] in respect of its material aspect (ie, the right not to suffer a double penalty) and the right to effective judicial protection *ex* Art. 24.1 CE[105] with respect to its procedural aspect (that is, with respect to the prohibition of double criminal proceedings or, more broadly, double criminal proceedings).

On the contrary, at Union level, and unlike in other supranational fields,[106] the recognition of *non bis ídem* as an inherent right came only with the wording of Art. 50 CFREU, which states that 'no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law'. However, prior to its proclamation in the Charter, the prohibition of *non bis in idem* entitled the Court of Justice of the European Union to be considered as a general principle of Community Law, under Arts. 54 to 58 CISA. It is thus explained that this Convention -which, by the way, the DEOI is replacing *ex* Art. 34 (1) (b), except for Ireland and Denmark as prior said- constitutes the normative basis for a good part of the CJEU rulings on *non bis in idem,*[107] although there is no shortage of decisions on the application of this right in the context of mutual recognition instruments.

[104] Textually, '*no one may be convicted or sentenced for actions or omissions which when committed did not constitute a criminal offence, misdemeanour or administrative offence under the law then in force*'.
[105] Textually, '*all persons have the right to obtain effective protection from the judges and the courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defence'*.
[106] The *non bis in idem* principle is recognized in Art. 17 (7) of the International Covenant on Civil and Political Rights (henceforth ICCPR), Resolution 2200A (XXI) of 16 December 1966, available at https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (last access on July 5th, 2018) as well as in Art. 4 of Protocol n. 7 to the European Convention on Human Rights, ETC n. 117, available at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/117 (last access on July 5th, 2018).
[107] It is important to bear in mind at least the wording of such Art. 54: '*A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts*

As far as its scope is concerned, one of the peculiarities of the banning of *bis in idem* at Union level is that it covers both the material or substantive dimension of this principle (duplicity of sanctions) and its procedural dimension (duplicity of processes), but this last dimension -and this is the peculiarity compared to the way in which proscription acts internally -only in cases where the duality of processes derives from an earlier process terminated by firm resolution on the crux of the matter. This means that *non bis in idem* does not cover situations of international *lis pendens* but it does not mean either that a second procedure cannot be ruled out even if there is an ongoing enforcement process either in the executing state itself or in another state of the Union. In view of it, therefore, *non bis in idem* does not reach international *lis pendens* cases and that, unlike other instruments of mutual recognition,[108] DOEI says nothing about *lis pendens* as ground for refusing recognition or execution of an OEI. For this reason, it is clear that this cannot be based on the fact that, on the same facts and with respect to the same subject, there is ongoing criminal proceedings either in our country or in another state of the Union.

On the other hand, but also in relation to the scope of this guarantee at the level of the Union, it should be noted that, as our courts maintain internally,[109] *non bis in idem* is not confined to the criminal sphere, but extends to the broader sanctioning area. It covers both the double procedure (administrative and criminal) and the double sanction (administrative and criminal) interdiction, but only in those cases where the administrative procedure and/or penalty is 'criminal in nature'. This categorization requires compliance with three parameters: (1) the legal classification of the offense in accordance with the domestic law of the state where it is envisaged; (2) the very nature of the infringement; and (3) the nature and severity of the sanction that may be imposed on the interested party.[110] It is therefore understood that, from

provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party'.

[108] See Arts. 4 (2) EAW FWD and 32 (1) (a) LRM.

[109] See for instance SSTC n. 2 of 16 January, and n. 234 20 December 2005', generally available at official search website http://hj.tribunalconstitucional.es/HJ/es/Busqueda/Index Also SSTS 2 March 2012, n. 152, and 9 June 2016, n. 507, available in general at official search service http://www.poderjudicial.es/search/index.jsp

[110] This list corresponds to the criteria, which, according to the ECHR, must be examined in order to determine whether the duplication of administrative and criminal sanctions infringes the *non bis in idem* enshrined in Protocol No 7 to the ECHR. At this point, however, attention should be drawn to the judgement pronounced by ECHR, GC, 15 November 2016, *A and B c. Norway*, appls. n. 24130/11 and 29758/11, available at http://hudoc.echr.coe.int/eng?i=001-168972 (last access on July 5th, 2018). As the CJEU points out in judgement on 20 March 2018, C-524/15, available as further CJEU judgements at official website https://curia.europa.eu/jcms/jcms/j_6/en/ it is possible that this ruling may radiate its influence at Union level and that it is therefore not permissible to refuse a request for judicial cooperation in proceedings on the basis of *non bis in idem*, despite the existence of a duplication of sanctions and the possibility of being criminalized.

Luxembourg, it has been held that Art. 50 CFREU does not preclude a Member State from imposing on the same person and for the same facts a failure to comply with declaratory obligations in the field of VAT, which is at the same time tax surcharge and a criminal penalty.[111] Or whether the penalty is to be taken into account in respect of the sanction is to deprive the farmer who makes certain false declarations in order to obtain such aid and the criminal conviction of that farmer for subsidization fraud. In relation to the interpretation of Art. 50 CFREU it is relevant the opinion maintained by Advocate General Campos Sánchez-Bordona, according to which it *'enshrines the principle ne bis in idem as fundamental right of individuals, which is not subject to exceptions. There is, on occasions, a failure to take proper account of that quality and that fundamental right is subordinated to financial considerations (the situation of the public finances, for example) which, while perfectly legitimate in other areas, are not sufficient to justify limitation of the right'*.[112]

This legal doctrine from the Court of Justice of the European Union seems to fit in its formulation with that coined by the Spanish courts as to when the concurrence of criminal and administrative sanctions violates the constitutional prohibition of *non bis in idem*. The fact is that when this guarantee is linked to the so-called triple identity requirement –ie, identity of subject, identity of fact and identity of foundation-, it is assumed that where the latter is lacking (that is, where protected and the sanction, criminal and administrative, is proportionate) the successive exercise of *ius puniendi* and the sanctioning power of the Administration does not harm *non bis in idem.*[113]

In this context, as said, first judgement in Spain was pronounced on January 30th, 1981 by Constitutional Court. Here TC concluded that the principle *non bis in idem* prohibits the imposition of a duality of sanctions *'in cases in which the identity of the subject is appreciated, fact and ground'*. Since then, TC has reiterated this idea, among others, in SSTC n. 234/1991, of 16 December, n. 270/1994, of 17 October, and n. 204/1996, of 16 December. In a recent judgement as it is STC n. 86/2017, of 4 July, TC highlighted that *'the guarantee of not being submitted to bis in idem is configured as a fundamental right that, in its material aspect, prevents punishing on more than one occasion the same fact on the same basis (by*

