

European investigation order for obtaining evidence in the criminal proceedings

Study of the proposal for a European directive

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The purpose of this paper is to analyse this new European initiative regarding an European Investigation Order (EIO) based on the principle of mutual recognition which shall facilitate the gathering and transmission of evidence in criminal matters between Member States. Taking into account the discussions and problems of the free movement of evidence in criminal matters, we will try to focus mainly on the content and purpose of the PD EIO and the differences between this proposed instrument and the European Evidence Warrant. In particular we will address the question of the necessity of an EIO and analyse if it provides enough safeguards for the protection of the fundamental rights of the defendant.

El objeto de este trabajo es analizar la Propuesta de Directiva Europea relativa a la orden – basada en el principio de reconocimiento mutuo – para la obtención de pruebas que se encuentren o hayan de obtenerse en otro Estado miembro en asuntos penales (EIO). Son muchas las cuestiones que se suscitan y se han discutido acerca de la libre circulación de la prueba en los procesos penales en Europa. No es nuestra intención recordar toda esa problemática, sino centrarnos en el contenido de la PD EIO, sus diferencias respecto el exhorto de obtención de pruebas, y valorar si este nuevo instrumento es necesario en el presente y si garantiza de manera suficiente los derechos fundamentales del imputado.

I. Introduction

In November 2009, the EU Commission adopted the “Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility”¹. The European Commission opened a consultation process and requested all the stakeholders to submit their replies to a questionnaire regarding the future proposal of a comprehensive instrument for the gathering of evidence and its admissibility in cross-border proceedings.² Shortly afterwards, the text for a Proposal for a Directive regarding the European Investigation Order in criminal matters (hereinafter PD EIO) was issued³. The EIO takes some rules from the Framework

¹ Done in Brussels the 11.11.2009, COM (2009) 624 final. The text can be viewed under <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0624:FIN:ES:PDF>.

² The replies sent by organizations, governments and other authors to the questionnaire can be found under http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_0004_en.htm. The replies of the governments differ greatly as some of them are openly against the extension of the mutual recognition principle with regard to the obtaining of evidence (e.g. UK, Germany); others, however, are in favour of strengthening the mutual recognition principle (e.g. The Netherlands, Spain, France, Austria or Poland).

³ For the elaboration of this paper we have used the document done in Brussels the 29.4.2010 (COPEN 115).

Decision on the European Evidence Warrant (FD EEW) expands its scope and adds rules that appeared already in the EU Convention on Mutual Assistance in Criminal Matters of 2000. In general, the EIO seeks to replace the fragmented regulation on the gathering of evidence with a comprehensive instrument applicable to all – almost all – elements of evidence, including specific rules on certain type of evidence like the interception of communications or the information related to bank accounts and transactions.

The purpose of this paper is to analyse this new European initiative regarding an EIO based on the principle of mutual recognition which shall facilitate the gathering and transmission of evidence in criminal matters between Member States. One of the main concerns in the development of a single European area of freedom, security and justice has been to improve the instruments of judicial cooperation in criminal matters. It would exceed the aim of this paper to recall all the problems that appear in cross-border criminal proceedings with regard to the free movement of evidence and explain all the issues that have been discussed – and are still hotly debated – among academics, practitioners and policy makers.⁴ Taking into account these discussions and arguments, we will try to focus mainly on the content and purpose of the PD EIO. In particular we will address the question of the necessity of an EIO in criminal matters and also if the regulation proposed is adequate for the goal sought and if it provides enough safeguards for the protection of the fundamental rights of the accused.

II. The Background of the EIO: From mutual legal assistance to mutual recognition in obtaining evidence

Before examining the details of the EIO, we will very briefly recall the path followed until the adoption of the present Proposal for a Directive of EIO, as this will help to understand the context in which it has been prepared and adopted.

1. The Mutual Assistance instruments

The mutual assistance in the obtaining of evidence within Europe has been governed by the European Convention of 20th April 1959,⁵ complemented by the Protocols signed in 1978⁶ and 2001⁷. Additionally the rules on mutual assistance in criminal matters were developed by the Schengen Agreement. Under the provisions of the Schengen Agreement,⁸ the grounds to refuse the execution of a mutual assistance request were reduced and the requirement of double incrimination

⁴ On the problems of cross-border evidence gathering and admissibility in Europe see the comprehensive study of *Gleiß*, *Beweisgrundsätze einer grenzüberschreitenden Strafverfolgung*, 2006; see also *Ambos*, ZIS 2010, 557.

⁵ Council of Europe, Treaty Series, Nr. 30.

⁶ Council of Europe, Treaty Series, Nr. 99.

⁷ Council of Europe, Treaty Series, Nr. 182.

⁸ Cf. specifically arts. 48 to 53.

was also restricted (art. 51). Moreover it provided for a simplified procedure for the transmission of the requests, allowing as a general rule the direct contact between judicial authorities of the requesting and executing state (art. 53). These were the essential rules regarding the gathering of evidence in criminal matters in another Member State, until the European Convention on Mutual Assistance in Criminal Matters of 29th May 2000 was adopted. It took more than five years until a sufficient number of states had signed the Convention in order to enter into force the 23rd August 2005. This Convention is based upon the same principles as the 1959 Convention, but it represents a significant step forward in the development of the judicial cooperation in criminal matters.

In parallel, while the mutual legal assistance was being reinforced and updated through international conventions, the European institutions decided to improve the judicial cooperation by replacing the existing international rules on mutual legal assistance with new European instruments based on the principle of mutual recognition (see the Council Conclusions of Tampere 1999)⁹. Since then several action plans and programmes focused on the implementation of the principle of mutual recognition have been approved. In these programmes the obtaining of evidence and its admissibility in criminal matters is placed as a priority for the EU institutions.¹⁰ The so called free movement of evidence appears to be one of the goals within the establishment of a single area of justice and an essential element to fight efficiently against cross-border and organized crime.

