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

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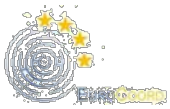

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## ABBREVIATIONS AND ACRONYMS

| | |
|---|---|
| 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 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters |
| EAW | Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States |

| | |
|---|---|
| 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 |
| eg | *exempli gratia* |
| *ex* | according to |
| EEW | Council Framework Decision 2008/978/JHA of 18 December 2008 on the European Evidence Warrant for the purpose of obtaining objects, documents and data for use in proceedings of criminal matters |
| EIO | European Investigation Order |
| EU | European Union |
| ff/*et seq* | and the following |
| FGE | *Fiscalía General del Estado* (General Public Prosecutor's Office) |
| GU | *Gazetta Ufficiale* |
| ie | *id est* |
| ICCPR | International Covenant on Civil and Political Rights of 16 December 1966 |
| LECrim | *Ley de Enjuiciamiento Criminal* (Spanish Act on Criminal Procedure) |
| LD | Italian Legislative Decree |
| 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

The Report is aimed to compare Italian, Polish and Spanish Reports on judicial practices in transnational evidence gathering according to same order. It is mainly based on compiling and analizing information through direct encounters with professionals of the judiciary and judicial institutions, including judges, prosecutors, defence lawyers and other interested parties.

Its objective is to identify practical problems deriving from prior judicial practices according to old EU instruments and, if it is the case, in relation with 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).[1]

Collected responses remain anonymous and were used solely to provide a general idea about the practice and its needs in EIO area. Each country involved in the current Project – Italy, Spain and Poland – has written its national Report following the common methodology established in WS2, deliverable D3.2.

The given answers are based, in general, on previous experiences of the interviewees, through which they contemplate important issues for the future. In this way, the report follows, as main objective, to find out about the current state of cooperation in order to draw up a common roadmap for all Member States of the European Union. Therefore, the experience in this area can be useful in order to identify the main difficulties faced in the EU system of cooperation that should be based on "mutual trust" between judicial authorities.

[1] On the status of implementation of Directive see information provided by EJN at https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=120 (last access on Feb. 26th, 2019).

## 1. INTRODUCTION

As an important fact, it is necessary to underline that during the study, the transposition of the aforesaid Directive was put into effect into the Polish and Spanish legal systems. In Italy the Directive was implemented earlier than in Poland or Spain; in fact, it entered into force on 28 July 2017[2], while in Spain implementation took place after deadline of 22 May 2017 with the still recent Law 3/2018, of 11 June[3], amending Law 23/2014, of 20 November, of mutual recognition of judicial decisions in criminal matters in the European Union[4]. In Poland DEIO has been transposed into Polish legal system at the beginning of 2018[5] (directives are implemented into Polish legislation by means of a separate law, supplemented with a circular concerning the application of the law in practice). This was the main disadvantage especially in Poland and Spain: at the time of conducting abovementioned interviews, the law professionals did not know how the Polish and Spanish legislator would transpose the provision of DEIO to their respective national systems.

In this regard, the initial scheme on which the content of this document was developed, did not underline that the Directive in question had been implemented by the legal systems. The discrepancy between the information we seek and the answers to the interviews given to us derives from this factor.

On the other side, the Italian report has also taken into consideration a Handbook published by the Italian Minister of Justice few months after the implementation of DEIO in Italy by Legislative Decree (hereinafter LD) of 21 June 2017, no. 108, aimed to clarify the interpretation of the new regulation as well as papers written by Judges who have worked in the area of judicial cooperation. As highlighted by a Judge with a long experience in the field of judicial cooperation also at International level, the Handbook is welcomed because, beyond its content, it has a specific meaning: it is the affirmation of a commitment made by

[2] Published in GU, 13 July 2017, no. 162, pp. 4-36.
[3] Published in BOE, 12 June, 2018, no. 142, pp. 60161-60206.
[4] *Ley de Reconocimiento Mutuo de Resoluciones Penales en la UE*, henceforth LRM. English version available at https://www.mjusticia.gob.es/cs/Satellite/Portal/es/servicios-ciudadano/documentacion-publicaciones/publicaciones/traducciones-derecho-espanol (last access on Feb. 26th, 2019).
[5] The Law of 10 January 2018 regarding amendments to the Code of Criminal Procedure, The Journal of Laws, item 201. This amendment entry into force on 8 February 2018.

the Minister towards the judicial authority, normally left alone in the interpretation of national rules that sometimes are not clear.

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 D3.2.

In this context first bunch of questions were related to personal background and position by interviewees. But to describe the current state of judicial cooperation in gathering of evidence not only from theoretical perspective, but also from practical one, is not simple. The experience of practitioners in this field is the starting point to identify the strength and weakness of the system in order to better approach the practical problems that are emerging in the application of DEIO.

The interviewees were judges, prosecutors and defence lawyers. Two models of interview were elaborated by the University of Burgos: one for judges and prosecutors and another for defence lawyers.

In relation to Italy, on the basis of the two types of questionnaires elaborated by the University of Burgos, interviews have been conducted by Italian Public Prosecutors and Judges (3 Public Prosecutors and 4 Judges); Some difficulties were found in matching defence lawyers with a specific experience in the field of judicial cooperation. Following informal conversations with some lawyers, it has been possible to affirm that in general defence lawyers do not have a specific knowledge of regulations on judicial cooperation in criminal matters.

Some of them have studied the matter when they have been involved in criminal proceedings concerning the application of the European Arrest Warrant as lawyers appointed by the State (Art. 97 CPC). Also the lack of knowledge of another language and, in particular, English language, can be assumed as an obstacle for lawyers. For this reason only 4 defence lawyers were interviewed.

The Polish report is based on the interviews conducted with Polish lawyers of Warsaw, Kraków and other, also smaller towns. Interviewing to Public Prosecutors who could provide relevant information was quite difficult. Interviewees did not agree to record any interview, therefore the paper protocol was sufficient.

However, most questions in the questionnaires, elaborated by the University of Burgos, were formulated in a general way, since some questions about the practical use of EIO are unlikely to be answered in a conclusive way, for obvious reasons.

In Spain 24 people have been interviewed in total: 12 judges, 6 prosecutors and 6 lawyers; many interviews have been expressly taped under consent by interviewees. The questions addressed primarily to judges and prosecutors have been specific and concrete aimed to assess how each of them is trained or prepared in the international and/or European judicial context. In the case of lawyers, it has been questioned if in their opinions the transposition of the European Investigation Order may intensify or not the rights of defence in cross-border criminal matters in the context of gathering evidence.

Judges present different conditions, although all of them have extensive professional experience. Several of them are currently assigned to the National Court (*Audiencia Nacional*), an organ that has a prominent role in the matter, either as Magistrates of the Criminal Chamber (*Sala de lo Penal*) or as Central Investigation Judges (*Jueces Centrales de Instrucción*). Others attend as Magistrates in Provincial Courts (*Audiencias Provinciales*) or other specialized courts. Some are currently deprived of jurisdictional functions, occupying positions of counselling, as Advisors in the International Relations Service of the General Council of the Judiciary or as Liaison Magistrates with other States. In many cases, the judges have been temporarily contact point with the Spanish Judicial Network (REJUE) or the European Judicial Network (EJN).

Prosecutors have a long professional career, with extensive experience in international judicial cooperation, within institutions such as the Special Anti-Drugs Office of the Public Prosecutor (*Fiscalía Especial para la Prevención y Represión del Tráfico Ilegal de Drogas*), the Unit of International Cooperation in the General Office of the Public Prosecutor (*Fiscal de Cooperación Penal Internacional*) or Eurojust.

The lawyers are specialists in Criminal Law and work normally in legal offices of small size (3-5 associates). Several of them work on legal assistance in white-collar crimes with international dimension and others are related to Non-Governmental Organizations, such as Rights International Spain. No one of the lawyers interviewed belong to the Legal Aid Unit in an specific Bar Association. They have different specialised trainings in criminal matters such as human trafficking, gender-based violence; or in international protection on refugees and asylum. In all of this cases they are related to international and European issues.

## 2. CURRENT SITUATION IN GENERAL TERMS

The first topic concerns the most frequently used international or European conventions and legal instruments commonly employed in the EU judicial cooperation field. In this regard, it should be noted that there are no significant differences among the three countries.

### 2.1 Legal issues: current legal instruments

Some provisions of the DEIO represent an innovation for Italian judicial authorities (Public Prosecutors and Judges). A significant change concerns new rules on interception of telecommunications with or without technical assistance. The reason is related to the late implementation by Italy of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (hereinafter MLA) 2000[6], in fact it was implemented by Legislative Decree no. 52 of 5 April 2017[7], which entered into force on 22 February 2018. Because of the late implementation, the MLA has not been applied in the context of judicial cooperation in penal matters till present times.

[6] 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, pp. 1-23.
[7] Published in GU, 27 April 2017, no. 97, pp. 28-33.

At EU level it has represented a significant step forward in the development of judicial cooperation in criminal matters, especially in the field of interceptions of telecommunications. Regarding mutual recognition instruments specifically related to evidence, Italy has never implemented FWD 2008/978/JHA of 18 December 2008, on the European Evidence warrant for the purpose of obtaining objects, documents and data for using proceedings in criminal matters (henceforth EEW)[8]. By contrast it has mplemented, although with considerable delay, FWD 2003/577/JHA, of 22 July 2003, on the execution in the European Union of orders freezing property or evidence[9], now replaced by DEIO as regards freezing of evidence.

In the context of judicial cooperation a relevant instrument, although not strictly connected with the gathering of evidence, is the FWD on 2002/584/JHA Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States or EAW[10]. It was implemented in Italy by law of 22 April 2005, no. 69[11].

In Poland the frequently mentioned regulations, by the majority of those interviewed were the EAW and other such as Convention on the Transfer of Sentenced Persons, done in Strasbourg on 21 March 1983[12] as well as Agreement between the Republic of Poland and the United States of America on extradition done at Washington on 10 July 1996[13] joint with other law sources.

In Spain, among the conventions and European legal instruments, the most commonly used is again the EAW, which is used not only for its own purpose but also for the assurance

[8] OJ L 350, 30.12.2008, pp. 72-92.
[9] OJ L 196, 2.8.2003, pp. 45-55.
[10] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ 18.7.2002, L 190, pp. 1-18.
[11] Published in GU, 29 April 2005, no. 98, pp. 6-23.
[12] ETS No. 112 available at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/112 (last access on Feb. 26th, 2019).
[13] Amended on June 9, 2006; see Treaties and other international acts series 10-201.17 available at https://www.state.gov/documents/organization/186155.pdf (last access on Feb. 26th, 2019).

of proof. The European Convention on Mutual Assistance in Criminal Matters of the Council of Europe of 20 April of 1959[14] and MLA 2000 are widely used.

To a lesser extent, in Spain, other European legal instruments are also used all of them at the moment implemented by prior Law 23/2014 or LRM joint with EAW. It includes, for example, the FWD 2008/909/JHA of 27 November de 2018, on the application of the principle of mutual recognition of judicial decisions in criminal matters for which penalties or other measures imposing custodial sentences or measures involving deprivation of liberty for the purpose of implementation in the European Union[15]; the FWD 2005/214/JHA of the Council, of 24 February 24, 2005, on the application of the principle of mutual recognition to financial penalties[16]; and the aforementioned FWD 2003/577/JHA on the execution of orders freezing property and securing evidence. In fact, according to Article 34 (2) DEIO, this last FWD is replaced by EIO joint with the EEW.

With non-European Union States, other international conventions are used. Among the most common, we find the bilateral extradition agreements of Spain with other countries, the European Convention on Extradition of the Council of Europe made in Paris on 13 December 1957[17] and the Agreement on Extradition between the European Union and United States of America made in Washington on 25 June 2003[18].

### 2.2 Practical issues

#### 2.2.1 Most requested sort of assistance

The most requested activities in the field of judicial cooperation in criminal matters vary between Member States. We can mention the following judicial practice as example

[14] ETS n. 030, available at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/030 (last access on Feb. 26th, 2019).
[15] OJ L 327, 5.12.2008, pp. 27-46.
[16] OJ L 76, 22.3.2005, pp. 16-30.
[17] ETS No. 024 available at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/024 (last access on Feb. 26th, 2019).
[18] OJ L 181, 19.7.2003, pp. 27-32.

In Italy the most requested assistance is the assistance information on bank accounts, on banking and other financial operations. In concrete, Italy has prepared a list of these activities: information on the existence and the activity of enterprises that apparently have a seat abroad; gathering of documents, such as final judgments enacted by the foreign authority, records of seizures or arrest executed in the requested State; gathering of information from persons who may be able to provide useful contents for investigative; serving of a summons to appear as a witness in front of the Italian judicial authority.

Also, in Poland it was necessary to asses the link between these requests of assistance within the international/European judicial cooperation and the transmission of evidence and/or its admissibility. As a consequence of previous affirmative responses, each interviewee was asked to provide examples. Mostly, the requested assistance concerns brief information about the qualification as felony and misdemeanor, also a technical assistance during a conducted legal action.

In Spain, the most requested assistance is the statement of the investigated person. In practice sometimes an European Arrest Warrant is used to avoid possible difficulties such as obtaining the statement. Some opinions suggest that this could be seen as an abuse of the EAW. Statements of witnesses and experts are also frequent.

Judges, prosecutors and lawyers agree that videoconference should be generalized to practice these statements. Some countries do not admit their use (Switzerland). In Spain, the defendant’s statement cannot be made by videoconference when there is a formal accusation. According to the opinion of several interviewees the application of the European Investigation Order facilitates the taking of the accused's statement by videoconference.

One Magistrate points out the utility of Spanish consulates in foreign countries as semi-official instance for cooperation in practice.

Next in relevance is what concerns the patrimonial investigations. This kind of information is gathered trough international cooperation requests such as inquiries on assets, properties, bank accounts or businesses, when they are suspects of connection with crime. Sometimes what needs to be done is not purely investigation, but an assurance measure (i.e. precautionary seizure) or an asset recovery (confiscation).

The legal Spanish professionals refer also to transmission of documents such as official copies (testimonios) of judicial resolutions issued in Spain, in order to assess the application of the *ne bis in idem* principle or to use judicial expedients in related cases. We have also received an answer regarding the requests for police's reports and criminal records related to a defendant. Another kind of assistance is also requested to the Spanish authorities, such as the intervention of communications. In relation to this investigative measure an experienced Magistrate affirms that "*if the cooperation request is moderately well done, we do not control anymore*". Moreover communications interventions without judicial authorization (like in the UK) should be admitted under the Mutual Assistance Agreement of 1959, but some Spanish courts do not admit them. Home entries, search and seizure procedures present difficulties (several interviewees have indicated it, without more specifications).

### 2.2.2 Length of criminal proceedings

Requests for judicial cooperation in criminal matters extend in any case the duration of criminal proceedings in Italy, Poland and Spain. There are only differences related to the specific duration cause it depends on the activity requested, the seriousness of the crimes, the number of accused and other factors.

Regarding Italy, as it was remarked before, now it is applicable the MLA 2000 Convention, its non-application caused delay until then. All the judges interviewed agree on the excessive time required to comply with the request for assistance and on the related consequences on the duration of criminal proceedings. According to one of the Public

Prosecutor interviewed in Italy, for “simple activities” (such as identifications of persons, service of acts, gathering of information, examination of witnesses during a trial by means of videoconference), the duration is between 4 up to 6 months including the translation of acts. At least 1 year for “more complex activities” like information on bank accounts. By contrast, the direct exchange of information between police officials is more efficient (also through the use of whatsApp) once there is a contact. The use of the Liaison Magistrates and the contact points of the European judicial network or Eurojust provide assistance and reduce waiting times.

In occasions, requests for cooperation are denied. Outside the European Union, judicial cooperation is generally slower. In countries such as Switzerland, United States, China or South America sometimes it takes 1 or 2 years to attend a request for judicial cooperation.

In Poland, the interviewees indicated that judicial cooperation affects duration of criminal process by its prolongation, without further specifications.

In relation with Spain, European official statistics show an average of approx. 200 days needed to solve the 1st instance of civil, commercial, administrative and other case according to Spanish procedural system[19]. The consequent delay of the instruction origins frequently the need to declare the case as complex. One weakness of the Spanish system is the need for everything to be translated into Spanish. The delay of the proceedings varies: on average it takes between 3-6 months, although it can reach up to 10-12 months. The shortest cases reported to us are resolved instantly by electronic means or during the same day. The longest one lasted for 3 or even 7 years. Simple requests are processed faster, such as summons, statements of witnesses or accused persons, especially when carried out by videoconference. European Arrest Warrant and European Protection Order are much faster. On the contrary, if it is about financial information, we can expect up to two years, although the time it is being reduced considerably. In some cases the speed of cooperation depends on the technical capacity of the required country. Within the European Union, the request for

[19]The 2018 EU Justice scoreboard, European Union, 2018, Figure 7 accessible at https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2018_en.pdf (last access on Feb. 26th, 2019).

judicial cooperation can be attended in a week, in countries such as France, Germany or Portugal.

### 2.2.3 Procedural safeguards

#### 2.2.3.1 Requirements as requiring/executing authority

In the Italian Report, the opinion of Public Prosecutors and Judges in the judicial cooperation aimed to gather evidence located abroad is that there is not any reduction of procedural guarantees. Defence lawyers believe that in the field of letters rogatory there is a reduction of suspects or defendants' procedural guarantees. In Italy, since 2000, by law no. 367 of 7 December, the defence both of person under investigation/accused/convicted and the victim, can collect, independently from the prosecution, some forms of evidence (such as interviews with persons who have knowledge of the facts of the case) at all the stage of a criminal proceedings; prior to this legislation it had to make a formal request to the Prosecutor, with the risk of prejudicing its strategy.

As underlined by a lawyer during the interview, although some investigative activities can be carried out by the defence, and this represents a guarantee at national level, the Italian Supreme Court holds that defendants are not competent to investigate abroad. Following this interpretation, whether a defence lawyer wants to collect evidence located in a foreign country, he/she must submit a formal request to the Public Prosecutor who will act through the instrument of letters rogatory. However, the judicial authority – a Public Prosecutor or a judge – could refuse to execute the request without a formal explanation, so undermining the rights of the defence, especially when there are substantiate reasons to believe that the evidence requested would be helpful to the accused. Starting from this point, the LD aimed to implementing DEIO (Art. 1 § 3) is a step forwards the protection of the rights of this subject because the defence may require the issuing of an EIO[20].

[20] More precisely, see p.14 Italian Report: 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. If the request is refused, the Public Prosecutor adopts a reasoned order (Art. 31 § 3), while the judge issues a decision (i.e., ordinanza) after having heard the parties (Art. 31 §4).

These measures vary between Member States, and normally are the object of a specific regulation. Arts. 4 (1) MLA 2000 and 9 (2) DEIO allow to specify procedural requirements.

In Poland, the answers to the question specifically concerned to the experience in proceedings carried out (or participated in), highlighted the need of previous experiences in international/European judicial cooperation. Also, it was requested to specify if it was on behalf of a requesting or executing authority. Unanimously respondents indicated, that Polish judicial authorities are more frequently the "requesting" part in proceedings. As a consequence of previous affirmative responses, the interviewees were asked to which countries such cooperation is directed (more than 70% is covered by Germany, France, UK and Austria). The United Kingdom, Italy and Netherlands are among the states that include specifications when acting as issuing authority.

The Polish team during interviews has made a sequel questions concerned interviewees' prediction (literally: beliefs) about the existence or posible existence of legally provided reduction of procedural safeguards in cases where international judicial cooperation takes place in gathering of evidence. The respondents indicated unanimously that it would have positive influence on procedural safeguards.

In Spain, judges and prosecutors, when they are the issuing authority, do not normally include specific requirements, allowing the requested State to use its *lex fori*. They do it just in case of compulsory requirements, as it occurs with the defendant's statement, whose practices require always legal assistance by a lawyer to be considered valid in Spain. As executing authority, Spanish judges act in accordance with their legal system, but respecting the specifications contained in the rogatory letters. These are referred, for example, to the information of rights to the investigated person, chain of custody in search and seizures, legal assistance, etc.

### 2.2.3.2 Information to defence lawyers

In Italy, the reference to the lawyer of the defense has to be done with respect of a distinction between preliminary investigations and a trial. In the Italian criminal system, preliminary investigations are kept in secret. Therefore, except when the Public Prosecutor must carry out an activity in which the lawyer has the right to be present he or she shall send a notice of the investigation to the suspect and victim. As a consequence when the Public Prosecutor during the preliminary investigation heard a person who may have relevant information for the purpose of investigations, neither information is given to the defence nor to the person under investigation or to the victim. Another exception during the preliminary investigation concerns the recourse to the special evidentiary hearing regulated by Arts. 392 and the following CPC where evidence admitted shall be gathered following the procedure set for the trial (ie, with the necessary participation of all the parties).

In Italian procedure, during the preliminary hearing and during a trial, when it is necessary to gather an evidence located abroad the defence is informed and can take part to the gathering of evidence according to Art. 4 (1) Convention 1959[21]; on the basis of this provision beside the traditional letters rogatory, wholly executed by the foreign authority, it has been developed the model of so called "joint letters rogatory" executed with the participation of the judicial authorities as well as of private parties of the requesting State. The possibility to take part to the activity performed abroad does not mean that in the execution of the letters rogatory the law of the requested authority is applicable: especially where this kind of participation is not provided according to the *lex loci*, the requested State can admit or refuse the participation, although it is obliged to inform the requesting authority on the date and place of the execution. However the authorization of the requesting authority's participation do not implies law enforcement powers on foreign territory.

In Poland, the interviews with defense lawyers were also conducted in order to learn about the practical experience of defence lawyers in international and European judicial

[21] Literally "*On the express request of the requesting Party the requested Party shall state the date and place of execution of the letters rogatory. Officials and interested persons may be present if the requested Party consents*".

cooperation in criminal matters. The fact that each respondent identifies the overall duration of his/her career with experience in judicial cooperation is the most important thing which has to be mentioned.

In general the defence lawyers are specialized in criminal law and work normally in legal offices of small size (1-5 associates) or medium size (6-15). Criminal proceedings with transnational element were mainly white-collar crimes. Most of interviewees (of defence lawyers), believe that the defence is in disadvantage in transnational criminal proceedings with respect to national cases. The main reason is not language or procedural obstacles but costs. One of the lawyers said that he was in France and Czech Republic where witnesses were interrogated by foreingn authorities, but his clients were big companies which were able to covert the costs of this activity in criminal proceedings. Every interviewed defence lawyer emphasized his or her hope that EIO would strenghten procedural guarantees for the defendant and, as mentioned above also would improve the duration of the criminal proceedings with cross-border element.

Regarding the judges answering in Spain they have been informed about a ‘secondary role of lawyers’, maybe motivated because the intervention of a lawyer in another country shows practical difficulties (language, lack of training or knowledge of forensic uses, etc.). In addition, intervention of a designated defence lawyer is not ensured. They can take knowledge of the investigations done trough the lawyer appointed extra for that purpose, with whom he or she must coordinate for the defence of his/her client.

The EIO already foresees the appointment of a lawyer in the executing State, which will result in the aforementioned coordination between lawyers. In Spain, a specific panel should be created for specialised lawyers, who be able to communicate in foreign languages. If the secret of the investigations has not been settled, lawyers are informed in advance of the cross-border investigation diligence (Art. 4 Convention 1959), as well as the possibility of moving to the execution stage in order to intervene. Mobility of the defence lawyer to the executing state depends on various factors, including economic ones. The personal assistance of the defence lawyer is not common, being replaced either for the use of video conferencing or the submission of written questionnaire (defendants or witnesses statements).

According to lawyers' opinion, the referral of questions is inefficient in practice, preferring personal intervention or video conferencing. In addition, when they ask questions in writing, there is a tendency to inadmissibility by the acting judge, considering them as tricky or suggestive questions.

Rights of defence and a fair trial with all guarantees are ensured in practice by carefully examining the way in which the cross examination has been carried out abroad, either at the request of the Public Prosecutor's Office or at the parties involved in the trial.

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

From the perspective of the Italian judicial system, the interception on communications is the main area where are emerging practical questions in relation to the implementation of DEIO. In Poland, none of the interviewed defence lawyers gave an answer to the questions about the specific type of evidence (interception of communications). The reason was that they had not faced this type of evidence in the proceedings in which they participate. In Spain, several of the interviewed judges and prosecutors lack of experience in the execution and transfer of electronic evidence, so they do not know how it is produced in practice.

Now, we will analyze the three States in the same order as usal.

In Italy the problem concerning interceptions underlined during interviews is that there is have a different regulation for the gathering of whatsapp messages or for the gathering of messages sent by e-mail.[22] It has to be said that in Italy before the entry into

[22] In Spain, it is known by several of the interviewees that there is an EU project on the topic, called e-CODEX (communication via online data exchange).

force of the new provisions implementing DEIO[23], it did not require the communication to the competent authority of the State interested by the communication that had its source in the foreign territory and were heard by the Italian Authority. Indeed, according to Italian case law[24], the recourse of routing procedure ("*instradamento*") it does not imply any violation of provisions on letters rogatory, because all the activity of interception, reception and registration of phone call is performed in Italy. While it is necessary the letter rogatory for intervention abroad related to interceptions of conversations abroad or captured only by a foreign service provider[25] .