[111] ECJ, 26 February 2013, *Fransson*, C-617/10.
[112] Opinion delivered on ECJ, 20 March 2018, *Criminal proceedings against Luca Menci*, C-524/15, para. 78.
[113] Summarized case-law in STC, 10 December 1991, n. 234 and 11 October 1999, n. 177, both available at http://hj.tribunalconstitucional.es/HJ/es/Busqueda/Index
[113] ECJ, 16 November 2010, *Mantello*, C-261/09.

all, STC 204/1996, of 16 December, para. 2; 2/2003, of 16 January, para. 3, and 189/2013, of 7 November, para. 2)'.[114]

5.3.3 Requirements

a) Identity of facts and offender

For the prescription of *bis in idem* it is necessary to deal with '*same facts'* according to Art. 54 CISA, which must be considered as an autonomous concept of Union Law.[115] In this context, the CJEU case-law is reiterated according to which, with a view to determining whether or not this factual identity (or identity of offense, in terminology of the ICCPR and Article 4 of Protocol 7 of the ECHR) is satisfied. Here national courts must consider the material facts, which are understood as '*a set of facts, which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected'*.[116] Thus, in order to assess whether one is faced with '*the same facts'*, as said, it is irrelevant what their legal qualification according to the national laws of the States involved or what protected legal good they injure. Neither does the fact that a criminal intent underlies criminal acts alone is sufficient to consider that these facts are '*the same'*.[117]

It is important to stress that the Spanish Supreme Court in STS n. 18/2016, January 26, declared that the CJEU doctrine on Art. 54 CISA '*does not prevent the second State from considering, in the exercise of its jurisdiction, that it does not exist factual elements, because they are involved in a complex conduct involving a succession of different actions, certain factual elements that have not been included in the facts prosecuted by the State that acted in the first place*'.[118]

b) *'Definitive criminal judgment'*

[114] STC, 4 July 2017, n. 86, legal basis para. 5.XLI, available at http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/25395 (last access on July 5th, 2018).
[115] ECJ, 16 November 2010, *Mantello*, cit..
[116] ECJ, 9 March 2006, *Van Esbroek*, C-436/04, para 42.1.
[117] ECJ, 18 July 2007, *Kraaijenbrink*, C-367/05.
[118] STS, 26 January 2016, n. 18, legal basis para. 10.VI, available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=7597833&links=%2218%2F2016%22&optimize=20160212&publicinterface=true (last access on July 5th, 2018).

At the level of the Union, the term '*definitive criminal sentence'* (*sentencia penal firme*) has a broader meaning than it has in Spanish legal system. According to CJEU case-law, *non bis in idem* is not only linked to sentences which put an end to the criminal proceedings, condemning or acquitting the accused in an inimitable manner, but reaching other decisions which, although not adopting the form of sentence or judgment from a judge or court,[119] imply a definitive termination of criminal proceedings and are adopted after a consideration of the merits of the case.

5.3.4 Non bis in idem in Spain

Non bis in idem clause in Spain is provided in general rule contained in Art. 32 (1) (a) LRM, which enounces that the Spanish judicial authorities shall not recognise and/or execute orders on employing mutual recognition instruments '*when a definitive, condemnatory or acquittal decision, has been pronounced in Spain or in another state other than that of the issuance, against the same person and in respect of the same facts, and its execution violates the principle non bis in idem in the terms provided by the laws and in international conventions and treaties in which Spain is a party and even when the convicted person was subsequently pardoned*.' As far as the *non bis in idem* principle is provided in prior general rule, no specific mention is foreseen in relation to EIO according to new Art. 207 (1) LRM.[120]

In Spain, most of case-law related to *non bis in idem* principle is referred to the execution of an EAW according to presents Arts. 48 (1) (c) and (d) LRM depending on the fact whether prior judgement was delivered in a EU Member State of in a third country; such case-law is specifically delivered by National, Supreme and Constitutional courts following the CJEU jurisprudence as well.[121] Also the principle of *ne bis in idem* can be properly extended to the

[119] See ECJ, 11 February 2003, *Gözütok and Brügge*, C-187/01 and C-385/01.
[120] On the refusal of EIO for this cause see L. CAMALDO, 'La normative di attuazione dell'ordine europeo di indagine penale: le modalitá operative del nuovo strumento di acquisizione della prova all'estero', 2017, *Cassazione Penale*, p. 4196 ff, at p. 4199.
[121] Today contemplated in Arts. 48 (1) (c) and (d) See specifically M. JIMENO BULNES, 'El principio de *non bis in idem*…', op. cit., at p. 287 ff; also in English language M. JIMENO BULNES, 'The application of the European Arrest Warrant in the European Union. A general assessment' in C. Fijnaut and J. Ouwerkerk (eds.), *The future of police and judicial cooperation in the European Union*, Martinus Nijhoff Publisher, 2010, p. 285 ff at p. 308 ff. Other literature in Spain for instance M. DE HOYOS SANCHO, 'Eficacia transnacional del *non bis in idem* y denegación de la euroorden', 2005 December 30th, *Diario La Ley*, n. 6330, http://diariolaley.laley.es

cases when the requested person has been pardoned or the case has been dismissed (*sobreseimiento*) for the same facts too, according to Arts. 48 (1) (a) and (b) LRM in relation with the execution of an EAW.

Notwithstanding the mandatory wording of the Spanish Law, the judicial practice shows that the prohibition of *bis in idem* is not a ground on which the Spanish courts often resort to refusing recognition or enforcement of requests for cooperation from other Member States. Despite of recent implementation in Spain of DEIO, it is unlikely a change in this direction. On the contrary, few are guessed the cases in which the Spanish courts presumably deny the execution of an OEI on the basis of *non bis in idem*. Such argument is based in following two reasons:

1) The first reason is that Art. 11 (4) DOEI circumscribes the channel of query to the issuing authority when, in order to decide whether the refusal for this reason, the necessary information (eg, if the administrative procedure or sanction has a '*criminal character*', if '*same facts*' are faced, if the decision has definitively extinguished public action, if the so-called '*enforcement condition*' has been fulfilled) can reside in another state.