2. The approval of the European Evidence Warrant

On 14th November 2003 the Commission presented the Proposal for a Framework Decision on the European Evidence Warrant,¹¹ to improve the judicial cooperation in the obtaining of pre-existing evidentiary elements. Later the Hague Programme¹² defined a five year roadmap to advance towards the establishment of a European area of freedom, security and justice, and expressly mentions the decisions related to the obtaining of evidence and its admissibility.¹³

⁹ http://www.europa.eu.int/european_council/conclusions/index_es.htm, Conclusions of the Presidency of the Tampere European Council of 15./16.10.1999. With regard to evidence, see precisely point Nr. 36.

¹⁰ See the programme of measures to implement the principle of mutual recognition of decisions in criminal matters of 2001, OJC 12, of 15.1.2001. The point 2.1.1, concerning the obtaining of evidence states the aim: “to ensure the evidence is admissible, to prevent its disappearance and to facilitate the enforcement of search and seizure orders, so that evidence can be quickly secured in a criminal case”.

¹¹ COM (2003) 688 final, of 14.11.2003. On the Proposal for a FD on the European Evidence Warrant see extensively under *Bachmaier*, in: Deu/Inchausti/Hernan (eds.), *El Derecho Procesal Penal en la Unión Europea*, 2006, pp. 131-178, and the literature quoted there.

¹² Approved in the European Council of 4./5.11.2004, DOC 53, de 3.3.2005.

¹³ Cf. point 3.3.1.

The distrust towards the implementation of the principle of mutual recognition and the particular problems that it poses with regard to the gathering of evidence in another Member State, caused that the Framework Decision on the Evidence Warrant (hereinafter FD EEW) was not approved until December 2008.¹⁴ The FD on EEW has a limited scope as it only applies to obtain pieces of evidence that already exist, as documents, objects or data. This instrument should constitute the first step towards a single mutual recognition instrument that would in due course replace all of the existing mutual assistance regime¹⁵. Following the objectives set out in the programmes and in the FD EEW, the Stockholm Programme of 11.12.2009 also includes among the priorities the setting up of a comprehensive system for obtaining evidence in cases with cross-border dimension.¹⁶ And in April 2010, even before the FD on EEW has been applied, an initiative for a Directive of an EIO is launched. As it can be seen, the EIO is the result of the advancement of the programme designed to strengthen the judicial cooperation and facilitating the obtaining and transmitting of evidence. We could affirm that in this regard, the European institutions have done their homework and they have prepared the instrument which had previously defined as the goal to be achieved.

3. Mutual legal assistance versus mutual recognition

Even if we consider that the EIO was a programmed and long foreseen instrument for the judicial cooperation in criminal matters, this does not mean that it is exempt of controversy. Some have express their concerns with regard to the EIO based on the principle that underpins this instrument, the mutual recognition of judicial decisions; others have shown open opposition to the EIO because the affirm it violates the principle of equality of arms between prosecution and defence in the criminal procedure.

As it is known, under the principle of mutual recognition, the judicial decisions from another Member State shall have the same effect and value as the national judicial decisions without a prior procedure of recognition and homologation.¹⁷ The system of mutual recognition thus is based on mutual trust. In essence it means that the state of execution can renounce to exert control upon the grounds that motivate the request for evidence of the issuing state, because the execution state can trust that the requesting authorities have already checked the legality, necessity and proportionality of the

¹⁴ FD 2008/978/JHA of 18.12.2008.

¹⁵ Point 39 of the Explanatory Memorandum of the Proposal for a FD on EEW.

¹⁶ The Stockholm Programme, Brussels 23.11.2009, 16484/09, JAI 866, point 3.1.1.

¹⁷ On the mutual recognition principle see, among others, *Ormazábal Sánchez*, *Espacio penal europeo y mutuo reconocimiento*, 2006; *Jimeno Bulnes*, *European Law Journal* 9 (2003), 614-630; *Bujosa Vadell*, *Derecho penal supranacional y cooperación jurídica internacional*, Cuadernos de Derecho Judicial XIII, 454; *Gleß*, *ZStW* 116 (2004), 353-367; *Peers*, *Common Law Market Review* 41 (2004), 5.

measure requested. If there is trust in another legal system and in their judges, there is in principle no problem in executing a foreign request in the same way as if it were a national decision or request. When the states apply common procedural safeguards and grant an equivalent protection to human rights, there is no problem in recognizing a foreign judicial decision even if it has applied different legal rules. Trust is the very essential basis for the acceptance of the mutual recognition principle. Given this trust, the requested state does not need to check the legality of the foreign judicial decision prior to execute it. This is the main difference between the mutual legal assistance system and the mutual recognition principle. Apart from the formalities – under the mutual legal assistance there is a “request”, whilst under the mutual recognition system, the issuing state sends an “order” – one of the main differences between mutual legal assistance and mutual recognition lies in the procedure for recognition and the grounds for refusal of the request. Under the mutual principle the requested state, as a rule, will not check and is not allowed to check the grounds – level of suspicion, necessity or proportionality of the measure – that have motivated the request, whereas under the system of mutual assistance the executing state has much more leeway to check the merits of the foreign judicial decision. However, this does not mean that the principle of mutual recognition is equivalent to a blind and automatic recognition and execution of the measure requested, but as a rule, the grounds for refusal are restricted to a minimum.

The Convention of 1959 allows the requested party to refuse to cooperate if it “considers that execution of the request is likely to prejudice the sovereignty, security, ordre public or other essential interests of its country” (art. 2b). These grounds for refusal are very broad and thus give ample discretionary powers to the requested authority. Additionally to these undefined causes for refusal, the execution of requests relative to search and seizure measures have to comply with specific requisites stated in art. 5 of the Convention, as for example that the offence is punishable in both states.¹⁸ Even if the requisite of the double incrimination is reduced by the Convention on the Application of the Schengen Agreement (art. 49), the grounds for refusal in principle remain the same

¹⁸ Art. 5: 1. Any Contracting Party may, by a declaration addressed to the Secretary General of the Council of Europe, when signing this Convention or depositing its instrument of ratification or accession, reserve the right to make the execution of letters rogatory for search or seizure of property dependent on one or more of the following conditions:

- a) that the offence motivating the letters rogatory is punishable under both the law of the requesting Party and the law of the requested Party;
 - b) that the offence motivating the letters rogatory is an extraditable offence in the requested country;
 - c) that execution of the letters rogatory is consistent with the law of the requested Party.
2. Where a Contracting Party makes a declaration in accordance with paragraph 1 of this article, any other Party may apply reciprocity.

as under the 1959 Convention, in addition to the principle of *ne bis in idem*”.

