The European Investigation Order in Criminal Matters: Developments in Evidence-gathering across the EU

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This paper offers an analysis of Directive 2014/41/EU on the European Investigation Order in criminal matters, with the aim of pinpointing positive and negative features of this measure, based on the principle of mutual recognition, destined to become the only legal instrument applicable to mutual assistance in criminal matters across the EU. The final objective of this analysis is to appreciate the significance of the EIO Directive in relation to pre-existing measures.

I. Introduction to the European Investigation Order

The first measure applying the principle of mutual recognition to evidence-gathering across the EU has been Framework Decision 2008/978/JHA on the European Evidence Warrant (hereinafter "EEW") for obtaining objects, documents and data for use in proceedings in criminal matters.[1] However, in the face of the very limited scope of the EEW, and following the entry into force of the Treaty of Lisbon – which expressly provides that judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions (Art. 82, para. 1, TFEU) – Member States decided to stop the implementation of this Framework Decision whilst waiting for the adoption of a comprehensive measure implementing the principle of mutual recognition to its maximum extent.

The debate on a new and single regime for the gathering of evidence across the EU started in 2009, with the publication of a Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility,[2] aimed at identifying major problems with mutual legal assistance and suggesting possible solutions. This debate continued after the adoption of the Stockholm Programme,[3] which scheduled the setting up of a measure based on the principle of mutual recognition for the gathering of any type of evidence across the EU.

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[1] OJ 2008 L 350/72. Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (OJ 2003 L 196/45) applies the principle of mutual recognition only to freezing orders issued for purpose of securing evidence. The subsequent transfer of secured evidence is ruled in accordance with traditional mutual assistance in criminal matters.

[2] Brussels, 11 November 2009, COM(2009) 624 final. For some comments on this document see: *S. Allegrezza*, Critical remarks on the Green paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, Zeitschrift für Internationale Strafrechtsdogmatik (ZIS) 2010, p. 569 et seq.; and *J.R. Spencer*, The Green Paper on obtaining evidence from one Member State to another and securing its admissibility: the Reaction of one British Lawyer, Zeitschrift für Internationale Strafrechtsdogmatik (ZIS) 2010, p. 602 et seq.

[3] OJ 2010 C 115/1.

Directive 2014/41/EU on the European Investigation Order (hereinafter "EIO") in criminal matters has been adopted in this context through an initiative of Belgium, Bulgaria, Estonia, Spain, Austria, Slovenia and Sweden, presented to the Council in April 2010. After a general approach on a draft was reached in December 2011,[4] the final text was adopted in April 2014,[5] following long-lasting negotiations where the European Parliament, proponent of many amendments, played an important role.[6]

This paper offers an analysis of the Directive on the EIO, with the aim of pinpointing positive and negative features of such a measure, destined to become the only legal instrument applicable to mutual assistance in criminal matters across the EU. The final objective of this analysis is to appreciate the significance of the EIO Directive in relation to pre-existing measures.

II. Positive features borrowed from previous legal instruments

Besides the elements that are typical of measures implementing the principle of mutual recognition – direct transmission between judicial authorities via a standard form, a closed list of grounds for refusal, and deadlines for the recognition and execution of foreign judicial decisions – Directive 2014/41 opportunely reproduces some of the features already present in legal instruments previously adopted by the European Union, namely the EU Convention on mutual legal assistance in criminal matters of 2000[7] and the Framework Decision on the EEW.

First of all, as provided under both the 2000 EU Convention[8] and the Framework Decision on the EEW,[9] the executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority, provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing Member State (Art. 9, para. 2). This is a provision of great importance since it ensures a high level of compatibility between the investigative measure to be carried out in the executing Member State and the law of the criminal proceedings in the issuing Member State.[10] Not to mention that this gradual shift from the rule founded on the *lex loci* to the rule based on the *lex fori* results in a concurrent application of laws of different Member States that is likely

[4] Brussels, 21 December 2011, 18918/11, Inter-institutional File: 2010/0817 (COD).