2) The second - although in order of importance may well be the first - is that it is extremely difficult for national courts to automatically identify *non bis in idem*. The assessment of this ground will depend, therefore, on the suspect *ex parte* to make it clear, which, in turn, will require him/her, either to appear in the issuing state and be aware of the referral of the EIO, or that conditions contemplated in Art. 22 (1) LRM[122] so that Spanish courts can notify the EIO. Only then, as some authors point out,[123] will pave the way to the Spanish judicial authorities in order to undertake the query referred to in Art. 14 (4) DEIO and, therefore, to refuse recognition or execution of the EIO for this reason.

5.4 Principle of territoriality

[122] Textually, '*when the affected person has his domicile or residence in Spain and unless the foreign proceeding has been declared secret or his notification frustrates the purpose pursued, he will be notified the foreign orders, whose execution has been requested*'.

[123] L. BACHMAIER WINTER, 'The Proposal for a Directive on the European Investigation Order and the grounds for refusal', op. cit., at p. 83 and 84; also in Spain C. RODRÍGUEZ-MEDEL NIETO, *Obtención y admisibilidad en España*, op. cit., at p. 437 and 438.

This clause is also contemplated in Art. 4 (7) EAW FWD in positive and negative direction and was provided in the same terms in prior Spanish EAW rule, Arts. 12 (h) and (i) LOEDE. Now there is a general provision for all instruments on mutual recognition in Art. 32 (3) LRM as prior cause of immunity but only redacted in positive terms. Also the law implementing the DEIO into Spanish legal system contains a specific reference to the principle of territoriality in new Art. 207 (1) (c) LRM, textually, '*when the decision refers to facts that have been committed outside the issuing State and totally or partially in Spanish territory and the conduct in relation to which the European Investigation order is issued does not constitute a crime in Spain*'.

Like some literature[124] highlights this provision will emphasize the lack of harmonization in substantive criminal matter. For instance, this can be the case of gender-based violence crimes, with a different, or even without any type of regulation, in the different Member States.

5.5 Human rights clause

As far as this specific ground for non-recognition and/or execution was absent of EAW grounds for refusal in European rule except the general provision in Recital 10 EAW FWD, no further regulation was contained in prior Spanish rule by contrast to other national legislations. By contrast, this cause is now contemplated in Art. 11 (f) DEIO[125] and also is now expressly provided with identical content in new 207 (1) (d) LRM according to recent law implementing the EIO in Spain. This article is in consonance with Art. 3 LRM as general provision indicating last one that *'the present law shall be applied with observance of the fundamental rights and liberties as well as principles contained in the Spanish Constitution, in Art. 6 TEU, the Charter of Fundamental Rights in the EU and the European Convention of Human Rights of the Council of Europe on November, 11th 1959'.*

[124] See E. MARTÍNEZ GARCÍA, *La orden europea de investigación*, op. cit, at p. 75.
[125] Some authors believe that Art. 11 (f) DEIO supposes an indirect public order clause; see L. BACHMAIER WINTER, 'Transnational evidence …', op. cit, at p. 25. Also it could be relevant interconnect this article with the text of further Art. 189 (3) LRM according to which '*the acts of investigation carried out by the executing state shall be considered valid in Spain, provided that they do not contradict the fundamental principles of the Spanish legal system*'; this regulation represents other side of the public order clause.

Also the Spanish implementation on EIO contains indirect reference to human rights clause as an important restriction of EIO issuance when human rights are affected. As prior indicated, restriction of issuance Spanish judicial authority is contemplated when affection to fundamental rights takes place as far as such possibility is then prohibited to public prosecutor according to Art. 187 (1) 2nd paragraph LRM. Moreover, also indicated, public prosecutor will be the appropriate judicial authority to recognise and to execute an EIO provided to measures not limitative of fundamental rights according to new Art. 187 (2) (a) LRM. This paragraph follows the principle announced in later Art. 206 (2) LRM, trying to execute the less detrimental measures to fundamental rights. On the contrary, if measures affect fundamental rights, firstly, prosecutor has to analyse the possibility to replace the measures with other measures not limitative of fundamental rights, and then, he/she will have to send the EIO to the judicial competent authority according to further Art. 187 (2) (b) LRM.

In the famous case *Melloni,*[126] the preliminary ruling first time promoted by the Spanish Constitutional by ATC 86/2011, June 9, presents a significant reflexion about the transcendence of the fundamental and/or human rights in the different instruments of mutual recognition even when there is not a specific reference to human rights' clause.[127] Literally it is said that, '*despite the fact that neither the Council Framework Decision 2002/584/JHA of 13 June nor Law 3/2003 of 14 March establishes such a requirement as a sine qua non for the executing state to proceed to the requested delivery does not mean that it can be ignored by the Spanish judicial bodies, as it is inherent in the essential content of a fundamental right recognized in our Constitution which is the right to a process with all the guarantees, to be respected - implicitly or explicitly - by any national law that is issued to that effect and satisfied by the judicial bodies'*.[128] Beside, in this judgement TC referred to Arts. 10 (1) and (2) CE; the first one refers to dignity as 'foundation of political order and social peace' and

[126] ECJ, 26 February 2013, C-399/11. See comments for instance by A. PLIAKOS and S. ANGNOSTORAS, 'Fundamental rights and the new battle over legal judicial supremacy: lessons from Melloni', 2015 (1) *Yearbook of European Law*, n. 1, p. 97 ff. Also in Spain L. BACHMAIER WINTER, 'Más reflexiones sobre la sentencia Melloni: primacía, diálogo y protección de los derechos fundamentales en juicios *in absentia* en el Derecho europeo', 2015 (56) *Civitas: Revista española de Derecho europeo*, p. 153 ff.

[127] On guarantees and protection of human rights see F. SIRACURANO, 'Procedure di cooperazione giudiziaria e garanzie defensive: lungo la strada, a piccoli passi', 2016 (3) *Archivio Penale*, p.1 ff.