According to the European institutions, the traditional mutual assistance mechanisms are too slow and inefficient to meet the needs of the judicial cooperation in criminal matters and therefore the system mutual assistance has to be replaced by instruments of judicial cooperation based on the principle of mutual recognition. The new instruments shall speed up the transmission procedure, overcome the language difficulties and reduce the possible grounds of refusal to comply with the request. According to this scheme for example art. 13 of the FD EEW defines much more narrowly the grounds for refusal and eliminates the mandatory application of these grounds article, stating that the evidence warrant “may” be refused.¹⁹ As it can be seen the FD EEW does not include a broad ground as the “*ordre public*”, but nevertheless it still provides for a long list of grounds to refuse the execution of the request. The principle of mutual recognition is to be implemented gradually or step by step. The Member States as well as the European institutions are well aware that it is probably too early to exclude all grounds for refusal as it is still necessary to allow the requested state to invoke certain grounds in order to deny the execution of the request. However, the FD EEW already establishes that in 2014 there

¹⁹ Art. 13.1: Grounds for non-recognition or non-execution
1. Recognition or execution of the EEW may be refused in the executing State:

- (a) if its execution would infringe the *ne bis in idem* principle;
- (b) if, in cases referred to in Article 14(3), the EEW relates to acts which would not constitute an offence under the law of the executing State;
- (c) if it is not possible to execute the EEW by any of the measures available to the executing authority in the specific case in accordance with Article 11(3);
- (d) if there is an immunity or privilege under the law of the executing State which makes it impossible to execute the EEW;
- (e) if, in one of the cases referred to in Article 11(4) or (5), the EEW has not been validated;
- (f) if the EEW relates to criminal offences which:
 - (i) under the law of the executing State are regarded as having been committed wholly or for a major or essential part within its territory, or in a place equivalent to its territory; or
 - (ii) were committed outside the territory of the issuing State, and the law of the executing State does not permit legal proceedings to be taken in respect of such offences where they are committed outside that State’s territory;
- (g) if, in a specific case, its execution would harm essential national security interests, jeopardise the source of the information or involve the use of classified information relating to specific intelligence activities; or
- (h) if the form provided for in the Annex is incomplete or manifestly incorrect and has not been completed or corrected within a reasonable deadline set by the executing authority.

should be an evaluation regarding the elimination or modification of art. 13.1 and 13.3.²⁰

This is the background of the present proposal for an EIO. Before making an assessment of this new proposed instrument, it might be useful to highlight very briefly the content of this instrument and its main differences with the FD EEW of 2008.

III. The European Investigation Order: a step further in the gathering of evidence in another Member State

1. A comprehensive order for obtaining evidence to overcome the complexity of the existing instruments

The FD EEW approved in 2008 after a long and arduous procedure, due to its limited scope of application, has to coexist with the instruments of mutual legal assistance, mainly the 1959 and 2000 Conventions on mutual assistance in criminal matters. Despite the strong efforts done by all the European institutions and the Member States – some Member States, to be precise –, it is unclear whether the EEW will in practice contribute significantly to facilitate the gathering of evidence in cross-border criminal cases and its admissibility in the criminal trial. We have to bear in mind that the EEW is another piece of a fragmented system, and this piecemeal approach does not help simplify the judicial cooperation between Member States. As the EEW is only applicable to pre-existing elements of evidence, for all other evidentiary materials that might be also needed, practitioners will still have to use the letters rogatory of the mutual legal assistance system. In other words, if for a criminal investigation the prosecutor or investigating judge need information relative to bank accounts or transactions, a witness interrogatory and a document stating the profession of the suspect, the request of this evidence can not be done through the EEW, as it only covers the last mentioned piece of evidence (art. 4 expressly excludes the EEW for witness interrogatory and bank information). Confronted with such a situation, it can be advanced that practitioners will opt to request all the evidence through one channel, the mutual legal assistance system, which covers all of them, instead of sending several requests through different means. It seems that the advantages of the EEW will be of limited significance in practice as in a majority of criminal cases the EEW shall need to be complemented with additional mutual assistance requests. The shortcomings of the EEW were known to the Commission, especially the fragmentation of the instruments, but according to the Commission this should only happen during a transitional period, until the EIO. This might explain why the proposal for an EIO has been launched even before the EEW has been applied.

Overcoming the fragmentary regime in the obtaining of evidence and providing an efficient instrument to facilitate the cooperation is the aim of the EIO. The logic behind the EIO, as exposed in its Explanatory Memorandum is as follows: the obtaining of evidence through judicial cooperation shall occur as quick and easy as possible. The coexistence of

different rules and systems entails complexity. In order to overcome the complexity, the system of mutual legal assistance has to be replaced completely with a single European instrument for the obtaining of all kind of evidence. The new approach claims for the substitution of the mutual legal assistance instruments, because they are considered to slow and inefficient. We will address later the truthfulness of the premise upon which the EIO is based and the statement regarding the inefficiency of the mutual legal assistance system and the efficiency of the mutual legal principle. It can be already advanced that the confusion introduced by the EEW is not a solid reason to replace the whole system of mutual legal assistance.