[5] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (OJ 2014 L 130/1).

[6] See European Parliament legislative Resolution of 27 February 2014 on the draft directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters [09288/2010 – C7-0185/2010 – 2010/0817(COD)] (Ordinary legislative procedure: first reading).

[7] OJ 2000 C197/1.

[8] See Art. 4.

[9] See Art. 12.

[10] For some critical remarks see *B. Schünemann*, The European Investigation Order: A Rush into the Wrong Direction, in: S. Ruggeri (ed.), Transnational Evidence and Multicultural Inquiries in Europe, 2014, p. 32, who criticizes the ample discretion given to national issuing authorities on whether or not to indicate formalities and procedures in the EIO. For similar considerations see *T. Rafaraci*, General Considerations on the European Investigation Order, in: S. Ruggeri (ed.), Transnational Evidence and Multicultural Inquiries in Europe, 2014, p. 42.

to overcome the issue of differences in a non-harmonised context, while increasing awareness and mutual knowledge of national procedures among judicial authorities across the EU. In fact, the Directive takes a step forward: the issuing authority may request that one or more authorities of the issuing Member State assist in the execution of the EIO in support to the competent authorities of the executing Member State to the extent that the designated authorities of the issuing Member State would be able to assist in the execution of the investigative measures indicated in the EIO in a similar domestic case.[11] The executing authority shall comply with this request provided that such assistance is not contrary to the fundamental principles of law of the executing Member State or does not harm its essential national security interests (Art. 9, para. 4).

Secondly, in line with the Framework Decision on the EEW[12] and partially with the 2000 EU Convention,[13] the Directive provides that, where the issuing authority has indicated in the EIO that, due to procedural deadlines, the seriousness of the offence or other particularly urgent circumstances, a shorter deadline than those generally applicable is necessary,[14] or if the issuing authority has indicated in the EIO that the investigative measure must be carried out on a specific date, the executing authority shall take as full account as possible of this requirement (Art. 12, para. 2). This provision too, on *ad hoc* deadlines, contributes to securing the compatibility of evidence gathered in the executing Member State with the law of the criminal proceedings in the issuing Member State, where a measure needs to be carried out within certain time limits according to national law. It aims at guaranteeing effective judicial assistance: compliance with specific deadlines may be decisive for admissibility and the use of evidence in the criminal proceedings in the issuing Member State.

Thirdly, the Directive provides for certain investigative measures that are aimed precisely at favouring admissibility and the use of evidence in the criminal proceedings in the issuing Member State – these measures resembling the ones already provided for under the 2000 EU Convention.[15] Those relevant to this scope are: temporary transfer of persons held in custody to either the issuing or executing

[11] This provision is reminiscent of Art. 4 of 1959 Council of Europe Convention on mutual legal assistance in criminal matters, which provides that: «[o]n the express request of the requesting Party, the requested Party shall state the date and place of execution of the letters rogatory. Officials and interested persons may be present if the requested Party consents.».

[12] See Art. 15, para. 1.

[13] See Art. 4, para. 2.

[14] The decision on the recognition or execution of the EIO shall be taken no later than 30 days after the receipt of the EIO, and the requested investigative measure shall be carried out not later than 90 days following the taking of the decision on the recognition or execution of the EIO (Art. 12, para. 3 and 4). The evidence obtained or already in the possession of the executing authorities shall be transferred without undue delay (Art. 13, para 1). On the importance of time limits in judicial cooperation procedures, see *A. Lach*, Transnational Gathering of Evidence in Criminal Cases in the EU *de lege lata* and *de lege ferenda*, Eucrim 2009, p. 107. The importance of time limits in judicial cooperation procedures is testified by the system introduced by the European Arrest Warrant. See the Report from the Commission on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Brussels, 11 April 2011, COM (2011) 175 final.

[15] See Art. 9, 10 and 11 of the 2000 EU Convention.