In the Handbook published by the Minister of Justice and addressed to practitioners is affirmed that the entry into force of LD no. 108/2017 aimed to implement DEIO should interrupt the practice of "*instradamento*".

Article 31 DEIO establishes the obligation in order to notify the relevant State, prior to the interception of the telecommunications if the competent authority knows that "*the subject of the interception is or will be on the territory of the notified Member State*" (Art. 31 §1 a) DEIO). If the authority does not know beforehand where the subject is or will be (or the location of the data), the notification shall be done to the Member State where he/she was at the moment of the interceptions, once this is known. Several practical questions arose.

First, considering that in accordance with Article 30 (3) DEIO, the "notified State" can prohibit the interception where the "*interception would not be authorised in a similar domestic case*", a matter of concerns is the different interpretation by Member States of this phrase. Indeed, according to the experience gathered by Eurojust, most of Member States have transposed literally the content of DEIO. It is not the case of Italy. Following Article 24 of Italian LD n. 108 of 2017, when the Public Prosecutor has received the notification regarding the interception, he or she has to transmit it to the judge for the preliminary investigations, who is the competent judicial authority for measures that interferes on fundamental rights of individuals. Only the judge may order the termination of interception "*if it concerns an offence for which, according to national law, would not be permitted*": it means that the Italian authority will conduct a formal control.

[23] Such as it was also affirmed by the judges interviewed about the recourse to routing procedure "instradamento wich means conveying of phone call departing from abroad to a place in Italy (a fortiori in case of phone call from Italy towards abroad, conveyed through a service provider located in Italy).
[24] See Cass, IV, 5 April 2017, n. 46968.
[25] See Cass, I, 4 March 2009, n. 13972; Cass, VI, 12 December 2014, n. 7634.

As a consequence, when foreign judicial authorities receive a notification from Italian authorities, if they believe that there is not an "analogy", therefore they may order the termination of interceptions and the impossibility to use any material intercepted (as it happened with Germany and Belgium).

With the aim to avoid this situation, Eurojust has invited Italian judicial authority to specify the legal characteristics with particular attention. "*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*".

In relation to Poland, as mentioned above, at the time when the interviews were conducted, this country had not yet implemented Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the EIO. Therefore, there are not anwsers about this specific aspect.

In Spain, when computers are involved, Police transfers the digital information into data preservation devices (CDs, pen drives, memory cards or external hard disks). The Court Officer (*Letrado de la Administración de Justicia*) certify that the copies correspond to the original ones. Interception of telephone communications is also practiced by the Police with a prior judicial authorization.

The essential information, extracted from the preserved recordings, are usually transferred to the competent research bodies in CD format, equipped with security and authenticity measures such as electronic signatures.

Electronic means are not used in order to send the information to the issuing authority yet. Until now, the transmission has been carried out either through ordinary mail or by a police department commissioned by the issuing State or, where appropriate, by a liaison magistrate. E-mail is sometimes used, even considering it is not always a secure communication channel.

### 2.2.4 Costs

Regarding costs, the answers of the the interviewed (Italian, Polish and Spanish addressees), appear more homogeneous.

In Italy, when there is a request for an expensive interception to a State that is incurring in economic problems, it should be attend to the aim of the act requested, rather than the economic situation. Finally, there are several judges and prosecutors who are in favour of sharing the expenses and, if the issuing State refuses, reject the request to obtain evidence. At this point, according to Italian interviewees, they are in agreement also if it is difficult an assessment of the proportionality by the execution authority.

In Poland, a specific question concerned a possible reaction of the in-charge person in particular proceedings (*dominus litis*) in circumstances such as extraordinary request for obtaining evidence from another EU Member State, which entails extraordinary costs according to regulation provided by Art. 6 (3) DEIO. Alternatives according to non fixed answers were: to refuse, to apply reciprocity, to consult the issuing authority and then to refuse to execute and also to consider sharing costs. Consultation with issuing authority and to refuse under proportionality principle were the most frequent answers.

Spanish judges and prosecutors usually execute investigation measures, regardless of the expense involved and even if the request from other EU Member State involves extraordinary costs (Art. 6 § 3 DEIO). The Spanish report suggests that the General Council of the Judiciary recommends always to accept the request and, if necessary, to try reach an agreement with the requesting State to share the expenses. However, if no economic agreement is reached, the application will be executed and the costs will be assumed by Spain. Eventually these cost will be claimed to the issuing authority later. Personal opinion of judges and prosecutors differs partially from the existing practice up to now. Some of them

think that the request to obtain evidence should be denied if it is disproportionately expensive, applying same criteria as at national level.

Other judges and prosecutors consider that the proper way should be the communication to the Ministry of Justice, requesting it to be in charge of the costs of obtaining evidence, even prior consultation with the State of execution to share expenses. In the opposite case, when the request for obtaining evidence is issued by a Spanish authority, some States request promptly the return of the expenses incurred. Disagreement for costs may be grounds for refusal and may involve intervention by the Ministry of Justice (thus leaving the field of mutual recognition).

### 2.2.5 Special considerations expressed by lawyers

All the Italian and Spanish lawyers believe that the defence is in disadvantage in transnational criminal proceedings with respect to national cases. Among the main reasons there are the poor knowledge of both language of the proceedings and the legal system of the involved States. The intervention in procedures abroad is also conditioned by the availability of financial means. To solve this gap, they suggest the intensive use of new technologies, especially video conferencing.

In Italy, however, a lawyer interviewed has requested the gathering of an oral evidence abroad as a condition for special proceedings named summary trial (*giudizio abbreviato*). The requested was admitted by the judge of the preliminary hearing, notwithstanding the opposition of the Public Prosecutor. In other cases, the answer was negative.

As another different aspect related to evidence gathering, they are asked to consider if there are enough mechanisms to control admissibility and validity of evidence. In this respect they talk about mechanisms to empower the defence, such as the request for nullification when investigation measures have been carried out without the required guarantees. The same applies to Italy, there are not sufficient mechanisms for challenging the validity. They consider it would be convenient that the defence lawyer takes part in the practice of investigative measures done abroad in order to discuss its validity in the executing state itself.

In the Polish Report each interviewee directly was asked to promote and to present problems in relation to the admissibility of evidence in the ongoing criminal proceeding. As a consequence, they were requested to provide examples of the matters aforementionned**, ie,** how many times, with which countries and for what type of practice. Most problems of admissibility concerns hearing of a witness, which foresees specific problems such as lack of information about the coherence between legal systems in the area of inadmissibility of evidence. Also, there are present problems concerning more technical matters such as differences in documents corrections (eg, no returns and notifications under Swedish law).

In Spain, at a national level, the defence lawyers consider that the provisions for legal assistance in Europe may be sufficient, but they are not always effective because some investigative measures are carried out in absence of a defence lawyer. Free legal assistance in both issuing and executing States is only guaranteed for execution of the European Arrest Warrants. In Poland, all the defence lawyers interviewed agree on the excessive time required to comply with the request for assistance and on the related consequences for the duration of criminal proceedings.

Lawyers claim that it seem to be possible that procedural guarantees and the right of defence are not fully respected abroad when coercive measures are requested from Spain. This is due to the lack of legislative harmonization. When Spain requests investigative measures without establishing conditions or requirements, it is more likelihood its practice with a lower level of guarantees. For example, a Spanish judge requested the taking of a statement abroad without establishing conditions and it was practiced by the Local Police.

There are no ways to check whether these guarantees have been fully respected in the requested State. In their opinion, the entry into force of the EIO could help to solve this problem, because the investigative measure can be requested from Spain to be practiced according to the Criminal Procedure Law (*lex fori*). Several of the interviewed lawyers have requested the gathering of evidence abroad. They affirm that admission of the requested evidence is easier when the prosecutor has also requested it; otherwise, it is frequently denied.

Common conclusion indicates the individual need of upgrading the own knowledge in this area.

## 3. STEPS TOWARDS A MODEL SHIFT IN EVIDENCE GATHERING AND TRANSMISSION: WHAT IS EXPECTED FROM THE EIO?

The EIO should considerably improve the effectiveness of judicial cooperation due to the limited grounds for refusal and the speediness of the proceedings.

In Italy, not all the persons interviewed have practice in the application of DEIO, but Public Prosecutors and Judges are optimistic on the future of these new instruments. Less optimistic are Lawyers who do not see an improvement in the level of guarantees for the accused involved. According to the judges the DEIO is a first step towards an European code of criminal procedure, and an harmonisation of the stage of investigations as well as of evidence. The comparison with foreign normative models where there is a high level of guarantees could increase the circulation at the EU level of the best model. It also covers any investigative measure, so overcoming the fragmentation of the previous system based on several instruments with the risk of a conflict among them.

To the questions about at overall view of Polish international judicial cooperation in the cross-border gathering, transfer and admissibility of evidence practice in the EU it was qualified as favourable or slightly favourable. In similar manner questions covered personal opinion of each respondent for example what do you see as the main benefits/strengths and drawbacks of the present judicial cooperation in the cross-border gathering/transfer/admissibility of evidence in Poland. A common response was the

improvement of effectiveness of cross border judicial cooperation, especially making proceedings easier and faster, as mentioned above, from Spain.

In relation to the matter of specific training or education delivered by the courts or other institutions in order to prepare the lawyers for international judicial cooperation, at the time, when the questionnaires were conducted (March 2017 – before Polish implementation of EIO went into force) 80% of respondents did not get any specified training in the area of EIO. However, 40 % of the interviewees declared that during their career, traininigs on judicial cooperation were provided[26]. If the respondent participated in such a specific traininig, he or she was asked to evaluate the helpfulness of the training or education for the daily practice on international judicial cooperation along the criminal procedure.

In Spain, 80% of the interviewees - judges, prosecutors, and defence attorneys - have a general opinion strongly favourable or favourable on the practice of judicial cooperation between Spain, Italy and Poland, and regarding the collection, transfer and admissibility of evidence.

In this respect, the improvement of the cooperation between all of States is considered possible. The remaining 20% has a less favourable opinion. They believe that it should improve, especially in terms of deadlines. None of the judges, prosecutors, and lawyers interviewed has a very unfavourable general opinion (strongly unfavourable) at this point. Lawyers consider that the principle of reciprocity is not always fulfilled, since Spain is very diligent with Europe and third countries, while some States, such as United Kingdom, are reluctant to provide cooperation. They also regret the scarce training of judges in cooperation instruments and the unequal treatment they give to prosecutors and to lawyers, since they only process requests for cooperation requested by the public prosecutor. They also observe that the level of collaboration by third States is much greater in relation with certain types of crimes (such as terrorism) than in others (such as money laundering or fraud).

[26] Especially on EAW, took place since year 2004.

## 4. FINAL REMARKS

Italy, Poland and Spain have drawn the same conclusions regarding the excessive length of procedures. One of the common observations is the increase in the length of criminal proceedings when cooperation operations are necessary. The EIO would come to suppose an advantage in this respect, standardizing the procedures. This is one of the crucial point of the judicial cooperation based on mutual assistance legal instruments.

In Italy, one of the most important conclusions consist in the request of an Office of the Public Prosecutors composed by a group of persons with specific competences in the area of judicial cooperation and with the knowledge of foreign languages.

Following the application of DEIO in Italy it will not be possible to use the "*instradamento*" procedure for the interceptions of telecommunications without technical assistance. Following Arts. 43 and 44 of the Italian LD, the Public Prosecutor prior to the interception for which no technical assistance is needed is obliged to notify the competent judicial authority of the Member State where the subject of interception is present "*immediately after it becomes aware that the subject of the interception is or has been during the interception, on the territory of notified Member State*". However, according to the Handbook of the Minister of Justice the notification is not necessary if the subject of the interception is in the Italian territory. Conversations are captured from or towards persons that are located in the territory of another Member States (so called "indirect interception"); the "*instradamento*" will be used for targets localized in the territory of States that are not bound by DEIO neither by MLA 2000.

The DEIO does not contain any specific provisions on the "electronic" evidence. The use of easier electronic formats to fill is repeatedly suggested by Italy and by Spain.

In the Polish Report a further question touched upon the matter of ones imaginations (literally: beliefs) about the degree of compliance of international judicial cooperation instruments (namely: satisfactory or not).

At a national level, in Spain, there are important discrepancies between the opinions expressed by Judges and Prosecutors, compared to the Lawyers' ones. While Judges and Prosecutors are, in general, optimistic, hopeful and positive for the implementation of the EIO Directive, Lawyers are quite critical because of the decrease in the threshold of protection of human rights. This opinion is common in the case of Lawyers, who feel that Prosecutors and defence are not equally treated when they issue an EIO.

The interviews allow to perceive a common concern: the EIO Directive will bring relevant novelties and all the participants in the criminal system should be prepared. Training courses, dissemination programs, easy ways of contact with (and support by) the European Judicial Network Contact Points, etc. must be immediately ready for a successful application of the norms. To ensure that practitioners are made aware of the further development of this instrument, the organization of training sessions is essential. A collection of the best practices would also be one of added value to allow them to efficiently fulfil their function. Specialized shifts of qualified professionals in international criminal matters should be implemented by Bar Associations[27]. The interviewees mark as next steps the necessity of guidelines both at EU level and at national level[28], EIO electronic model forms and training for practitioners.

The interviewees apply, in general, a pragmatic approach in the interpretation of norms. The aim of overcoming the difficulties derived from cooperation originates, sometimes, the search of solutions not foreseen in the corresponding regulations. It is generally stated that many of these problems are solved more easily by non-strictly formal channels. A good example of what has been said is the low consideration given by Spanish practitioners to the protection of data in criminal cooperation.

Besides, there should be common guidelines regarding the distribution of the economic costs of cooperation. The requested State should be able to reject a request for cooperation if it exceeds a reasonable cost (unless it is assumed by the requesting State).

[27] This conclusion is partially similar of those of the Plenary meetings of the EJN concerning the practical application of the EIO (Brussels, 8 December 2017).

[28] At the time of writing a practical guide on EIO is recently prepared by the International Relations Section of the General Council of Judiciary Branch with limited access to judges in the intranet of Prontuario on International Judicial Cooperation http://www.prontuario.org

In conclusion, most respondents confirm that there are many difficulties in such cooperation and a variety of examples have been provided: difficulties in formalisation of procedures (e.g. acces to criminal records), unexpected differences in domestic systems, problems with the double criminality principle and also the most basic problems such as acces to contemporary unified sources of law.

Each questionnaire was closed by open questions about the identification of problems with data protection laws and the speciality principle in the transfer of certain evidence to the requesting State and final invitation to express any own statements and comments. The overall conclusion, somehow present in every single interview, was a positive attitude to EIO intruments. The responses were either not formulated in a way that would allow a general conclusion, or the respondents did not have any data necessary to answer.

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"Judicial practices related to evidence transfer in Italy"
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**WORKSTREAM 2 – PHASE 2**

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

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**Work Package: WS2**
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**Approved by Coordinator on:**
**Dissemination level: All partners**[Comments]

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# Section 1: Research objectives

## 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 (hereinafter: DEIO) is a new and comprehensive instrument aimed at the gathering of evidence located in another EU country, with strict time limits necessary to ensure a quick and effective cooperation. In order to overcome the fragmentation of legal sources that regulate this matter, from 22 of May 2017, the DEIO replaces the "corresponding" provisions of several instruments of judicial cooperation applicable between the Member State bound by DEIO (Art. 34 § 1).

As a new tool based on the principle of mutual recognition, "*but also taking into account the flexibility of the traditional system of mutual legal assistance*"[29], it poses several practical issues that involve practitioners: Public Prosecutors and judges on one side and defence lawyers on the other. This paper analyses the content of interviews addresses to Italian Public Prosecutors, judges and lawyers with experience in the field of traditional instruments of judicial cooperation, such as letters rogatory[30], regulated by several Conventions, and the Framework Decision of 13 June 2002 on the European Arrest and the surrender procedure between Member States (hereinafter: FD EAW). Notwithstanding the FD EAW is related to the surrender procedure, it has been the first instrument aimed at implementing the principle of mutual recognition in the field of penal cooperation. Therefore, the experience in this area can be useful in order to identify which are the main difficulties faced in the EU system of cooperation that should be based on the "mutual trust" between judicial authorities.

The objective is to describe the current state of judicial cooperation in the gathering of evidence not only from a theoretical perspective, but also from a practical one. Indeed, the experience of practitioners in this field is a starting point to identify strength and weakness of the system in order to better approach practical problems that are emerging in the application of DEIO, as demonstrated by the activity reported by Eurojust[31]. In the context of DEIO

[29] See Considerandum n. 6 of DEIO.
[30] Regarding Italian case law on the gathering of evidence abroad through the instrument of letters rogatory see Corte Suprema di Cassazione, Ufficio del Massimario e del ruolo servizio penale, Relazione tematica: "*Stato della giurisprudenza in materia di acquisizione probatoria all'estero*", Rel V/02/2012.
[31] See Eurojust, Desk Italiano, *Relazione del membro nazionale*, 2017, p. 63; see, also, Eurojust meeting on the European investigation order, *Outcome Report*, December 2018.

Eurojust has been contacted in order to facilitate and support relation between the interested judicial authorities. Furthermore Eurojust is intervened where Public Prosecutors, received the request for the execution of an EIO have consider appropriate the constitution of a joint investigation team (a measure not covered by DEIO), informing Eurojust.

In the analysis we have also taken into consideration a Handbook published by the Italian Minister of Justice a few months later the implementation of DEIO in Italy[32] by Legislative Decree (hereinafter: LD) of 21 June 2017, no. 108, aimed at clarifying the interpretation of the new regulation as well as papers written by judges who have worked in the area of judicial cooperation. As highlighted by a judge with a long experience in the field of judicial cooperation also at International level[33], the Handbook is welcomed because, beyond its content, has a specific meaning: is the affirmation of a commitment made by the Minister towards the judicial authority, normally left alone in the interpretation of national rules that sometimes are not clear. Moreover, the involvement of the Minister will be necessary for the reorganization of the judiciary offices with particular regard to the Office of the Public Prosecutor who, for the first time, has a specific competence as executing authority as well as issuing authority in the context of the EIO. In the future the High Council of the Judiciary (C.S.M.) will have to express his opinion in choosing Public Prosecutors with experience in the area of judicial cooperation and with a proper knowledge of a foreign language.

## 1.2 Target subjects

On the basis of the two types of questionnaires elaborated by the University of Burgos, interviews have been conducted with Italian Public Prosecutors and Judges (3 Public Prosecutors and 4 Judges); some difficulties we had in finding defence lawyers with a specific experience in the field of judicial cooperation. Following informal conversations with some lawyers, it is possible to affirm that in general defence lawyers do not have a specific knowledge of regulations on judicial cooperation in criminal matters. Some of them have studied the matter when have been involved in criminal proceedings concerning the

[32] See E. SELVAGGI, 'L'ordine europeo di indagine-EIO: Come funziona?', 2018 *Cassazione penale*, p. 45.
[33] See Minister of Justice, *Circolare in tema di attuazione della direttiva 2014/41/UE relative all'ordine europeo di indagine penale- Manuale operativo*, 26 October 2017; see, also, answers given by Eurojust to some questions related to the EIO: Eurojust, *L'ordine di indagine europeo. Cosa è utile sapere? Domande e risposte*, written by Italian Desk of Eurojust, 2017, p. 1 ff.

application of FD EAW as lawyers appointed by the State (Art. 97 CPC). Also the lack of knowledge of another language and, in particular, of English language, can be assumed as an obstacle for lawyers. For this reason we have only 5 interviews with defence lawyers.

# Section 2: Current situation

## 2.1 Legal issues

The Italian Government has transposed Directive 2014/41/EU of 3 April 2014, regarding the European Investigation Order in criminal matters (EIO), whose deadline had expired on the 22 of May 2017, by LD no. 108/2017[34], entered into force on 28 July 2017. As said before, a few months later the implementation of DEIO, the Italian Minister of Justice has published a Handbook addressed to practitioners in order to solve practical issues related to the application of national provisions. Indeed, some provisions of the DEIO represent an innovation for Italian judicial authorities (Public Prosecutors and Judges): first of all the competence to recognise and to execute the EIO falls on District Prosecution Offices, while in the past was on the Court of Appeal within the district where the requested evidence had to be collected[35]. When the required activity, under request of the issuing authority or according to Italian legislation, must be performed by the judge for preliminary investigation, the Public Prosecutor requires its execution to the judge for preliminary investigations (Art. 5 § 1 LD no. 108/2017). Moreover, where the request of assistance (issued or received) concerns offences such as of mafia type (as well as terrorism and other serious offences), it is necessary to inform the National Anti-Mafia and Counter-terrorism Prosecutor, a specific

[34] Published in *GU*, 13 July 2017, no. 162. For a comment on the LD see, among others, G. DE AMICIS, 'Dalle rogatorie all'ordine europeo di indagine: verso un nuovo diritto della cooperazione giudiziaria penale', 2018 *Cassazione penale*, n. 1, p. 22 ff.; F. FALATO, 'La proporzione innova il tradizionale approccio al tema della prova: luci ed ombre della nuova cultura probatoria promossa dall'ordine europeo di indagine penale', 2018 *Archivio penale*, n. 1, p. 1 ff; R.E. KOSTORIS, L'attuazione italiana dell'ordine investigativo europeo, in A.GIARDA-F. GIUNTA-G. VARRASO (eds.), *Dai decreti attuativi della legge "Orlando" alle novelle di fine legislatura*, Cedam, 2018, p. 491 ff.; 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*, p. 158 ff.; M.R. MARCHETTI, 'Ricerca e acquisizione probatoria all'estero: l'ordine europeo di indagine', 2018 *Archivio penale*, speciale riforme, p. 1 ff. See, also, contributions in M. DANIELE-R.E.KOSTORIS (eds.), *L'ordine europeo di indagine. Il nuovo volto della raccolta transnazionale delle prove nel d.lgs. n. 108 del 2017*, Giappichelli, 2018.

[35] Pursuant to LD 3 October 2017, no. 149, containing rules on judicial cooperation in criminal matters, also for the execution of letters rogatory, which is a matter regulated at national level within book XI of the Italian Criminal Procedure Code, the competence has been recognized to the Public Prosecutor.

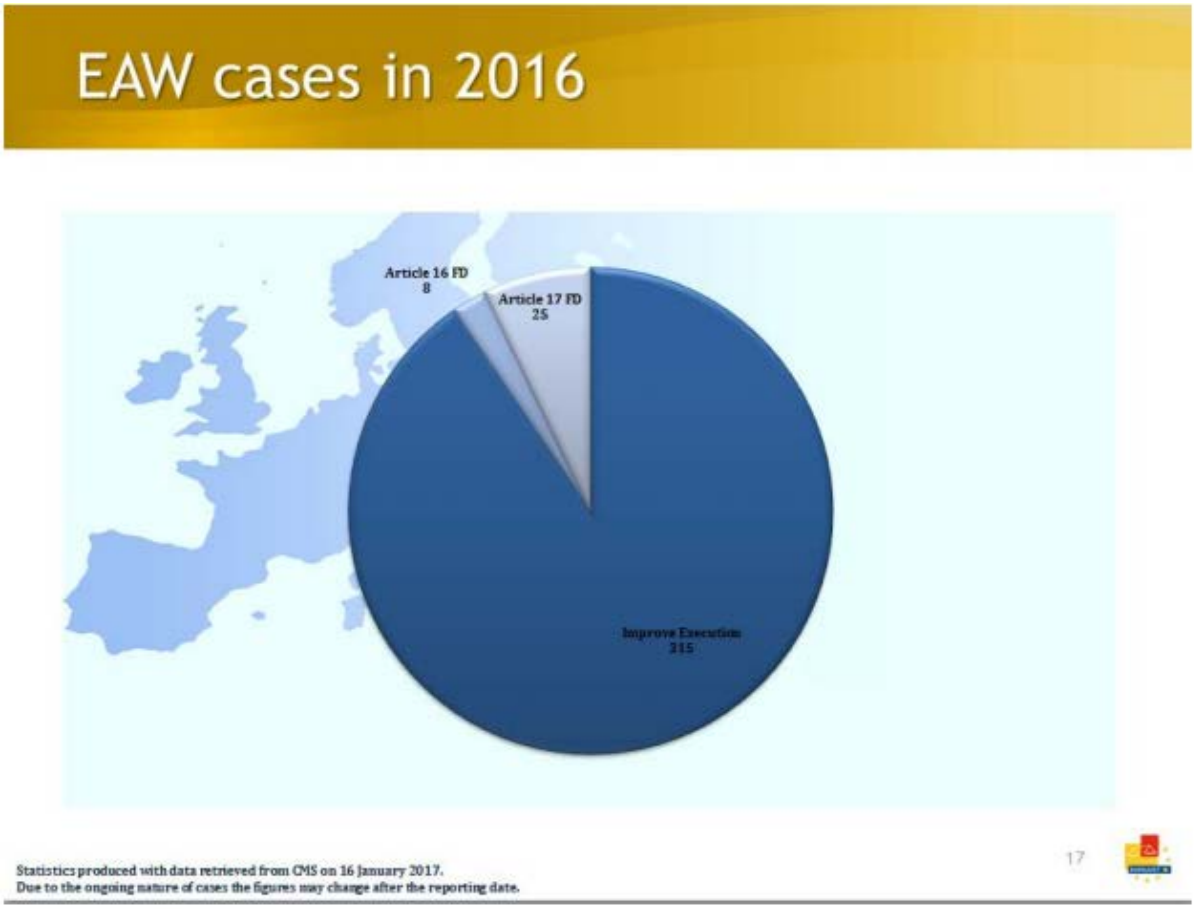
body which has the competence for the coordination of investigative activities regarding these offences and, according to practitioners, although it is not expressly recognized, also the Italian Desk of Eurojust.

