



DELIVERABLE 5.5

“TRAINING COURSES MATERIALS”

28.2.2019



Best practices for EUROpean COORDination on investigative measures and evidence gathering

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ABBREVIATIONS AND ACRONYMS

AFSJ	Area of Freedom, Security and Justice
AN	<i>Audiencia Nacional</i> (National Court)
AAN	Order by National Court
AFSJ	Area of Freedom, Security and Justice
AP	<i>Audiencia Provincial</i> (Provincial Court)
appl./appls.	application/applications
Art.	Article
BOE	<i>Boletín Oficial del Estado</i> (Spanish Official Journal)
BOCG	<i>Boletín Oficial de las Cortes Generales</i> (Official Journal of the Spanish Parliament)
CE	<i>Constitución Española</i> (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



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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	<i>exempli gratia</i>
ex	according to
EEW	European Evidence Warrant
EIO	European Investigation Order
EU	European Union
ff/ <i>et seq</i>	and the following
FGE	<i>Fiscalía General del Estado</i> (General Public Prosecutor's Office)
ie	<i>id est</i>
ICCPR	International Covenant on Civil and Political Rights of 16 December 1966
LECrim	<i>Ley de Enjuiciamiento Criminal</i> (Spanish Act on Criminal Procedure)
LD	Italian Legislative Decree
LO	<i>Ley Orgánica</i> (Organic Law)
LOEDE	Law 3/2003, on March 14 th , on European Arrest Warrant and Surrender
LOPJ	<i>Ley Orgánica del Poder Judicial</i> (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 (<i>Ley de reconocimiento mutuo de resoluciones penales en la Unión Europea</i>)
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.	<i>opus citatum</i>
p.	Page



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para.	paragraph (<i>fundamento jurídico</i>)
SAN	Judgement by National Court
SAP	Judgement by Provincial Court
STC	Judgement by Constitutional Court
STS	Judgement by Supreme Court
TC	<i>Tribunal Constitutional</i> (Constitutional Court)
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TS	<i>Tribunal Supremo</i> (Supreme Court)
vol.	Volume



1. EXECUTIVE SUMMARY

This document is aimed to present training materials offered to different target groups such as judges, prosecutors and lawyers posted in Eurocoord webpage (<http://eurocoord.eu/>). Training materials includes a presentation letter for each target group as well as a presentation and questionnaire in relation with each subject. Content of respective presentation makes reference to different deliverables, which complete document can be found at prior webpage too. These deliverables are the following ones:

- Legal Framework (D2.4)
- Judicial Practice (D3.3)
- Code of Best Practices (D4.4)

Be notice that not always the appropriate format of presentation (pptx) can be converted as word document (docx or pdf).

Finally a questionnaire with the aim at evaluating the training courses is included

2. TRAINING COURSE MATERIALS FOR JUDGES



2.1 Course Presentation

We are proud to present this training course materials addressed to **JUDGES**.

Its content disseminates the results of the research project “*Best practices for European Coordination on Investigative Measures and Evidence Gathering*” (EUROCOORD)” (Ref. JUST-2015-JCOO-AG-1-723198) funded by the European Commission and coordinated by the Universidad de Burgos in collaboration with Universidad Complutense de Madrid, Università degli Studi di Palermo and Jagellonian University. Its structure is as follows:

- **Presentation n. 1: Legal Framework (D2.4)**

Its objective is comparing Italian, Spanish and Polish 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) as all as prior legal instruments and case-law on evidence gathering in respective Member States. Also, the most interesting and problematic questions in applying the EIO in specific Member States such as participants in present project are foreseen. We provide a questionnaire to assess the knowledge learned.

- **Presentation n. 2: Judicial Practice (D3.3)**

Its objective is to identify practical problems deriving from the implementation in each national systems of DEIO. It is mainly based on gathering information through direct encounters with professionals of the judiciary and judicial institutions, including judges, prosecutors, defence lawyers and other interested parties. The given answers are based, in general, on previous experiences of the interviewees in relation to international and/or European judicial cooperation in general and evidence gathering in particular, through which they contemplate important issues for the future practice on EIO. Also, a questionnaire to assess the knowledge learned is included.

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

Its objective is to present a Code of Best Practices (CBP) on the application of the European Investigation Order (EIO) in all Member States at EU. The CBP as usually all codes of best practices in the legal field tries to identify the most efficient way to apply the EIO in cross-border criminal investigations and give guidance to those who will use it, mainly judges, public prosecutors, and defence lawyers on behalf of the defendants.

Another questionnaire to assess the knowledge learned is also added.

2.2 Course Materials Related To Legal Framework (D2.4)

2.2.1 Presentation



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

**Training course
Judges**

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

WS5.5 “Training Courses Materials”

Partners:



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- DIRECTIVE 2014/41/EU ON THE EIO: WHAT IS AN EIO?
- THE IMPLEMENTATION IN ITALY, POLAND AND SPAIN
- ART. 34 § 2 DEIO AND ITS MEANING
- SUBJECTS: WHO CAN ISSUE THE EIO?
- SUBJECTS: THE ROLE OF THE DEFENCE
- TYPES OF PROCEEDINGS
- THE CONCEPT OF "COERCIVE" MEASURES
- GROUNDS FOR NON RECOGNITION OR NON EXECUTION
- LEGAL REMEDIES AT NATIONAL LEVEL
- SPECIFIC INVESTIGATIVE MEASURES
- THE ADMISSIBILITY OF EVIDENCE OBTAINED THROUGH AN EIO

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



ART. 1 § 1 DEIO

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

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

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

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The implementation in Italy, Poland and Spain



ITALY

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



POLAND

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



SPAIN

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

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Art. 34 § 1 of DEIO and its meaning

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

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

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Art. 34 § 2 DEIO and its meaning

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

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

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

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

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SUBJECTS



Who can issue the EIO?

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

i) *"a judge, a court, an investigating judge or a public prosecutor competent in the case concerned; or*

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

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SUBJECTS

Who can issue the EIO?

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

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

	ITALY Public Prosecutor (during preliminary investigation) Judge who is proceeding (in the following stages)
	POLAND Court or Public Prosecutor (the preparatory stage of the criminal proceedings)
	SPAIN Public Prosecutors (issue or execute the EIO in Spain only when the measure requested does not entail restriction of fundamental rights)

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SUBJECTS

The role of the defence

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

ART. 1 § 3:

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

Any role has the victim!