Member State (Art. 22 and 23),[16] hearing by videoconference or other audiovisual transmission (Art. 24),[17] and hearing by telephone conference (Art. 25).[18] These measures are meant to be carried out mainly by the issuing authority, in compliance with the law of the issuing Member State, with the mere assistance of the executing authority; in fact, in case of temporary transfer to the issuing Member State of persons held in custody in the executing Member State, evidence is gathered directly in the proceedings in the issuing Member State. These measures are of significant importance especially in those legal systems which are based on the primacy of oral evidence: they may have a positive impact on the effective exercise of the right to cross-examine witnesses and, in a more general sense, the right to a fair trial – a right expressly granted at EU level by Art. 47 of the Charter of Fundamental Rights of the European Union.

Lastly, notwithstanding initial opposition,[19] detailed provisions on interception of telecommunications have finally been encompassed under the EIO (Art. 30 and 31), along the same lines as the 2000 EU Convention.[20] This is certainly a positive move towards legal certainty and against potential abuses in such a sensitive field for both fundamental rights of individuals and effectiveness in the fight against crime. Meanwhile, these provisions address the issue of comprehensiveness with the objective of defining a single regime applicable to all types of investigative measures and evidence.

III. Innovative positive features

The first feature of Directive 2014/41 which reveals a significant departure from the 2000 EU Convention and the Framework Decision on the EEW – both coexisting with other relevant legal instruments applicable to mutual assistance in criminal matters – concerns the scope of the EIO, covering any investigative measure (Art. 3).[21] Indeed, the EIO is a judicial decision issued or validated by the competent judicial authority of a Member State to have one or several specific investigative measure(s) carried out in another Member State to obtain evidence; the EIO may also be issued for obtaining evidence that is already in the possession of the competent authorities of the executing Member State (Art. 1, para. 1).

[16] Art. 9 of the 2000 EU Convention provides for the transfer of persons held in custody to the requested State only.

[17] For some critical remarks on hearings by videoconference see *J. Blackstock*, The European Investigation Order, New Journal of European Criminal Law (NJECL) 2010, p. 496.

[18] Provisions on video and telephone conferences mostly reproduce provisions on video and telephone conferences as provided for under Art. 10 and 11 of the 2000 EU Convention.

[19] See the first draft of the Directive: Interinstitutional File: 2010/0817 (COD), 9145/10, Brussels, 29 April 2010.

[20] Provisions on interception of telecommunications mostly reproduce provisions on interception of telecommunications as provided for under the 2000 EU Convention.

[21] On the opportunity to better define "investigative measure" see *A. Mangiaracina*, A New and Controversial Scenario in the Gathering of Evidence at the European Level: The Proposal for a Directive on the European Investigation Order, Utrecht Law Review (ULR) 2014, p. 120, e *D. Sayers*, The European Investigation Order. Travelling without a 'roadmap', CEPS – 'Liberty and Security in Europe' publication series June 2011, p. 15.

Thanks to its comprehensiveness, the EIO will replace, as from 22 May 2017, the corresponding provisions of the conventions applicable between the Member States bound by the Directive,[22] namely: the 1959 Council of Europe Convention and its Protocols; the 1990 Convention implementing the Schengen Agreement; and the 2000 EU Convention and its additional Protocol (Art. 34, para. 1). The EIO will also replace in relations between the Member States bound by the Directive: Framework Decision 2003/577/JHA on orders freezing property or evidence (as far as freezing of evidence is concerned);[23] and Framework Decision 2008/978/JHA on the EEW (Art. 34, para. 2). The abolition of this multiplicity of instruments – all potentially applicable in the same criminal proceedings and, in certain cases, even in relation to a single piece of evidence – removes the fragmentation of the current system, which ultimately undermines the objective of simplified legal assistance procedures between Member States across the EU.[24] Handling so many and such different sources of law may not always be an easy task for domestic lawyers.[25]

The EIO Directive even specifically provides for the innovative possibility: (a) to gather information on bank and other financial accounts (Art. 26); (b) to obtain information on banking and other financial operations (Art. 27); (c) as well as to carry out investigative measures implying the gathering of evidence in real time, continuously and over a certain period of time – measures including but not limited to controlled deliveries on the territory of the executing Member State, as already provided for by the 2000 EU Convention – such as the monitoring of banking or other financial operations that are being carried out through one or more specified accounts (Art. 28).