Another significant change concerns new rules on interception of telecommunications with or without technical assistance. The reason is related to the late implementation by Italy of the 2000 European Union Convention on Mutual Legal Assistance in Criminal Matters (hereinafter: EU CMACM), that has represented at EU level a significant step forward in the development of judicial cooperation in criminal matters, especially in the field of interceptions of telecommunications. This Convention has been implemented by Italy only in 2017, by Legislative decree no. 52, entered into force on the 22 February 2018. As a consequence of the late implementation, the EU CMACM has not been applied in the context of judicial cooperation in penal matters.

The main instrument applied by Italian judicial authorities in the framework of judicial cooperation has been the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 (hereinafter: ECMACM), adopted by the Council of Europe as well as its additional Protocol of 17 March 1978, signed and ratified by Italy[36] and in the context of request concerning the execution of economic preventive measures ("*misure di prevenzione*"), the Convention on Laundering Search, Seizure and Confiscation of the Proceeds from crime of 20 November 1990, also ratified by Italy[37].

Regarding mutual recognition instruments specifically related to evidence, Italy has never implemented FD 2008/978/JHA, of 18 December 2008, on the European Evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters. By contrast has implemented, although with considerable delay, by LD no. 35 of 15 February 2016, FD 2003/577/JHA, on the execution in the EU of orders freezing property or evidence, now replaced by DEIO as regards freezing of evidence. In the context of judicial cooperation a relevant instruments, although not strictly connected to the gathering of evidence, is the FD EAW, implemented in Italy by law of 22 April 2015, no. 69.

[36] Italy has ratified this Convention by law 23 February 1961, no. 215 and Protocol of 1978 by law 24 July 1985, no. 436.
[37] Italy has ratified this Convention by law 9 August 1993, no. 328.




## 2.2 Practical issues

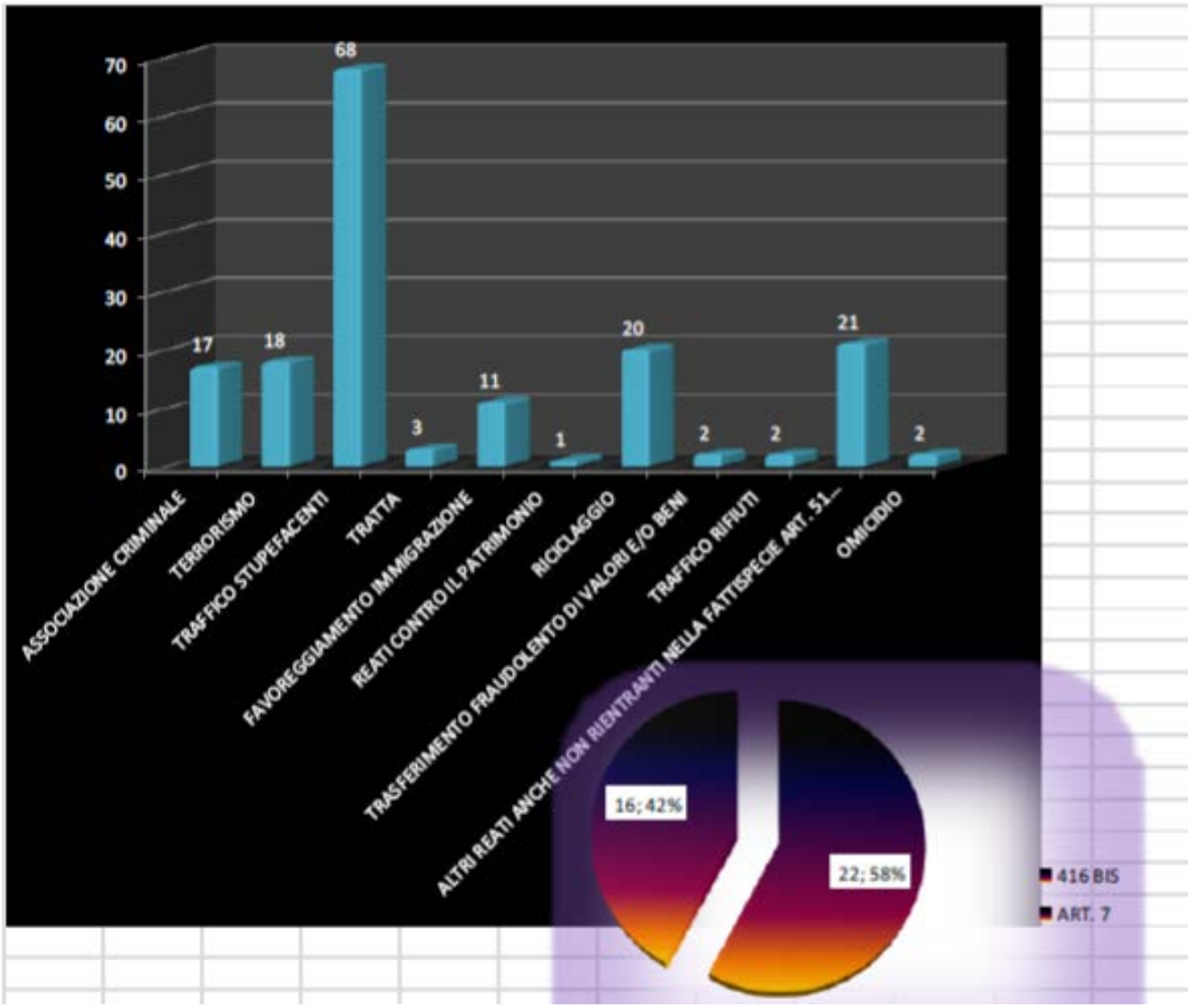
### 2.2.1 Position

The judges interviewed are Prosecutors or Judges, being a difference in Italy between the two categories. Among the latter there is a judge who has worked in the specific section of the Court of Appeal that had competence on the execution of the request regarding the letter rogatory as well as the EAW; and another who, at the date of the interview was member of the Italian Supreme Court and now is working as a member of the Permanent Representative of Italy towards the International Organisations in Wien.

Lawyers interviewed are specialised in criminal law and all of them work in their own law firm (normally composed by 4/6 lawyers).

### 2.2.2. Practice on International and/or European judicial cooperation

All the Prosecutors and Judges have a specific experience in the field of judicial cooperation in penal matters. Most of them have worked, with different positions, in criminal proceedings for crimes such as mafia-type criminal organisations, trafficking in human beings, trafficking in drugs, terrorism and other transnational offences. Also lawyers have worked in "transnational" proceedings where it was necessary to gather evidence located abroad and in one case mentioned in an interview, the evidence to collect abroad was requested by the defence and admitted by the judge, notwithstanding the opposition of the Public Prosecutor.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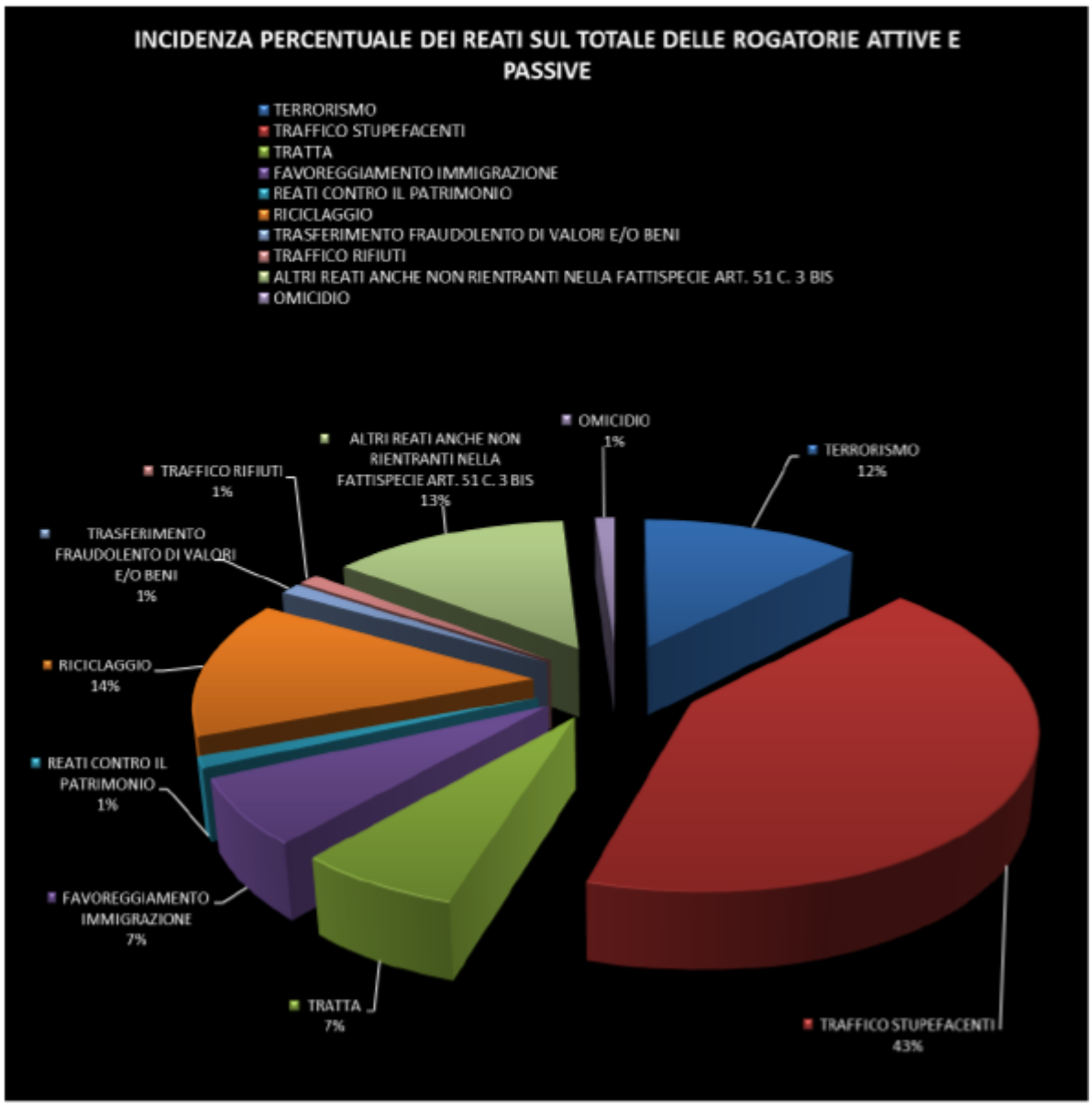
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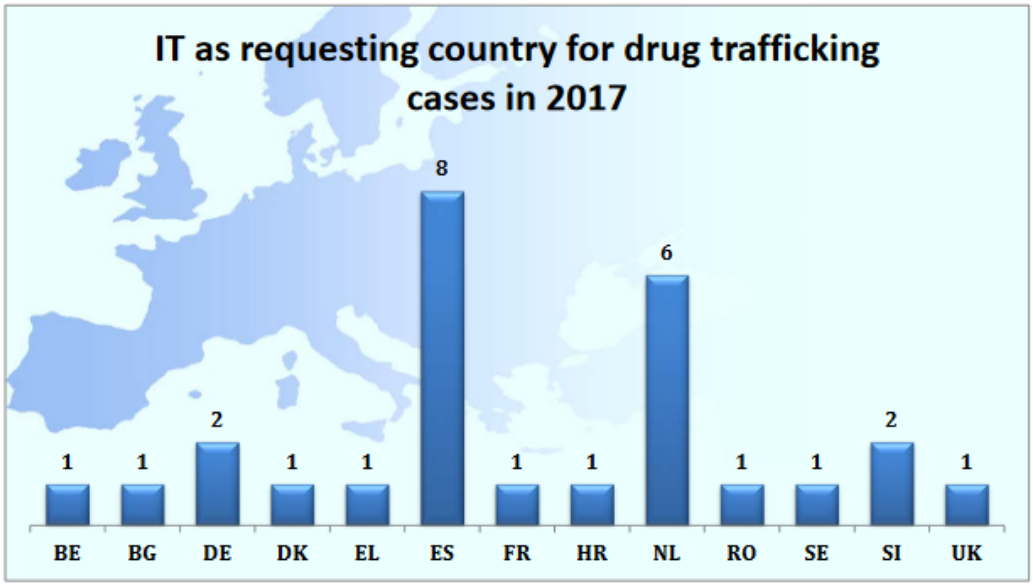
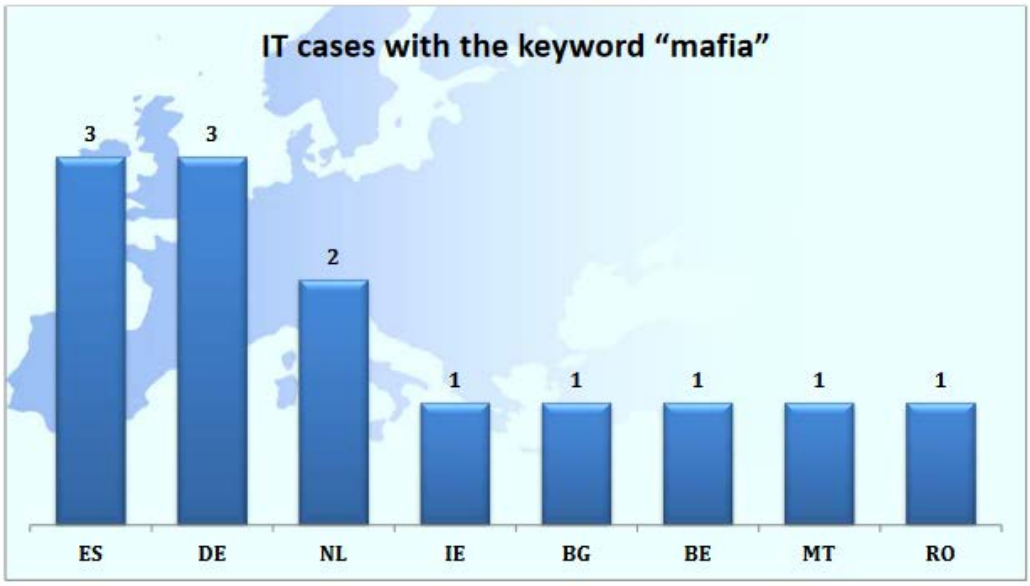



### 2.2.3. Training or education on International judicial cooperation

Any of the persons interviewed – Public prosecutors, Judges and lawyers – have received a specific training or education in judicial cooperation: they all have studied autonomously.

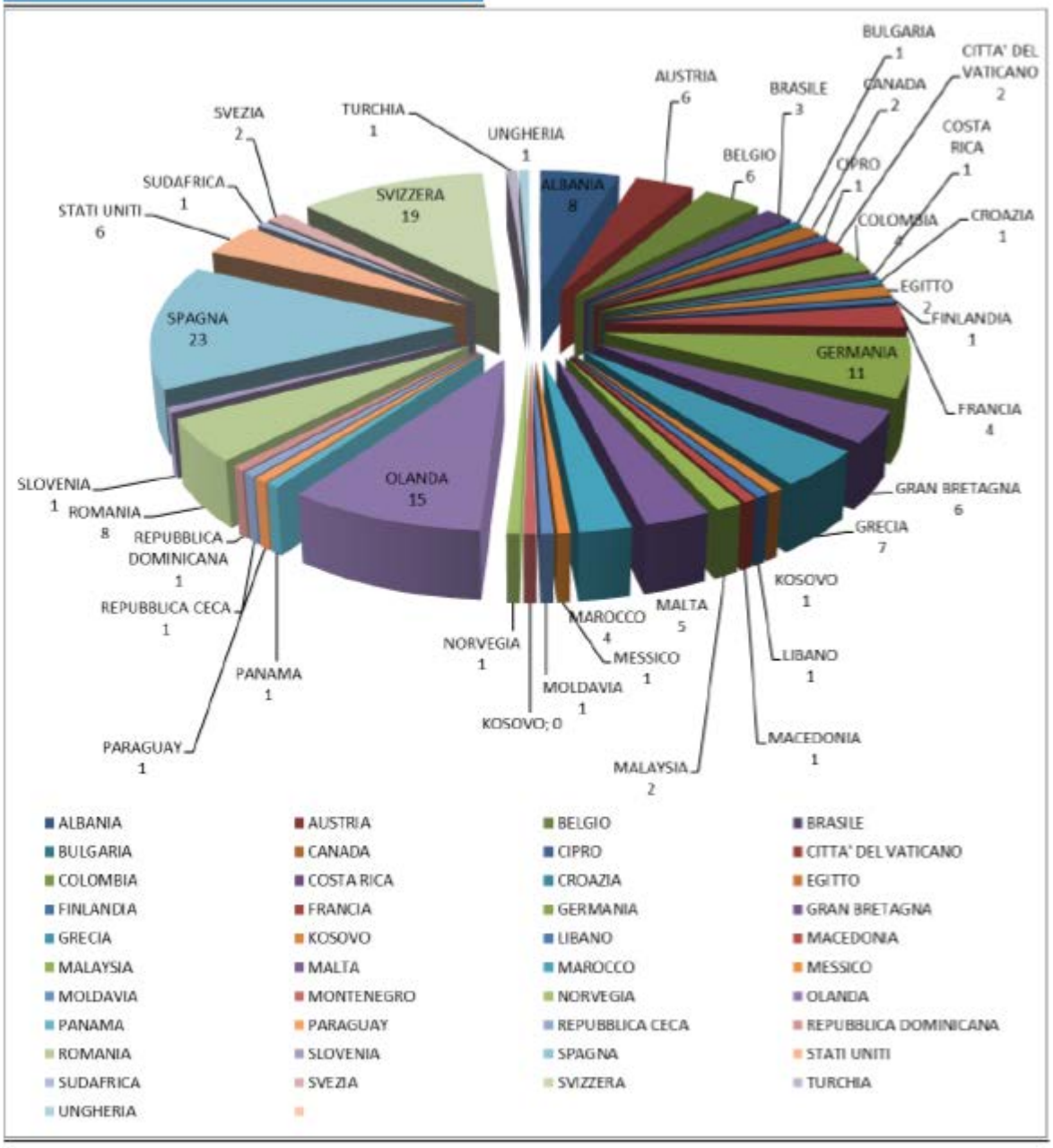
However Judges and Prosecutors have underlined that in the last few years the C.S.M. through the mandatory permanent training of Judges – has organised specific training courses on judicial cooperation, especially regarding letters rogatory and how to request the assistance to a foreign judicial authority. Also the European Judicial Training Network (EJTN) has organised courses on the application of FD EAW.

### 2.2.4. Participation in any practice on international/European judicial cooperation. Countries

All the judges have performed their activity within proceedings for transnational crimes where it was relevant the gathering of evidence abroad. Among countries with whom they have cooperated, we can mention the following: Luxembourg, Sweden, Norway, Romania, Portugal, Netherlands, Check Republic, Slovakia, Bulgaria, Germany, Poland, Croatia**,** Slovenia, Switzerland, United Kingdom, Republic of San Marino, Greece, Denmark and Belgium, USA, Colombia, China, Sudan, EAU, Virgin Islands, Dominican Republic, Munich, Switzerland, Republic of Moldova, Ukraine, Albania, Cyprus and Principality of Andorra. An important role in order to facilitate judicial cooperation is assigned to Eurojust[38].

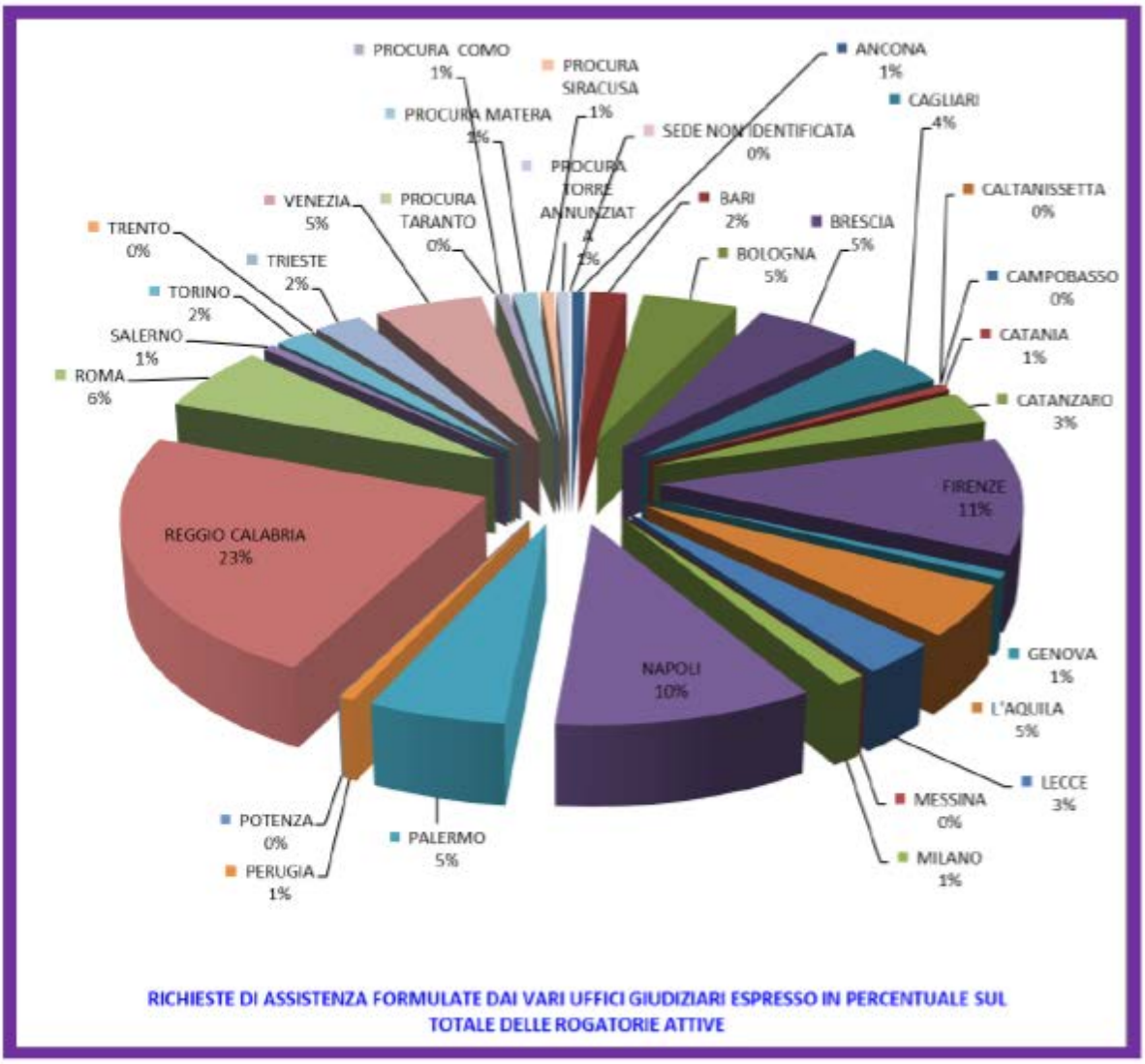
[38] See Desk italiano di Eurojust, *Relazione del membro nazionale*, 2017.