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SUBJECTS

The role of the defence



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

Weak points:

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

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The concept of “coercive” measures



The DEIO does not provide any definition of coercive measure.



Coercive measures in Italy:

- Measures that infringe the right to **personal freedom**, such as, for instance, inspections (Art. 244 and 245 of the CPC);

- Searches (Article 247 and ff of the CPC);

- Forced collection of biological samples from living persons (Art. 359-bis of the CPC);

- Measures that infringe the right to the **inviolability of domicile**.

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Grounds for non recognition or non execution

Listed in Article 11 DEIO, as Optional.



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



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

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Grounds for non recognition or non execution

Listed in Article 11 DEIO, as Optional.



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

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

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

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Legal remedies at national level

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



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

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

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Legal remedies at national level

Poland and **Spain** make a reference to general legislation



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



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

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Specific investigative measures



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

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

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

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The admissibility of evidence obtained through an EIO



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



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

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

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LIFE CYCLE OF AN EIO



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



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2.2.2 Questionnaire

1. Has the Directive on the European Investigation Order (DEIO) been fully transposed into the Spanish, Italian and Polish legal systems?
2. Does Art. 34 § 2 of the DEIO provide the automatic abolition of all the previous normative instruments adopted in the field of judicial assistance in criminal matters?
3. Which “judicial authority” can issue or validate the EIO in the Spanish, Italian and Polish legal systems?
4. Does the administrative authority have any role in the issuance of an EIO?
5. Are there any significant provisions on the participation of a defence lawyer or of private parties at the stage of execution of an EIO? If the answer is affirmative, in which countries?

6. In what types of proceedings can an EIO be issued?
7. Does the DEIO contain a definition of coercive measure?
8. How have the grounds for non-recognition or non-execution of the EIO been implemented? As mandatory or optional?
9. Are there any remedies at national level against the decision to execute an EIO?
10. Regarding the interception of communications without technical assistance which are main issues?
11. Are there specific rules regarding the admissibility of evidence obtained through an EIO?

2.3 Course Materials Related to: Judicial Practice (D3.3)

2.3.1 Presentation



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

Training course for Judges

WS5.5 “Training Courses Materials”

Partners:





RESEARCH OBJECTIVES

LEGAL ISSUES

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

Conclusions

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RESEARCH OBJECTIVES



Interviewees: Target subjects



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LEGAL ISSUES



Current legal instruments

Italy

- Convention on Mutual Assistance in Criminal Matters of 1959 (entry into force in 1981);
- FD 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property and securing;
- Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters. **(Date of transposition: 28 July 2017).**

1st

Poland

- Convention on the Transfer of Sentenced Persons, done in Strasbourg on 21 March 1983;
- Agreement between the Republic of Poland and the United States of America on extradition on 10 July 1996;
- Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters. **(Date of transposition: 10 January 2018).**

2nd

Spain

- Convention on Mutual Assistance in Criminal Matters of 1959;
- Mutual Legal Assistance 2000;
- FD 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property and securing
- FD 2005/214/JHA of the Council, of February 24, 2005, relating to the application of the principle of mutual recognition of pecuniary sanctions;
- FD 2008/909/JHA of 27 November de 2018, on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty;
- Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters. **(Date of transposition: 11 July 2018)**

3rd

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Most requested sort of assistance



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Length of criminal proceedings

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

Source:

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



Outside EU:

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

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

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Procedural safeguards

Requirements as requiring/executing authority



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

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Information to defence lawyers



- A 'secondary role' may be motivated because the intervention of a lawyer in another country shows practical difficulties (language, lack of training or knowledge of forensic uses, etc.).
- Coordination between lawyers.
- 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).
- The difficulty of the mobility of the defence lawyer could be replaced either for the use of video conferencing or to the submission of written questionnaire (defendants or witnesses statements).
- Tendency to inadmissibility the written questions, considering them tricky or suggestive.

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Information to defence lawyers



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

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Information to defence lawyers



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

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Practice on execution and transfer of electronic evidence and interception communications

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

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

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

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

No
data

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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).
- **Italy:** Disagreement for costs may be grounds for refusal and may involve intervention by the Ministry of Justice (thus leaving the field of mutual recognition).
- **Poland:** In case of extraordinary costs, Consultation with issuing authority and refuse (under proportionality principle)..

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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 (*No harmonization of procedural guarantees and the right of defence, poor knowledge of the language of the proceedings and of the legal system*).

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

Suggestion: new technologies, especially video conferencing.

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

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

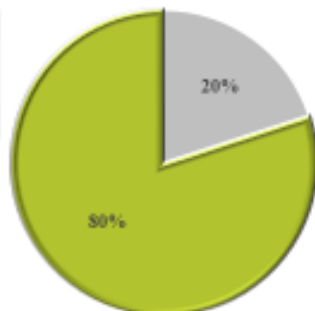
Suggestion: it would be convenient that the defence lawyer takes part in the practice of investigative measures done abroad in order to discuss its validity in the executing state itself".

Polish lawyers: *"Most problems of admissibility concerns hearing of a witness or with technical matters such as differences in documents corrections"*.

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Steps towards a model shift in evidence gathering and transmission



Spain: 20% strongly unfavourable.

Reasons:

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

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

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Steps towards a model shift in evidence gathering and transmission



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

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

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

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Steps towards a model shift in evidence gathering and transmission



80%: No training in the area of EIO

Poland: 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.

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.



40%: Training on judicial cooperation

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CONCLUSIONS

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

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CONCLUSIONS

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

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CONCLUSIONS

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

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CONCLUSIONS

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

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2.3.2 Questionnaire

1. Has Directive of European Investigation Order (DEIO) been transposed into Spanish, Italian and Polish legal system?
2. Is the videoconference a mean to obtain the statement of the accused, witnesses or expert? Does any country not admit it?
3. Are defence lawyers informed on the execution of a cross-border investigative measure in advance?
4. Do you believe that there is (or may exist) a reduction of procedural guarantees in cases where international judicial cooperation takes place in the gathering of evidence?
5. In relation with an EIO, has the lack of harmonization of procedural rights an impact in the respect of procedural guarantees?