2. Main differences between the EEW and the EIO

The PD EIO covers all kind of investigative measures, except the setting up of joint investigation teams and certain interceptions of communications (art. 3.2 PD EIO). Its scope of application is not limited to a list of offences, as it is the case in the EEW (art. 14.2 FD EEW). As a rule, the EIO is applicable to all criminal proceedings or administrative proceedings in criminal matters (art. 4 PD EIO). On the other hand, the grounds to refuse the request for evidence are further limited, as the new PD EIO does not mention the *ne bis in idem* nor the double incrimination requisite. Art. 10 PD EIO establishes as possible grounds for refusal a) certain kind of immunities or privileges; b) grounds of national security or national interest, as well as intelligence activities; c) the measure requested is not foreseen in the executing state and no other measure available would serve to achieve a similar result.; and d) the EIO has not been issued within a criminal procedure and the measure would not be authorised in a similar national case.

As seen, the fact that the measure is not regulated in the executing state is not an automatic ground for refusal. The requested authority shall try to achieve the same result through other legal measures, and only if this is not possible either, then the absence of legal regulation will end up in a refusal to enforce the measure. The way to proceed will be the same, if the measure requested exists in the executing state, but its use is restricted to a category of offences which do not include the offence stated in the request. In those cases, art. 9.1c) PD EIO provides for the enforcement through other measures, and only if this solution is not applicable, the request shall not be executed.

The PD EIO has eliminated the statement contained in art. 7 FD EEW, which requires the issuing state to check the legality, proportionality, admissibility and necessity of the evidence prior to issuing the EEW.²¹ In my opinion the

²⁰ Art. 24.3 FD EEW.

²¹ Art. 7 FD EEW. Conditions for issuing the EEW:

Each Member State shall take the necessary measures to ensure that the EEW is issued only when the issuing authority is satisfied that the following conditions have been met:

a) obtaining the objects, documents or data sought is necessary and proportionate to the purpose of proceedings referred to in art. 5;

elimination of this provision does not constitute any relevant change, as it is taken for granted that every judicial authority will check those conditions before issuing the EIO.

Furthermore the PD EIO includes certain specific rules for measures that do not fall under the scope of the EEW and presently can only be requested through the mechanisms provided in the Convention of mutual assistance of 29th May 2000 and its Protocols. With the aim of reducing the fragmentation, several provisions contained in the 2000 Convention are transferred to the text of the EIO. Among these we can mention, for example: the temporary transfer of persons;²² the hearing of witness or experts by videoconference (art. 21 PD EIO, which is similar to art. 10 of the 2000 Convention) or by telephone conference (art. 22 PD EIO which corresponds to art. 12 of the 2000 Convention); the interception of communications (measure covered by the general provisions of the EIO, already foreseen in arts. 17-22 of the 2000 Convention); the request for bank data and monitoring of bank transactions (arts. 23, 24 y 25 PD EIO, correspond to the rules included in the Protocol to the Convention of 2000, of 16 October 2001); o the controlled deliveries (art. 26 PD EIO, which correspond to art. 12 2000 Convention).

As to the time limits to enforce the request of evidence, neither the Convention of 1959 nor the Convention of 2000 establish a fixed term, although the 2000 Convention expressly states that the request shall be executed "as soon as possible, taking as full account as possible of the procedural deadlines and other deadlines indicated by the requesting Member State," (art. 4.1 Convention of 2000). Notwithstanding this rule, in practice the execution of requests of evidence suffer frequent delays. The delays obviously have a bearing on the efficiency of the criminal investigation and consequently on the criminal trial. With the aim of speeding up the enforcement of the request of evidence, the FD EEW provides already for a deadline, deadline that is also included in the PD EIO.²³

Finally, an important difference between the FD EEW and PD EIO is to be found with regard to the legal remedies. Whilst art. 18 FD EEW expressly states that the Member States shall ensure the access to the legal remedies to all interested parties as well as third parties affected by the

b) the objects, documents or data can be obtained under the law of the issuing state in a comparable case if they were available on the territory of the issuing State, even though procedural measures might be used.

These conditions shall be assessed only in the issuing State in each case.

²² Arts. 19 and 20 PD EIO regulate the temporary transfer of persons that is now included in art. 9 of the Convention of Mutual Assistance in Criminal Matters of 29th May 2000, although the provision of the PD EIO is more complete.

²³ Likewise to the FD EEW, the PD EIO states that the requested state will immediately adopt the necessary measures to comply with the request. Furthermore, precise deadlines for recognition and execution are provided in art. 15.3 FD EEW (general deadline 60 days) and in art. 11.4 PD EIO (as a rule, 90 days).

measure taken in compliance with an EEW, the PD EIO remains silent on this issue. Such an express statement might not be indispensable, as the duty to provide full access to courts and to legal remedies against judicial measures is something that is implied in the procedural safeguards recognized in art. 6 of the ECHR. However, it would not harm to keep such a rule in the regulation of the EIO.

3. *The limitation of the grounds for refusal*

Two are the issues that in my opinion merit a closer analysis: the suppression of the requirement of double criminality and the absence of a reference to the *ordre public* as a possible ground to refuse the recognition and enforcement of the EIO. And secondly, the difficulties that entail the application of a single instrument to legal systems whose principles of criminal justice and procedure differ significantly, if they are not contradictory.

a) According to the wording of the PD EIO, the requested State is obliged to comply the EIO issued by another Member State, even in those cases where the cooperation requested is directed to the investigation of an act that does not constitute an offence in the executing State. The condition of the double criminality has been partially eliminated from the text of the FD EEW, although it still remains for some cases.²⁴ The European Commission has clearly stated that the requirement of double criminality is contrary to the principle of mutual recognition and therefore the purpose is to gradually eliminate it from the European instruments of judicial cooperation in criminal matters and therefore the double criminality requirement has been directly dropped in the EIO. This means that, the executing State is obliged to carry out the investigative measure requested as an EIO even if the evidence is aimed to prosecute an offence which is not punishable under the law of the executing State.

It might be accepted that the cooperation and transmission of evidence between two Member States takes place even if the facts that give rise to the request do not constitute an offence in the executing State. Double criminality might not be necessary to establish the obligation to cooperate in the obtaining of evidence if no coercive investigative measures are to be adopted in the executing State. For example, if a judge in Germany issues an EIO with regard to an offence of denial of the holocaust, requesting the Spanish authorities to interrogate a witness or to find out the whereabouts of the suspect, the compliance with that request would, to my mind, not entail any infringement of fundamental rights or contradiction with the constitutional principles of the requested State.