[128] ATC, 9 June 2011, n.86, legal basis para. 2 (c) (2), available at http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/22561#complete_resolucion&completa (last access on July 6th, 2018).

the second one imposes the obligation to provide an interpretation of fundamental rights based on international treaties.[129]

Precisely, according to the mentioned ATC n. 86/2011, on prior Art. 10 (2) CE there is specific remission to Arts. 6 TEU, 47 (2), 48 (2), 52 (3) and 53 CFREU. In this sense, the Court of Justice in *Melloni* case specified that '*although the right of the accused to appear at trial is an essential element of the right to a fair trial, that right is not absolute (…). The accused may waive that right of his own free will, either expressly or tacitly, provided that the waiver is established in an unequivocal manner, is attended by minimum safeguards commensurate to its importance and does not run counter to any important. at public interest. In particular, violation of the right to a fair trial has not been established, even where the accused did not appear in person, if he was informed of the date and place of the trial or was defended by a legal counsellor to whom he had given a mandate to do so'*.[130] However, the Court of Justice stressed how the harmonization of the conditions of execution of European arrest warrant enhances the procedural rights of persons subject to criminal proceedings whilst improving mutual recognition of judicial decisions between Member States.[131] This reflection suggests the reference to the principle of harmonization mentioned indirectly in the Explanatory Memorandum of the recent Law 3/2018 implementing DEIO into the Spanish system.[132]

Last, the Court of Justice stated how '*by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order (…) rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State'*.[133] CJEU declared that if Member States would have this faculty, such one would imply *to 'doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust*

[129] Textually, '*2. Provisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain.*'
[130] Para. 49.
[131] Para. 51.
[132] See para. II.1. Today principle of harmonization has been substituted by principle of 'approximation' according to Art. 82 (1) TFEU; see opinion and literature in M. JIMENO BULNES, *Un proceso europeo para el siglo XXI*, Civitas & Thomson Reuters, 2011, at p. 35.
[133] Para. 59.

and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision'.[134]

This interpretation is followed by Spanish Courts. In concrete TS gathers up all this case-law in STS n. 733/2013, of 10 October, in which it is stated that '*there is a consolidated body jurisprudence in relation to the consequences arising from the existence of a European judicial area, in the framework of the Union resulting from communion in the same values and guarantees shared between the Member States of the Union, although its concrete positivization depends on the legal traditions of each state, but that in all cases safeguard the essential content of those values and guarantees'*.[135]

At this point, it can be made a reference to specific investigative measures such as international supervised delivery in Art. 12 MLA 2000. Spanish authority checks up if the legislation of the state, where supervised delivery is put into practice, is fulfilled (*lex loci*). In a European judicial area, procedural actions in other Member States cannot be undermined by the Spanish legal system.[136]

In general, we can declare that TS shows a confident attitude in the Area of Freedom, Security and Justice. For instance, there are examples in case-law such as STS n. 1345/2005, of 14 October,[137] STS n. 886/2007, of 2 November,[138] or STS n. 630/2008, of 8 October.[139] In opinion of some authors,[140] this confident position of TS is not a shared point of view in others European countries.

[134] Para. 63.
[135] STS, 10 October 2013, n.7 33, legal basis para. 19.VII available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=6856345&links=exhorto%20prueba%20uni%C3%B3n%20europea%20denegaci%C3%B3n&optimize=20131014&publicinterface=true (last access on July 6th, 2018).
[136] F. GRANDE MARLASKA-GÓMEZ and M. DEL POZO PÉREZ, op. cit., at p.17.
[137] STS, 14 October 2005, n. 1345 at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=1073029&links=%221345%2F2005%22&optimize=20051222&publicinterface=true (last access on July 6th, 2018).
[138] STS, 2 November 2007, n. 886 available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=2590778&links=%22886%2F2007%22&optimize=20071220&publicinterface=true (last access on July 6th, 2018).
[139] STS, 8 October 2008, n. 630 at available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=3420015&links=%22630%2F2008%22&optimize=20081127&publicinterface=true (last access on July 6th, 2018).
[140] R. MORÁN MARTÍNEZ, 'Obtención y utilización de la prueba transnacional', op. cit., at p. 94.

6. LEGAL REMEDIES AT NATIONAL LEVEL

Despite of the general provision contained in Art. 14 (1) DEIO in favour of legal remedies in order to challenge the issuance of EIO, none reference is expressly contemplated in the Spanish law implementing EIO. In this case remission to Art. 24 LRM is necessary, which 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'*. To be noticed that Recital 22 DEIO Preamble requires that *'legal remedies available against an EIO should be at least equal to those available in a domestic case against the investigative measure concerned'*, joint with another conditions to be fulfilled.[141]

In this context, general rules regulated in Arts. 216 LECrim *et seq* must be applied, which foresee different types of legal remedies such as 'the reform appeal, appeal and complaint appeal' (*recurso de reforma, de apelación y de queja*). As prior indicated,[142] EIO shall be ordinary issued by Order (*auto*) from the Judge of the Investigative or, if it is the case, Judge of Minors or Judge of Violence against Women, whose resolution can be appealed before the superior court (in concrete, Court of Appeal or *Audiencia Provincial*) as any other according to following Arts. 217 and 236 LECrim. Same solution must be adopted in relation to the execution of EIO as far as the appropriate decision for it is also an order pronounced by the judicial authorities numerated in prior Art. 187 (3) LRM including again Judges of the Investigative (also Violence against Women, who works in criminal matters as Judge of the Investigative for gender violence); by contrast, if EIO is executed by Central Judges of the Investigative, Minors and/or Criminal appropriate authority shall be the National Court.[143] The Law 3/2018 has introduced an important provision in new Art. 187 (3) (a) in relation to the competence by Judges of the Investigative and /or of Minors to be added to their

[141] Textually '*in accordance with their national law Member States should ensure the applicability of such legal remedies, including by informing in due time any interested party about the possibilities and modalities for seeking those legal remedies. In cases where objections against the EIO are submitted by an interested party in the executing State in respect of the substantive reasons for issuing the EIO, it is advisable that information about such challenge be transmitted to the issuing authority and that the interested party be informed accordingly.'*
[142] See *supra* 2.1. Judicial authorities.
[143] See Art. 65 (5) LOPJ.

territorial competence to be added to such one related to the place 'where the investigative measures must be adopted': *or, alternatively, where there is another territorial connection with the crime, with the accused or with the victim*'.

More problematic according to Spanish Law shall be the question when the EIO is issued and/or executed by public prosecutor according to same further Art. 187 LRM as far as no specific mention to legal remedies to decisions pronounced by this authority is foreseen in Act on Criminal Procedure. To be pointed that in Spain at the moment the public prosecutor cannot adopt criminal decisions as far as, also said,[144] in Spain the direction of the investigative stage and/or pre-trial investigation is still conducted by a judge and the public prosecutor (*fiscal)* in only charged with the task of the public accusation. Moreover, it could be appropriate to incorporate the possibility to interpose legal remedies based on substantive reasons not only in the issuing State but also in the executing State.[145]

Another possible incidental remedy in order to avoid the issuance of EIO is the rule contemplated in further Art. 192 LRM according to Spanish implementation on EIO, following general prescription contained in Art. 10 (1) DEIO. Such rule allows Spanish issuing authority to remove, modify or complete EIO *ex officio* in the case of executing authority notifies that the result pursued by the EIO can be achieved by a less restrictive research measure or the requested investigation (principle of proportionality) or the measure does not exist in its law or is not provided for in a similar domestic case.