6. Are judges, prosecutors and lawyers trained in European law (specifically in instruments of mutual recognition)?
7. Which is the relevance of the training in European law of judges, prosecutors and lawyers in the application of an EIO?
8. Regarding the evidence obtained abroad, do you consider there are enough mechanisms to challenge its validity and admissibility?
9. How is it possible to reduce the length of the criminal proceeding as a consequence of the request or the execution of an EIO?
10. Do you think that the implementation of the EIO will enhance the rights of the defence in cross-border criminal cases within the gathering of evidence?

2.4 Course Materials Related to: Code of Best Practices (D4.4)

2.4.1 Presentation



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

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



Partners:



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Code of Best Practices (D4.4)

- INTRODUCTION
- COERCIVE MEASURES IN SPAIN, ITALY AND POLAND
- COMPETENT AUTHORITIES
- RECEIVING AUTHORITY, RECOGNITION WHEN RECEIVING AUTHORITY IS NOT COMPETENT FOR THE EXECUTION
- WHO MAY REQUEST THE ISSUING OF THE EIO?
- PROPOSED BEST PRACTICE
- FORM OF THE EIO AND JUDICIAL DECISION
- EXECUTION OF THE EIO
- LEGAL REMEDIES AT NATIONAL LEVEL: SPAIN, ITALY AND POLAND
- IMPLEMENTATION OF ARTICLES 26, 27 AND 28 IN SPAIN, ITALY AND POLAND
- RELATIONSHIP WITH OTHER MUTUAL RECOGNITION INSTRUMENTS

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Introduction.

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

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COERCIVE MEASURES IN SPAIN, ITALY AND POLAND

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

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



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COERCIVE MEASURES IN SPAIN, ITALY AND POLAND

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

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



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COMPETENT AUTHORITIES



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Who may request the issuing of the EIO?



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Proposed Best Practice



➤ The decision rejecting the issuing of an EIO requested by the defence should be motivated.

➤ Victims and other parties should be entitled to request the issuing of an EIO.

➤ Centralising the receiving of the EIOs in the PP Office is positive for speeding up the process, for ensuring common standards in the whole territory of a State as to the recognition of an EIO.



➤ In cases of several measures requested within the same EIO, the decision on the competence of the executing authority might be quicker if the whole procedure is coordinated by one single authority.



➤ CBP: Direct contact between requesting and executing judicial authority is crucial. The communication channels should work equally regardless who is the receiving/executing authority.

➤ The splitting of the reception and execution of the EIO between the PPs and the judges does not appear to present practical problems.

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FORM OF THE EIO AND JUDICIAL DECISION



➤ The EIO is set out in a form signed by the issuing authority.

➤ The form shall explain all the elements that justify the necessity and proportionality of the measure requested. If such information is missing, before refusing, the receiving/executing authority shall communicate with the issuing authority asking to complement the data required.

➤ The issuing authorities should include in the EIO those requirements that will facilitate the admissibility of the evidence and which should be followed by the executing authority.



➤ Within Section J (Legal remedies), it should be specified not only whether an appeal against the issuing of the EIO has been lodged, but also whether such an appeal is admissible according to the lex fori.

➤ It is possible to identify the authority competent to receive the EIO through the EU ATLAS.



➤ In Italy the EIO shall be transmitted to the Direzione Nazionale Antimafia e Antiterrorismo (and Ministero della Giustizia) when the investigations refer to some of the crimes mentioned in art. 51 (3 and 3bis) ICPP.

➤ In Spain, the issuing of the EIO (and its execution) shall be included in the corresponding statistics, which then shall be sent to the Ministry of Justice .

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EXECUTION OF THE EIO



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



Ex officio upon request of the defence



Requirements of proportionality/necessity of the EIO



Issuing authority, validating authority



Formal requirements of the EIO form, transmission, confidentiality

Support: EJN and Eurojust, direct contact

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LEGAL REMEDIES AT NATIONAL LEVEL



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

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LEGAL REMEDIES AT NATIONAL LEVEL



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

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LEGAL REMEDIES AT NATIONAL LEVEL



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

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LEGAL REMEDIES AT NATIONAL LEVEL



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

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LEGAL REMEDIES AT NATIONAL LEVEL



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

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

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IMPLEMENTATION OF ARTICLES 26, 27 AND 28 IN SPAIN



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

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IMPLEMENTATION OF ARTICLES 26, 27 AND 28 IN ITALY



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

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IMPLEMENTATION OF ARTICLES 26, 27 AND 28 IN POLAND



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

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Relationship with other mutual recognition instruments

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

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2.4.2 Questionnaire

1. What we lost by not acting in accordance with the Code of Good Practice?
2. Access to electronic data or associated information held by the service providers is a coercive or non coercive measure in Spain? Motivate the answer
3. Who is the competent authority to Receive, recognise and execute the EIO in Poland?
4. Who may request the issuing of the EIO in Italy, Spain and Poland?
5. Where is set out the EIO and what elements it shall explain?
6. Can the executing authority check whether the issuing authority has judicial nature under its national law and what exceptions exist?
7. In what rules have Articles 26, 27 and 28 DEIO been implemented in Spain, Italy and Poland?
8. ¿Is it possible (indicate an example) to lodge an interlocutory appeal against the decision to issue the EIO in Italy, Spain and Poland?
9. Would any mutual recognition instrument be applied with preference that the rules on the assignment of cross-border investigative measures and the channels of communication foreseen in the EPPO?
10. What problems identify the CBP in the implementing the EIO?

3. TRAINING COURSE MATERIALS FOR PROSECUTORS

3.1 Course Presentation

We are proud to present this training course materials addressed to **PROSECUTORS**.

Its content disseminates the results of the research project “*Best practices for European Coordination on Investigative Measures and Evidence Gathering*” (EUROCOORD)” (Ref. JUST-2015-JCOO-AG-1-723198) funded by the European Commission and coordinated by the Universidad de Burgos in collaboration with Universidad Complutense de Madrid, Università degli Studi di Palermo and Jagellonian University. Its structure is as follows:

- **Presentation n. 1: Legal Framework (D2.4)**

Its objective is comparing Italian, Spanish and Polish 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) as all as prior legal instruments and case-law on evidence gathering in respective Member States. Also the most interesting and problematic questions in applying the EIO in specific Member States such as participants in present project are foreseen. We provide a questionnaire to assess the knowledge learned.