## ROGATORIE ATTIVE PER PAESE ROGATO

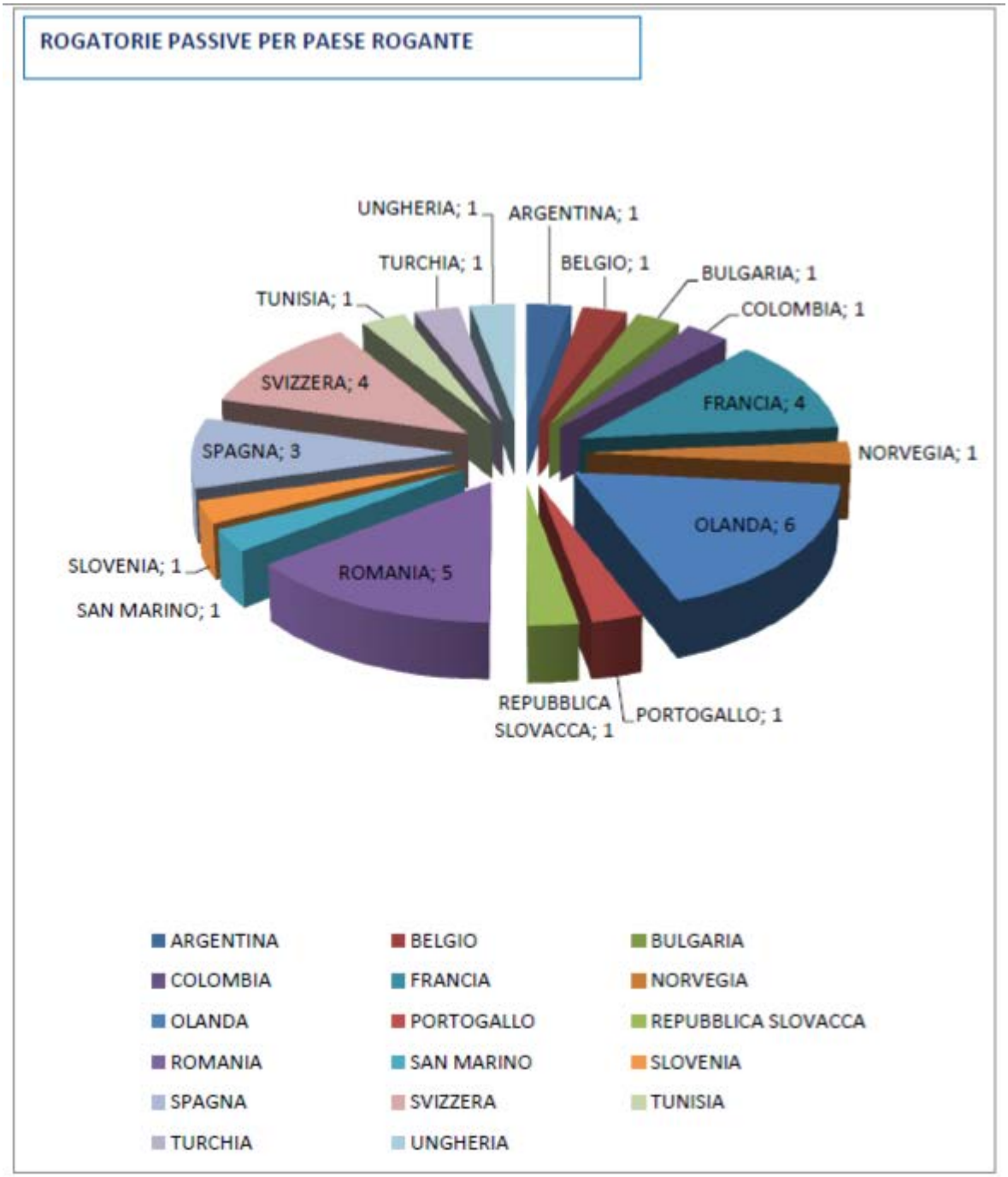


| PER DDA /UFFICIO GIUDIZIARIO | TOTALI | ATTIVE | PASSIVE |
|---|---|---|---|
| | | | |
| ANCONA | 1 | 1 | 0 |
| BARI | 3 | 3 | 0 |
| BOLOGNA | 9 | 8 | 1 |
| BRESCIA | 9 | 9 | 0 |
| CAGLIARI | 8 | 7 | 1 |
| CALTANISSETTA | 0 | 0 | 0 |
| CAMPOBASSO | 0 | 0 | 0 |
| CATANIA | 1 | 1 | 0 |
| CATANZARO | 5 | 5 | 0 |
| FIRENZE | 18 | 18 | 0 |
| GENOVA | 1 | 1 | 0 |
| L'AQUILA | 9 | 8 | 1 |
| LECCE | 5 | 5 | 0 |
| MESSINA | 0 | 0 | 0 |
| MILANO | 7 | 2 | 5 |

| PER DDA /UFFICIO GIUDIZIARIO | TOTALI | ATTIVE | PASSIVE |
|---|---|---|---|
| | | | |
| NAPOLI | 18 | 17 | 1 |
| PALERMO | 9 | 9 | 0 |
| PERUGIA | 1 | 1 | 0 |
| POTENZA | 0 | 0 | 0 |
| REGGIO CALABRIA | 46 | 38 | 8 |
| ROMA | 20 | 10 | 10 |
| SALERNO | 1 | 1 | 0 |
| TORINO | 3 | 3 | 0 |
| TRENTO | 0 | 0 | 0 |
| TRIESTE | 6 | 4 | 2 |
| VENEZIA | 12 | 9 | 3 |
| PROCURA TARANTO | 1 | 0 | 1 |
| PROCURA COMO | 1 | 1 | 0 |
| PROCURA MATERA | 2 | 2 | 0 |
| PROCURA SIRACUSA | 1 | 1 | 0 |
| PROCURA TORRE ANNUNZIATA | 1 | 1 | 0 |
| SEDE NON IDENTIFICATA | 1 | 0 | 1 |
| | | | |
| | 199 | 165 | 34 |



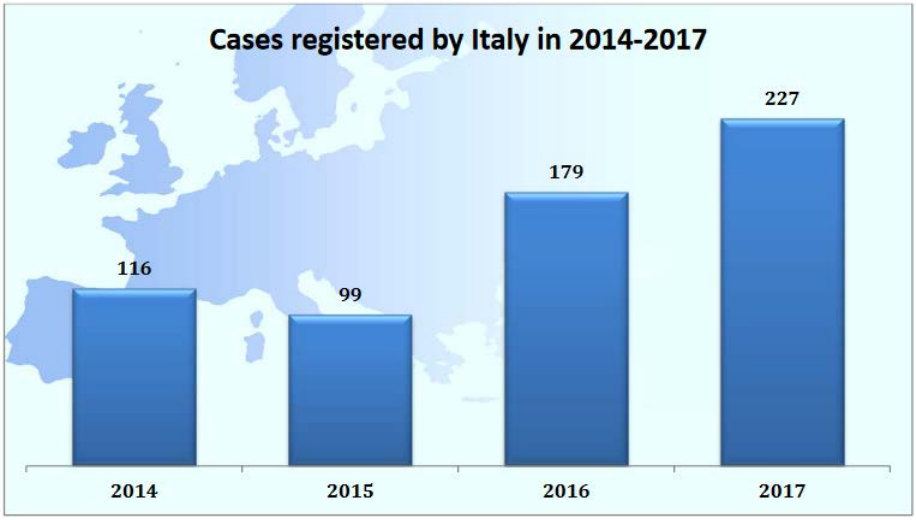

RICHIESTE DI ASSISTENZA FORMULATE DAI VARI UFFICI GIUDIZIARI ESPRESSO IN PERCENTUALE SUL TOTALE DELLE ROGATORIE ATTIVE




**2.2.5. The international/European conventions and/or legal instruments most commonly employed.**

According to the professional experience of Judges and Prosecutors interviewed, the most used normative instruments in the gathering and transmitting of evidence in criminal matters, are the following: the ECMACM of 1959 and its additional Protocol of 17 March 1978; the Convention on Laundering Search, Seizure and Confiscation of the Proceeds from crime of 8

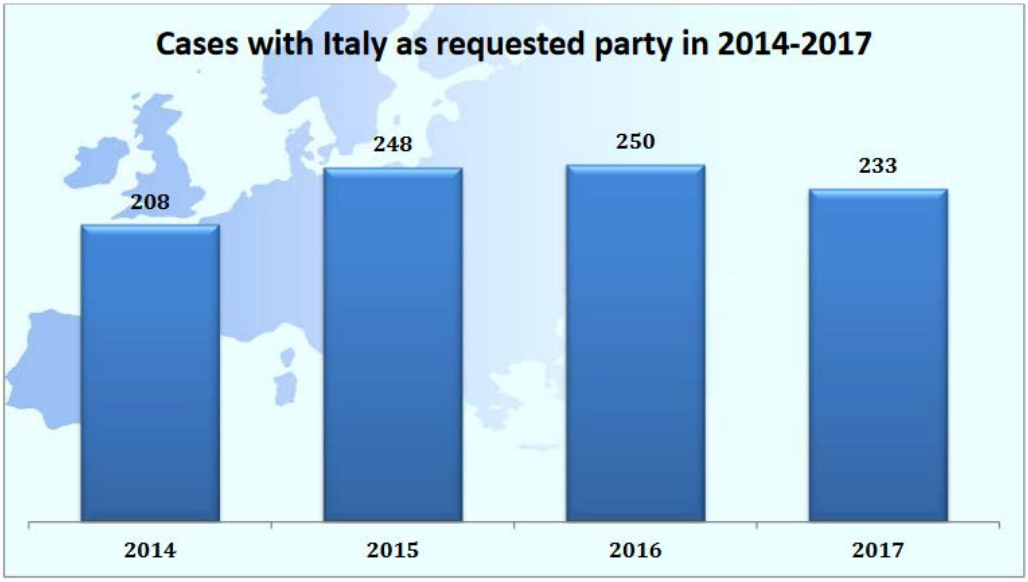
November 1990[39], especially used in the field of a special proceedings named proceedings for the application of a preventive economic measure that is regulated at national level by LD no. 159 of 6 September 2011 and following amendments; the Convention implementing the Schengen Agreement of 14 June 1985 (hereinafter: CISA); the bilateral Agreement between Italy and Switzerland of 10 September 1998; the FD EAW as implemented by Law no. 69/2005; the 1998 UN Transnational crime Convention and its additional Protocols on smuggling and trafficking of human beings. As said before Italy has ratified the EU CMLAC only recently, so this instrument has not been used by persons interviewed.




*Italy as requesting Eurojust assistance*

[39] Chambre criminelle, 13 November 2003. For a comment see G. MELILLO, 'L'esecuzione all'estero delle misure di prevenzione patrimoniali (Una interessante pronuncia della Corte di Cassazione francese)', 2004 *Questione giustizia*, p. 777 ff. As a model of "good practice" it is to mention the decision of the Switzerland Federal Tribunal of 21 January 2011 that has accepted the letter rogatory requested by the Prosecution Office of Milan aimed at obtaining, within the special proceeding of prevention, information and bank documents. The decision is published in www.penalecontemporaneo.it, 11 July 2011, with a note of E. NICOSIA, 'Il Tribunale penale federale svizzero accoglie una rogatoria della Procura di Milano finalizzata alla confisca "di prevenzione" di conti bancari'. More recently see M.A.ACCILI SABBATINI-A.BALSAMO, Verso un nuovo ruolo della Convenzione di Palermo nel contrasto alla criminalità transnazionale', 2018 *Diritto penale contemporaneo, Rivista trimestrale*, p. 122 ff.


IT judicial authorities requesting Eurojust assistance in 2017
Milano 26
Torino 20
Napoli 16
Trieste 15
Calabria 11
Roma 10
Palermo 10
Bolzano 8
Firenze 7
Bologna 7
Bari 6
Udine 5
Genova 5
Catanzaro 5
Lucca 4
Arezzo 4
Verona 3
Venice 3
Padova 3
Gorizia 3
Brescia 3
Bergamo 3
Asti 3
Ancona 3




*Italy as requested Country*

### 2.2.6. Length of criminal proceedings

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

It is impossible to give a definitive answer regarding duration because it depends on the activity requested, the seriousness of the crimes, the number of accused and other factors. In any case, the deadlines are much more respected with countries that belong to the EU and with the same countries the proceedings is usually shorter. According to one of the Public Prosecutor interviewed, for “simple activities” (such as identifications of persons, service of acts, gathering of information, examination of witnesses during a trial by means of videoconference), the duration is between 4 up to 6 months (including the translation of acts). At least 1 year for “more complex activities” (like information on bank accounts). By contrast, the direct exchange of information between police officials is more efficient (also through the use of whatsApp) once there is a contact. The request of judicial assistance addressed to Netherlands, aimed to obtain the authorisation to the transmission of data intercepted within their territory has been executed in one week, later, for prorogation in one/two days. Ukraine has executed the activity requested in 3 months (the activity aimed at ascertain the existence of enterprises with a seat in their territory). Poland and Germany, after

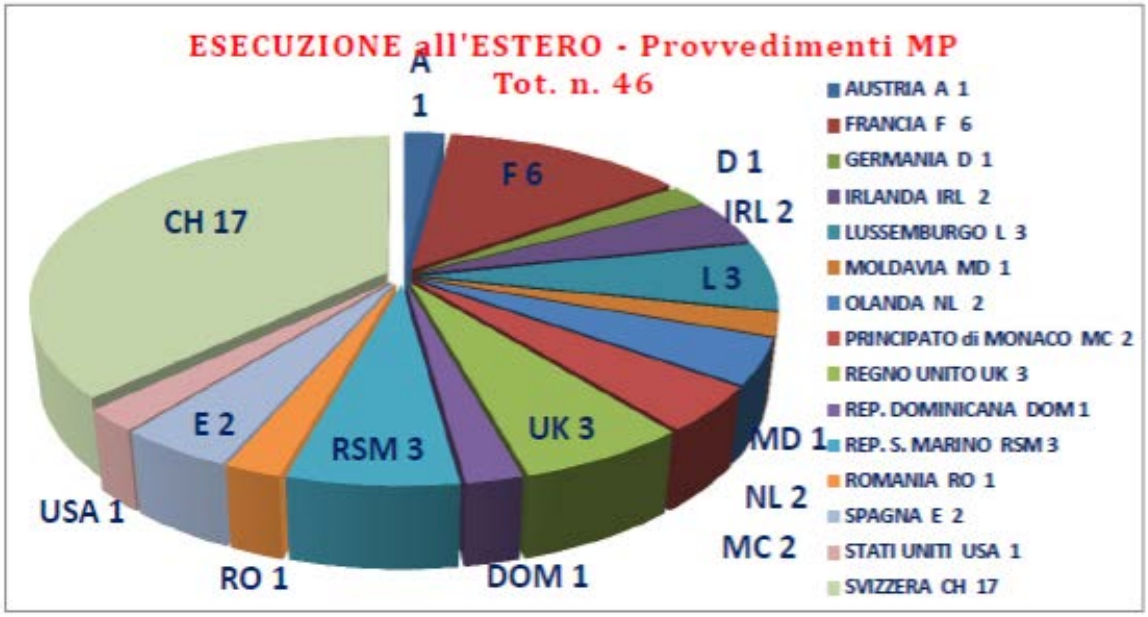
2 years, have to complete the gathering of documents and the request regarding the existence in their territory of enterprises.

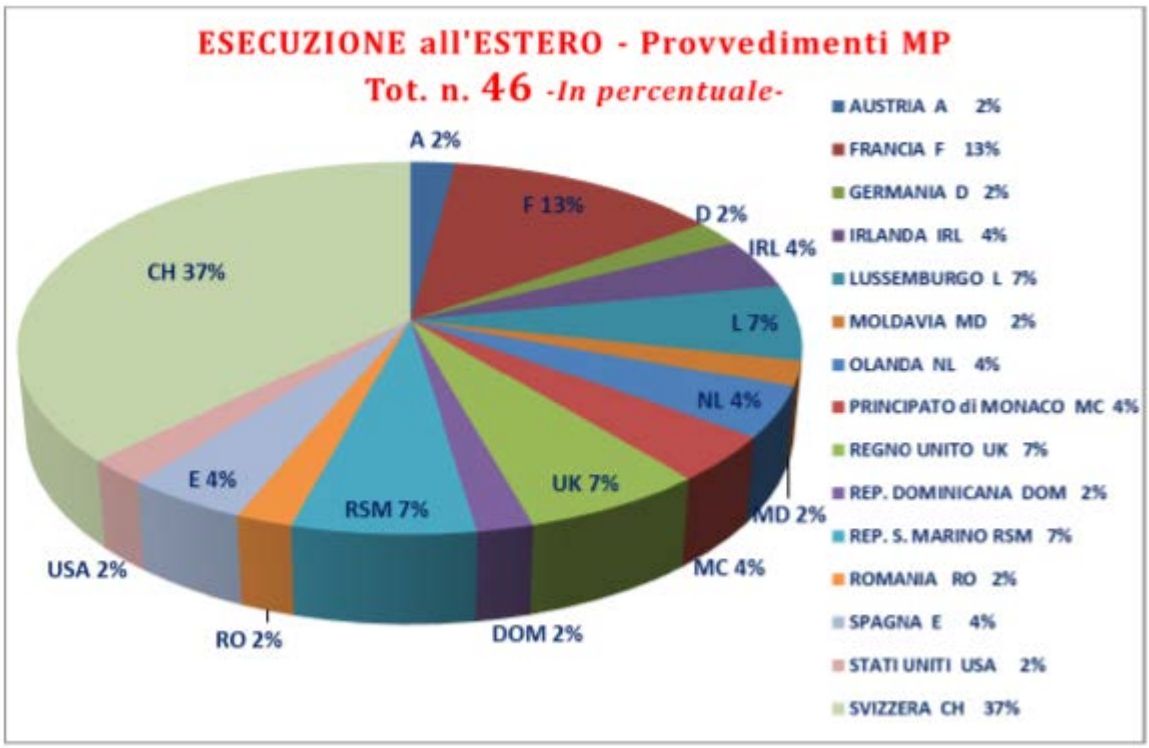
### 2.2.7. Satisfaction

For many reasons the degree of satisfaction of judges, prosecutors and defence lawyers with the response to requests for judicial cooperation is not high.
From the perspective of Public Prosecutors and judges, the main difficulties in the practice of judicial cooperation concern the different criminalization for the same behaviour also in countries that are members of EU. The lack of double criminality concerning certain types of crimes, such as the offence of participation to mafia- type organisations provided for by Art. 416-*bis* CC can be a ground for refusal the assistance requested as well as the differences between investigative tools that could be used in the national systems.
Another problem concerns the language that is used and consequently the translation: the lack of a common language at the EU level implies the risk that in the translation, especially if the translator is not an expert of law, the meaning of the content of the act could be changed.
From the perspective of lawyers, the lack of knowledge of the rules governing a different system is an obstacle in order to increase the mutual trust.

### 2.2.8. Most requested sort of assistance

Among the activities most requested in the field of judicial cooperation in criminal matters we can mention the following: information on bank accounts, on banking and other financial operations; information on the existence and the activity of enterprises that apparently have a seat abroad; gathering of documents, such as final judgments enacted by the foreign authority, records of seizures or arrest executed in the requested State; gathering of information from persons who may be able to provide information that is useful for investigative purposes; serving of a summon to appear as a witness in front of the Italian judicial authority. As said before within the special proceedings for preventive measures Italian authorities have requested information on bank accounts.




### 2.2.9. Admissibility of evidence in the ongoing criminal proceedings in Italy

In general there are not problems in admitting an evidence gathered abroad following a letter rogatory. According to Art. 431, letter d), of the Italian CPC, the trial dossier – which is in the knowledge of the trial judge – contains, among the others: the "*documentary evidence gathered abroad, by means of an international letter rogatory, and the records of*

*unrepeatable actions carried out through the same procedure*" (e.g., the results of DNA analysis) and "*the records 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*" (letter f). A particular situation concerns the case of statements given in the pre-trial stage by a person living abroad by means of letters rogatory, statements that, despite being originally repeatable, have become non-repeatable for subsequent circumstances. The Italian code (Art. 512 *bis* CPC) allows for this evidence to be read out only if the person examined, although summoned, did not appear in court, and examination at trial is absolutely impossible. Regarding the interpretation of Article 431 § 1, letter f) CCP, Italian courts allow for the use of testimonial evidence on the sole condition that the defence lawyer could take part in the execution of letters rogatory, even though the accused expressly requested personal participation[40]. As underlined by scholars, "this interpretation frustrates the *audi alteram partem* rule, giving a rather formalistic sense to the right to be fairly involved in the collection of oral evidence" [41].

### 2.2.10. Requirements as requested/executing authority

In the execution of FD EAW there have been problems related to the detention conditions in the requesting State. To solve this problem, where there are situations that could have an incidence on the execution of the request (such as the overcrowding of prisons), it would be a solution to ask the supervision of an European body.

### 2.2.11. Procedural safeguards

While in the opinion of Public Prosecutors and Judges in the judicial cooperation aimed at gathering evidence located abroad there is not any reduction of procedural guarantees, defence lawyers believe that in the field of letters rogatory there is a reduction of procedural guarantees for the person under investigation/accused.

[40] S. RUGGERI, *Audi alteram partem in criminal proceedings. Towards a participatory understanding of Criminal Justice in Europe and Latin America*, Springer, 2017, p. 195.
[41] See Cass., VI, 13 July 1999, no. 11109.

It is to say that in Italy, since 2000, by law no. 367 of 7 December, the defence both of person under investigation/accused/convicted both of the victim, can collect, independently from the prosecution, some forms of evidence (such as interviews with persons who have knowledge of the facts of the case) at all the stage of a criminal proceedings; prior to this legislation it had to make a formal request to the Prosecutor, with the risk of prejudicing its strategy. As underlined by a lawyer during the interview, although some investigative activities can be carried out by the defence, and this represents a guarantee at national level, the Italian Supreme Court[42] holds that defendants are not competent to investigate abroad. Following this interpretation, a defence lawyer wishing to collect evidence located in a foreign country must submit a formal request to the Public Prosecutor who will act through the instrument of letters rogatory. However, the judicial authority – a Public Prosecutor or a judge – could refuse to execute the request without a formal explanation, so undermining the rights of the defence, especially when there are strong reasons to believe that the evidence requested would be helpful to the accused.

Starting from this point, the LD aimed at implementing DEIO (Art. 1 § 3) is a step forwards the protection of the rights of this subject because the defence may require the issuing of an EIO. 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. If the request is refused, the Public Prosecutor adopts a reasoned order (Art. 31 § 3), while the judge issues a decision (i.e., *ordinanza*) after having heard the parties (Art. 31 § 4).

According to a judge this procedure means that the request and the refuse are in the file of the proceedings: this is a guarantee because the defence in the course of the trial could demonstrate the impossibility to gather the evidence located abroad[43].

With reference to legal remedies, a specific and new guarantee has been introduced by LD aimed at implementing DEIO. Indeed, according to Art. 13, a person under investigation and a defence may submit an opposition against the decree that recognises the EIO, to the judge for preliminary investigations. When Italy is the issuing authority, the person under investigation or the defendant, the defence, the person whose items have been seized and the person who would be entitled to their restitution, may submit a request for re-examination,

[42] Cass., I, 19 June 2007, no. 23967.
[43] E. SELVAGGI, p. 49.

against the EIO aimed at the seizure for the gathering of evidence, according to Art. 324 of CPC. Regarding the application of Art. 13 of LD, as clarified by the Supreme Court[44], the opposition is aimed at denouncing original defects of the decree of recognition of the EIO, or of its communication as well as the modalities followed for its execution. When a search or a seizure have been executed through an EIO, the only remedy is the opposition.

### 2.2.12. Information to Defence lawyers

Regarding the right of a defence lawyer to be informed about a request for judicial assistance, it is necessary to make a distinction between preliminary investigations and a trial. In the Italian criminal system, preliminary investigations are kept in secret. Therefore, except when the Public Prosecutor must carry out an activity in which the lawyer has the right to be present, shall he send a notice of the investigation to the suspect and victim. As a consequence when the Public Prosecutor during the preliminary investigation heard a person who may have relevant information for the purpose of investigations, any information is given to the defence neither to the person under investigation or to the victim. Another exception during the preliminary investigation concerns the recourse to the special evidentiary hearing regulated by Art. 392 and ff. CPC where evidence admitted shall be gathered following the procedure set for the trial (i.e. with the necessary participation of all the parties).

During the preliminary hearing and during a trial, when it is necessary to gather an evidence located abroad the defence is informed and can take part to the gathering of evidence. According to Art. 4 § 1 of the 1959 ECMACM of 1959 "*on the express request of the requesting Party the requested Party shall state the date and place of execution of the letters rogatory. Officials and interested persons may be present if the requested Party consents*". On the basis of this provision beside the traditional letters rogatory, wholly executed by the foreign authority, it has been developed the model of so called "joint letters rogatory" executed with the participation of the judicial authorities as well as of private parties of the requesting State. The possibility to take part to the activity performed abroad does not mean that in the execution of the letters rogatory it is applicable the law of the requested authority: especially where this kind of participation is not provided according to the *lex loci*, the requested State can admit or refuse the participation, although is obliged to inform the

[44] Cass., III, 11 October 2018, no. 5940, that is the first judgment concerning the EIO.

requesting authority about the date and place of the execution. However the participation of the requesting authority does not authorize law enforcement powers on foreign territory[45].

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

From the perspective of the Italian judicial system, this is one of the most problematic issue and is the main area where are emerging practical questions in relation to the implementation of DEIO.

It is, in particular, for interceptions of telecommunications whose execution does not require the technical assistance of the judicial authority of another Member State, a situation that is now regulated by Art. 31 of DEIO. According to § 1: "*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*". Such notification shall be done either prior to the interception if the location of the subject is known by the intercepting Member State, or during or after the interception has been carried out, when the authority issuing the interception order did not previously know such circumstance. Moreover, the competent authority of the notified Member State can also "where necessary" communicate the "intercepting State" that the intercepted material cannot be used or be used only under certain conditions (§ 3 lett. b) DEIO).