In relation with other possible incidental remedies to execution of an EIO it can be mentioned new Art. 207 (3) LRM establishing that '*before partial or total rejecting the recognition and enforcement of the EIO, the competent Spanish authority shall request the issuing authority to provide the necessary additional information and, where appropriate, remedy the defect in which it was committed*'. This one is a text similar to the still current Art. 198 (5) LRM related to European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters. As well as, in consonance with the before article when Spanish authority is the issuing authority.

[144] See *supra* 2.1. Judicial authorities.
[145] See CGPJ Report, p. 33, point 100 d). Also same page includes some other recommendations related to the promotion of legal remedies against the decision of no issuing an EIO, which is not contemplated in current Art. 13 LRM as well as some other content to be added to this rule in relation to such legal remedies.

7. SPECIFIC INVESTIGATIVE MEASURES

The aim of this chapter is to address certain issues that might give rise to problems in the process of implementation or that will need certain interpretative guidelines regarding certain investigative measures, in particular the interception of communications and the gathering and transfer of electronic evidence. At the moment of drafting this chapter, only a few of the Member States have not yet concluded the process of transposing the Directive into the domestic legal order; nevertheless, reference will only be made to the provisions of the Directive and the Law 3/2018 amending the Spanish Act 23/2014, of 20 November, on mutual recognition of judicial decisions in criminal matters in the European Union (LRM) to implement the EIO Directive. This law, as already mentioned, was published on June 11th 2018 and entered into force on July 2st 2018.

Chapter IV of the Directive EIO under the title '*Specific Provisions for certain investigative measures*' (Arts. 22 -30 DEIO) provides for rules on various measures. In particular, the Directive, following largely the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, has included rules on: the temporary transfer of persons held in custody (to the issuing and the executing State (Arts. 22 and 23 DEIO); on the hearing by videoconference, other audiovisual transmission and telephone (Arts. 24 and 25 DEIO); measures aimed at obtaining information on banking and financial accounts and operations (Arts. 26 and 27), as well as certain measures implying the gathering of evidence in real time (Art. 28); covert investigations (Art. 29) and interception of communications (Arts. 30 and 31 DEIO).

For analyzing the impact of the implementation of the EIO in the Spanish legal system, it is worth to focus on those measures that are most used in practice or that might pose problems regarding the compatibility with other instruments. To that end, the holding of hearing through audiovisual or telephone means will not be addressed here, as no problematic issues are expected to appear, and as there is already experience with regard to them, under the rules

of the MLA 2000. On the other hand, the regulation on covert investigations (Art. 29 DEIO), mainly states that the principle of mutual recognition shall not apply to these operations, and a specific agreement is needed to carry them out. And finally, the request of information regarding bank and other financial accounts and operations, although certain problematic issues may appear regarding rule on data protection, consumer protection and privacy and certain rules on bank secrecy, they will not be dealt with here, because these specific rules follow the same principles applicable to the gathering of any other evidence. In short, although Arts. 26 and 27 contain specific rules for the gathering of banking or other financial information, the same requisites, procedure and grounds for refusal apply to them as provided under the general rules of the DEIO.

Therefore, the focus will be put on following measures:

1. Temporary transfer of persons held in custody.
2. Real time gathering of evidence: monitoring of banking or financial operations and operations of controlled deliveries.
3. Interception of telecommunications.

7.1. Temporary transfer of persons held in custody

According to the modifications provided by the Law 3/2018 amending LRM in Spain, new Arts. 195, 196, 214 and 215 LRM transpose Arts. 22 and 23 DEIO.

Related to the costs, the Law 3/2018 rewrites the article 14 (a) LRM: *'If the issuance of a European investigation order by the Spanish authority involves the temporary transfer of a person in custody to Spain or the executing State in order to carry out an investigation, the Spanish State shall finance the costs of transfer and return'.* A *sensu contrario,* Art. 25 (3) (a) LRM according to the modification provided by the same law establishes that *'if the issuing of a European investigation order by the competent authority of another Member State implies the temporary transfer of a person in custody to Spain or to the issuing State for the purpose of carrying out an investigative measure, the issuing State will finance the expenses of the transfer and its return'.* Both rules are redacted in consonance with Arts. 22 (10) and 23 (3) DEIO.

In consonance with Art. 22 (1) DEIO, further Art. 214 (1) LRM regulates the grounds for refusal to the execution of an EIO by Spain requesting this measure.
It is expressly provided that *'the competent Spanish authority shall refuse to recognize and execute a European investigation order for the temporary transfer of persons deprived of their liberty in Spain, in addition to the cases provided for in Article 32 (1) and Article 208, in case: (a) the person in custody does not consent; or (b) the transfer is liable to prolong the detention of the person in custody.'*

By contrast, it is necessary to mention that Arts. 43 (2) and (3) LRM have not been amended by the Law 3/2018. These articles stipulate that '2. *Temporary surrender may be requested, even before the executing authority has given a ruling on the final surrender, to carry out the prosecution or the oral hearing.*' and '*3. For the same purpose, temporary surrender may be requested if the executing authority, after having agreed to surrender the person sought, decides to suspend it because it is pending in the executing State the conclusion of a trial or the execution of a sentence imposed by an act other than that motivated by the European arrest and surrender order'.*

7.2 Real time gathering of evidence: monitoring of banking or financial operations and operations of controlled deliveries

Arts. 198, 199, 217 and 218 Law 3/2018 amending the LRM transpose Arts. 26 and 27 DEIO. In the meantime, Art. 28 DEIO is transposed by further Arts. 200 and 219 LRM. In relation with such regulation some questions can be addressed here.