- **Presentation n. 2: Judicial Practice (D3.3)**

Its objective is to identify practical problems deriving from the implementation in each national systems of DEIO. It is mainly based on gathering information through direct encounters with professionals of the judiciary and judicial institutions, including judges, prosecutors, defence lawyers and other interested parties. The given answers are based, in general, on previous experiences of the interviewees in relation to international and/or European judicial cooperation in general and evidence gathering in particular, through which they contemplate important issues for the future practice on EIO. Also a questionnaire to assess the knowledge learned is included.

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

Its objective is to present a Code of Best Practices (CBP) on the application of the European Investigation Order (EIO) in all Member States at EU. The CBP as usually all codes of best practices in the legal field tries to identify the most efficient way to apply the EIO in cross-border criminal investigations and give guidance to those who will use it, mainly judges, public prosecutors, and defence lawyers on behalf of the defendants.

Another questionnaire to assess the knowledge learned is also added.

3.2 Course Materials Related To Legal Framework (D2.4)

3.2.1 Presentation



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

Training course for Prosecutors

WS5.5 “Training Courses Materials”

Partners:



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- DIRECTIVE 2014/41/EU ON THE EIO: WHAT IS AN EIO?
- THE IMPLEMENTATION IN ITALY, POLAND AND SPAIN
- ART. 34 § 2 DEIO AND ITS MEANING
- SUBJECTS: WHO CAN ISSUE THE EIO?
- SUBJECTS: THE ROLE OF THE DEFENCE
- TYPES OF PROCEEDINGS
- THE CONCEPT OF "COERCIVE" MEASURES
- GROUNDS FOR NON RECOGNITION OR NON EXECUTION
- LEGAL REMEDIES AT NATIONAL LEVEL
- SPECIFIC INVESTIGATIVE MEASURES
- THE ADMISSIBILITY OF EVIDENCE OBTAINED THROUGH AN EIO

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



ART. 1 § 1 DEIO

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

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

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

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The implementation in Italy, Poland and Spain



ITALY

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



POLAND

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



SPAIN

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

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Art. 34 § 1 of DEIO and its meaning

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

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

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Art. 34 § 2 DEIO and its meaning

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

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

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

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

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SUBJECTS



Who can issue the EIO?

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

i) *"a judge, a court, an investigating judge or a public prosecutor competent in the case concerned; or*

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

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SUBJECTS

Who can issue the EIO?

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

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

	ITALY Public Prosecutor (during preliminary investigation) Judge who is proceeding (in the following stages)
	POLAND Court or Public Prosecutor (the preparatory stage of the criminal proceedings)
	SPAIN Public Prosecutors (issue or execute the EIO in Spain only when the measure requested does not entail restriction of fundamental rights)

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SUBJECTS

The role of the defence

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

ART. 1 § 3:

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

Any role has the victim!

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SUBJECTS

The role of the defence



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

Weak points:

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

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The concept of “coercive” measures

The DEIO does not provide any definition of coercive measure.



Coercive measures in Italy:

- Measures that infringe the right to **personal freedom**, such as, for instance, inspections (Art. 244 and 245 of the CPC);

- Searches (Article 247 and ff of the CPC);

- Forced collection of biological samples from living persons (Art. 359-bis of the CPC);

- Measures that infringe the right to the **inviolability of domicile**.

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Grounds for non recognition or non execution

Listed in Article 11 DEIO, as Optional.



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



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

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Grounds for non recognition or non execution

Listed in Article 11 DEIO, as Optional.



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

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

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

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Legal remedies at national level

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



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

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

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Legal remedies at national level

Poland and **Spain** make a reference to general legislation



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



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

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Specific investigative measures



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

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

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

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The admissibility of evidence obtained through an EIO



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



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

- documentary and unrepeatable evidence gathered abroad through an EIO (such as the result of DNA analysis) can be included into the trial file pursuant to Art. 431 of the CPC without further conditions.

- conversely, repeatable evidence gathered by means of an EIO (such as witness statements), can be included in the trial file under the condition that the defence lawyer has been able to participate at the evidence gathering and to exercise powers recognised by Italian law.

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LIFE CYCLE OF AN EIO



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



EUROJUST IDENTIFIES CHALLENGES AND BEST PRACTICE REEIO CASES

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3.2.2 Questionnaire

12. Has the Directive on the European Investigation Order (DEIO) been fully transposed into the Spanish, Italian and Polish legal systems?
13. Does Art. 34 § 2 of the DEIO provide the automatic abolition of all the previous normative instruments adopted in the field of judicial assistance in criminal matters?
14. Which “judicial authority” can issue or validate the EIO in the Spanish, Italian and Polish legal systems?
15. Does the administrative authority have any role in the issuance of an EIO?
16. Are there any significant provisions on the participation of a defence lawyer or of private parties at the stage of execution of an EIO? If the answer is affirmative, in which countries?

17. In what types of proceedings can an EIO be issued?
18. Does the DEIO contain a definition of coercive measure?
19. How have the grounds for non-recognition or non-execution of the EIO been implemented? As mandatory or optional?
20. Are there any remedies at national level against the decision to execute an EIO?
21. Regarding the interception of communications without technical assistance which are main issues?
22. Are there specific rules regarding the admissibility of evidence obtained through an EIO?