What remains outside the scope of application of the EIO Directive is the setting up of joint investigation teams and the gathering of evidence within such teams

[22] While the United Kingdom has notified its wish to take part in the adoption and application of the Directive (Whereas nr. 43), Ireland and Denmark are not taking part in the adoption of the Directive and are not bound by it or subject to its application (Whereas nr. 44 and nr. 45).

[23] Indeed, an EIO may be issued in order to take any measure with a view to provisionally preventing the destruction, transformation, removal, transfer or disposal of an item that may be used as evidence. The issuing authority shall indicate in the EIO whether the evidence is to be transferred to the issuing Member State or is to remain in the executing Member State (Art. 32).

[24] On the positive effects of a single measure for the gathering of any type of evidence in the EU see, *inter alia*: *S. Allegrezza*, ZIS 2010, p. 569 et seq.; *S. Allegrezza*, Collecting Criminal Evidence Across the European Union: The European Investigation Order Between Flexibility and Proportionality, in: S. Ruggeri (ed.), Transnational Evidence and Multicultural Inquiries in Europe, 2014, p. 53; *R. Belfiore*, Movement of Evidence in the EU: The Present Scenario and Possible Future Developments, European Journal of Crime, Criminal Law and Criminal Justice 2009, p. 10 et seq.; *R. Belfiore*, Critical Remarks on the Proposal for a European Investigation Order and Some Considerations on the Issue of Mutual Admissibility of Evidence, in: S. Ruggeri (ed.), Transnational Evidence and Multicultural Inquiries in Europe, 2014, p. 93 et. seq.; and *J.R. Spencer*, The Problems of Trans-border Evidence and European Initiatives to Resolve Them, Cambridge Yearbook of European Legal Studies (CYELS) 2007, p. 479. However, for some critical remarks see: *S. Ruggeri*, Horizontal cooperation, obtaining evidence overseas and the respect for fundamental rights in the EU. From the European Commission's proposals to the proposal for a directive on a European Investigation Order: Towards a single tool of evidence gathering in the EU?, in: S. Ruggeri (ed.), Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings, 2013, p. 285 et seq.

[25] According to *J.R. Spencer*, CYELS 2007, p. 477, the existing *acquis* on evidence-gathering does not amount to a coherent system: as the list of diverse legal instruments of mutual legal assistance lengthens, so the fragmentation becomes ever worse.

(Art. 3). However, this exclusion is not surprising and does not undermine the objective of comprehensiveness: joint investigation teams operate outside the "realm" of mutual recognition.[26]

Another new positive feature in the Directive deals with the choice of the measure that needs to be carried out for the execution of an EIO, as well as the modalities by which an EIO can be executed. While it is for the issuing judicial authority to choose which type of investigative measure to request,[27] this authority being in the best position to make such a choice,[28] it is for the executing authority to recognise an EIO without any further formality being required, and ensure its execution in the same way and under the same modalities as if the investigative measure concerned had been ordered by an authority of the executing Member State, unless that authority decides to invoke one of the grounds for non-recognition or non-execution, or one of the grounds for postponement, as provided for in the Directive (Art. 9, para. 1). However, the executing judicial authority enjoys a certain margin of maneuver, since it may have recourse to an investigative measure other than that indicated in the EIO where this other investigative measure selected by the executing authority would achieve the same result by less intrusive means than the investigative measure indicated in the EIO (Art. 10, para. 3). The executing judicial authority shall have recourse to an investigative measure other than that indicated in the EIO also where the investigative measure indicated in the EIO does not exist under the law of the executing Member State, or the investigative measure indicated in the EIO would not be available in a similar domestic case [Art. 10, para. 1, (a) and (b)]. Only where there is no other investigative measure which would have the same result as the investigative measure requested, the executing authority shall refuse the assistance requested (Art. 10, para. 5).[29]