²⁴ The FD EEW requires that the offence that originates the warrant is punishable in both States: where the collection of evidence requires to carry out a search and seizure in the requested State and for those cases where the offence is not included in the list of art. 14 FD EEW. If the offence is listed in art. 14, the double incrimination will only be required if the offence for which the EEW has been issued is punished with less than three years imprisonment in the issuing State.

However, if the fulfilment of the EIO requires to carry out a telephone tapping or a domicile search, the executing State should be allowed to refuse the enforcement of such a measure on the basis of the preservation of the coherence of its own criminal justice system. It appears to be quite inconsistent that a State might be obliged to restrict the fundamental rights of its own citizens in its own territory to investigate an act that is not punishable under its own laws.²⁵ The essential basis of the mutual recognition system – the mutual trust in the respective legal orders and legal actors, and the trust in the assessment made relative to the necessity and proportionality of the measure requested – is lacking in such a case. Rather on the contrary: when the offence that gives rise to the EIO is not punishable under the laws of the executing State, it is manifest that both States do not share the same criteria with regard to the need and proportionality of the investigative measure and thus the basis that underpins the principle of mutual recognition, mutual trust, is blurred. Necessity and proportionality are essential conditions to allow the adoption of any investigative coercive measure which entails a restriction of the fundamental rights of a person and lacking these conditions according to the executing State, it should be possible to refuse the enforcement of the EIO.

In sum, in my opinion, only if the evidence can be collected without resorting to the restriction of fundamental rights, the dual criminality requirement could be disregarded.²⁶ The question that now arises is if the PD EIO allows a Member State to refuse the execution of an EIO on this ground. Even if this fact is not expressly recognized in the PD EIO as a ground for refusal, the executing State should be able to oppose the recognition alleging that the execution is contrary to its constitutional principles. Such a solution, would be coherent with the provision of art. 9.1 b) PD EIO, namely the possibility of refusing the enforcement of the EIO when the measure requested is only provided for a

certain category of offences, and the offence which originates the EIO is not included in that category. If a measure can be refused because it is only provided for a more serious crime, it should also be possible to refuse it if the measure could not be applied to investigate the offence described in the EIO form, because the offence as such does not exist in the executing State.

b) Certain national criminal justice systems in Europe apply the principle of legality in a very strict way, others have foreseen wide exceptions to the application of this principle and finally some states decide the criminal prosecution upon reasons of convenience or opportunity to prosecute. For instance, in Spain, the criminal prosecution is not subject to criminal policy guidelines or priorities – at least not legally. In principle, all offences regulated in the Criminal Code, irrespective of the seriousness of the offence or other factual circumstances have to be investigated and if enough evidence is collected, the case shall proceed to trial. In this context it is not unusual that the Spanish authorities – the investigating judge or the public prosecutor – require the judicial cooperation of another Member State with regard to the investigation of offences that could be classified as less serious or even minor offences. In practice it has often occurred that a Spanish investigating judge sends to the Dutch authorities a request for collecting evidence that is needed to investigate a minor drug offence. Such an offence, if only a little quantity of drugs is involved, won't be prosecuted in The Netherlands as a result of applying the principle of opportunity. This means that the Dutch State has decided not to allocate resources for the investigation of these minor offences if they occur in their territory. Would it be sensible to oblige that State to change that policy and allocate resources to investigate those facts when requested by a foreign authority? According to the PD EIO the requested state can not invoke the absence of the double incrimination requirement or the lack of proportionality of the measure to refuse the enforcement of the EIO. This situation can be considered as somewhat contradictory as it would mean that a Member State could be obliged to allocate in some cases more resources to prosecute a crime committed in another Member State than if it had been committed in the own national territory. The practice nowadays shows that the States that apply the principle of opportunity as a rule refuse to execute those requests issued by another Member State regarding the investigation of minor offences.

IV. An Assessment of the PD EIO

When assessing the PD EIO, it is important, in the first place, to distinguish diverse levels or perspectives. This section is aimed at providing exclusively a preliminary and non-definitive assessment of PD EIO – in my opinion; a more comprehensive evaluation of it would be premature and probably imprudent. I will express here some thoughts about the PD EIO, with specific emphasis on its pros and cons and also on the question of if it is indeed necessary to create a European investigation order at this very moment – or if, on the contrary, it would be more advisable to postpone its implementation.

²⁵ Empirical data show that the Member States are not willing to execute special investigative measures if the double criminality requirement is not complied with. See *Vermeulen/De Bondt/Van Damme*, EU cross-border gathering and use of evidence in criminal matters, Towards mutual recognition of investigative measures and free movement of evidence, 2010, p. 115, partly available on-line. On the huge debate that has arisen with regard to the abolition of the double criminality by the FD EAW, see *Jimeno Bulnes*, in: Hoyos (ed.), Criminal proceedings in the European Union: essential safeguards, 2008, p. 101 (pp. 113-122).

²⁶ On the dual criminality requirement see also *Schünemann*, Observations on the Green Paper on obtaining evidence from one Member State to another and securing its admissibility, http://ec.europa.eu/justice_home/news/consulting_public/0004/civil_society/eurodefensor_en.pdf, p. 10; *Peers*, in: State-watch analysis: The proposed European Investigation Order: Assault on human rights and national sovereignty, expresses also his concerns with regard to the abolition of the dual criminality requirement and says it “represents a fundamental threat to the rule of law”. <http://www.statewatch.org/analyses/no-96-european-investigation-order.pdf>.