3.3 Course Materials Related to: Judicial Practice (D3.3)

3.3.1 Presentation



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

Training course for Judges

WS5.5 “Training Courses Materials”

Partners:





RESEARCH OBJECTIVES

LEGAL ISSUES

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

Conclusions

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RESEARCH OBJECTIVES

Interviewees: Target subjects



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LEGAL ISSUES



Current legal instruments

Italy

- Convention on Mutual Assistance in Criminal Matters of 1959 (entry into force in 1981);
- FD 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property and securing;
- Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters. **(Date of transposition: 28 July 2017).**

1st

Poland

- Convention on the Transfer of Sentenced Persons, done in Strasbourg on 21 March 1983;
- Agreement between the Republic of Poland and the United States of America on extradition on 10 July 1996;
- Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters. **(Date of transposition: 10 January 2018).**

2nd

Spain

- Convention on Mutual Assistance in Criminal Matters of 1959;
- Mutual Legal Assistance 2000;
- FD 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property and securing
- FD 2005/214/JHA of the Council, of February 24, 2005, relating to the application of the principle of mutual recognition of pecuniary sanctions;
- FD 2008/909/JHA of 27 November de 2018, on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty;
- Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters. **(Date of transposition: 11 July 2018)**

3rd

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Most requested sort of assistance



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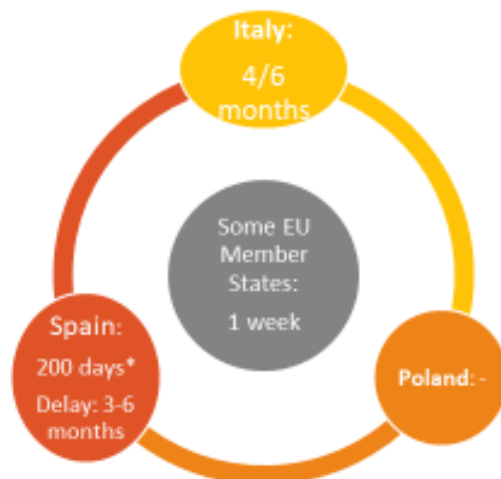


Length of criminal proceedings

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

Source:

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



Outside EU:

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

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

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Procedural safeguards

Requirements as requiring/executing authority



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

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Information to defence lawyers



- A 'secondary role' may be motivated because the intervention of a lawyer in another country shows practical difficulties (language, lack of training or knowledge of forensic uses, etc.).
- Coordination between lawyers.
- 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).
- The difficulty of the mobility of the defence lawyer could be replaced either for the use of video conferencing or to the submission of written questionnaire (defendants or witnesses statements).
- Tendency to inadmissibility the written questions, considering them tricky or suggestive.

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Information to defence lawyers



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

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Information to defence lawyers



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

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Practice on execution and transfer of electronic evidence and interception communications

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

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

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

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

No
data

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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).
- **Italy**: Disagreement for costs may be grounds for refusal and may involve intervention by the Ministry of Justice (thus leaving the field of mutual recognition).
- **Poland**: In case of extraordinary costs, Consultation with issuing authority and refuse (under proportionality principle)..

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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 (*No harmonization of procedural guarantees and the right of defence, poor knowledge of the language of the proceedings and of the legal system*).

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

Suggestion: new technologies, especially video conferencing.

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

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

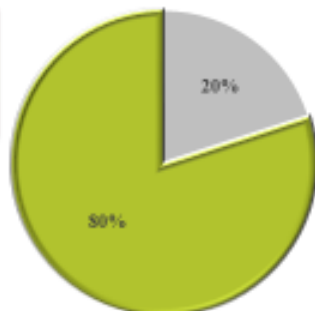
Suggestion: *it would be convenient that the defence lawyer takes part in the practice of investigative measures done abroad in order to discuss its validity in the executing state itself"*.

Polish lawyers: *"Most problems of admissibility concerns hearing of a witness or with technical matters such as differences in documents corrections"*.

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Steps towards a model shift in evidence gathering and transmission



Spain: 20% strongly unfavourable.

Reasons:

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

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

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Steps towards a model shift in evidence gathering and transmission



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

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

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

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Steps towards a model shift in evidence gathering and transmission



80%: No training in the area of EIO

Poland: 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.

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.



40%: Training on judicial cooperation

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CONCLUSIONS

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

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CONCLUSIONS

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

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CONCLUSIONS

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

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CONCLUSIONS

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

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3.3.2 Questionnaire

11. Has Directive of European Investigation Order (DEIO) been transposed into Spanish, Italian and Polish legal system?
12. Is the videoconference a mean to obtain the statement of the accused, witnesses or expert? Does any country not admit it?
13. Are defence lawyers informed on the execution of a cross-border investigative measure in advance?
14. Do you believe that there is (or may exist) a reduction of procedural guarantees in cases where international judicial cooperation takes place in the gathering of evidence?
15. In relation with an EIO, has the lack of harmonization of procedural rights an impact in the respect of procedural guarantees?

16. Are judges, prosecutors and lawyers trained in European law (specifically in instruments of mutual recognition)?
17. Which is the relevance of the training in European law of judges, prosecutors and lawyers in the application of an EIO?
18. Regarding the evidence obtained abroad, do you consider there are enough mechanisms to challenge its validity and admissibility?
19. How is it possible to reduce the length of the criminal proceeding as a consequence of the request or the execution of an EIO?
20. Do you think that the implementation of the EIO will enhance the rights of the defence in cross-border criminal cases within the gathering of evidence?

3.4 Course Materials Related to: Code of Best Practices (D4.4)

3.4.1 Presentation



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

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



Partners:





Code of Best Practices (D4.4)

- INTRODUCTION
- COERCIVE MEASURES IN SPAIN, ITALY AND POLAND
- COMPETENT AUTHORITIES
- RECEIVING AUTHORITY, RECOGNITION WHEN RECEIVING AUTHORITY IS NOT COMPETENT FOR THE EXECUTION
- WHO MAY REQUEST THE ISSUING OF THE EIO?
- PROPOSED BEST PRACTICE
- FORM OF THE EIO AND JUDICIAL DECISION
- EXECUTION OF THE EIO
- LEGAL REMEDIES AT NATIONAL LEVEL: SPAIN, ITALY AND POLAND
- IMPLEMENTATION OF ARTICLES 26, 27 AND 28 IN SPAIN, ITALY AND POLAND
- RELATIONSHIP WITH OTHER MUTUAL RECOGNITION INSTRUMENTS

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Introduction.

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

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COERCIVE MEASURES IN SPAIN, ITALY AND POLAND

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

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



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COERCIVE MEASURES IN SPAIN, ITALY AND POLAND

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

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



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COMPETENT AUTHORITIES



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Who may request the issuing of the EIO?



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Proposed Best Practice



➤ The decision rejecting the issuing of an EIO requested by the defence should be motivated.

➤ Victims and other parties should be entitled to request the issuing of an EIO.