This flexibility clause represents a particular iteration of the principle of mutual recognition which resembles the one already applied under Framework Decision 2009/829/JHA on the application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.[30] By

[26] Art. 13 of the 2000 EU Convention and Framework Decision 2002/465/JHA on joint investigation teams will continue to apply.

[27] The Framework Decision on the EEW provides that the executing Member State is the only responsible for choosing the measures which under its national law will ensure the provision of the objects, documents or data sought by an EEW and for deciding whether it is necessary to use coercive measures to provide that assistance (Art. 11, para. 2).

[28] The EIO Directive clearly states that: «[t]he issuing authority is best placed to decide, on the basis of its knowledge of the details of the investigation concerned, which investigative measure is to be used.» (Whereas nr. 10).

[29] This is a ground for refusal that must be added to those grounds for refusal expressly provided for under Art. 11. See: *A. Mangiaracina*, ULR 2014, p. 127.

[30] According to Framework Decision 2009/829/JHA, if the nature of the supervision measures is incompatible with the law of the executing Member State, the competent authority in that Member State may adapt them in line with the types of supervision measures which apply, under the law of the executing Member State, to equivalent offences. The adapted supervision measure shall correspond as far as possible to that imposed in the issuing Member State and may not be more severe than the supervision measure which was originally imposed (Art. 13, para. 1 and 2).

the adjustment of the requested measure with a different one, as long as this different measure is equally effective, a third option is offered with respect to the choice between wholesale recognition of the judicial decision as issued by the issuing authority or outright refusal of recognition of that decision by the executing authority. Such flexibility clause, especially the one in favour of a less intrusive measure – which *de facto* introduces a proportionality test to be carried out by the executing authority[31] in relation to the objective to be pursued by the execution of an EIO rather than the purpose of the proceedings in the issuing Member State (see *infra* § IV) – is certainly to be welcomed in consideration of the existing differences between national judicial systems: it allows to ensure both effective cooperation and the respect of the rights of individuals involved in the execution of the requested measure.

IV. Some critical remarks

As emerged from the experience gained in the concrete implementation of the European Arrest Warrant (hereinafter "EAW"), mutual recognition measures need to be limited to cases where their application is proportionate to the crime of the proceedings. Proliferation of EAWs for minor crimes in certain Member States has raised some problems concerning potential conflicts with national domestic laws applying stricter proportionality rules.[32] In order to prevent this phenomenon in the area of judicial cooperation in criminal matters dealing with mutual legal assistance, Directive 2014/41, similarly to the Framework Decision on the EEW, demands the issuing authority to check that the issuing of an EIO is necessary and proportionate for the purpose of the proceedings. Differently from the Framework Decision on the EEW, the Directive provides that this proportionality test should be carried out by taking into account the rights of the suspected or accused person [Art. 6, para. 1(a)].

However, such a proportionality test seems not to be decisive to prevent the abuse of EIOs,[33] not even if carried out in a context where due attention is paid to the rights of the suspected or accused person. The assessment of proportionality is

[31] *S. Allegrezza* (fn. 24), p. 64; *A. Mangiaracina*, ULR 2014, p. 127-128; and *T. Rafaraci* (fn. 10), p. 41.

[32] See: *R. Davidson*, A sledgehammer to crack a nut? Should there be a bar of triviality in European arrest warrant cases?, Criminal Law review 2009, p. 31; *T. Ostropolski*, The Principle of Proportionality under the European Arrest Warrant – with an Excursion on Poland, New Journal of European Criminal Law (NJECL) 2014, p. 167 et seq.; and *J.R. Spencer-J. Vogel*, Proportionality and the European Arrest Warrant, Criminal Law Review 2010, p. 480 et seq.