First, it is important to note that when the account holder is not domiciled or resides in Spain, the territorial jurisdiction could be articulated in connection with the place where the head office of the institution is located.[146]

Second, further Art. 217 *in fine* LRM introduces the obligation regulated in Art. 19 (4) DEIO in relation with confidentiality rule in order to related to ensure that *'banks or financial institutions do not disclose to the bank costumer concerned or other third persons that information has been transmitted to the issuing State in accordance with this article and the*

[146] See alternative territorial *fora* introduced in prior Art. 187 (3) LRM by recommendation of CGPJ Report; see conclusion n. 12 at p.96.

following one, or that an investigation is being carried out'. Nevertheless the Spanish appropriate authority may use for this purpose the information compiled by the 'Financial Title File'[147] provided that the adoption of present measure has as purpose the investigations of money laundering crimes or financing of the terrorism according to Art. 43 (1) Law 10/2010, of 28 April, on the prevention of money laundering and financing of terrorism prior enounced.

Last, in relation to the operations of controlled deliveries, it must be said that Arts.17 and 18 DEIO are not specifically recognized in the specific law implementing EIO in Spain. These rules make reference to the criminal and civil liability regarding officials of the issuing State in relation with acts committed in the territory of the executing State, which is contemplated in its incorporation should be desirable in order to properly respect the principle of legality. Also it must be here added that such investigative measure is generally contemplated in Spanish criminal procedure regulation. In concrete Art. 263 bis (1) LECrim authorizes to the judge, public prosecutor or judicial police head units to apply this measure in order to investigate the manufacture, transport or distribution of material of any kind, in order to facilitate the tracking and interception of the crime at origin and destination and identify those responsible; but special conditions such as the existence of judicial order containing specific reasoning and the enforcement of the proportionality test must be fulfilled.

7.3 Interception of telecommunications

Pursuant to Art. 30 (1) DEIO, '*an EIO may be issued for the interception of telecommunications in the Member State from which technical assistance is needed*'. This provision has to be complemented with the general rules applicable to the issuing of any EIO. According to Art. 6 (1) DEIO and further Arts. 189 (1) and 206 (1) LRM according to the Law 3/2018 implementing the EIO in Spain, an EIO shall only be issued when it '*is necessary and proportionate for the purpose of the proceedings, taking into account the rights of the defendant or accused*' and the requested measure could have been ordered

[147] Created by Order ECC/2503/2014, of 29 December, BOE n. 316, 31.12.2014, p. 107641 ff. available at https://www.boe.es/buscar/doc.php?id=BOE-A-2014-13713 (last access on July 6th, 2018).

'*under the same conditions in a similar internal case'*. Necessity and proportionality are the conditions that have to be assessed by the 'judicial' authority for issuing an EIO and under a strict application of the mutual recognition principle the executing authority should not check the proportionality and necessity of the measure requested.

LO 13/2015, October 5, by modifying the Act on Criminal for the strengthening of procedural guarantees and the regulation of technological investigative measures introduces Art. 588 bis (a) LECrim, which enshrines the guiding principles to intercept a telephone and telematic communications, also to be extended to other technological measures: these are the principles of specialty, suitability, exceptionality, necessity and proportionality of the measure.

This article offers a legal interpretation of each principle:

*'2. The **principle of specialty** requires that a measure be related to the investigation of a particular crime. Technological research measures aimed at preventing or discovering crimes or clearing suspicions without objective basis shall not be authorized.*

*3. The **principle of suitability** shall serve to define the objective and subjective scope as well as duration of the measure by virtue of its usefulness.*

4. In application of the principles of exceptionality and necessity, the measure can only be agreed upon:

(a) where other measures less burdensome to the fundamental rights of the investigated or prosecuted persons are not available to the investigation, in view of their characteristics, and equally useful for clarifying the facts, or

b) when the discovery or verification of the fact investigated, the determination of its author or authors, the investigation of their whereabouts, or the location of the effects of the crime is severely hampered without recourse to this measure.

*5. The investigative measures regulated in this chapter will only be considered **proportionate** when, taking into account all the circumstances of the case, the sacrifice of the rights and interests involved does not exceed the benefit of its adoption that results in the public interest and of third parties. For the weighing of conflicting interests, the public interest valuation will be based on the gravity of the fact, its social importance or the technological scope of*

production, the intensity of the existing indications and the relevance of the result sought with the restriction of the right.'

In this context some recent case-law can be added. For example, SAN of 8 September 2017, where the Spanish National Court summed up the general requirements to be fulfilled by the adoption of an interception of communications. Specifically, '*it should be recalled, in general, that the essential requirements for the probationary validity (evidence) of the information obtained as a result of telephone interventions according to prior case-law are a) jurisdiction, ie, the interception of telecommunications must be authorized and subsequently controlled by the judicial authority, taking into account that the Judge is the only authority to which the power and responsibility are constitutionally conferred in order to determine the timeliness of the measure with consideration to the protection of the rights of those who suffer it; b) specialty, in the sense that such proceedings are to be agreed for the investigation of concrete facts presumed to be offences and not for the investigation of actions of a prospective and indeterminate nature; (c) proportionality as far as this interception of communications is considered to be a serious interference in a fundamental right of maximum sensitivity and which, in addition, on the basis of its own nature, is carried out maintaining in ignorance the person attached to it (secrcy), taking into account the importance of the investigated infringement; d) necessity, as it has been necessary to adopt such investigative given the characteristics of the investigated facts and the serious difficulty of their discovery by other investigative measures less harmful to the citizen, who suffers this measure; and, lastly, (d) sufficient reasoning of the decision adopted by the judge, which, in short, must reflect the existence of the aforementioned requirements, either expressly or at least by reference to the reasons given by the applicant for the intervention, based on objective data revealing the basis of the suspicions that serve as the basis for adopting the measure. Likewise, and together with such requirements, the authorizing officer must also clearly establish the personal, objective and temporary scope of the investigative measure ensuring that, in its practice, these conditions are not violated.'*[148]

[148] SAN 8 September 2017, n. 19, para. 2.XXI, available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=AN&reference=8154944&links=requisitos%20Y%20interceptacion%20comunicaciones%20telematicas&optimize=20171002&publicinterface=true (last access on July 6th, 2018).

7.3.1 Grounds for refusal and substitution of the requested measure

And regarding the grounds for refusal, the interception of communications requested in an EIO may be refused if the measure does not exist, would '*not be available in a similar domestic case*' (Arts. 10 (5) DEIO and 11 (1) (h) DEIO as well as further Arts. 206 (3) and (5) LRM), or there are substantial grounds to believe that its execution '*would be incompatible with the executing State's obligation in accordance with Article 6 TEU and the Charter'* (Art. 11 (1) (f) DEIO and further Art. 207 (1) (d) LRM).[149]

In the context of telephone interceptions, such measure exists in Spain as well as in the rest of EU Member States, and thus a refusal or substitution based on the non-existence of such measure will never apply. However, the threshold requirements for granting the interception of telephone communications varies greatly in the laws of the EU Member States, and it may occur quite often that the interception requested would not be possible for investigating a similar domestic case.