➤ Centralising the receiving of the EIOs in the PP Office is positive for speeding up the process, for ensuring common standards in the whole territory of a State as to the recognition of an EIO.



➤ In cases of several measures requested within the same EIO, the decision on the competence of the executing authority might be quicker if the whole procedure is coordinated by one single authority.



➤ CBP: Direct contact between requesting and executing judicial authority is crucial. The communication channels should work equally regardless who is the receiving/executing authority.

➤ The splitting of the reception and execution of the EIO between the PPs and the judges does not appear to present practical problems.

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FORM OF THE EIO AND JUDICIAL DECISION



➤ The EIO is set out in a form signed by the issuing authority.

➤ The form shall explain all the elements that justify the necessity and proportionality of the measure requested. If such information is missing, before refusing, the receiving/executing authority shall communicate with the issuing authority asking to complement the data required.

➤ The issuing authorities should include in the EIO those requirements that will facilitate the admissibility of the evidence and which should be followed by the executing authority.



➤ Within Section J (Legal remedies), it should be specified not only whether an appeal against the issuing of the EIO has been lodged, but also whether such an appeal is admissible according to the lex fori.

➤ It is possible to identify the authority competent to receive the EIO through the EU ATLAS.



➤ In Italy the EIO shall be transmitted to the Direzione Nazionale Antimafia e Antiterrorismo (and Ministero della Giustizia) when the investigations refer to some of the crimes mentioned in art. 51 (3 and 3bis) ICPP.

➤ In Spain, the issuing of the EIO (and its execution) shall be included in the corresponding statistics, which then shall be sent to the Ministry of Justice .

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EXECUTION OF THE EIO





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




 Ex officio upon request of the defence

 Requirements of proportionality/necessity of the EIO

 Issuing authority, validating authority

 Formal requirements of the EIO form, transmission, confidentiality



 Support: EJN and Eurojust, direct contact

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LEGAL REMEDIES AT NATIONAL LEVEL



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

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LEGAL REMEDIES AT NATIONAL LEVEL



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

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LEGAL REMEDIES AT NATIONAL LEVEL



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

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LEGAL REMEDIES AT NATIONAL LEVEL



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

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LEGAL REMEDIES AT NATIONAL LEVEL



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

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

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IMPLEMENTATION OF ARTICLES 26, 27 AND 28 IN SPAIN



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

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IMPLEMENTATION OF ARTICLES 26, 27 AND 28 IN ITALY



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

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IMPLEMENTATION OF ARTICLES 26, 27 AND 28 IN POLAND



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

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Relationship with other mutual recognition instruments

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

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3.4.2 Questionnaire

11. What we lost by not acting in accordance with the Code of Good Practice?
12. Access to electronic data or associated information held by the service providers is a coercive o non coercive measure in Spain? Motivate the answer
13. Who is the competent authority to Receive, recognise and execute the EIO in Poland?
14. Who may request the issuing of the EIO in Italy, Spain and Poland?
15. Where is set out the EIO and what elements it shall explain?
16. Can the executing authority check whether the issuing authority has judicial nature under its national law and what exceptions exist?
17. In what rules have Articles 26, 27 and 28 DEIO been implemented in Spain, Italy and Poland?
18. ¿Is it possible (indicate an example) to lodge an interlocutory appeal against de decision to issue the EIO in Italy, Spain and Poland?
19. Would any mutual recognition instrument be applied with preference that the rules on the assignment of cross-border investigative measures and the channels of communication foreseen in the EPPO?
20. What problems identify the CBP in the implementing the EIO?

4. TRAINING COURSE MATERIALS FOR LAWYERS

4.1 Course Presentation

We are proud to present this training course materials addressed to **LAWYERS**.

Its content disseminates the results of the research project “*Best practices for European Coordination on Investigative Measures and Evidence Gathering*” (EUROCOORD)” (Ref. JUST-2015-JCOO-AG-1-723198) funded by the European Commission and coordinated by the Universidad de Burgos in collaboration with Universidad Complutense de Madrid, Università degli Studi di Palermo and Jagellonian University. Its structure is as follows:

- **Presentation n. 1: Legal Framework (D2.4)**

Its objective is comparing Italian, Spanish and Polish 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) as all as prior legal instruments and case-law on evidence gathering in respective Member States. Also the most interesting and problematic questions in applying the EIO in specific Member States such as participants in present project are foreseen. We provide a questionnaire to assess the knowledge learned.

- **Presentation n. 2: Judicial Practice (D3.3)**

Its objective is to identify practical problems deriving from the implementation in each national systems of DEIO. It is mainly based on gathering information through direct encounters with professionals of the judiciary and judicial institutions, including judges, prosecutors, defence lawyers and other interested parties. The given answers are based, in general, on previous experiences of the interviewees in relation to international and/or European judicial cooperation in general and evidence gathering in particular, through which they contemplate important issues for the future practice on EIO. Also a questionnaire to assess the knowledge learned is included.

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

Its objective is to present a Code of Best Practices (CBP) on the application of the European Investigation Order (EIO) in all Member States at EU. The CBP as usually all codes of best practices in the legal field tries to identify the most efficient way to apply the EIO in cross-border criminal investigations and give guidance to those who will use it, mainly judges, public prosecutors, and defence lawyers on behalf of the defendants.

Another questionnaire to assess the knowledge learned is also added.

4.2 Course Materials Related To Legal Framework (D2.4)

4.2.1 Presentation



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

**Training course
Judges**

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

WS5.5 “Training Courses Materials”

Partners:



EUROCOORD -JUST-2015-JCOO-AG-1 n° reference 723198



- DIRECTIVE 2014/41/EU ON THE EIO: WHAT IS AN EIO?
- THE IMPLEMENTATION IN ITALY, POLAND AND SPAIN
- ART. 34 § 2 DEIO AND ITS MEANING
- SUBJECTS: WHO CAN ISSUE THE EIO?
- SUBJECTS: THE ROLE OF THE DEFENCE
- TYPES OF PROCEEDINGS
- THE CONCEPT OF "COERCIVE" MEASURES
- GROUNDS FOR NON RECOGNITION OR NON EXECUTION
- LEGAL REMEDIES AT NATIONAL LEVEL
- SPECIFIC INVESTIGATIVE MEASURES
- THE ADMISSIBILITY OF EVIDENCE OBTAINED THROUGH AN EIO

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



ART. 1 § 1 DEIO

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

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

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

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The implementation in Italy, Poland and Spain



ITALY

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



POLAND

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



SPAIN

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

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Art. 34 § 1 of DEIO and its meaning

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

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

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Art. 34 § 2 DEIO and its meaning

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

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

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

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

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SUBJECTS



Who can issue the EIO?