It is to premise that in Italy, before the entering into force of new provisions aimed at implementing DEIO, as also affirmed by the judges interviewed the recourse to routing procedure ("*instradamento*") - it means conveying of phone call departing from abroad to a place in Italy (*a fortiori* in case of phone call from Italy towards abroad, conveyed through a service provider located in Italy) - did not required the communication to the competent authority of the State interested by the communication that had its source in the foreign

[45] See Trib. Milano, 19 September 2011, RG 1622/07, in www.penalecontemporaneo.it.

territory and were heard by the Italian Authority. Indeed, according to Italian case law[46], the recourse to routing procedure ("*instradamento*") does not imply any violation of provisions on letters rogatory, because all the activity of interception, reception and registration of phone call is performed in Italy, while is necessary the letter rogatory for intervention abroad related to interceptions of conversations abroad or captured only by a foreign service provider[47]. Moreover, there is no need to request judicial cooperation if a mobile phone being intercepted is carried abroad and: a) the electronic surveillance focuses only on national telephone numbers being contacted or b) the telephone communications involving that telephone device are channeled to a domestic operator[48]. This happens when a national sim card located in a foreign country communicates with other sim cards of its same nationality. If it is deemed necessary to intercept the communications of a non-national mobile phone located abroad with other foreign mobile phones, in that case the request of judicial cooperation is necessary[49].

This interpretation was favoured by the non-ratification of EU CMLACM, that regulates the same situation in Art. 20, headed "Interception of telecommunications without the technical assistance of another Member State". According to § 2, "Where for the purpose of a criminal investigation, the interception of telecommunications is authorised by the competent authority of one Member State (the 'intercepting Member State'), and the telecommunication address of the subject 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 inform the notified Member State of the interception: (a) prior to the interception in cases where it knows when ordering the interception that the subject is on the territory of the notified Member State; (b) in other cases, immediately after it becomes aware that the subject of the interception is on the territory of the notified Member State. Then § 3 enumerates the information that it is necessary to notify.

The situation is changed following the implementation of EU CMLACM by LD n. 52 of 2017 as well as of DEIO by LD n. 108 of 2017. Both instruments have provided respectively in Art. 20 and 31, the notification to the competent authority of the Member State where the subject of interception is located from which no technical assistance is needed. Therefore, in

[46] See Cass, IV, 5 April 2017, no. 46968.
[47] See Cass, I, 4 March 2009, no. 13972; Cass, VI, 12 December 2014, no. 7634.
[48] See Cass., III, 3 March 2016, no. 25833.
[49] See Cass, IV, 7 June 2005, no. 35229.

relationship with EU States that have implemented DEIO it is to apply Art. 31 of DEIO. Also in the Handbook published by the Minister of Justice and addressed to practitioners is affirmed that the entry into force of LD no. 108/2017 aimed at implementing DEIO should interrupt the practice of "*instradamento*".

As said before, Art. 31 DEIO establishes the obligation to notify the relevant State, prior to the interception of the telecommunications if the competent authority knows that "the subject of the interception is or will be on the territory of the notified Member State" (Art. 31 (1) a) DEIO). If the authority does not know beforehand where the subject is or will be (or the location of the data), the notification shall be done to the Member State where he/she was at the moment of the interceptions, once this is known.

Several practical questions have arose. First, considering that in accordance with Article 30 § 3 DEIO, the "notified State" can prohibit the interception where the "*interception would not be authorised in a similar domestic case*", a matter of concerns is the different interpretation by Member States of this phrase. Indeed, according to the experience gathered by Eurojust, most of Member States have transposed literally the content of DEIO. It is not the case in Italy. Following Article 24 of Italian LD n. 108 of 2017, when the Public Prosecutor has received the notification regarding the interception, he has to transmit to the judge for the preliminary investigations, who is the competent judicial authority for measures that interferes on fundamental rights of individuals. Is the judge who may order the termination of interception "if it concern an offence for which, according to national law, would not be permitted": it means that the Italian authority will conduct a formal control. As a consequence, foreign judicial authorities who receive a notification from Italian authorities, on the basis of a confront between the information set out in Annex C and national rules, believes that there is not an "analogy" and therefore have ordered the termination of interception and the impossibility to use any material intercepted (it happened with Germany and Belgium). With the aim to avoid this situation, Eurojust has invited Italian judicial authority to fill in annex C with particular attention, especially in the part related to "*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*" (Annex C, V.). It is necessary to give information on the following points: the offence for which it is proceeding; the description of the investigative context and of level of proof required; the necessity that

has required the recourse to the technical instrument with regard to the specific target and grounds for evidence related to the offence; the qualification of the person (person under investigation or third party) that is presumably using the instrument intercepted; if the person intercepted is not the person under investigation it is necessary to specify relation with the illicit conduct and/or relationship with the persons who are responsible of the offence; a reference to the decision adopted by the Italian Judge who has authorised the interception.
Another problem concerning interceptions underlined during interviews is that in Italy we have a different regulation for the gathering of whatsapp messages or for the gathering of messages sent by e-mail[50].

### 2.2.14. Cost

According to interviewees it should be possible to ask for the sharing of costs. It is difficult an assessment of the proportionality by the requested authority. Shall we address a request for an expensive interception to a State that is incurring in economic problems, the risk is to look at the economic situation rather that to the aim of the act requested. According to DEIO the executing States shall bear all costs undertaken on the territory of the executing State. When the executing authority considers the costs excessive high, may consult with the issuing authority to share costs. In this case, according to the Handbook, it can be useful the support of the Ministry of Justice[51].

### 2.2.15. Overall view

Judges and prosecutors have the opinion that the system of cooperation at EU level is favourable. Defence lawyers do not share the same opinion and according to them the system is unbalanced in favour of the prosecution[52].

[50] See R. DEL COCO, 'L'utilizzo probatorio dei dati whatsapp tra lacune normative e avanguardie giurisprudenziali', 2018 *Processo penale e giustizia*, n. 3, p.532 ff.
[51] See p. 30.
[52] For critical remarks see, among scholars, F.M. GRIFANTINI, 'Ordine europeo di indagine e investigazioni difensive', 2016 *Processo penale e giustizia*, n. 6, p. 3 ff.

### 2.2.16. Benefits/strengths

In the current system a real fight against transnational crimes – such as terrorism, trafficking and smuggling of human beings… – requires an efficient system of judicial cooperation. Despite the efforts recognized to Courts of Appeals and Prosecutor General Offices when dealing on decisions and executions on requests of mutual legal assistance, the relevant procedures resulted lengthy, especially when after the designation by Courts of Appeal, other authorities such as judges of preliminary investigations and public prosecutors (when the latter were delegated by the judges of preliminary investigations) were called to execute such requests and then transmit the acquired evidence to the Courts of Appeal that forwarded such evidence to the requesting foreign law enforcement agencies[53]. The Ministry of Justice, in 2015[54], recommended to expedite the procedures related to judicial cooperation. Such recommendations, however, called on domestic judicial authorities to transmit the own requests straight to the relevant foreign law enforcement agencies directly or through the European Judicial Network or Eurojust and focused therefore only on requests of judicial cooperation issued by domestic judicial authorities. Following the implementation of DEIO Public Prosecutors and judges of preliminary investigations are entitled to request mutual legal assistance and issue decisions and orders to be executed in EU Member States directly to the corresponding foreign judicial authority. The direct communication between authorities provided by DEIO is a positive factor.

Among other negative factors underlined by scholars[55] in the traditional system of cooperation there was the application of the principle of reciprocity; the recourse to the *lex loci* for the gathering of evidence abroad; the limited role assigned to the requesting authority in collecting the evidence located abroad.

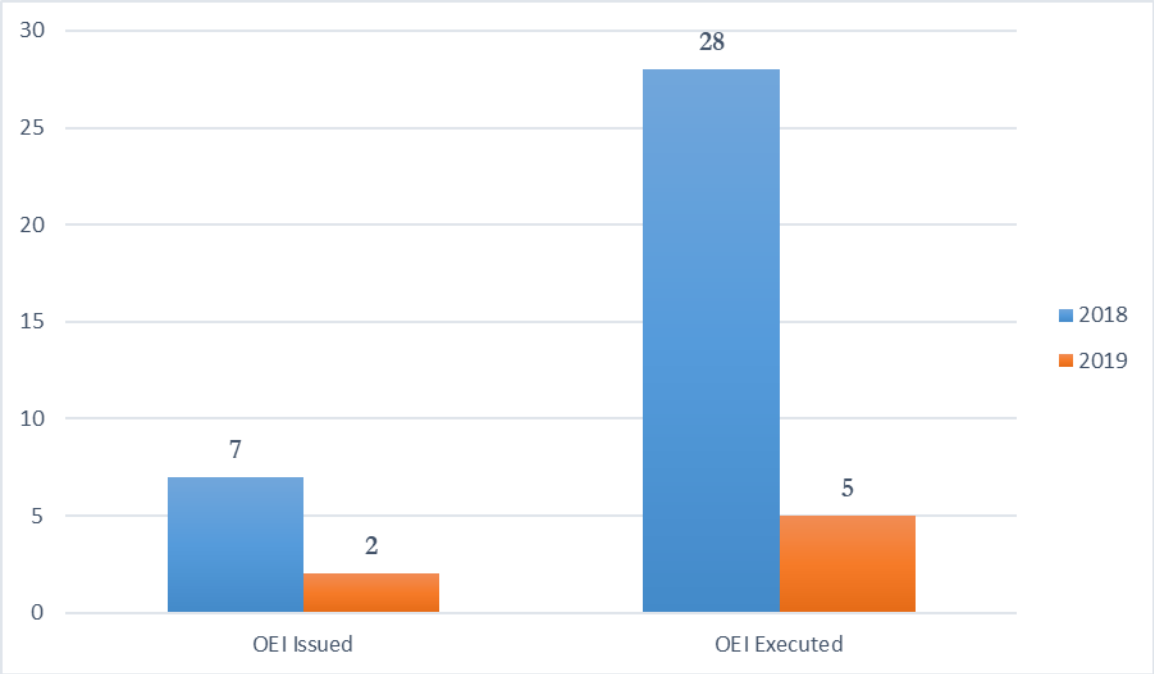
### 2.2.17. Implementation of the European Investigation Order

[53] See N. PIACENTE, Overview of Italian legislation and case law on judicial cooperation, 2018 *Diritto penale contemporaneo, Rivista trimestrale*, p. 65 f.
[54] See Ministero della Giustizia, Circolare 10 August 2015 – *Cooperazione giudiziaria internazionale in materia penale. Canali di trasmissione delle richieste di assistenza giudiziaria. Esigenze di razionalizzazione*.
[55] F. RUGGERI, 'Le nuove frontiere dell'assistenza penale internazionale: l'ordine europeo di indagine penale', 2018 *Processo penale e giustizia*, n. 1, p. 132.

Most of the persons interviewed have not practice in the application of DEIO, but Public Prosecutors and Judges are optimistic on the future of this new instruments which is giving good results. Less optimistic are lawyers who do not see an improvement in the level of guarantees for the accused involved. According to the judges the DEIO is a first step towards an European code of criminal procedure, and an harmonisation of the stage of investigations as well as of evidence. The comparison with foreign normative models where there is a high level of guarantees could increase the circulation at the EU level of the best model. The EIO should considerably improve the effectiveness of judicial cooperation due to the limited grounds for refusal and the speediness of the proceedings. It also covers any investigative measure, so overcoming the fragmentation of the previous system based on several instruments with the risk of a conflict among them.

The Head of the Public Prosecutor office in Palermo, by decision adopted in November 2017, has instituted two different registers, one for letters rogatory and another for the EIO, to be distinguished between active and passive ones, and which have to be filed by the Secretary of the Public Prosecutor. The following elements should be included in the registers: requesting authority and date of receipt; summary of the activity requested; responsible judge; date and decree of recognition (in case of an EIO) and/or of delegation for the execution (in case of letters rogatory) and delegated authority (for letters rogatory) and delegated authority (judicial police or other office in relation to the type of activity); date of execution of the activity; date of the transfer of evidence gathered. This should facilitate the collection of statistical data.

| **PUBLIC PROSECUTOR OFFICE OF PALERMO** | | |
|---|---|---|
| | **2018** | **2019** |
| **European Investigation Order** **ISSUED** | **7** | **2** |
| **European Investigation Order** **EXECUTED** | **28** | **5** |




### 2.2.18 Lack of implementation

The deadline for the transposing of DEIO has expired on the 22 of May 2017 and only at the date of 12 September 2018 the process of implementation has been completed[56]. Concerning the legal regime to apply in relationship with Member States that had not transposed the DEIO, the text of the Italian LD implementing the DEIO, like other national legislations, does not contain any provision regarding transitional situations. At this regard practitioners have followed the teleological/pragmatic interpretation given by the Italian desk of Eurojust and by the European Judicial Network (EJN). According to them, the word "replaces" used in Article 34 DEIO does not entail the automatic abolition of all previous normative instruments adopted in the field of judicial assistance: they will retain their application in situations where the DEIO is not applicable, such as for instance in relation with Denmark and Ireland, and also in relation with Member States that have not completely transposed the DEIO[57]. Such an

[56] See https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=120.
[57] According to Eurojust, *Note on the meaning of "corresponding provisions" and the applicable legal regime in case of delayed transposition of the EIO Directive*, p. 5, a majority of national authorities consulted were in favour of a pragmatic/teleological approach. A few national draft EIO law prescribe the continued use of EU CMACM in relation with 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).

interpretation would be in line with the aim of the Directive and also with the application of the principle of interpretation in conformity to the content of Directives, as developed by the ECJ. It is clear from Article 35 § 1 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 Italian legislation this means that for requests received before the 28 July 2017 (date of entry into force of DEIO) shall apply LD no. 52 of 2017, in relation with States that have ratified 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 rule on the transfer of evidence, at this aim it is necessary also to apply traditional instrument of cooperation.

### 2.2.19 Special questions to lawyers

*-Is the defence in transnational criminal proceedings in a disadvantaged position compared to cases involving national criminal justices system only? Are the provisions for legal aid enough?*

All the lawyers believe that the defence is at a disadvantage in transnational criminal proceedings with respect to national cases (see sub 2.2.12 and 2.2.13). Among other reasons, due to lack of complete knowledge of the foreign language and the legal mechanisms of the States involved, but above all because the intervention in procedures abroad is conditioned to the availability of financial means. At this regard Italian regulation on legal aid would not apply to defence activity carried out abroad[58].

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

A lawyer interviewed has requested the gathering of an oral evidence abroad as a condition for a special proceedings named summary trial (*giudizio abbreviato*). The requested was admitted by the judge of the preliminary hearing, notwithstanding the opposition of the Public Prosecutor. In other cases the answer was negative. A lawyer interviewed has requested the

[58] On the right to the "dual defence" within FD EAW see F. SIRACUSANO, 'Il diritto all'assistenza del difensore nel procedimento di esecuzione del mandato d'arresto europeo', in D. NEGRI-P.RENON (eds.), *Nuovi orizzonti del diritto alla difesa tecnica*, Giappichelli, 2017, p. 238 ff.

gathering of evidence abroad (such as video- recording) within an EIO, but the requested has been rejected on the justification that it was not relevant for the proceedings.

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

Regarding the evidence obtained abroad, there are not sufficient mechanisms for challenging the validity.

## Section 3: Steps towards a model shift in evidence gathering and transmission

### 3.1 Glimpsing the future: what is expected on the EIO?

Most of the persons interviewed have not practice in the application of DEIO, but Public Prosecutors and Judges are optimistic on the future of this new instruments. Less optimistic are lawyers who do not see an improvement in the level of guarantees for the accused involved. According to the judges the DEIO is a first step towards an European code of criminal procedure, and an harmonisation of the stage of investigations as well as of evidence. The comparison with foreign normative models where there is a high level of guarantees could increase the circulation at the EU level of the best model. The EIO should considerably improve the effectiveness of judicial cooperation due to the limited grounds for refusal and the speediness of the proceedings. It also covers any investigative measure, so overcoming the fragmentation of the previous system based on several instruments with the risk of a conflict among them.

The DEIO also includes access to electronic evidence but the Directive does not contain any specific provisions on this type of evidence. The European Commission, by proposing the introduction of European Production Orders and European Preservation Orders[59], is aimed at making it easier to secure and gather electronic evidence for criminal proceedings stored or held by service providers in another jurisdiction. The new instrument will not replace the EIO for obtaining electronic evidence but provides an additional tool for authorities. There may be

[59] See Strasbourg, *Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters,* 17 April 2018, COM (2018) 225 final.

situations, for example when several investigative measures need to be carried out in the executing Member State, where the EIO may be the preferred choice for public authorities. Creating a new instrument for electronic evidence, according to the content of the Proposal, is a better alternative than amending the EIO Directive because of the specific challenges inherent in obtaining electronic evidence which do not affect the other investigative measures covered by the EIO Directive.

## Conclusions

1) The application of DEIO at national level requires an Office of the Public Prosecutors composed by a group of persons with specific competences in the area of judicial cooperation and with the knowledge of foreign languages.
2) Regarding cross-border offences it is important that the communication relevant to the issuing or the execution of an EIO to the National Anti-mafia and counter-terrorism Prosecutor is disclosed, as well as to Eurojust, which is playing a key role in this field.
3) A system of judicial cooperation to be effective has to reduce delays in cross-border access to the evidence, that is one of the crucial point of the judicial cooperation based on mutual assistance Conventions.
4) Following the application of DEIO in Italy it will not be possible to use the "*instradamento*" procedure for the interceptions of telecommunications without technical assistance, a system criticised by several authors. Following Artt. 43 and 44 of the Italian LD, the Public Prosecutor prior to the interception for which no technical assistance is needed is obliged to notify the competent judicial authority of the MS where is the subject of interception "immediately after it becomes aware that the subject of the interception is or has been during the interception, on the territory of notified Member State". However, according to the Handbook of the Minister of Justice[60] the notification is not necessary when intercepting a target that is in the Italian territory, are captured conversations from or towards persons that are located in the territory of another Member States (so called "indirect interception"); the

[60] See footnote no. 4.

"*instradamento*" will be used for targets localized in the territory of States that are not bound by DEIO neither by EU CMLACM .

5) Regarding the defence, notwithstanding the DEIO and also Italian LD provide that the issuing of an EIO may be requested by a suspected or accused person, there is not a real equality of harms with the Public Prosecutor. Moreover participation of a defence during the gathering of evidence abroad, although not specifically provided, should be encouraged by the executing State.
6) The DEIO does not contain any specific provisions on the "electronic" evidence. Should the Commission approve the Proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters[61], it will be necessary to adopt a specific regulation in order to avoid a new fragmented system.

## Abbreviations and Acronyms

| | |
|---|---|
| AFSJ | Area of Freedom, Security and Justice |
| appl./appls. | application/applications |
| Art. | Article |
| Cass | Italian Supreme Court |
| CC | Italian Criminal Code |
| 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 |
| CSM | High Council of the Judiciary |
| 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 |

[61] Strasbourg, 17 April 2018, COM (2018) 225 final.

| | |
|---|---|
| Eg | *exempli gratia* |
| *Ex* | according to |
| EEW | European Evidence Warrant |
| EIO | European Investigation Order |
| EU | European Union |
| EU MLACM | Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union established by Council Act of 29 May 2000 |
| ff/*et seq* | and the following |
| Ie | *id est* |
| LD | Italian Legislative Decree |
| 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 |
| Trib | Tribunal of first instance |

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# "Judicial practices related to evidence transfer in Poland"

[26.01.2019]

**WORKSTREAM 2 – PHASE 2**

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

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## Section 1: Resarch objectives

## Introduction

Classical mutual legal assistance within the EU was based mainly on the European Convention on Mutual Assistance in Criminal Matters[62](with two additional protocols[63]), CISA[64] and the EU Convention on Mutual Assistance in Criminal Matters Between the Member States of the European Union[65] (with one additional protocol[66]). Those acts were replaced by 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 (hereinafter: DEIO). DEIO also replaces two EU instruments: Framework Decisions 2008/978/JHA[67] and 2003/577/JHA[68] (art. 34 (2) of the directive 2014/41/EU).

Directives are implemented into Polish legislation by means of a separate law, supplemented with a circular concerning the application of the law in practice.

Although the deadline for the implementation of DEIO was 22 May 2017, it has been transposed to Polish legal system in the beginning of 2018.[69] This is the main disadvantage: at the time of conducting abovementioned interviews, the law professional had not known how the Polish legislator would transpose the provision of DEIO to the Polish CPC.

62 Signed on 20 April 1959, ETS no. 030, the convention was ratified by all EU member states.

63 Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, ETS no. 030, signed on 17 March 1978 and the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters signed on 8 November 2011, ETS no.182. The former was ratified by all EU member states, the latter was ratified by 22 EU member states (except Austria, Greece, Hungary, Italy, Luxembourg and Spain).

64 Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239 of 22.9.2000, p. 19-62.

65 OJ C 197 of 12.7.2000. The convention was ratified by 24 EU member states (except Croatia, Greece, Ireland and Italy). However, it must be noticed that the purpose of this Convention is to supplement the provisions and facilitate the application between the member states of the European Union's already binding instruments (inter alia Council of Europe Convention on MLA).

66 Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union established by the Council in accordance with Article 34 of the Treaty on European Union OJ C 326 of 21.11.2001.

67 Council Framework Decision 2008/978/JHA of 18 December 2008 on the European Evidence Warrant for the purpose of obtaining objects, documents and data for the use in proceedings in criminal matters, OJ L 350, 30.12.2008, p. 72–92 (hereinafter: FD EEW). In fact, this act was repealed by EU Regulation 2016/95 repealing certain acts in the field of police cooperation and judicial cooperation in criminal matters, OJ L 26, 2.2.2016, p. 9–12. At the time of repeal, the FD EEW was implemented only by 6 states (Croatia, Denmark, Finland, Netherlands, Slovenia, Spain). According to art. 2 of the regulation 2016/95, any European evidence warrant executed under FD EEW will continue to be governed by that Framework Decision until the relevant criminal proceedings have been concluded with a definitive decision.

68 Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ L 196, 2.08.2003, p. 45-55. However, directive 2014/41/EU only replaces this FD in regard to freezing of evidence

69 The Law of 10 January 2018 r. regarding amendments to the Code of Criminal Procedure, The Journal of Laws, item 201. This amendment entry into force of 8 February 2018.

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## Target subjects

The main objective is to describe the current state of judicial cooperation in gathering of evidence not only from theoretical perspective, but also from practical one. Indeed, the experience of practitioners in this field is the starting point to identify the strength and weakness of the system in order to better approach the practical problems that are emerging in the application of DEIO.

Two models of interview were elaborated: one for judges and prosecutors and another for defence lawyers. The Polish report is based on the information gathered through direct interviews with law professionals: judges, prosecutors and defense lawyers. However, most questions in the questionnaires, elaborated by the University of Burgos, were formulated in a general way, since some questions about the practical use of EIO are unlikely to be answered answer in conlusive way, for obvious reasons.

Interviews were conducted with Polish lawyers of Warsaw, Kraków and other, also smaller towns. We had some difficulties finding Public Procecutors who would be ready to provive relevant information. Two Public Prosecutor Offices in Warsaw declared that any of the Prosecurors would give us an interview. It is hard to establish the meta-reason.

## Section 2: Report on questionnaires evaluation

Definitely, the most important part of Workstream 2 – Phase 1 of Horizion 2020 „Best practices for EUROpean COORDination on investigative measures and evidence gathering" was conducting interviews with law professionals[70]. In Poland, due to essence of EIO instrument and organisational part of the Polish implementation of EIO Directive, which foresees the participation of Judges and Prosecutors at any stage of proceedings, as well as the organisation of Polish Judiciary, utmostly important was to conduct interviews with thereof[71].

### 2.1. Overall view of judges and prosecutors questionnaires content: general remarks

The interviews were conducted only for research purposes, especially in order to learn about the Polish judicial practice on international and European judicial cooperation in criminal matters related to the transmission of evidence and its admissibility. Collected responses remain anonymous and were used solely to provide a general idea about the practice and its needs in EIO area. Although there was such an option, the interviewers did not ask permission to record any interview, since the paper protocol was sufficient.

Questions and interrogated areas were as follows: General questions, Experience in EU judicial cooperation and Cross-border evidence.

Specified questions were devoted to both personal experience and needs of judicial cooperation in area of cross border evidence gathering. The questions concerned the interviewee‘s position and work experience at court in his or her current position as well as their work on international and/or European judicial cooperation. A further question touched the matter of specific training or education delivered by courts or other institutions in order to prepare for international judicial cooperation. Alternatively, the interlocutors who participated in such a specific traininig were asked to evaluate the helpfulness of the training or education in their daily work on international judicial cooperation along the criminal procedure. A further question concerned experience[72] in proceedings carried out (or participated), which

70 See: WP2 - Comparative analysis of specific national and European jurisprudence and legislation [Months: 1-8], on UNIPA, UBU, UCM, UJ; see esp. p. 3 „Interviews addressed to judicial authorities and involved juridical practitioners (Prosecutors' Office, judicature, etc.)" in GRANT AGREEMENT No — 723198 — EUROCOORD, p. 68.

71 See: art. 589w *in medio* CCP.

72 Esp. specified in number of.

calls for previous practice in international/European judicial cooperation. Also it was requested to specify if it was as requesting or executing authority. As a consequence of previous affirmative responses interviewee was asked to which countries.