If we look at the PD EIO from the perspective of facilitating reciprocal judicial cooperation to obtain evidence from another Member State, it is unquestionably a positive and useful initiative. Counting on a unified instrument to transmit all requests for evidence – except those excluded by art. 3.2 PD EIO – between all member States certainly simplifies the judicial cooperation²⁷. National authorities would have at their disposal a uniform and simple form to fill out in order to transfer their requests for gathering evidence. Thus, it would be possible to overcome the difficulties implied in deciding among a variety of European instruments, some of them based on mutual recognition and some others on mutual assistance. Also, it would be no longer necessary to verify whether the rules of a given convention are or not applicable with respect to a given country, or whether that particular country has formulated reservations with regard to that convention.

In addition to unifying in one directive all – better, almost all – the relevant rules on judicial cooperation for obtaining evidence, another positive aspect of PD EIO is that it includes a formal declaration of respect for fundamental rights and for the principles derived from art. 6 of the Union Treaty – following the precedent set by the Framework Decision on the European Arrest Warrant (hereinafter FD EAW and the FD EEW). Furthermore, it should be noted that art. 1.3 PD EIO states that the directive shall not have the effect of requiring member States to adopt measures that are contrary to their respective constitutional principles related to the right of association, freedom of the press and freedom of expression. This provision makes clear that no State shall be obliged to recognize or execute an investigation order if it implies infringing on fundamental rights protected by its own Constitution or contravening the case law of the European Court of Human Rights on fundamental rights.

A third element that deserves a positive evaluation is the fact that the current PD EIO has mitigated the strict application of the principle of mutual recognition. As stated by § 6 of the Explanatory Memorandum, this instrument is aimed at improving the implementation of the principle of mutual recognition but with the traditional flexibility that was characteristic of the system of mutual assistance. Thus, when regulating the grounds to refuse the cooperation, art. 10 PD EIO authorizes States to refuse the enforcement of requests when its own laws do not foresee the requested measures or justify them only for more serious crimes. Another expression of flexibility is art. 8.2 PD EIO, which provides, with all logic, that the authorities of the executing State shall comply with the investigation order following the formalities and proceedings indicated by the issuing State only if the application of the *lex fori* does not contradict its own fundamental legal principles.²⁸

²⁷ Although the scope of the PD EIO is not fully clear due to the undefined concept of “investigative measure” doubts may arise as whether the EIO applies to all covert investigative measures.

²⁸ As *Ambos* points out, the grounds to refuse the execution of the EIO show that in the concrete regulation the systems of

Also the establishment of deadlines for execution by PD EIO can be viewed as appropriate. It certainly may impose a strong pressure on the authorities of the executing State, and it may not be possible to respect always the deadlines specified by art. 11 PD EIO when the requested measures are particularly complex. However, these provisions seem justified considering that excessive delay in the execution of letters rogatory – especially those related to the collecting of evidence – is one of the most serious problems in the realm of judicial cooperation. Although it is likely that the provision of deadlines will not entirely solve this problem, its mere existence might contribute to foster the rapid execution of requests. This is, of course, only a conjecture, for an accurate assessment of the consequences of the deadlines cannot be done until it has been put into practice.

In spite of the advantages that EIO can bring for a greater efficiency in the transmission and execution of requests for gathering evidence in criminal matters, it also raises some important questions. First of all, the fact that the executing State cannot refuse to comply with the requested measure on substantive grounds nor the affected party can oppose to the enforcement of the measure. According to the principle of mutual recognition, the executing State is not entitled to perform a control of the justification of the requested measure as a condition for its execution. Furthermore, in the standard form annexed in the PD EIO it is not even necessary to mention the indications or suspicions that have led to the commencement of the criminal investigation and consequently to the request for obtaining evidence. The authorities of the executing State are bound to trust the issuing State’s assessment and do not have any opportunity to corroborate the necessity or the proportionality of the requested measure. The only ground for opposition, in application of the general clause contained in art. 1.3 PD EIO, is that the executing State deems that the measure in question would violate fundamental rights or certain constitutional rules.

With this in mind, we may accept that PD EIO impose the judicial authorities of different States to have a ‘blind’ trust on each other, but to require from the parties in the process an identical trust on the public authorities is perhaps not so easy to accept without objections. We should not forget that one of the functions of the defence consists in verifying the legality and constitutionality of all measures adopted in the investigation of a crime. Often this verification can be done only a posteriori, with regard both to the measures executed within national territory and to those others executed through judicial cooperation in another State. To require the defence to trust blindly in the way of acting of the law enforcement authorities, prosecutors or judges – regardless if they are national or foreign authorities – is contrary to their own duties, which are aimed at questioning and controlling the methods followed in the obtaining of evidence. The defence lawyer’s task is to check the legality of the measures adopted by the criminal justice authorities, and not to trust that they have accomplished their tasks correctly. In any event, to

mutual legal assistance and mutual recognition are very similar, cf. *Ambos*, ZIS 2010, 557 (561).

control the legality of investigative measures performed in a foreign country entails an additional difficulty, for it involves a different legal system and the relevant documentation is frequently in a foreign language. Without the assistance or support of lawyers that are acquainted with the legal system of the executing State (or States), it is virtually impossible to control if the evidence has been legally obtained. These difficulties are not new, and do not stem from the application of the principle of mutual recognition or from European instruments of cooperation. The same difficulties have already been raised with respect to the letters rogatory executed under international conventions.

Another controversial issue is the fact that PD EIO does not require judicial authorization to perform those investigative measures that entail especially serious limitations on fundamental rights. The text of PD EIO can be interpreted in the sense that also public prosecutors can issue the EIO (art. 2 a) i).²⁹ It is true that the ECtHR's case law does not generally require judicial authorization as a condition to adopt investigative measures that restrict fundamental rights but, in my opinion, PD EIO should have explicitly established this principle. Taking into account that the parties in a criminal process must face additional difficulties to verify the legality of the way in which evidence has been obtained in a foreign country, these difficulties should have been counterbalanced by imposing a previous judicial authorization for the execution of all coercive measures.