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

i) *"a judge, a court, an investigating judge or a public prosecutor competent in the case concerned; or*

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

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SUBJECTS

Who can issue the EIO?

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

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

	ITALY Public Prosecutor (during preliminary investigation) Judge who is proceeding (in the following stages)
	POLAND Court or Public Prosecutor (the preparatory stage of the criminal proceedings)
	SPAIN Public Prosecutors (issue or execute the EIO in Spain only when the measure requested does not entail restriction of fundamental rights)

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SUBJECTS

The role of the defence

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

ART. 1 § 3:

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

Any role has the victim!

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SUBJECTS

The role of the defence



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

Weak points:

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

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The concept of “coercive” measures

The DEIO does not provide any definition of coercive measure.



Coercive measures in Italy:

- Measures that infringe the right to **personal freedom**, such as, for instance, inspections (Art. 244 and 245 of the CPC);

- Searches (Article 247 and ff of the CPC);

- Forced collection of biological samples from living persons (Art. 359-bis of the CPC);

- Measures that infringe the right to the **inviolability of domicile**.

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Grounds for non recognition or non execution



Listed in Article 11 DEIO, as Optional.



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



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

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Grounds for non recognition or non execution



Listed in Article 11 DEIO, as Optional.



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

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

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

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Legal remedies at national level

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



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

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

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Legal remedies at national level

Poland and **Spain** make a reference to general legislation



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



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

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Specific investigative measures



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

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

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

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The admissibility of evidence obtained through an EIO



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



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

- documentary and unrepeatable evidence gathered abroad through an EIO (such as the result of DNA analysis) can be included into the trial file pursuant to Art. 431 of the CPC without further conditions.

- conversely, repeatable evidence gathered by means of an EIO (such as witness statements), can be included in the trial file under the condition that the defence lawyer has been able to participate at the evidence gathering and to exercise powers recognised by Italian law.

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LIFE CYCLE OF AN EIO



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



EUROJUST IDENTIFY CHALLENGES AND BEST PRACTICE REEIO CASES

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4.2.2 Questionnaire

23. Has the Directive on the European Investigation Order (DEIO) been fully transposed into the Spanish, Italian and Polish legal systems?

24. Does Art. 34 § 2 of the DEIO provide the automatic abolition of all the previous normative instruments adopted in the field of judicial assistance in criminal matters?

25. Which “judicial authority” can issue or validate the EIO in the Spanish, Italian and Polish legal systems?

26. Does the administrative authority have any role in the issuance of an EIO?

27. Are there any significant provisions on the participation of a defence lawyer or of private parties at the stage of execution of an EIO? If the answer is affirmative, in which countries?

28. In what types of proceedings can an EIO be issued?
29. Does the DEIO contain a definition of coercive measure?
30. How have the grounds for non-recognition or non-execution of the EIO been implemented? As mandatory or optional?
31. Are there any remedies at national level against the decision to execute an EIO?
32. Regarding the interception of communications without technical assistance which are main issues?
33. Are there specific rules regarding the admissibility of evidence obtained through an EIO?

4.3 Course Materials Related to: Judicial Practice (D3.3)

4.3.1 Presentation



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

Training course for Lawyers

WS5.5 “Training courses Materials”

Partners:



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RESEARCH OBJECTIVES

LEGAL ISSUES

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

Conclusions

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RESEARCH OBJECTIVES

Interviewees: Target subjects



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LEGAL ISSUES



Current legal instruments

Italy

- Convention on Mutual Assistance in Criminal Matters of 1959 (entry into force in 1981);
- FD 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property and securing;
- Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters. **(Date of transposition: 28 July 2017).**

1st

Poland

- Convention on the Transfer of Sentenced Persons, done in Strasbourg on 21 March 1983;
- Agreement between the Republic of Poland and the United States of America on extradition on 10 July 1996;
- Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters. **(Date of transposition: 10 January 2018).**

2nd

Spain

- Convention on Mutual Assistance in Criminal Matters of 1959;
- Mutual Legal Assistance 2000;
- FD 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property and securing
- FD 2005/214/JHA of the Council, of February 24, 2005, relating to the application of the principle of mutual recognition of pecuniary sanctions;
- FD 2008/909/JHA of 27 November de 2018, on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty;
- Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters. **(Date of transposition: 11 July 2018)**

3rd

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Most requested sort of assistance



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Length of criminal proceedings

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

Source:

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



Outside EU:

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

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

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Procedural safeguards

Requirements as requiring/executing authority



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

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Information to defence lawyers



- A 'secondary role' may be motivated because the intervention of a lawyer in another country shows practical difficulties (language, lack of training or knowledge of forensic uses, etc.).
- Coordination between lawyers.
- 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).
- The difficulty of the mobility of the defence lawyer could be replaced either for the use of video conferencing or to the submission of written questionnaire (defendants or witnesses statements).
- Tendency to inadmissibility the written questions, considering them tricky or suggestive.

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Information to defence lawyers



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

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Information to defence lawyers



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

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Practice on execution and transfer of electronic evidence and interception communications

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

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

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

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

No
data

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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).
- **Italy**: Disagreement for costs may be grounds for refusal and may involve intervention by the Ministry of Justice (thus leaving the field of mutual recognition).
- **Poland**: In case of extraordinary costs, Consultation with issuing authority and refuse (under proportionality principle)..

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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 (*No harmonization of procedural guarantees and the right of defence, poor knowledge of the language of the proceedings and of the legal system*).

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

Suggestion: new technologies, especially video conferencing.

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

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

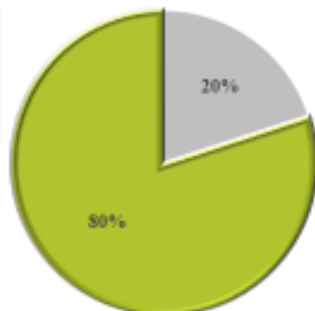
Suggestion: *it would be convenient that the defence lawyer takes part in the practice of investigative measures done abroad in order to discuss its validity in the executing state itself"*.