In relation to the proportionality principle, there is also the issue on the possible substitution of the measure if the executing authority considers that the information needed could be obtained through less intrusive means than the interception of communications according to Art. 10 (3) DEIO and further Art. 206 (2) LRM. If the substitution is not feasible or is not accepted by the issuing authority, it could lead to the withdrawal of the EIO Art. 10 (4) DEIO and further Art. 206 (4) LRM), or to the refusal of the execution, under Art. 10 (5) DEIO and further Art 206 (5) LRM.

The executing authority may also refuse the execution of the EIO if the requested investigative measure does not exist in the executing state. Due to the recent and broad regulation on IT investigative measures in the Spanish Act on Criminal Procedure[150], it will hardly occur that the requested interception of communications does not exist in Spain. However, in several EU Member States, for example, the installing of microphones for the interception of conversations in a private space does not exist, and thus Art. 10 (1) (a) DEIO as well as new Art. 206 (3) LRM should apply. In such case, the executing authority shall notify that such assistance cannot be provided and inform the issuing authority of the

[149] On the grounds of refusal see L. BACHMAIER WINTER, 'Transnational evidence…', op. cit., at p. 53 ff; A. MANGIARACINA, 'A new and controversial scenario in the gathering of evidence at the European level…', op. cit., at p. 127 ff.

[150] As said, by LO 13/2015, of 5 October, modifying the Act on Criminal for the strengthening of procedural guarantees and the regulation of technological investigative measures, cit.

possibility of adopting a substitute measure that could serve for achieving, if not the same, at least similar results. Nevertheless, the executing authority shall not check before ordering the execution if the measure requested exists in the issuing country. This is a requirement to be complied with by the issuing authority and mutual trust applies here.

Another cause of denial of the measure not specifically contemplated in the DEIO is whether the executing authority could refuse the execution of the EIO or not, based on the ground the legal persons cannot be criminally prosecuted under is national laws; this, no is the case in Spain where legal persons respond personally.[151]

7.3.2 Duration and prolongation of the measure

Another problem may arise with regard to the duration of the interception of telecommunications. An EIO requesting the interception of telecommunications shall express the '*desired duration of the interception*' (Art. 30 (2) DEIO). The expression 'desired' has not been used by chance: it conveys, for instance, that the executing authority is not bound by the duration requested by the issuing state. The duration of the interception will need to comply with the timeframe established under the law of the issuing authority, but the executing authority will order the execution of the measure –provided that the other requirements are complied with and that no grounds for refusal exist– according to its own laws. The regulation of the maximum length for interception of telecommunications shows great variations among the EU Member States. While the maximum length of the interception order is one month in Belgium, the Netherlands or Sweden, it can be granted for up to three months in Germany and Spain, and for four months in France and the Czech Republic.[152]

Further to the necessary compliance with the *lex loci*, while trying to adapt to the *lex fori* in this regard, it is unclear if the executing authority can decide on the duration of the interception, applying national proportionality standards. It seems that the executing authority should try to respect the principle of mutual recognition in so far as this does not collide with its own laws and constitutional principles. In that vein, as long as the 'desired' duration

[151] See specifically L. BACHMAIER WINTER, 'Mutual recognition and cross-border interception of communications: the way ahead for the European Investigation Order', in C. Brière and A. Weyembergh (eds.), *The needed balances in EU Criminal Law*, Hart Publishing, 2017, p. 313 ff, at p. 320.

[152] See T. TROPINA, 'Comparative analysis' in U. Sieber and N. von zur Mühlen (eds), *Access to Telecommunication Data in Criminal Justice*, Duncker & Humblot, 2016, p. 13 ff.

expressed in the EIO is not contrary to the national provisions, the executing authority should not apply its own criteria to limit such duration.

Finally, there is another point that shall be addressed in practice while executing an EIO and it is how to deal with the extension of the initial requested duration of the interception: Spain allows the extension of the three-month initial period to a maximum of 18 months according to general provisions contemplated in Art. 324 (1) and (2) LECrim respectively. Regarding the prolongation of the initial authorisation contained in the EIO, Spanish national law subject such time extensions to a periodical assessment on the need of the measure, thus requiring that the judge checks the results obtained so far, and decides whether the requisites of necessity and proportionality are still in place.[153] This periodical review for granting the prolongation of the measure should also be carried out when the interception of communications is executed in a foreign country by way of an EIO. To that end, the executing authority should transmit to the issuing authority the communications intercepted within the time periods set out by it –or immediately, if possible– and the issuing authority should decide on granting the extension or not. Such a prolongation, as a rule, should not exceed the maximum timeframe accepted in the national law of the executing state.

7.3.3 Execution of an EIO on interception of communications by way of direct transmission of the data

With regard to the execution of an EIO regarding the interception of communications, these general rules are also applicable, but Art. 30 (6) DEIO provides for a specific rule on the execution of the EIO issued for the interception of telecommunications. It precisely states:

> '*An EIO referred to in paragraph 1 may be executed by:*
>
> *(a) transmitting telecommunications immediately to the issuing State; or*
>
> *(b) intercepting, recording and subsequently transmitting the outcome of interception of telecommunications to the issuing State.*

[153] See M. FORDHAM and T. DE LA MARE, 'Identifying the principles of proportionality', in J. Jowell and J. Cooper (eds.), *Understanding Human Rights Principles*, Hart Publishing, 2001, p. 27 ff. In Spain generally E. MARTINEZ GARCÍA, *Actos de investigación e ilicitud de la prueba*, Tirant lo Blanch, 2009.

The issuing authority and the executing authority shall consult each other with a view to agreeing on whether the interception is carried out in accordance with point (a) or (b)'.

This Article follows almost exactly, albeit with another wording, the provision contained in Art. 18 (1) of the MLA 2000, where the immediate transmission of the intercepted telecommunications and the recording and subsequent transmission are also foreseen as possible means of executing the MLA request and transferring the results to the issuing authority.