In any event, the most controversial question regarding PD EIO is the principle of equality of arms in criminal procedure. A general criticism has been that the EU, when pursuing the creation of European space of justice, is mainly concerned only about reinforcing the efficiency of criminal prosecution and endowing judicial cooperation with more speedy mechanisms, but there is no parallel effort to increase and refine procedural guarantees for the accused. This criticism is not without fundament. Certainly, if the aim is to put supranational measures at the disposal of the public prosecution, it is logical to think that one of the priorities should be facilitating the articulation of the defence at the same level – at least, a similar degree of efficiency at the cross border level should be sought. Reality, however, is far from it. Except for a minimal number of defendants with sufficient resources to organize and pay for a transnational defence, it is normally very difficult for the defendant to have access to elements of evidence available in other member State or to

²⁹ Of the same opinion the response to Green Paper on obtaining evidence from one Member State to another and securing its admissibility written by the German Federal Bar (Bundesrechtsanwaltskammer), p. 3, under http://ec.europa.eu/justice_home/news/consulting_public/0004/civil_society/german_federal_bar_en.pdf. Previously expressed their opinion against the possibility that the public prosecutor may issue an EEW, among others, *Gazeas*, ZRP 2005, 18 (21); *Vogel*, The European Evidence Warrant: A New Legal Framework for Transnational Evidence Gathering in Criminal Matters, speech at European Criminal Bar Association (ECBA) in Paris on 1.5.2004.

verify how the evidence gathered by the prosecution has been obtained. Despite the many and intensive efforts by European institutions, this proposal for a framework decision on certain procedural rights in the criminal proceedings has not reached yet the necessary consensus to be approved.³⁰ In this scenario, the approval of another instrument to help the transfer of evidence between prosecution authorities can but increase the imbalance between the prosecution and the defendants.³¹ This imbalance already exists, for the traditional instruments of mutual judicial assistance were also designed to facilitate the cooperation between judges and public prosecutors, and did not create accessible channels for the use of the defence or the accused. Therefore, the shortcomings of the PD EIO – and the DM EEP – in this regard are found as well in the rules contained in the conventions of mutual judicial cooperation.

In order to facilitate the admissibility of evidence gathered in another Member State, the PD EIO considers the possibility that the authorities of the issuing State assist in obtaining that evidence (art. 8.3) and makes reference to the executing State's obligation to comply with the formalities and procedures indicated by the issuing State – except, of course, that it would be incompatible with its own fundamental legal principles. These two provisions, already present in the DM EEP and partially also in the Convention of 29th May 2000, aim at preventing that the evidence is rendered inadmissible in the issuing State in which it must have effect. Naturally, to ensure the free circulation of evidence and its admissibility by any court irrespective of where it has been obtained, the ideal would be to have homogeneous procedural rules. But, as this goal seems unrealistic at the moment, at least it would be useful to bring the national legislations nearer through the approval of some minimum standards about the gathering of evidence. Common standards would

³⁰ On the Proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, see *Bachmaier*, *Proceso penal y protección de los derechos del imputado en Europa*. La propuesta de Decisión Marco sobre determinados derechos procesales en los procesos penales en la UE, in: De la Oliva, Armenta, Calderón (eds.), *Garantías fundamentales del proceso penal en el espacio judicial europeo*, 2007, pp. 41; Arangüena (ed.), *Procedural safeguards in criminal proceedings throughout the European Union*, 2005; *Arangüena*, in: Hoyos (fn. 25), 2008, pp. 132.

³¹ In favour of postponing the EIO until there are minimum procedural safeguards in force, see, for example the reply of "Fair Trials International" to the Green Paper on obtaining evidence from one Member State to another and securing its admissibility, http://ec.europa.eu/justice_home/news/consulting_public/0004/civil_society/fair_trials_international_en.pdf p. 2; also CCBE observations: http://ec.europa.eu/justice_home/news/consulting_public/0004/civil_society/ccbe_en.pdf, p. 2; and the ECBA comments http://ec.europa.eu/justice_home/news/consulting_public/0004/civil_society/ecba_en.pdf, p. 2.

reduce legal incompatibilities between States, thus diminishing the problems related to the admissibility of evidence.

However, I do not consider that this harmonization should be understood either as a prerequisite for the approval of PD EIO or as a *sine qua non* for the implementation of instruments aimed at facilitating mutual judicial cooperation.³² At present, the issue of the admissibility of evidence must be dealt with primarily at the national level, according to the checks and balances of each system of criminal justice,³³ and it is not for the European institutions to impose rules about when and why evidence can or cannot be declared admissible. For instance, in Spain the Supreme Court has held since long ago,³⁴ that all evidence gathered abroad was admissible, provided that it had been obtained in accordance with the procedural laws of the executing State. This entails a relative distortion of the consistency of Spanish domestic evidentiary rules but, at the same time, eliminates the problems derived from the inadmissibility of evidence obtained without full and scrupulous respect for the *lex fori*. In this point, I consider that the issue of the admissibility of evidence gathered in a foreign country is essentially the responsibility of national legislation. So we can see, that, in a certain way, the Spanish courts have been applying the principle of mutual recognition prior to the European mutual recognition instruments, but as a result of trust – or pragmatism –, but not as an imposed obligation to show firm trust towards European judicial decisions.

The foregoing observations are however compatible with being in favour of seeking some minimum European standards on the gathering of evidence, with the aim of ensuring the protection of the rights of the accused. More harmonization at the pre-trial stage would be positive not only to facilitate the admissibility of evidence, but also to help the defence in controlling the lawfulness of the collecting of evidence. These should be understood, in my view, not as rules on how evidence must be evaluated or can be admissible in each State, but rather as minimum safeguards – i.e. criteria that determine when the evidence should be considered inadmissible for not having met some minimum requirements. And even in that case, it would constitute a substantial interference with the structure of criminal procedure of member

States, which would be of doubtful justification under the principle of subsidiarity.