Polish lawyers: *"Most problems of admissibility concerns hearing of a witness or with technical matters such as differences in documents corrections"*.

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Steps towards a model shift in evidence gathering and transmission



Spain: 20% strongly unfavourable.

Reasons:

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

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

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Steps towards a model shift in evidence gathering and transmission



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

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

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

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Steps towards a model shift in evidence gathering and transmission



Poland: 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.

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.

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CONCLUSIONS

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

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CONCLUSIONS

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

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CONCLUSIONS

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

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CONCLUSIONS

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

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4.3.2 Questionnaire

21. Has Directive of European Investigation Order (DEIO) been transposed into Spanish, Italian and Polish legal system?
22. Is the videoconference a mean to obtain the statement of the accused, witnesses or expert? Does any country not admit it?
23. Are defence lawyers informed on the execution of a cross-border investigative measure in advance?
24. Do you believe that there is (or may exist) a reduction of procedural guarantees in cases where international judicial cooperation takes place in the gathering of evidence?
25. In relation with an EIO, has the lack of harmonization of procedural rights an impact in the respect of procedural guarantees?

26. Are judges, prosecutors and lawyers trained in European law (specifically in instruments of mutual recognition)?
27. Which is the relevance of the training in European law of judges, prosecutors and lawyers in the application of an EIO?
28. Regarding the evidence obtained abroad, do you consider there are enough mechanisms to challenge its validity and admissibility?
29. How is it possible to reduce the length of the criminal proceeding as a consequence of the request or the execution of an EIO?
30. Do you think that the implementation of the EIO will enhance the rights of the defence in cross-border criminal cases within the gathering of evidence?

4.4 Course Materials Related to: Code of Best Practices (D4.4)

4.4.1 Presentation



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

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



Partners:





Code of Best Practices (D4.4)

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Introduction.

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

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COERCIVE MEASURES IN SPAIN, ITALY AND POLAND

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

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



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COERCIVE MEASURES IN SPAIN, ITALY AND POLAND

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

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



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COMPETENT AUTHORITIES



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Who may request the issuing of the EIO?



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Proposed Best Practice



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

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FORM OF THE EIO AND JUDICIAL DECISION



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

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EXECUTION OF THE EIO



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



Ex officio upon request of the defence



Requirements of proportionality/necessity of the EIO



Issuing authority, validating authority



Formal requirements of the EIO form, transmission, confidentiality

Support: EJN and Eurojust, direct contact

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LEGAL REMEDIES AT NATIONAL LEVEL



Issuing of the EIO	Public prosecutor (Prior to the opening of the criminal trial)	Investigating judge (*) (When a criminal proceeding has been initiated, but prior to the judgment)	Trial Court/ (Trial)
Pre-trial investigations by the prosecutors (Diligencias de Investigación Fiscal)	There is no appeal (art. 13.4 LRM).		
Pre-trial phase of the criminal proceeding against minors	No direct appeal is provided, but the parties may challenge it before the Juvenile Judge (art. 26.2 LORPM).		
Proceeding for crime punishable with imprisonment of more than 9 years Proceedings for grave crimes (Procedimiento ordinario)		Reforma/appeal (arts. 216 y ss. LECrim). *** Annulment of the proceedings/acts (240.2 LOPJ)	No direct appeal is permitted, but it is possible to lodge complaint. It is necessary to lodge complaint in order to appeal the judgment (art. 659 LECrim). *** Annulment of the proceedings/acts (240.2 LOPJ)
Proceedings for crimes punishable with imprisonment up to 9 years (Procedimiento abreviado)		Reforma/appeal (art. 766 LECrim). *** Annulment of the proceedings/acts (240.2 LOPJ)	No direct appeal is permitted, but the part that requested the issuing of the EIO and whose request was rejected may reproduce its request at the beginning of the trial (art. 783.1° III LECrim). *** Annulment of the proceedings/acts (240.2 LOPJ)

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LEGAL REMEDIES AT NATIONAL LEVEL



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

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LEGAL REMEDIES AT NATIONAL LEVEL



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

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LEGAL REMEDIES AT NATIONAL LEVEL



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

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LEGAL REMEDIES AT NATIONAL LEVEL



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

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

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IMPLEMENTATION OF ARTICLES 26, 27 AND 28 IN SPAIN



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

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IMPLEMENTATION OF ARTICLES 26, 27 AND 28 IN ITALY



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

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IMPLEMENTATION OF ARTICLES 26, 27 AND 28 IN POLAND



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

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Relationship with other mutual recognition instruments

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

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4.4.2 Questionnaire

21. What we lost by not acting in accordance with the Code of Good Practice?
22. Access to electronic data or associated information held by the service providers is a coercive or non coercive measure in Spain? Motivate the answer
23. Who is the competent authority to Receive, recognise and execute the EIO in Poland?
24. Who may request the issuing of the EIO in Italy, Spain and Poland?
25. Where is set out the EIO and what elements it shall explain?
26. Can the executing authority check whether the issuing authority has judicial nature under its national law and what exceptions exist?
27. In what rules have Articles 26, 27 and 28 DEIO been implemented in Spain, Italy and Poland?
28. ¿Is it possible (indicate an example) to lodge an interlocutory appeal against the decision to issue the EIO in Italy, Spain and Poland?
29. Would any mutual recognition instrument be applied with preference that the rules on the assignment of cross-border investigative measures and the channels of communication foreseen in the EPPO?
30. What problems identify the CBP in the implementing the EIO?

5. TRAINING EVALUATION QUESTIONNAIRE

TRAINING QUESTIONNAIRE

Dear all, please, take a few minutes of your time to fill in this short questionnaire and let us know what we did well and what we can improve in our training. Thank you in advance!

***Obligatorio**

*

	Yes	To some extent	No	I cannot tell
Are you familiar with the concept of training?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Did the training increase your knowledge and understanding about OIET?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Do you find the training interesting?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Are the presented topic relevant to the current situation in your job?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Do you agree with the methodology used: online tool?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

What did you like most and least in the training?