[33] See: *L. Bachmaier Winter*, European investigation order for obtaining evidence in the criminal proceedings. Study of the proposal for a European directive, Zeitschrift für Internationale Strafrechtsdogmatik (ZIS) 2010, p. 584; *L. Bachmaier Winter*, The Role of the Proportionality Principle in Cross-Border Investigations Involving Fundamental Rights, in: S. Ruggeri (ed.), Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings, 2013, p. 98 et seq.; and *S. Allegrezza*, (fn. 24), p. 62 et seq. See also *C. Heard-D. Mansell*, The European Investigation Order: Changing the Face of Evidence-Gathering in the EU Cross-border Cases, New Journal of European Criminal Law (NJECL) 2011, p. 357: according to them, the introduction of a proportionality assessment by the issuing judicial authority should prevent "forum shopping", understood as the risk that prosecutors may use the EIO to obtain unfair advantages from differences between countries' procedural systems.

partially implicit in the assessment of legality of the requested measure – i. e. the investigative measure indicated in the EIO could have been ordered under the same conditions in a similar domestic case [Art. 6, para. 1 (b)] – and is carried out by the issuing authority on the basis of national law, according to different criteria in each Member State, greatly influenced by the principle of mandatory prosecution, on the one hand, and the principle of opportunity, on the other hand. This proportionality test alone could raise the same problems already encountered in the application of the Framework Decision on the EAW.[34]

The Directive tries to overcome the limits of this condition by providing the executing authority with the unprecedented possibility to consult the issuing authority on the importance of the EIO, where the executing authority has reason to believe that the conditions concerning proportionality and legality have not been met; after that consultation, the issuing authority may decide to withdraw the EIO (Art. 6, para. 3). This possibility, though, raises serious doubts for two main reasons. First, it is not clear to what extent the executing authority, which is external to criminal proceedings in the issuing Member State and the legal system where those proceedings take place, may be in the position to verify that either the condition of proportionality or that of legality have not been met. Secondly, if the executing authority is not satisfied with the conditions concerning proportionality and legality, and the issuing authority does not withdraw the EIO anyway, the executing authority seems to be allowed to refuse the execution of an EIO; this ground for refusal, however, conflicts with the core of the principle of mutual recognition,[35] as very well explained by the Commission in relation to the implementation of the EAW.[36]

In the light of these considerations, if it is certainly opportune to limit the undesirable proliferation of EIOs in relation to proceedings concerning minor crimes, the solution should not be to grant the executing authority too much discretion, especially where such discretion may affect assessments that should pertain to the sole issuing authority. In this respect, the solution offered by the Council as far as the implementation of the Framework Decision on the EAW is concerned – i. e. to require that the *issuing authorities of all Member States* apply a proportionality test, including those jurisdictions where prosecution is mandatory,

[34] For a different opinion see: *A. Mangiaracina*, ULR 2014, p. 132.

[35] However, see *T. Ostropolski*, NJECL 2014, p. 181, who believes that the finally adopted compromise largely retains the essence of mutual recognition since it unequivocally states that proportionality shall be assessed by the issuing authority in each case and the possible decision to withdraw the EIO remains in the hands of the issuing authority. See also *D. Helenius*, Mutual Recognition in Criminal Matters and the Principle of Proportionality. Effective Proportionality or Proportionate effectiveness?, New Journal of European Criminal Law 2014, p. 357 et seq., and *J.S. Hodgson*, Safeguarding Suspects' rights in Europe: A Comparative Perspective, New Criminal Law Review (NCLR) 2011, p. 630 et seq.