The next batch of questions concerned the matter of the most frequently used international/European conventions and/or legal instruments commonly employed according to the ones within the EU judicial cooperation. Another interrogated area was strictly related to the duration of the criminal proceedings. The interviewee was asked to answer, out of his or her experience, how the international judicial cooperation generally affected the practice and duration of international proceedings. Also, there was a question about expanding criminal proceedings duration due to judicial cooperation. Depending on previous answers, there was sequel question about the general time for executing the request since it is issued. The interviewee was also asked to promote a general rule upon his or her experience about the shortest and most extensive deadline respectively and with which countries involved. A further question touched matter of ones imaginations (literally: beliefs) about the degree of compliance of international judicial cooperation instruments (namely: satisfactory or not). Each interviewee was asked to express his or her free opinions in this area.

Another sort of examination touched upon the kinds of assistance that had been most frequently requested in international/European judicial cooperation according to one‘s experience. Also, it was necessary to specify if any of these requests had been related to the transmission of evidence and/or its admissibility. As a consequence of previous affirmative responses, each interviewee was asked to provide examples. In realtion to previous questions, each interviewee was asked to promote and describe example problems with the admissibility of evidence in the ongoing criminal proceeding in Poland in the aspect of international judicial cooperation practice. As a consequence, there was a request to provide examples of matters aforementionned (How many times, with which countries and for what type of practice).

In realtion to previous questions, each respondent was asked to specify the experienced request to execute or execution of the requests according to the specific requirements of the counterpart EU countries. Consequently, it was necessary to specify the circumstances of the action (act as issuing authority), which concerns specification and compliance with *lex forum*. Also, each responding interviewee was asked to describe the faced problems (if any) in this regard with the executing authority.

A sequel question concerned one‘s prediction (literally: beliefs) about the existing or

possible existence of legally provided reduction of procedural safeguards in cases where international judicial cooperation takes place in gathering of evidence. Consequently, each interviewee was asked to express his or her own opinion about the most frequent ones and what are or could be the procedural rights most affected and why (for ex. search of premises, search of computers, telephone tapping, etc.).

The next responded matter was the presence of defence lawyers during the undertaken actions in the execution of a cross-border investigative measure. Also, there was a question of practice in the area of notificartion in advance about the undertaken action, so that the defence lawyer can appear in the executing country. Then, a batch of speciified questions was provided (such as: Is this provided in the law? How are defence rights and fairness of proceedings in practice ensured when assessing the evidence obtained abroad?).

Afterwards, questions about intercepting telecommunication were set up. Each interviewee was asked how the execution and transfer of electronic evidence and interception of communications occurred in practice. Also, there was pointed out the matter of intercepting telecommunications abroad without technical assistance. In particular, it was asked whether suitable judiciary body informed a given country country later. Also, there was a specified question set out, namely : Would the evidence be inadmissible if the state in question was not notified (upon art. 31 DEIO)?

Afterwards. a question about a possible reaction of the in-charge person at particular proceedings (dominus litis) in circumstances such as extraordinary request for obtaining evidence from another EU Member State, which entails extraordinary costs (which ich regulated by art. 6.3 DEIO). Proposed alternatives (non fixed answers) were: to refuse, to apply reciprocity, to consult with issuing authority and then refuse to execute and also consider sharing costs.

A subsequent matter concerned personal experience in area of cross-proceedings data transfer. Especially, it touched upon the matter of evidence admisability limitation – such as transferring the data obtained for other criminal proceedings while those data could not have been obtained for the particular case where judicial cooperation request has taken place.

A subsequent questions covers various matters such as: overall view of Polish international judicial cooperation in the cross-border gathering/transfer/admissibility of evidence practice in the EU; Is it or can it be perceived as strongly favourable – somewhat favourable – slightly favourable – slightly unfavourable – somewhat unfavourable – strongly unfavourable. In a similar manner, the questions covered personal opinions of each

respondent, for ex. what do you see as the main benefits/strengths and drawbacks of the present judicial cooperation in the cross-border gathering/transfer/admissibility of evidence in Poland. In aforementioned manner questions were as follows: Are you aware of the further implementation of European Investigation order (EIO), in what way will this implementation help in improving the practice of the international/European judicial cooperation. And also: "If not all the EU MS transpose the EIO Directive on time (by 22nd May 2017), how will you deal with the requests for gathering evidence (upon art. 34 DEIO)[73].

Each questionnaire was closed by open questions about identification of problems with data protection laws and the speciality principle in the transfer of certain evidence to the requesting State and final invitation to provide any own statements and comments.

### 2.2. Overall view of defence lawyers questionnaires content - general remarks

The interviews with defense lawyers were also conducted for research purposes only, especially in order to learn about the practical experience of defence lawyers in international and European judicial cooperation in criminal matters or in other words: to learn about international and European judicial cooperation in criminal matters from the perspective of defence lawyers . Despite such possibility, interviewees did not agree to record any interview, since the paper protocol was sufficient.

Questions and interrogated areas were as follows: General questions (including i.e. experience in EU judicial cooperation) and Cross-border evidence.

The defence lawyers are specialized in criminal law and work normally in legal offices of small size (1-5 associates) or medium size (6-15). Criminal proceedings with transnational element were mainly white-collar crimes.

Most of interviewees (of defence lawyers) believe that the defence is at a disadvantage in transnational criminal proceedings with respect to national cases. The main reason is not language or procedural obstacles but costs. One of the lawyers said that he was in France and Czech Republic where witnesses were intorrigated by foreingn authorities, but his clients were big companies which were able to covert he costs of this activity in criminal proceedings.

None of the interviewed defence lawyers gave the answer to the questions about the

73 Suggested answers were: A) if you are executing authority and your State has transposed the EIO, but the issuing State has not; B) if your are executing authority and your State has not transposed the EIO but the issuing State has not; C) If you are the issuing State and your State has not transposed the EIO?; D) If you are the issuing State and your State has transposed the EIO and the executing has not.

specific type of evidence (interception of communications). The reason was that they had not faced this type of evidence in the proceedings in which they participate.

As mentioned above, at the time when the interviews were conducted, Poland had not yet implemented Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in Criminal Matters. But every interviewed defence lawyer emphasized his or her hope that EIO would strenghten procedural guarantees for the defendant and also would improve the timing of the criminal proceedings with cross-border element.

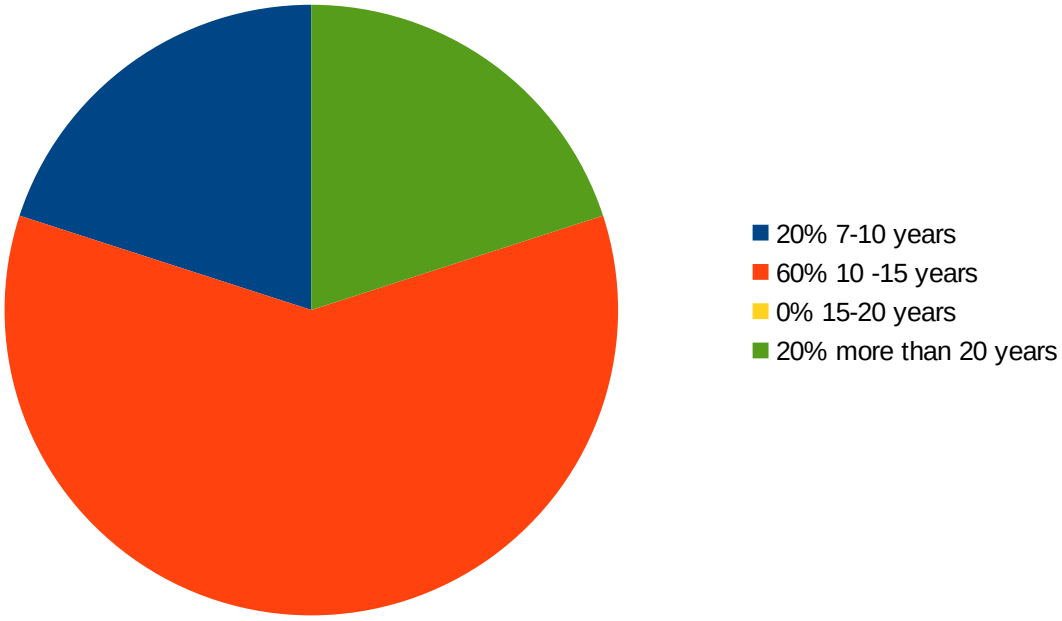
All the defence lawyers interviewed agree on the excessive time required to comply with the request for assistance and on the related consequences for the duration of criminal proceedings.

### 2.3. Summary report on questionnaires results (done by its description)

In the area of the respondents' current job position and work experience at court/in a prosecutor's office/ or in a rivate area (defence lawyers), answers seem to differ, but **rather younger judicial staff are involved**[74]. As far as the professional experience is taken into account, the most experienced interviewed lawyer (a male prosecutor, in charge of District's Prosecution Office in Pleszew, Wielkopolskie region) obtained his current position in 1986, whereas the youngest interviewed lawyer (a female judge in Kraków Regional Court, which is also an academic teacher and expert in judicial cooperation) launched her career in 2010. Utmostly important to mention is that each respondent **identify overall duration of his/her career with experience in judicial cooperation**[75]. Therefore, the overall experience also concerns "practice on international and/or European judicial cooperation" thereof. Declared experience in international judicial coopertion is therefore between: **8 – 29 years**. The diagram below shows the percentage of the participaton of judiacial staff in realtion to their experience in judiciary:

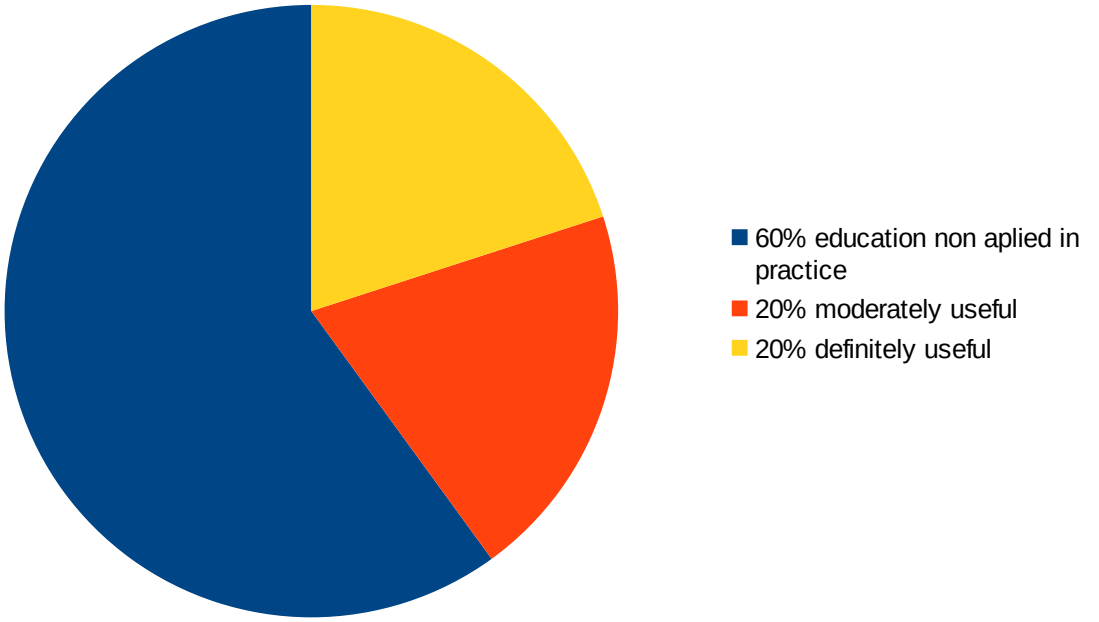
74 It is due to various reasons: mainly skills in western foreign languages (mostly: English and German occasionally other foreign languages such as French), the obligations to upgrade personal skills as a lawyer, also high motion between legal professions in the 90s of the 20th century in Poland.

75 Internal structure of prosecution offices and court departments allow to accept the aforementioned declarations (lack of particular cases specialisation).

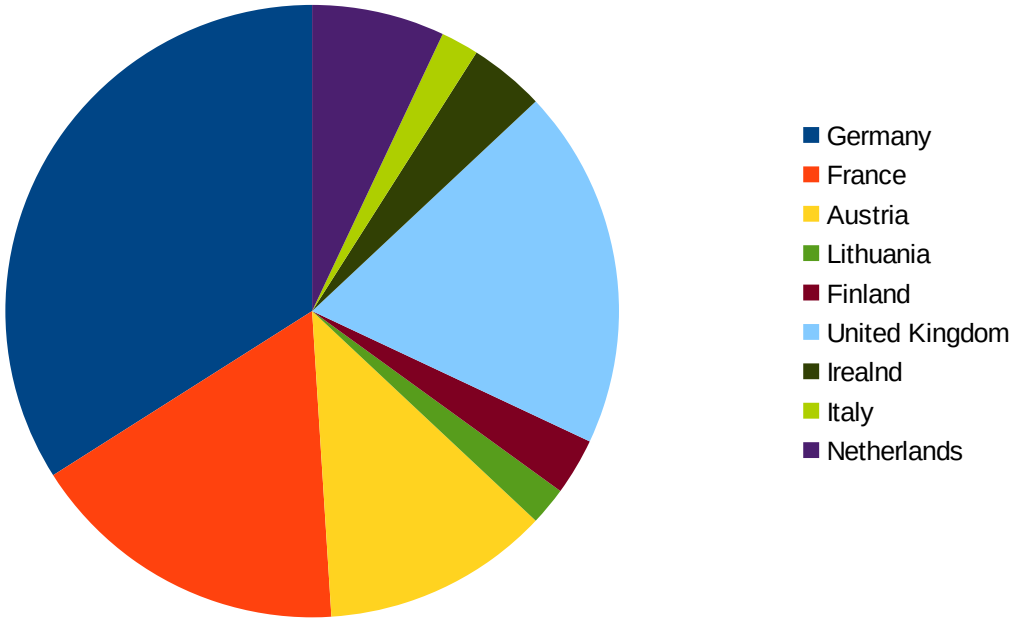



A further question touched upon the matter of specific training or education delivered by the courts or other institutions in order to prepare the lawyers for international judicial cooperation. **At the time, when the questionnaires were conducted** (March 2017 – before Polish implementation of EIO went into force) **80% of respondents did not get any specified training in the area of EIO**. However, 40 % of the interviewees declared that during their career „traininigs on judicial cooperation" were provided[76]. If the respondent participated in such a specific traininig, he or she was asked to evaluate the helpfulness of the training or education for their daily practice on international judicial cooperation along the criminal procedure. Diagram shows usefulness of the education/training provided:

76 Especially on EAW, took place since year 2004.




A further question concerned the experience in proceedings carried out (or participated in), which calls for previous experiences in international/European judicial cooperation. Also, it was requested to specify if it was on behalf of a requesting or executing authority. **Unanimously respondents indicated, that Polish judicial authorities are more frequently the "requesting" part in proceedings.** As a consequence of previous affirmative responses, the interviewees were asked to which countries such cooperation is directed (**more than 70% is covered by Germany, France, UK and Austri**a). The overall diagram shows the countries of most frequent cooperation.




In the area of the most frequently used international/European conventions and/or legal instruments commonly employed according to ones within the EU judicial cooperation, the frequently mentioned regulations were: *2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States,* and other such as: *Convention on the Transfer of Sentenced Persons, done at Strasbourg on 21 March 1983, Agreement between the Republic of Poland and the United States of America on extradition done at Washington on 10 July 1996* and also other law sources.

The next interrogated area was strictly related to the duration of the criminal proceedings. **The respondents indicated unanimously, that judicial cooperation affects duration of criminal process by its prolongation.**

A further question touched upon the matter of ones imaginations (literally: beliefs) about the degree of compliance of international judicial cooperation instruments (namely: satisfactory or not). Each interviewee was asked to express his or her free opinions in this area. **Most respondents confirm that there are many difficulties in such cooperation and a variety of examples have been provided: difficulties in formalisation of procedures (in ex. acces to criminal records), unexpected differences in domestic systems, problems with the double criminality principle and also the most basic problems such as acces to contemporary unified sources of law.** The next sort of examination touched upon the kinds of assistance most frequently requested within the international/European judicial cooperation

according to one‘s experience. Also, it was necessary to specify if any of these requests were related to the transmission of evidence and/or its admissibility. As a consequence of previous affirmative responses, each interviewee was asked to provide examples. **Mostly, the requested assistance concerns rapid information about the qualification as felony and misdemeanor, also a technical assistance during a conducted legal action.**

In realtion to previous questions, each interviewee was asked to promote and encounter example problems with the admissibility of evidence in the ongoing criminal proceeding. As a consequence, they were requested to provide examples of the matters aforementionned (How many times, with which countries and for what type of practice). **Most problems of admissibility concerns hearing of a witness (lack of information about the coherence between legal systems in the area in inadmissibilities of evidences). Also, problems concern more technical matters such as differences in documents corrections (for ex. no returns and notifications under Swedish law). Common conclusion indicates the individual need of upgrading the own knowledge in this area.**

A sequel questions concerned one‘s prediction (literally: beliefs) about the existing or posiible existence of legally provided reduction of procedural safeguards in cases where international judicial cooperation takes place in gathering of evidence. **The respondents indicated unanimously that it will have positive influence on cooperation.**

Afterwards, a question concerned a possible reaction of in-charge person in particular proceedings (dominus litis) in circumstances such as extraordinary request for obtaining evidence from another EU Member State, which entails extraordinary costs (which ich regulated by art. 6.3 DEIO). Alternatives (non fixed answers) were: to refuse, to apply reciprocity, to consult with the issuing authority and then refuse to execute and also consider sharing costs. **Consultation with issuing authority and refuse (under proportionality principle) were the most frequent answers.**

Subsequent questions covered various matters such as: overall view of Polish international judicial cooperation in the cross-border gathering/transfer/admissibility of evidence practice in the EU; **It was qualified as somewhat favourable or slightly favourable.** In similar manner questions covered personal opinion of each respondent *for ex*. what do you see as the main benefits/strengths and drawbacks of the present judicial cooperation in the cross-border gathering/transfer/admissibility of evidence in Poland. **A common response was the improvement of effectiveness of cross border judicial cooperation, especially making proceedings easier and faster.**

Each questionnaire was closed by open questions about the identification of problems with data protection laws and the speciality principle in the transfer of certain evidence to the requesting State and final invitation to express any own statements and comments. **The overall conclusion, somehow present in every single interview, was a positive attitude to EIO intruments.**

In the remaining scope, the responses were either not formulated in a way that would allow a general conclusion, or the respondents did not have any data necessary to answer.

## Section 3: Conclusions

### 3.1. General conclusion

All the persons interviewed have no experience in the application of DEIO, but most of them were optimistic on the future of this new instrument. However, it was not opinion based on dogmatic arguments but rather wishfull thinking. The main disadvantage of the conducted interviews as a method was the lack of the law implementing DEIO. The first draft of the statute implementing DEIO to the CCP was presented in the November of 2017.

### 3.2. Detailed conclusions

4 At the time when the questionnaires were conducted (March 2017 – before Polish implementation of EIO went into force) 80% of respondents did not get any specified training in area of EIO

5 Polish judicial authorities are more frequently the "requesting" part in proceedings with cross-border elements. That is why most of respondents hope that EIO would improve the cooperation in criminal matters with regard to evidence gathering.

6 The main problem of the international cooperation in criminal matters – from the perspective of defence lawyers – is the problem of costs.

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**WORKSTREAM 2 – PHASE 2**

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

**Version:**

**Preparation date:** 30th September 2018

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**Approved by Coordinator on:**

**Dissemination level:** CO (only for consortium partners)

# Table of Contents

# Section 1: Research objectives

## 1.1 Introduction

The Spanish report is mainly based in information gathered through direct encounters with professionals of the judiciary and judicial institutions, including judges, prosecutors, defence lawyers and other interested parties. It is aimed at identifying the practical problems deriving from the implementation in Spain of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 on the European Investigation Order in criminal matters.

The given answers are based, in general, on previous experiences of the interviewees, through which they contemplate important issues for the future. In this way, the report follows as first objective to find out about the current state of cooperation in order to draw up a common roadmap for all States belonging to the European Union.

As an important fact, it must be highlighted that during the course of the study has taken place the transposition of the aforementioned Directive to the Spanish legal system.

The initial scheme on which the content of this document was developed, did not underline that the Directive in question had been implemented by the legal systems. The discrepancy between the information we seek and the interviews given to us derives from this factor.

## 1.2 Target subjects

### 1.2.1 The interviewees. Position

The interviewees were judges, prosecutors and defence lawyers. In total, 24 people have been interviewed: 12 judges, 6 prosecutors and 6 lawyers.

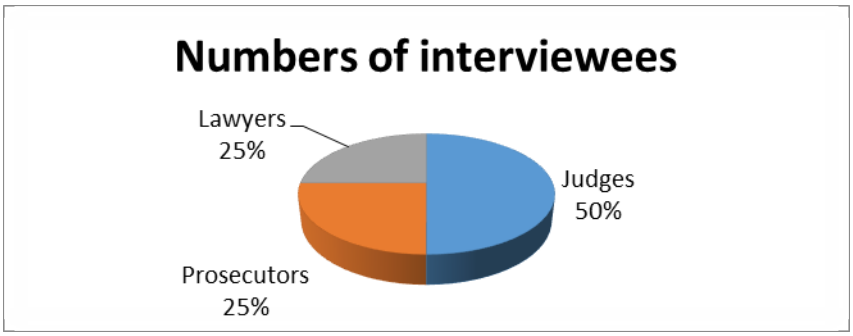


Figure n.1

Two models of interview were elaborated: one for judges and prosecutors and another for defence lawyers. The questions addressed primarily to judges and prosecutors have been specific and concrete aimed at assessing how each of them is trained or prepared in the international and/or european judicial context. In the case of lawyers, it has been questioned if in their opinions the transposition of the European Investigation Order may intensify or not the rights of defence in cross-border criminal matters in the context of gathering evidence.

Judges present different conditions, although all of them have extensive professional experience. Several of them are currently assigned to the National Court (*Audiencia Nacional*), an organ that has a prominent role in the matter, either as Magistrates of the Criminal Chamber (*Sala de lo Penal*) or as Central Investigation Judges (*Jueces Centrales de Instrucción*). Others attend as Magistrates in Provincial Courts (*Audiencias Provinciales*) or other specialized courts. Some are currently deprived of jurisdictional functions, occupying positions of counselling, as Advisors in the International Relations Service of the General Council of the Judiciary or as Liaison Magistrates with other States. In many cases, the judges have been temporarily contact point with the Spanish Judicial Network (REJUE) or the European Judicial Network (EJN).

Prosecutors have a long professional career, with extensive experience in international judicial cooperation, within institutions such as the Special Anti-Drugs Office of the Public Prosecutor (*Fiscalía Especial para la Prevención y Represión del Tráfico Ilegal de Drogas*), the Unit of International Cooperation in the General Office of the Public Prosecutor (*Fiscal de Cooperación Penal Internacional*) or Eurojust.

The lawyers are specialists in Criminal Law and work normally in legal offices of small size (3-5 associates). Several of them work on legal assistance in white-collar crimes with international dimension and others are related to Non-Governmental Organizations, such as Rights International Spain.

No one of the lawyers interviewed belong to the Legal Aid Unit in an specific Bar Association. They have different specialised trainings in criminal matters such as human trafficking, gender based violence; or in international protection on refugees and asylum. In all of this cases they are related to international and European issues[77].

### 1.2.2. Practice on international and / or European judicial cooperation

All judges are provided with practical experience in European and international judicial cooperation, either as issuing authority or in some cases as executing authority, exercising its competence as Magistrates of the National Court (*Audiencia Nacional*) or of the other Courts specializing in the execution of rogatory letters. Some provide assistance to other judges in matters of judicial cooperation, acting as contact points of the European Judicial Network or Spanish Judicial Network, as liaison magistrates or as members of the International Relations Service of the General Council of the Judiciary.

Prosecutors also have practical experience in international and European judicial cooperation. Some of them are attached to the Prosecutor's Office of the National Court (*Audiencia Nacional*), others act as points of contact for the Anti-Drug Prosecutor's Office or the network of specialized prosecutors. Finally, others are members of the Office of the Public Prosecutor (the International Cooperation Unit of the State Prosecutor's Office). The large number and tittle of courses, seminars and meeting of Public Prosecutors, and more specific, courses and other formation related to International Cooperation can be checked in the Official Website of Public Prosecutor's Office[78].

The lawyers have experience as defenders in matters with a cross-border dimension, mainly economic crimes, but also crimes of terrorism or drug trafficking. Some of them are registered in the office of the National Court (*Audiencia Nacional*), with experience in crimes of genocide, war crimes and torture.

### 1.2.3. Training or education on international judicial cooperation

Most of the judges interviewed have been trained with regard to international judicial cooperation. The General Council of the Judiciary organizes every year a one semester virtual

[77] As example of specialization courses offered by Bar Association of Madrid see Website of ICAM, Accessible at www.icam.es Official statistic of Free Legal Help at https://www.abogacia.es/wp-content/uploads/2018/07/XII-OBSERVATORIO-JUSTICIA-GRATUITA-2017-OK.pdf

[78] www.fiscal.es

course on judicial cooperation in the European Union and in third countries, which includes some face-to-face sessions. In addition, members of the Spanish Judicial Network receive annually a one week-long update course. We must remember in this respect that the European Commission set the objective that by 2020, 700000 legal professionals (which represents half of all legal professionals in the EU) had participated in European judicial training activities[79].