It could be said that the Directive does not innovate much on this point, as the possibility of immediate or direct transmission of the communications is already foreseen. However, the impact in practice may differ, because the Directive expressly states that both issuing and executing authorities must agree on how the execution of the interception of communications shall be carried out. It may thus be expected that the direct access and immediate transmission of the intercepted telecommunications to the issuing authority will gain increasing importance in the AFSJ. For the moment, the direct data transfer obtained through the interception of communications is hardly used in practice,[154] but efforts should be made in order to advance towards the direct transmission of the communications intercepted.

The present law and practice on the execution of requests on interception of telecommunications and the transfer of those data in the different Member States is quite diverse. In Belgium, for instance, the real-time transfer of communication data is not possible;[155] thus the provisions of Arts. 18 and 19 of the MLA 2000 have not had any practical application so far. In Sweden, no direct access is provided, and the real-time transfer of data has to go through the channels of the Swedish system (police, prosecutor and/or courts).[156] In Germany the real-time transfer of data is possible, both on the basis of an international convention (such as Art. 18 MLA 2000), as well as upon bilateral agreements.[157] In such cases, however, the German authorities must ensure that the German national rules are complied with and that they are respected by the requesting state. To that

[154] See excellent comments by T. TROPINA, op. cit., at p. 116.
[155] See G. BOULET and P. DE HERT, 'Access to Telecommunication Data in Criminal Justice: Belgium' in U. Sieber and N. von zur Mühlen (eds), op. cit., p. 123 ff, at pp. 238 - 239.
[156] See I. CAMERON, 'Access to Telecommunication Data in Criminal Justice: Sweden', in U. Sieber and N. von zur Mühlen (eds), op. cit., p. 611 ff, at pp. 642–44.
[157] T. WAHL (with B. VOGEL and P. KÖPPEN) 'Access to Telecommunication Data in Criminal Justice: Germany' in U. Sieber and N. von zur Mühlen (eds), op. cit., p. 99 ff, at pp. 594–595.

end, the German authorities, when acting as executing authorities, will subject the transfer of the real-time data to conditions, so that the privileges and immunities applicable under German law are safeguarded by the issuing authority directly accessing the communications data.

In Spain, for example, there are no legal provisions on the filtering of incoming data or of outgoing data, or on the way the transfer of the information obtained through the interception of communications to the issuing authority is to be carried out.[158] In practice, the transfer takes place in different ways: it is not infrequent that a member of the judicial police, or even a member of the public prosecution, travels abroad to take the disks with the recorded communications and brings them to the Spanish Judge of the Investigative. This is often done when the Spanish officers have already travelled to the relevant country for the purposes of the investigation, but there are also cases where the travel takes place only for bringing the disks with the intercepted communications. However, this is not the only practice. For example, when it comes to judicial cooperation with France, the transfer of data is often done through the *liaison* magistrates. The National Court reports of cases where the data have been transferred through the embassy personnel (single cases of data transfer with the USA).[159] In investigations where several EU countries are involved and joint investigation teams have been set up, the disks sometimes are transferred through the heads of the respective joint investigation teams. In other cases, the disk is attached to the documents related to the request, and sent by ordinary channels. In sum, there is no uniform practice. But, as far as we know, at present neither the current legal framework nor the technical setting allows for the judge from another EU Member State to have direct access to the data resulting from the telecommunications interception.

In view of these diverse systems and taking into account the different scope of privileges and immunities in the laws of each Member State, it can be expected that the execution of the EIO, through an immediate transmission of the data, will not be generally implemented in the near future, although such a system of transmission could considerably improve the admissibility of the evidence.

[158] See L BACHMAIER, 'Access to Telecommunication Data in Criminal Justice: Spain' in U. Sieber and N. von zur Mühlen (eds), op. cit., p. 647 ff, at pp. 701 - 702.
[159] This information has been obtained by interviewing several Central Judges of the Investigative attached to the National Court in Spain.

Allowing the issuing authority to connect directly to the system of interception of telecommunications of the executing state, once the requirements of the EIO have been duly checked by the executing authority, would also increase the safeguards regarding the confidentiality of the information obtained. The executing state would, in principle, not have any knowledge of the content of the communications intercepted, but would only be responsible for the technical execution of the measure, and thus the risks of leaks of the intercepted data might also be reduced.

It goes without saying that such a system would clearly improve the cooperation in the gathering of evidence, and provide for swifter transmission of the results to the investigating authority in the issuing state. It would also be consistent with the principles of a single AFSJ, as the issuing authority would have access to the communications directly as if those communications had been intercepted in its own country.

However, the direct transmission will not only require a prior situation of mutual trust between the Member States, but also a certain harmonisation of the immunities and privileges in the issuing and executing states, or precise agreements setting out the conditions to be respected in the execution of such investigative measure. Taking the example of the lawyer–client privilege, although it is widely recognised and the interception of such communications is prohibited in most EU Member States, there are still differences on how to filter those conversations if they have been accidentally recorded, or on the person in charge of the filtering and the destruction of these conversations. The rules and practice on how to deal with communications that infringe the lawyer–client privilege[160] vary from country to country. Such differences can of course have an impact on the rights of the defendants and the protection of the privacy in each Member State.

If problems may arise in the execution of interception of communications when equal privileges are applicable in the issuing and executing states, the situation can become even more complicated when both states do not have the same rules on immunities and protection of confidential relationships. For example, while professional immunities are broadly regulated in Germany, the approach is much more lenient in the Spanish system. Which law

[160] That is the 'confidentiality' according to Art. 4 Directive 2013/48/EU of 22 October 2013 on the right to access of a lawyer, one of the most discussed rules along EU negotiations for the adoption of such Directive. See M. JIMENO BULNES, 'La Directiva 2013/48/UE del Parlamento europeo y del Consejo de 22 de octubre de 2013 sobre los derechos de asistencia letrada y comunicación en el proceso penal…', op. cit., at pp. 469 – 470.

should apply when filtering the intercepted communications? It appears that, in this example, if Spain were the executing state, it would not have problems in authorising a direct access to the telecommunications, as its standards on the protection of such professional immunities would be respected. In principle, the Spanish executing authority would not have any objection to the fact that the German authorities apply a higher standard of protection and a very strict filtering procedure. Such system would ensure admissibility in the issuing state, while not infringing –rather raising– the standards and laws of the executing state. But, how to deal with the opposite situation, where Spain would be the issuing state and Germany the executing state? Would the executing authority subject the real-time transmission of data to conditions, according to their rules on professional privileges and immunities? If direct access is granted, how would the German authority control that the issuing state finally respects those conditions, and deletes conversations and communications that should not be intercepted under German Law?

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