V. Concluding Remarks

Summarizing, in my opinion the text of the PD EIO is on the whole positive, from the perspective of facilitating and speeding up the request and execution of evidence that is available in other member State. A single instrument that can be used for the request of almost all types of evidence is much more practical and efficient than the EEP, of predictable little success because of its limited scope of application. However, if we take the perspective of the accused, the PD EIO continues to ignore that facing evidence obtained in a foreign country causes additional difficulties for the defence, and does not foresee a way to balance the inequality of arms between the parties in the criminal procedure. Perhaps approving the PD EIO is somewhat premature and it would be preferable to wait until the directive on the procedural rights of the accused raises sufficient consensus. Nevertheless, I do not share the opinion that the approval of the PD EIO should first wait to have the results of the application of the EEP in order to have more experience in the area of evidence gathering³⁵ – as indicated above, the little practical application of the EEP is quite predictable in view of its very limited scope.

We can even question the very ground of the creation of EIO as an instrument of judicial cooperation.³⁶ The Commission has repeatedly affirmed, and the PD EIO's Explanatory Memorandum insists on it, that Europe should go beyond the systems of mutual judicial assistance because of their inefficiency. In this direction, it has approved diverse instruments based on the principle of mutual recognition, and now affirms that the coexistence of both systems cause and increased complexity and confusion, and therefore the conventional rules of mutual judicial assistance must be replaced. This reasoning seems certainly weak to me.

On the one hand, it is grounded on the premise that the instruments of mutual assistance do not function appropriately; and on the other hand, without a clear rationale, it advocates that – instead of improving them – we should substitute them with other cooperation instruments. This reasoning lacks consistency because is not sufficiently substantiated with empirical data.³⁷ We have recently collected data, within a

³² For the opposite opinion see *Schünemann*, Observations on the Green Paper on obtaining evidence from one Member State to another and securing its admissibility, http://ec.europa.eu/justice_home/news/consulting_public/0004/civil_society/eurodefensor_en.pdf, p. 1, and p. 3 calling for the “most extensive harmonisation possible of the law of evidence”.

³³ See also *Spencer*, ZIS 2010, 602, and the Comments of the Deutscher Richterbund on the European Commission's Green Paper on obtaining evidence from one Member State to another and securing its admissibility, under http://ec.europa.eu/justice_home/news/consulting_public/0004/civil_society/deutscher_richterbund_en.pdf, p. 2.

³⁴ Spanish Supreme Court (Sala de lo Penal), decision of 19.1.1995 – STS 13/1995. More recently Spanish Supreme Court (Sala de lo Penal), decision of 20.9.2005 – STS 1142/2005.

³⁵ The EJCN (European Network of Councils for the Judiciary) is however in favour of a step-by-step approach, and not replacing the existing instruments by the EIO until they have been tested. See http://ec.europa.eu/justice_home/news/consulting_public/0004/civil_society/encj_en.pdf, p. 3. In favour of waiting for the EEW to be applied and make an assessment of the functioning of the principle of mutual recognition with regard to the obtaining of evidence see *Ambos*, ZIS 2010, 557 (559 point 3.).

³⁶ On the different models of cooperation in criminal matters in Europe, their optimization, their requirements as well as the advantages and conditions of supranational solutions, see the extensive study by *Sieber*, ZStW 121 (2009), 1 (28 ff.).

³⁷ See also the response to the Green Paper on obtaining evidence from one Member State to another and securing its

research project about the practical operation of mutual judicial cooperation between EU member States. Through numerous interviews with judges, public prosecutors and lawyers involved in European cross-border criminal cases – or proceedings with cross-border elements – we have sought to identify the main problems they must face when dealing with evidence gathering in another Member State. This coordinated investigation has revealed that the most important problems appear in connection with delays in the execution of requests and with the linguistic barrier that sometimes make communication difficult. There were no significant complaints about the system of mutual assistance. Furthermore, very rarely causes for refusal were mentioned in the execution of requests and, in the opposite direction, very rarely some of the interviewed persons had felt obliged to refuse the execution of a request for gathering evidence. The vast majority of the interviewed agreed that the system functions appropriately, except for the delays in the execution of requests, and no one expressed the need to substitute mutual assistance with new instruments based on mutual recognition.

This merely partial inefficiency of the current systems of judicial assistance moves us to consider if it would not be better to rectify those flaws instead of replacing the instruments themselves.³⁸ Why there has been no emphasis on reinforcing the compliance of the 2000 Convention's provisions, especially with respect to deadlines, or on endowing the administration of justice with more means to respond adequately to requests of judicial cooperation? If the major problems in judicial cooperation are caused by an overload of work, lack of specialized training and linguistic barriers, why are not these priority areas and the main efforts are put in the creation of a new normative framework? The Commission's choice has been clearly to promote new instruments of cooperation but it could well be rather a political choice and not necessarily the consequence of a legal analysis of the real problems that we find in cross border criminal proceedings in the EU. The EIO would be, no doubt, very useful for the creation of a future European Public Prosecutor, who would have an automatic and efficient instrument at his disposal in any member State. However, from the perspective of granting appropriate safeguards from the accused it raises serious con-

cerns. And finally, from the point of view of facilitating, improving and speeding up the gathering and transfer of evidence, perhaps the EIO is might not be strictly necessary. In any event, its mere existence and implementation would not likely be enough to solve the current problems that judges, public prosecutors and lawyers must face in proceedings with cross-border elements.

admissibility written by the German Federal Bar (Bundesrechtsanwaltskammer), p. 2, under http://ec.europa.eu/justice_home/news/consulting_public/0004/civil_society/german_federal_bar_en.pdf. the statement of the ECBA on the Green Paper, http://ec.europa.eu/justice_home/news/consulting_public/0004/civil_society/ecba_en.pdf; and the response of "The Law Society of England and Wales",

http://ec.europa.eu/justice_home/news/consulting_public/0004/civil_society/law_society_of_england_and_wales_en.pdf.

However, some studies are already directed to this objective as may be seen in Vermeulen/De Bondt/Van Damme (fn. 25).

³⁸ Of this opinion also, *Spencer*, in his provisional reactions to the Green Paper on obtaining evidence from one Member State to another and securing its admissibility,

http://ec.europa.eu/justice_home/news/consulting_public/0004/civil_society/john_spencer_en.pdf.