Many of them recognized themselves as 'self-taught persons' in judicial cooperation, even as trainers or teachers in training activities. One of the judges has a doctorate and other of them participates usually in European projects on the matter. They regret that no specialization is required to exercise as magistrate of the National Court, despite their wide attributions in criminal matters.

Prosecutors think that training in international judicial cooperation is absolutely necessary, although not all of them have received the specific academic preparation, so they have acquired it through practice. Centre for Legal Studies, set up in Madrid, offers a specific module of international cooperation within its continuing training program. Some prosecutors have also intervened as trainers, for example in the online course offered by Eurojust.

### 1.2.4. Participation in any practice on international / European judicial cooperation. Countries

Judges and prosecutors interviewed usually participate in international judicial cooperation in relation to many States, assuming different functions.

The most frequent activity is to give effect to European Arrest Warrant, extraditions or rogatory letters, either as issuing authority or as executing authority.

This activity is produced mainly with Member States of the European Union, the United States, different countries in Latin America, North Africa and, to a lesser extent, in the rest of Africa, Asia and Australia.

Within the European Union, the most intense relationship is with countries such as France, Portugal, United Kingdom, Germany and Italy. The reasons reside in geographical proximity and in matters of mutual interest, such as terrorism offenses.

With American countries highlights the relationship with the United States, Argentina, Colombia, Brazil or Mexico. Somewhat less frequent are the contacts with Chile, Peru, Ecuador, Guatemala, Panama, Paraguay or Venezuela. One remarkable exception Bolivia, a country with which there is no cooperation.

[79] See Website https://e-justice.europa.eu/content_the_european_judicial_training_policy-121-en.do

In Africa, the most intense relationship is distantly with Morocco, especially in terms of terrorism and trafficking of human beings. There are bilateral instruments of cooperation, although the collaboration is sometimes informal or opaque. Less frequent is the cooperation with other relatively close countries such as Mauritania and Algeria.

With the rest of Africa and Asia, there is an only relationship to speak about with each one of the following countries: Nigeria, Israel, Egypt, Yemen, Hong Kong and Qatar. Work visits of judges and prosecutors are carried out in Australia.

All of them consider fundamental to facilitate judicial cooperation among states the work done by institutions such as Eurojust, by the contact points of the European and judicial networks, by the liaison magistrates. Some of them stand out the tasks of the Department of Judicial Cooperation of the United States Embassy in Madrid.

Eurojust has coordinated groups not only at its headquarters in The Hague, but also in Madrid. The contact points resolve between 300/600 consultations/year. In addition, Spain has liaison magistrates in different EU states, such as France, Italy, United Kingdom; and also outside the EU, such as Morocco and the United States.

Outside from interstate judicial cooperation, Spanish Judiciary provide assistance to International Courts, such as the International Court of Justice, the International Criminal Court or the International Criminal Tribunal for the former Yugoslavia.

## 1.3 Some data on international judicial cooperation

According to official statistics by General Counsel of Judicial Power, it could be highlighted the next data related to international cooperation in Spanish Courts[80]:

**National Court (*Audiencia Nacional*), Criminal Matters**

| | | **2017** | **2016** | **2015** |
|---|---|---|---|---|
| **European Union** | **Communication acts** | 14 | 2 | 5 |
| | **Urgent Measures** | 0 | 0 | 0 |
| | **Other** | 0 | 0 | 1 |

[80] Requests for cooperation processed directly by the judicial bodies accessible at http://www.poderjudicial.es/cgpj/es/Temas/Estadistica-Judicial/Plan-Nacional-de-Estadistica-Judicial/Relaciones-con-organos-judiciales-extranjeros/Solicitudes-de-cooperacion-tramitadas-directamente-por-los-organos-judiciales

| | | | |
|---|---|---|---|
| **Other countries** | 1 | 3 | 0 |

**Instruments of mutual recognition within the European Union (issued) in National Court (*Audiencia Nacional*)**

| | **2017** | **2016** | **2015** |
|---|---|---|---|
| **European arrest warrant and the surrender procedures** | 22 | 21 | 19 |
| **Resolutions imposing custodial sentences or measures involving deprivation of liberty** | 0 | 4 | 0 |
| **Resolution of probation** | 0 | 0 | 0 |
| **Resolution on measures for the monitoring of pretrial release** | 0 | 0 | 0 |
| **European protection orders** | 0 | 0 | 0 |
| **Orders freezing property or evidence** | 1 | 0 | 1 |
| **Resolution imposing financial penalties** | 0 | 0 | 0 |
| **European Evidence Warrant** | 0 | 0 | 0 |

| **Instruments of mutual recognition within the European Union (requested) in National Court (*Audiencia Nacional*)** | | | |
|---|---|---|---|
| | **2017** | **2016** | **2015** |
| **European arrest warrant and the surrender procedures** | 5 | 2 | 24 |

**Central Investigating Judges (*Juzgados Centrales de Instrucción*)**

| | | **2017** | **2016** | **2015** |
|---|---|---|---|---|
| **Requests for international judicial assistance submitted** | **To a state of the EU** | | | |
| | **To a non-EU State** | 195 | 168 | 100 |

**Instruments of mutual recognition within the European Union (issued) by Central Investigating Judges (*Juzgados Centrales de Instrucción*)**

| | 2017 | 2016 | 2015 |
|---|---|---|---|
| **European arrest warrant and the surrender procedures** | 190 | 232 | 147 |
| **Resolutions imposing custodial sentences or measures involving deprivation of liberty** | 0 | 0 | 0 |
| **Resolution of probation** | 0 | 0 | 0 |
| **Resolution on measures for the monitoring of pretrial release** | 0 | 1 | 0 |
| **European protection order** | 0 | 0 | 0 |
| **Orders freezing property or evidence** | 32 | 67 | 29 |
| **Resolution imposing financial penalties** | 0 | 0 | 0 |
| **European Evidence Warrant** | 58 | 21 | 10 |
| | **Requests for judicial cooperation, sent to an EU State, in cases in which some other request for judicial cooperation has already been addressed to another EU State** | | | |

**Instruments of mutual recognition within the European Union (requested) in Central Investigative Judges (*Juzgados Centrales de Instrucción*)**

| | 2017 | 2016 | 2015 |
|---|---|---|---|
| **Special investigative measures with foreign authorities (joint investigation teams, undercover agents, cross-border controlled deliveries)** | 13 | 6 | 18 |
| **European Arrest Warrant** | 1033 | 1048 | 1002 |

**Women Violence Courts (*Juzgados de Violencia sobre la Mujer*)**

**Instruments of mutual recognition within the European Union (issued)**

| | 2017 | 2016 | 2015 |
|---|---|---|---|
| **European arrest warrant and the surrender procedures** | 9 | 10 | 3 |

| | | | |
|---|---|---|---|
| **Resolutions imposing custodial sentences or measures involving deprivation of liberty** | 2 | 0 | 0 |
| **Resolution of probation** | 0 | 0 | 0 |
| **Resolution on measures for the monitoring of pretrial release** | 0 | 1 | 0 |
| **European Protection Order** | 8 | 9 | 2 |
| **Orders freezing property or evidence** | 0 | 0 | 0 |
| **Resolution imposing financial penalties** | 0 | 0 | 0 |
| **European Evidence Warrant** | 18 | 12 | 1 |

**Instruments of mutual recognition within the European Union (requested)**

| | **2017** | **2016** | **2015** |
|---|---|---|---|
| **European arrest warrant and the surrender procedures** | 0 | 0 | 0 |
| **Resolutions imposing custodial sentences or measures involving deprivation of liberty** | 0 | 0 | 0 |
| **Resolution of probation** | 0 | 0 | 0 |
| **Resolution on measures for the monitoring of pretrial release** | 0 | 0 | 0 |
| **European Protection Order** | 0 | 0 | 0 |
| **Orders freezing property or evidence** | 0 | 0 | 7 |
| **Resolution imposing financial penalties** | 0 | 0 | 1 |
| **European Evidence Warrant** | 0 | 0 | 0 |

**First Instance and Investigative Courts (*Juzgados de Primera Instancia e Instrucción*)**

| **Requested** | | | **2017** | **2016** | **2015** |
|---|---|---|---|---|---|
| **Civil** | **EU** | **Obtaining evidence Rgl. EC. 1206/01** | 134 | 151 | 182 |
| | **Other countries** | | 280 | 350 | 246 |

**Instruments of mutual recognition within the European Union (issued)**

| | 2017 | 2016 | 2015 |
|---|---|---|---|
| **European arrest warrant and the surrender procedures** | 163 | 104 | 130 |
| **Resolutions imposing custodial sentences or measures involving deprivation of liberty** | 1 | 1 | 0 |
| **Resolution of probation** | 0 | 0 | 0 |
| **Resolution on measures for the monitoring of pretrial release** | 0 | 1 | 1 |
| **European Protection Order** | 4 | 0 | 1 |
| **Orders freezing property or evidence** | 9 | 25 | 16 |
| **Resolution imposing financial penalties** | 2 | 6 | 5 |
| **European Evidence Warrant** | 232 | 208 | 91 |

**Instruments of mutual recognition within the European Union (requested)**

| | 2017 | 2016 | 2015 |
|---|---|---|---|
| **European arrest warrant and the surrender procedures** | 0 | 0 | 5 |
| **Resolutions imposing custodial sentences or measures involving deprivation of liberty** | 0 | 0 | 0 |
| **Resolution of probation** | 0 | 0 | 0 |
| **Resolution on measures for the monitoring of pretrial release** | 3 | 0 | 0 |
| **European Protection Order** | 0 | 0 | 0 |
| **Orders freezing property or evidence** | 14 | 13 | 17 |
| **Resolution imposing financial penalties** | 0 | 0 | 2 |
| **European Evidence Warrant** | 17 | 23 | 21 |

| | 2017 | 2016 |
|---|---|---|
| **Special investigative measures with foreign authorities (joint investigation teams, undercover agents, cross-border controlled deliveries)** | 33 | 34 |

**Criminal Court**

**Instruments of mutual recognition within the European Union (issued)**

| | **2017** | **2016** | **2015** |
|---|---|---|---|
| **European arrest warrant and the surrender procedures** | 40 | 42 | 45 |
| **Resolutions imposing custodial sentences or measures involving deprivation of liberty** | 14 | 17 | 4 |
| **Resolution of probation** | 2 | 6 | 0 |
| **Resolution on measures for the monitoring of pretrial release** | 2 | 0 | 0 |
| **European Protection Order** | 1 | 1 | 1 |
| **Orders freezing property or evidence** | 1 | 3 | 2 |
| **Resolution imposing financial penalties** | 69 | 55 | 54 |
| **European Evidence Warrant** | 6 | 30 | 21 |

Related to official statistics about European instrument requested and issued by Public Prosecutor[81],

| Country | Letters rogatory |
|---|---|
| Germany | 1467 |
| Argentina | 36 |

[81] Requests for cooperation processed through the Office of the Prosecutor accessible at http://www.poderjudicial.es/cgpj/es/Temas/Estadistica-Judicial/Plan-Nacional-de-Estadistica-Judicial/Relaciones-con-organos-judiciales-extranjeros/Solicitudes-de-cooperacion-tramitadas-a-traves-de-la-Fiscalia

| | |
|---|---|
| Austria | 323 |
| Belgium | 120 |
| Bulgary | 50 |
| Denmark | 35 |
| Slovakia | 39 |
| France | 339 |
| Greece | 38 |
| Netherlands | 348 |
| Hungry | 62 |
| Italy | 87 |
| Polond | 268 |
| Portugal | 552 |
| United Kingdom | 131 |
| Czech Republic | 77 |
| Rumany | 131 |
| Suitzerland | 96 |
| Others | 440 |

# Section 2: Current situation (general terms)

## 2.1 Legal issues

### 2.1.1 Current legal instruments

According to María José Segarra, General Prosecutor of Spain, until EIO was transposed, Prosecutor's Office received 645 EIO. Therefore, it was necessary to increase the number of prosecutors to give a response to such a high number of requests. Following her statements, in the time since Directive was implemented into Spanish legal system until August 2018, 104 EIO have been received and requested by competent authority, Public Prosecutors.[82]

[82] Statements on the framework of an interesting Seminar at International University of Menendez Pelayo in august 2018, accessible at http://www.uimptv.es/c-cursos2018-10del20al24deagosto-ordeneuropeadeinvestigacion-283.html

Among the conventions and European legal instruments, the most commonly used is the European arrest warrant, which is used not only for its own purpose but also for the assurance of proof. The Convention on Mutual Assistance in Criminal Matters of 1959 and MLA 2000 are also widely used. In the cooperation with Italy is applicable very recently[83].

To a lesser extent, other European legal instruments are also used, such as: The Council Framework Decision 2008/909/JHA of 27 November de 2018, on the application of the principle of mutual recognition of judicial decisions in criminal matters on the application of the principle of mutual recognition of judicial decisions in criminal matters for which penalties or other measures involving deprivation of liberty (custodial measures) for implementation in the European Union; the Framework Decision 2005/214/JHA of the Council, of February 24, 2005, relating to the application of the principle of mutual recognition of pecuniary sanctions; Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property and securing evidence[84]; the Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition of confiscation orders.[85]

Still within the European Union, the lack of practical use of the Council Framework Decision 2008/978 / JHA of 18 December 2008 on the European Evidence Warrant to collect objects, documents and data intended for criminal proceedings.

With non-European Union states, other international conventions are used. Among the most common, we find the bilateral extradition agreements of Spain with other countries, the European Convention on Extradition of the Council of Europe made in Paris on December 13, 1957 and the Extradition Agreement between the European Union and United States made in Washington on 25 June 2003.

### 2.1.2 Strengths and weaknesses of the system

In general there are no problems regarding the admissibility of the evidence obtained within the frame of legal instruments on judicial cooperation in criminal proceedings. This

[83] See Legislative Decree 5 April 2017, n. 52 Implementing rules of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, signed in Brussels on 29 May 2000. (17G00065) (OJ General Series 97, 27.04.2017). Note: entry into force of the provision: 12/05/2017 http://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2017-04-27&atto.codiceRedazionale=17G00065&elenco30giorni=true

[84] See LUÍS MARTÍN GARCÍA, A., BUJOSA VADELL, L. *La obtención de prueba en materia penal en la Unión Europea*, Atelier, 2016.

[85] See JIMÉNEZ-VILLAREJO FERNÁNDEZ, F. "Novedades legislativas en materia de decomiso y recuperación de activos", *Revista de Derecho Penal*, 2012, http://www.reformapenal.es/wp-content/uploads/2012/01/Penal34_NovLegislativas.pdf .

impression is reached, too, if we take into account the open nature of the case law of the Supreme Court on the matter.

There are, nevertheless, some exceptions. Thus, for example, the statement of the person being investigated is not admissible in Spain when it is practiced without legal assistance, something which happens in countries such as the United Kingdom and Germany, where it is not compulsory in police dependencies. Telephone calls made without judicial authorization, in countries such as the United Kingdom and Belgium, or of a prospective type, carried out in the Netherlands, are also not admissible in Spain. Finally, home searches and seizures are not admissible in are conducted in night time (which is admissible in countries such as Belgium).

There are different opinions about whether international judicial cooperation in obtaining evidence implies a reduction in procedural guarantees. Several judges and prosecutors believe that these are equivalent to cases of domestic judicial assistance, and even higher because guarantees of the State of execution are added to the guarantees of the issuing State.

They consider that procedural guarantees are quite harmonized in the different States. However, most judges and prosecutors believe that there may be a reduction in procedural guarantees since those required by each Member State are different in terms of measures limiting fundamental rights.

Thus, for example, there are guarantees in Spanish law that are not always contemplated in comparative law: the legal assistance in the defendant's declaration, the judicial authorization for the intervention of the communications, the presence of the investigated person in home searches or that of a judicial officer (*Letrado de la Administración de Justicia*) attesting the correctness of the activity. Disparity between regulations is even greater on the matter of lawful interception of telecommunications: there are regulations that consider prospective interventions fully licit, in other cases there is no maximum period of intervention, etc.

Most affected guarantees may be, first of all, right of defence; but also other fundamental rights such as privacy, secrecy of communications and home inviolability.

Lawyers are unanimous in their opinion: obtaining evidence through international judicial cooperation can lead to a reduction of procedural guarantees. They refer basically to the right of defence, but also to other guarantees of the judicial process: contradiction, equality of arms, right to translation, etc.

In their opinion, right of legal assistance is sometimes not respected, but in other occasions its violations are grounded on lack of quality of the preparation of the engaged lawyers. For this

reason they demand greater quality control on the on-call shift of the National Court (*Audiencia Nacional*), since now is required just 10 years of professional experience, but not specific training.

They affirm that adversarial guarantees of contradiction are not respected often in the investigative proceedings, since these are executed directly by the judicial police without intervention nor knowledge of the defence lawyers. In this respect they demand for more possibilities of opposing the requests of cooperation and also that the presence of the lawyer in the State of execution is guaranteed, either in person or through video conference.

The right to translation suffers due its non-existence and, sometimes, its lack of quality. The latter is maybe caused because of its outsourcing in external companies, so they demand the translation as a public service provided by the Administration.

## 2.2 Practical issues

### 2.2.1 Most requested sort of assistance

The most requested assistance is the statement of the investigated person. In practice sometimes is used a European Arrest Warrant to avoid possible difficulties obtaining the statement, being deactivated after having obtained it. Some opinions suggest that this could be seen as an abuse of the EAW.

Statements of witnesses and experts are also frequent.

Judges, prosecutors and lawyers agree that videoconference should be generalized to practice these statements. Some countries do not admit their use however (like Switzerland). In Spain, the defendant’s statement is not allowed to be made by videoconference when there is a formal accusation. In the opinion of several of the interviewees the application of the European Investigation Order facilitates the taking of the accused's statement by videoconference. One Magistrate points out the utility of Spanish consulates in foreign countries as semi-official instance for cooperation in practice.

Next in relevance is what concerns to patrimonial investigations. This kind of information is gathered trough international cooperation requests such as inquiries on assets, properties, bank accounts or businesses, when they are suspects of connection with crime. Sometimes what needs to be done is not purely investigation, but an assurance measure (i.e. precautionary seizure) or an asset recovery (confiscation).

The legal professionals refer also to transmission of documents such as official copies (*testimonios*) of judicial resolutions issued in Spain, in order to assess the application of the 'ne bis in idem' principle or to use judicial expedients in related cases. We have also received answers relating requests for police reports and criminal records related to a defendant.

Another kind of assistance is also requested to the Spanish authorities, such as the intervention of communications. In relation to this investigative measure an experienced Magistrate affirms that "*if the cooperation request is moderately well done, we do not control anymore*".

Another one points that communications interventions without judicial authorization (like in the UK) should be admitted under the Mutual Assistance Agreement of 1959, but some Spanish courts do not admit them.

Home entries, and search and seizure procedures present difficulties (several interviewees have indicated it, without more specifications)

Analysis of drugs have been mentioned by several of the interviewees. Undercover agents and controlled deliveries of illicit goods seem to be less frequent, although they are also in mind.

### 2.2.2 Length of criminal proceedings

European official statistics show an average of approx. 200 days needed to solve the 1st instance of civil, commercial, administrative and other case in Spanish Procedural System[86]. Requests for judicial cooperation in criminal matters extend in any case the duration of criminal proceedings. The consequent delay of the instruction origins frequently the need to declare the case as complex (after the reform of the art. 324 of the Spanish Criminal Procedural Law in 2015). One weakness of the Spanish system is the need for everything to be translated into Spanish.

The delay of the proceedings varies: on average it takes between 3-6 months, although it can reach up to 10-12 months. The shortest cases reported to us are resolved instantly by electronic means or during the same day. The longest one lasted for 3 or even 7 years. Simple requests are processed faster, such as summons, statements of witnesses or accused persons, especially when carried out by videoconference. European Arrest Orders and European Protect Warrants are much faster. On the contrary, if it is about financial information, we can

[86] The 2018 EU Justice scoreboard, European Union, 2018, Figure 7 accessible at https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2018_en.pdf

expect up to two years (although the time it is being reduced considerably). In some cases the speed of cooperation depends on the technical capacity of the required country.

Within the European Union, the request for judicial cooperation can be attended in a week, in countries such as France, Germany or Portugal.

Regarding Italy, as it was remarked before, now it is applicable the MLA 2000 Convention[87], but until recent dates its non-application caused delay. United Kingdom and Netherlands are also slow to respond. Answering a direct answer in this respect we have been told that International Letters of Request (ILOR) to the United Kingdom take: a) at least 8 weeks; b) 3 months; c) up to a year.

The use of the Liaison Magistrates and the contact points of the European judicial network or Eurojust provide assistance and reduce waiting times.

In occasions, requests for cooperation are denied. That was once the case in Belgium, referring to ETA's terrorist crimes, allegedly to protect better Human Rights.

Outside the European Union, judicial cooperation is generally slower. In countries such as Switzerland, United States, China or South America sometimes it takes 1 or 2 years to attend a request for judicial cooperation.

### 2.2.3 Procedural safeguards

#### *2.2.3.1 Requirements as requiring / executing authority*

Art. 4.1 MLA 2000 and art. 9.2 DEIO allow to specify procedural requirements. Spanish judges and prosecutors, when acting as issuing authority, do not normally include specific requirements, allowing the requested State to use its *lex fori*. They do it just in case of compulsory requirements, as it occurs with the defendant's statement, whose practices require always legal assistance by a lawyer to be considered valid in Spain[88].

In some cases, the investigating judge himself has moved to the requested State (the Netherlands) to carry out the appropriate investigations. Some Magistrates refer to cases where mandatory requirements have been replaced by equivalents guarantees. Some others relate problems with defendant's statements taken without a lawyer in British Police Stations. Some problems have arisen with the statements of forensic doctors as experts: while in Spain they work incardinated in the judicial system, in other States they are private professionals who must be compensated for their work.

[87] See LEGISLATIVE DECREE 5 April 2017, n. 52 Implementing rules of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, signed in Brussels on 29 May 2000

[88] Problems on this case have arisen outside the EU with Switzerland, a country which denies the appointment of a lawyer for the person investigated in less serious crimes.

As executing authority, Spanish judges act in accordance with our legal system, but respecting the specifications contained in the rogatory letters. These are referred, for example, to the information of rights to the investigated person, chain of custody in search and seizures, legal assistance, etc.

The United Kingdom, Italy and Netherlands are among the states that include specifications when acting as issuing authority. The latter, for example, requests that statements must be taken with the assistance of a lawyer not only to those under investigation, but also to witnesses.

Some problems have arisen with France, the United Kingdom and Germany, countries where the practice of a lawful interception of communications require much weaker motivation than in Spain. Under the Spanish system, the rogatory letters originated in these States could not meet the requirements of motivation and proportionality as legally requested.

#### *2.2.3.2 Information to defence lawyers*

Defence lawyers are not always informed in advance about the execution of a cross-border investigation proceeding. In most cases (such as organized crime) this lack is due to the qualification of the investigation as secret: only the Public Prosecutor's Office is informed and defence lawyers have the right to be informed only after the end of the period of secrecy. In any case hidden investigations must be compatible with the minimum guarantees, just as if there were no cooperation activity.

In the answers of the judges we have been told about a ‘secondary role of lawyers’, maybe motivated because the intervention of a lawyer in another country shows practical difficulties (language, lack of training or knowledge of forensic uses, etc.). In addition, intervention of a designated defence lawyer is not ensured. They can take knowledge of the done investigations trough the lawyer appointed extra for that purpose, with whom he or she must coordinate for the defence of his/her client.

The European Investigation Order already foresees the appointment of a lawyer in the executing State, which will result in the aforementioned coordination between lawyers. In Spain, a specific panel should be created for specialised lawyers, who also are able to communicate in foreign languages.

If the secret of the investigations has not been settled, lawyers are informed in advance of the cross-border investigation diligence (Article 4 of the 1959 Convention), as well as the possibility of moving to the execution stage in order to intervene. Some States limit the intervention of a foreign lawyer, i.e. France in cases of terrorism.

Mobility of the defence lawyer to the executing state depends on various factors, including economic ones. The personal assistance of the defence lawyer is strange, being replaced either for the use of video conferencing or to the submission of written questionnaire (defendants or witnesses statements).

In the opinion of the lawyers, the referral of questions is inefficient in practice, preferring personal intervention or video conferencing. In addition, when they ask questions in writing, there is a tendency to inadmissibility by the acting judge, considering them tricky or suggestive.

One of the lawyers reports two practical experiences: a) in the first one, a statement of a person investigated in Italy, he was authorized either to intervene directly or to submit a list of questions; b) in the second one, a witness statement in France, he moved to Bordeaux and was allowed to ask questions in writing.

Rights of defence and a fair trial with all guarantees are ensured in practice by carefully examining the way in which the cross examination has been carried out abroad, either at the request of the Public Prosecutor's Office or at the parties involved in the trial.

#### *2.2.3.3 Data protection norms*

Data protection is considered, in general, a minor or second level problem by the interviewed Magistrates (judges and prosecutors). Some of them are not able at all to identify problems with data protection laws and hazards in transmitting evidence to the requesting State, either because they have not been confronted with this situation or because they consider such problems are not serious enough.

One of them literally states as follows:

> "*Europe must rethink the importance of data protection and the issue of evidentiary nullifications. We must put social and collective protection above*".

Spain is not particularly careful in this regard, unlike other States. Data protection is in general granted less importance in comparison with other rights or interests granted in the criminal process. Attending the legal interest concerned, they consider that personal data protection standards must be more demanding in crimes against life or physical integrity, such as terrorism, than in crimes of corruption or money laundering.

Several judges and prosecutors warn about the risk of an inadequate use in other cases of the obtained data for a proceeding, in a breach of the principle of specialty. In some countries, such as France, they ask judges and prosecutors to sign a clause protecting the transferred data.

It seems to be a barrier to the exchange of data between criminal and other jurisdictions (civil or administrative). Thus, for example, when the issuing State sends a second rogatory letter requesting permission to use in a civil matter the data provided in the first petition for a criminal case, Spanish Courts do not authorize this second request because it is allegedly prohibited by our Data Protection Law.

Another problem related to data protection is the risk of leaking personal information due to the physical transfer of files, which involves many different people.

In relation to the topic of data protection, one of the prosecutors interviewed is concerned about the latest jurisprudence of the ECJ. He states as follows:

> *"After the judgment of the Court of Justice of the European Union (CJEU) in Joined Cases C-2013-2015 and C-698/15 (Tele2 and Watson), the data retention legislative framework has either been changed, is currently being reviewed or has been subject to developing judicial precedent in a significant number of countries.*
>
> *Our 'Law on the retention of electronic communications and public communication networks data' (Law 25/2007 of 18 October 2007) provides a judicial supervision in general terms. Despite of them, considering the cross-border approach, many countries are reviewing their legislation to shape data retention regulations according the requirements of the European case law. The potential for a legislative disharmony within in the European Union is considerable.*
>
> *Take into consideration the development of a common understanding of the requirements resulting from the CJEU judgment at an EU level, seems to be urgent. It should thereafter be considered whether a common framework for data retention for the purpose of preventing and fighting crime would be beneficial.*
>
> *The current state of things requires further monitoring of the legislative developments and the potential impact of the judgement in next months and years, both on a national level and in the area of judicial cooperation in criminal matters*".

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

Several of the interviewed judges and prosecutors have a lack of experience in the execution and transfer of electronic evidence, so they do not know how it is produced in practice.

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

Interception of telephone communications is also practiced by the Police with a prior judicial authorization. The essential information, extracted from the preserved recordings, are usually transferred to the competent research bodies in CD format, equipped with security and authenticity measures such as electronic signatures.

Sending of the information to the issuing authority is not yet done electronically. It is known by several of the interviewees that there is an EU project on the topic, called e-CODEX (communication via online data exchange).

Transmission is carried out until now either through ordinary mail (!), either by a police commissioned by the issuing State or, where appropriate, by a liaison magistrate. E-mail is sometimes used, even considering it is not always a secure communication channel.

Some public prosecutors refers on agreements with Facebook that allow the Computer Crime Units of the Police to send directly warrants onto the national portal of social networks servers (Facebook, Twitter) so that the request for identification and search can be directly carried out. The processing period is approximately two weeks. This period may be reduced to one day and sometimes down to several hours in cases of terrorism and in the event of an imminent threat.

#### *2.2.3.5 Information to interested country*

There is little experience by judges and prosecutors in trans-border lawful interception of communications without technical assistance.

Although there is an obligation to report later (article 20 MLA 2000 Convention), Spanish judges do not usually communicate the trans-border intervention of communications to the corresponding State. One of them said to us that, for instance, he considers irrelevant for the Swiss authorities that Spanish Police is listening to the conversations of an investigated person in Spain who spends casually two days in Switzerland.

However, some foreign authorities, especially French, inform Spain when they are intervening in the communications of some subject in our country.

On the admissibility of the evidence obtained if the notification has not been made to the corresponding State, opinions of judges and prosecutors are divided.

Those who have less experience in this type of diligence understand that the test would be inadmissible because it contravenes Art. 20 of the MLA 2000 Convention. In their opinion, the intervention of the notified State constitutes a second filter or procedural guarantees, which acts as a proof of the validity for the undertaken action. Since it is foreseen in a mandatory way by supranational texts, we could not act without consider it.

However, those with more experience in this kind of investigations, consider questionable that the lack of communication results in inadmissibility of the gathered evidence. The reason for the provision in MLA Convention would be more connected to sovereignty reasons than to an effective protection of fundamental rights.

We have been told about a case where communications from a ship sailing nearby the Madeira archipelago were intercepted from Spain, without notifying the intervention to Portugal. The evidence was admitted, as soon as it was checked that the taped conversations were obtained through a police contribution.

#### *2.2.3.6 Casual findings*

Some of the Magistrates have answered they transfer data obtained in a criminal investigation to other proceedings, even if those data have not been obtained in the specific case for which the judicial cooperation was requested. In their opinion, the prosecution of crime prevails over the principle of specialty in evidence matters, prevailing the principle of availability. Any information that has been obtained can be provided on the basis of the lack of prohibition of the spontaneous exchange of information. Limitations on an exchange of date are considered an inadequate barrier to international judicial cooperation.

In the Spanish procedural system, this possibility is foreseen. Article 579bis Spanish Criminal Procedural Law[89] deals with the matter ('Use of information obtained in a different procedure and chance discoveries') in relation to interception of written communications. Evidence obtained in those interceptions can be incorporated into other proceedings, prior specific judicial authorization. In particular, section 3 is remarkable: "*The continuation of this measure for the investigation of the accidentally discovered crime requires authorization from the competent judge, for which, it will verify the diligence of the action, evaluating the framework in which the accidental finding occurred and the impossibility of having requested the measure that included it at the time. Likewise, it will be informed if the proceedings continue to be declared secret, in order that such declaration be respected in the other criminal proceeding, communicating the moment in which said secret is raised.*"

[89] OJ L 260, 17/09/1882, pp. 803 a 806, accessible at https://www.boe.es/buscar/doc.php?id=BOE-A-1882-6036

### 2.2.4 Costs

Spanish judges and prosecutors usually execute investigation measures, regardless of the expense involved and even if the request from other EU Member State involves extraordinary costs (Article 6.3 DEIO).

The General Council of the Judiciary recommend always to accept the request and, if necessary, try to reach an agreement with the requesting State to share the expenses. However, if no economic agreement is reached, the application will be executed facing Spain the expenses. Eventually they are later claimed to the issuing authority.

Personal opinion of judges and prosecutors differs partially from the existing practice up to now. Some of them think that the request to obtain evidence should can be denied if it is disproportionately expensive, applying same criteria as at national level. In these cases, a balance of the interests concerned must be done in order to, for example, deny the request to dismantle a boat to locate drugs, something whose cost amounts to millions of euros.

Other judges and prosecutors consider that the proper way should be the communication to the Ministry of Justice, requesting it to take charge of the costs of obtaining evidence, even prior consultation with the State of execution to share expenses.

Finally, there are several judges and prosecutors who are in favour of sharing the expenses and, if the issuing State refuses, reject the request to obtain evidence. They give as an example the necessity to share the expenses derived from translations in telephone tapping.

In the opposite case, when the request for obtaining evidence is issued by a Spanish authority, some States request promptly the return of the expenses incurred. This is the case, for example, with Switzerland and the United Kingdom. In one case, Lithuania claimed to Spain the costs incurred by a video conference for the interrogation of a witness. The judge made us notice, however, that it was much cheaper than bringing the witness to Spain.

General rule suppose that costs are assumed by executing State except if they are considered to be ‘exceptionally high’, an uncertain expression which should be highlighted.

Disagreement for costs may be grounds for refusal and may involve intervention by the Ministry of Justice (thus leaving the field of mutual recognition).

### 2.2.5 Special considerations expressed by lawyers

Most lawyers consider that the right of defence in transnational criminal proceedings faces greater disadvantages with respect to national cases. Among the main reasons is the poor

knowledge of the language of the proceedings and of the legal system of the involved States. In addition, the intervention in criminal proceedings abroad is conditioned to the availability of financial means in order to move to the seat of the acting Authority. To solve this gap, they suggest the intensive use of new technologies, especially video conferencing.

They consider that the provisions for legal assistance in Europe may be sufficient, but they are not always effective because some investigative measures are carried out in absence of a defence lawyer. Free legal assistance in both issuing and executing States is only guaranteed for execution of the European Arrest Warrants.

Lawyers assert that it seem to be possible that procedural guarantees and the right of defence are not fully respected abroad when coercive measures are requested from Spain. This is due to the lack of harmonization in this area of the legislation of the different States of the European Union. As example one of them remarks the enormous differences between the German and Romanian legal systems.

When Spain requests investigative measure without establishing conditions or requirements, there is a risk that it will be practiced abroad with a lower level of guarantees. One of them tell about a case as example: a Spanish judge requested the taking of a statement abroad without establishing conditions and it was practiced by the Local Police. There are no ways to check whether or not these guarantees have been fully respected in the requested State.

Outside the European Union is even greater the insight that procedural guarantees and the right of defence are not respected. For example, in the defence of those involved in the 9/11 attacks, evidence produced in Guantánamo and even in Syria was admitted, with the argument they were practiced according to the *lex loci.*

In their opinion the entry into force of the European Investigation Order could help to solve this problem, since the investigative measure can be requested from Spain to be practiced according to our Criminal Procedure Law (*lex fori*), in which a high level of guarantees are presents.

Several of the interviewed lawyers have requested the gathering of evidence abroad. They affirm that admission of the requested evidence is easier when it has also been requested by the prosecutor; otherwise, it is frequently denied. Once admitted, the way of practicing in the requested State is usually unknown on pieces of the admitted evidence are refused and not carried out by the executing Authorities.

They are asked if they consider there are enough mechanisms to control admissibility and validity of the evidence. In this respect they talk about mechanisms for empower the defence, such as the request for nullification when investigation measures have been carried out without the required guarantees under Spanish law system. That is the case of the statement of witness or defendants not practiced in front a judicial authority.

Nevertheless, requests for nullification are usually dismissed. This situation stimulates the creation of 'procedural paradises' to gather evidence with a huge decrease in guarantees, such as Ireland, Croatia or Greece.

In general terms there is not a control of the due procedural diligence by the judges (*ex officio*) neither under *lex fori* nor under *lex loci.* Unlike it happens in other countries such as the United Kingdom, Spanish judges usually do not put in question the legality of the investigations carried out abroad. These are accepted without further review, except in specialized judicial bodies such as the National Court (*Audiencia Nacional*), a judicial authority where cooperation mechanisms are part of its everyday tasks.

They consider it would be convenient that the defence lawyer take part in the practice of investigative measures done abroad in order to discuss its validity in the executing state itself. If this intervention does not exist, when the piece of evidence arrives in Spain, it is much harder to be able to contradict its evidentiary value, since it has been admitted in the required state.

# Section 3: Steps towards a model shift in evidence gathering and transmission

## 3.1. Questions on the implementation of the European Investigation Order

### 3.1.1 On the way to an effective implementation

At the time when interviews were done, Spain had not yet implemented Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters. Because of this legal lack, and facing the negative consequences of a dissimilar state of transposition in the different Member States,

Spanish State Prosecutor's Office issued the Opinion 1/2017, a transitory set of rules to apply EIO until legal transposition[90].

Directive was implemented by Law 3/2018, of June 11th, which modifies Law 23/2014, of November 20th, on Mutual Recognition of Criminal Resolutions in the European Union, to regulate the European Investigation Order.[91]

The implementation in Spain of the European Investigation Order will help to improve European judicial cooperation in several aspects. First of all the unification in a single text of different scattered norms is highly appreciate. So is the possibility of gathering several requests of investigative measure in a single document, for example, the search and seizure in a closed place together with a simultaneous interception of electronic communications. This option will be very useful in complex investigations.

It is also considered very interesting the uniformity offered by using the same forms, following the experience provided by the European Arrest Warrant and unlike other more formal cooperation instruments. Use of forms facilitates the translation, as well as the identification of the requested measure, so that there is less margin for mistakes. Forms must be filled in very carefully and completely, without forgetting the data about the crime, suspects, justification for the measure, and so on.

Other positive aspects are:

- Deadlines for the acceptance (30 days) and execution (90 days) of the measures requested, which will reduce the delay of the procedure
- Defined grounds for denial (Grounds for non-recognition or non-execution), which will avoid the discretion of the enforcement authority.
- European Investigation Order helps to clarify the competent judicial authorities in each case and enables as well the defence to request for evidence.

It has been noted, however, that the European Investigation Order needs a good implementation in Spain in order to improve European judicial cooperation effectively. The most cited examples on this regards the way of transposing the mandatory and optional grounds for denial, as well the strengthening of the right of defence. Some interviewees believe that the transposition into Spanish law will not improve European judicial cooperation, among other reasons, because the grounds for refusal are very broad and the possibility of denying the measure is always open.

[90] Opinion 1/2017, of 19 May, Prosecutor of the International Criminal Cooperation Chamber on the applicable legal regime due to the non-transposition of Directive 2014/41/EC, 19/05/2017, accessible at Official website www.fiscal.es
[91] OJ L. 142, 12.06.018, Pp.60161 to 60206.

In addition, the European Investigation Order does not imply any improvement in those proceedings excluded, such as undercover agents or joint investigation teams, or in those that involve obtaining evidence in real time in accordance with the legislation of the required State. It is commonly accepted that European Investigation Order can be an effective instrument for prosecution, but not for the defence.

### 3.1.2 Questions related to a provisory lack of implementation

This matter was addressed in Spain by Opinion 1/17 of the International Cooperation Unit of the Attorney General's Office (*Fiscalía General del Estado*), which contained an analysis of the transitory situation since that date (May 22, 2017) until the complete transposition in the Member States, including all possible cases.

In essence, the Opinion of the Attorney General's Office recommends continuing with the application of the current instruments, while the Directive has not been transposed in both States involved, requiring and required. However, the application of the above regulations must be carried out considering the DEIO.

Although that Opinion is aimed exclusively to Prosecutors, it has also been well received by judges who usually share the same standards. The General Council of the Judiciary itself discourages the use of normative instruments not implemented in the required State, considering the risk of inefficiency.

Some judges disagree with this majority opinion, however. They were in favour of the application of the European Investigation Order Directive even though only one of the States involved has transposed it, on the basis of the Directives direct effect.

Until October 16th 2017, 85 European Investigation Orders had been received by Spain and were initiated in the different Prosecutor's Offices, coming from France, Germany, Italy, Portugal, Finland, Lithuania, Latvia, etc., States that have had already transposed the Directive. Nevertheless this EIO were registered as such, but processed in practice as rogatory letters.

## 3.2 Glimpsing the future: what is expected on the EIO?

### 3.2.1 Satisfaction

80% of the interviewees - judges, prosecutors, and defence attorneys - have a general opinion strongly or somewhat favourable on the practice of judicial cooperation between Spain, Italy,

and Poland regarding the collection, transfer and admissibility of evidence. They consider that there is room for improvement in cooperation between all of three States, even although Spain is yet a very 'cooperative' country.

The remaining 20% has a less favourable opinion (slightly favourable, slightly or somewhat unfavourable) about the practice of judicial cooperation between Spain, Italy, and Poland regarding collection, transfer and admissibility of evidence. They believe that it should improve, especially in terms of deadlines.

None of the judges, prosecutors, and lawyers interviewed has a very unfavourable general opinion (strongly unfavourable) at this point.

The level of satisfaction of judges, prosecutors and defence lawyers with the response to requests for judicial cooperation is low. In the opinion of judges and prosecutors, the main difficulties are placed in the language barrier and the scarce training in cooperation tools. It is also a problem that the different legal systems are very diverse and there is no homogeneity in criminal proceedings. In this case, the convenience of moving towards a unique criminal process in Europe is well perceived. The disappointment comes also from delays in answering requests, or even its denial, sometimes due to minor formal defects.

Lawyers consider that the principle of reciprocity is not always fulfilled, since Spain is very diligent with Europe and third countries, while some States, such as United Kingdom, are reluctant to provide cooperation. They also regret the scarce training of judges in cooperation instruments and the unequal treatment they give to prosecutors and to lawyers, since they only process requests for cooperation formulated by the public prosecutor. They also observe that the level of collaboration by third States is much greater in relation with certain types of crimes (such as terrorism) than in others (such as money laundering or fraud).

Lawyers complain of the excessive formal requirements to send a rogatory letter: specification of the crime in order to prove the existence of double criminality, authorship, etc... They also regret that judicial cooperation can sometimes cover invasive measures urged by foreign States Intelligence Services or Police Bodies (for example wiretapping).

### 3.2.2 Benefits/strengths

Current judicial cooperation between Spain, Italy and Poland regarding collection, transfer and admissibility of evidence occurs usually in the fight against organized crime. Its main advantage lies in the fact that it facilitates the prosecution and judge of serious crimes.

Direct communication between judges without the intervention of a central authority is perceived also as a very positive factor, overcoming principle of reciprocity that governed in this matter until now.

A very complete regulatory framework that favours the use of judicial cooperation between all three States is considered a strength of the system. In addition it must be taken into account the important role played by the European Judicial Network and the natural desire to cooperate between judges and prosecutors.

It is valued favourable at the national level the specialization of Courts in passive judicial cooperation (Madrid and Marbella) or the existence of the accurate technical means, since all Courts (which should use it) are provided with video conferencing equipment. Finally, it is considered that Italy and Poland benefit most from the judicial cooperation between all three States: Spain is usually the place in which the investigation measures requested are executed.

The main weak point of the current judicial cooperation between Spain, Italy, and Poland in terms of collection, transfer and admissibility of evidence consists of the dysfunctions derived from the non-harmonization of criminal procedures. It has been required in this regard an European procedural code in order to regulate in a unique way the method of obtaining evidence throughout the European Union.

In close connection with the lack of common procedural regulations, there is also concern about the possible reduction of procedural guarantees for defence, limiting rights (i. e. in interception of communications).

Other weaknesses to highlight are the delays generated in criminal procedures, the lack of knowledge of normative instruments, the overload of work in the Courts or the poor quality of the translations.

Interviewees insist on the need of formation on European Criminal law and, especially, on the European Order of Investigation, as mutual recognition instrument useful for the whole inquiring phase. Those training activities should be practical and include, even, to the way of filling the forms. The role developed by the European Judicial Network and its website is considered a key element for effective European judicial cooperation.

Lawyers should not be excluded from this training, because they also recognize a great lack of knowledge in this field. This collective claims also to be asked for their opinion when transposing the different Directives to national legal systems.

In relation to the European Investigation Order, it is considered very interesting the initiative to create an electronic version of it together with a communication platform.

However, its regulation is subject to several criticisms:

1) the possibility to substitute the requested diligence by a different one following only the criteria of the executing authority is considered inappropriate (art. 10 DEIO);

2) the difficulty of assessing the optional cause of non-recognition or non-execution in art. 11.1(d) DEIO ('the execution of the EIO would be contrary to the principle *of ne bis in idem*');

3) the inclusion administrative infractions within the types of proceedings for which the EIO can be issued (art. 4 b DEIO)

In relation to this last criticism, one of the interviewed indicates verbatim:

> *"To maintain administrative offences in the framework of judicial criminal cooperation is a wrong decision because it keeps off the authorities to focus their attention in the relevant cases, and this situation can interfere in the efficacy and in the image of the system. There are a lot of differences between countries relating these kinds of proceedings.*
>
> *For instance, in Spain we don't have the possibility to issue an EIO for investigate administrative offences because our laws don't foresee an appeal before a Criminal Court.*
>
> *Nevertheless, our judicial authorities are receiving thousands of requests relating minor administrative offences in order to execute them. More of them are related to minor road offences, like breaches in the payment of highway fees. This situation means a serious use of the scarce existing judicial resources that in my opinion should be devoted to work only in serious organized crime*".

In relation to a judicial revision or resolutions, if Public Prosecutor denies recognition / execution of an EIO there is foreseen no appeal. This lack of legal prevision could leak to a breach of the right to a fair trial and the right of defence. In Italy is possible to appeal to Investigation Judge.

Changing our perspective to focus now on the group of lawyers, at least half of them are not sure that the transposition of the European Investigation Order Directive will intensify the rights of defence in cross-border criminal matters in relation to the collection of evidence.

In their view, it would be desirable a correct transposition of the Directive, because usually such legal activities are more favourable to the prosecution than to the defence. They consider that the new regulation could imply a risk that the cooperation will become 'smoother', as it has happened with the European Arrest Warrant.

Approximately the other half of the interviewed lawyers understand that the transposition of the Directive could bring advantages for the rights of the defence in cross-border criminal matters obtaining of evidence, since legal advice is generalized in the required State. In fact, double legal advice now extends to the beneficiaries of the free legal advice system, while till now this possibility already exist just for defendants who could afford to hire a lawyer in the executing State.

Lawyers are unanimously against granting the requiring State an access to telecommunications through direct interceptions in the executing State. They consider that the latter has to maintain sovereignty in this matter, because there is a limitation of fundamental rights. It could be very dangerous to allow such measure, because it would be configured a judge with universal competence, simply by means of technological advances. In addition, prospective investigations would be encouraged.

# Conclusions

**1) Differences of opinions**

There are important discrepancies between the opinions expressed by Judges and Prosecutors, compared to those of the Lawyers. While those of the former are, in general, optimistic, hopeful and positive for the implementation of the EIO Directive, the latter are quite critical because of the decrease in the threshold of protection of human rights.

In many cases this fear is clearly perceived and expressed. This opinion is common in the case of lawyers, who feel that prosecutors and defence are not equally treated when formulating an EIO.

**2) Excessive length of procedures**

One of the common observations is the increase in the length of criminal proceedings when cooperation operations are necessary. The EIO would come to suppose an advantage in this respect, standardizing the procedures.

The use of electronic formats easy to fill is repeatedly suggested.

**3) Scope of the EIO Directive**

Regarding Article 34 of the EIO Directive which deals with the relations to other legal instruments, agreements and arrangements, participants in the inquiry stated that this instrument replaces most of the previous MLA Agreements (see 2.1.1).

It will not be the case in some specific cases: the Service and sending of procedural documents (Article 5 of the MLA 2000 Convention); the spontaneous exchange of information (Article 7 of the MLA 2000 Convention); transfer of criminal proceedings (Article 21 of the MLA Convention and the CoE Convention 1972 on the Transfer of Proceedings); or the returning of an object to the injured party (Article 8 of the 2000 Convention) including a seizure for this purpose (decomiso).

**4) Pragmatic approach and principle ‘favor cooperationis’**

The interviewees apply, in general, a pragmatic approach in the interpretation of norms. The aim of overcoming the difficulties derived from cooperation originates, sometimes, the search of solutions not foreseen in the corresponding regulations. It is generally stated that many of these problems are solved more easily by non-strictly formal channels.

A good example of what has been said is the low consideration given by Spanish practitioners to the protection of data in criminal cooperation.

**5) Clarification in the system of attribution of costs**

There should be common guidelines regarding the distribution of the economic costs of cooperation. The requested State should be able to reject a request for cooperation if it exceeds a reasonable cost (unless it is assumed by the requesting State)

**6) Need for training and specialization**

An increase of the workload in judicial cooperation is to be expected so the EIO will be widely disseminated in the Member States. The interviews allow us to perceive a common concern on this matter: the EIO Directive will bring relevant novelties and all the participants in the criminal system should be prepared. Training courses, dissemination programs, easy ways of contact with (and support by) the European Judicial Network Contact Points, etc. must be immediately ready for a successful application of the norms.

To ensure that practitioners are made aware of the further development of this instrument, the organization of training sessions is essential.

A collection of best practices would also be of added value to allow them to efficiently fulfil their function.

Specialized shifts of qualified professionals in international criminal matters should be implemented by the bar associations.

N.B.: This conclusion is partially similar of those of the Plenary meetings of the EJN concerning the practical application of the EIO (Brussels, 8 December 2017). They mark as next steps: the necessity of Guidelines both at EU level and at National level; EIO electronic model forms and training for practitioners.

**7) Transitional period**

Due to the late transposition of the EIO Directive by Spain, practitioners considered adequate the application of the Opinion 1/17 of the International Cooperation Unit of the Attorney General's Office (Fiscalía General del Estado). They stated also for the application of the 1959 and 2000 MLA Conventions.

# Case Law

## European Court of Justice

ECJ, 26 February 2013, Melloni, C-399/11

ECJ, 5 April 2016, Aranyosi and Cãldãraru Joined Cases, C-404/15 and C-659/15 PPU

Consider the use of the useful information supplied by the EJN: https://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=8&QL=0

## European Court of Human Rights

ECtHR, GC, 20 October 2015, Dvorski v. Croatia, appl. no. 25703/11

Consider the use of the document 'Case Law by the European Court of Human Rights of Relevance for the Application of the European Conventions on International Co-Operation in Criminal Matters (updated to 30 January 2017)', available at https://rm.coe.int/16806ee1c9

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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 |
| ECtHR | 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 |
| 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 |