[36] See the Report on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Brussels, 11 April 2011, COM (2011) 175 final. As pointed out by the Commission, a disproportionate use of EAWs might «[…] lead to a situation in which the executing judicial authorities (as opposed to the issuing authorities) feel inclined to apply a proportionality test, thus introducing a ground for refusal that is not in conformity with the Council Framework Decision or with the principle of mutual recognition on which the measure is based» (p. 8).

according to *uniform criteria* expressly indicated[37] – may constitute the best solution to address this delicate issue also as far as evidence-gathering across the EU is concerned.

Another critical remark concerning Directive 2014/41 deals with the results stemming from the blurring – implicit – distinction between coercive and non-coercive investigative measures, to which important derogations are linked.

According to Art.10, para. 2, it is not possible to make recourse to an investigative measure other than that provided for in the EIO when one of the following investigative measures are requested: (a) the obtaining of information or evidence which is already in the possession of the executing authority and the information or evidence could have been obtained, in accordance with the law of the executing Member State, in the framework of criminal proceedings or for the purposes of the EIO; (b) the obtaining of information contained in databases held by police or judicial authorities and directly accessible by the executing authority in the framework of criminal proceedings; (c) the hearing of a witness, expert, victim, suspected or accused person or third party in the territory of the executing Member State; (d) any non-coercive investigative measure as defined under the law of the executing Member State; and (e) the identification of persons holding a subscription of a specified phone number or IP address. The result is that these investigative measures (evidence already existing, data already available, oral evidence and the more generic category of non-coercive measures) always have to be available under the law of the executing Member State. In fact, two of the grounds for refusal expressly provided for under Art. 11 do not apply to these investigative measures, since they may frustrate this "duty of availability". Such grounds for refusal are those applying where: (i) the conduct for which the EIO has been issued does not constitute an offence under the law of the executing Member State, unless it concerns an offence listed within the categories of 32 offences for which double criminality needs not to be verified, as indicated by the issuing authority in the EIO, if it is punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years; and (ii) the use of the investigative measure indicated in the EIO is restricted under the law of the executing Member State to a list or category of offences or to offences punishable by a certain threshold, which does not include the offence covered by the EIO.[38]

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[37] See the Revised version of the European handbook on how to issue a European Arrest Warrant, Brussels, 17 December 2010, 17195/1/10, where the issuing authorities are required to «[…] consider proportionality by assessing a number of important factors. In particular these will include an assessment of the seriousness of the offence, the possibility of the suspect being detained, and the likely penalty imposed if the person sought is found guilty of the alleged offence. Other factors also include ensuring the effective protection of the public and taking into account the interests of the victims of the offence.» (p. 14). See also the Reply to the Question for written answer E-012918/13 concerning the principle of proportionality as regards the European arrest warrant, where «the Council notes that there is a broad consensus among the Member States that the proportionality test should be conducted in the issuing Member State, and not in the executing Member State.» (OJ 2014 C 241/71).

[38] For some critical comments on these grounds for refusal, see *L. Bachmaier Winter*, The Proposal for a Directive on the European Investigation Order and the Grounds for Refusal: A Critical Assessment, in: S. Ruggeri (ed.), Transnational Evidence and Multicultural Inquiries in Europe, 2014, p. 85 et seq.

In the light of the differences between the initial proposal and the final text of the Directive,[39] it is possible to suppose that the aim of the European legislator has been to draw a distinction between non-coercive measures (those expressly listed) and coercive measures (other than those expressly listed).[40] The possibility to have recourse to a measure other than that provided for in the EIO, as well as all the grounds for refusal provided for under Art. 11 – including those two that introduce more stringent legality tests – apply only where coercive measures are at issue. After all, it is in relation to coercive measures, because of their very nature, that the flexibility clause and more stringent legality tests appear to be adequate.[41]

Even though already before the adoption of the final text of the Directive such a solution had been suggested as the most opportune,[42] it remains unclear which measures should be considered coercive and which ones should not.[43] The provision referring to the executing judicial authority for the definition of non-coercive investigative measures [Art. 10, para. 2(d)] is not decisive to clear doubts on what can be considered non-coercive,[44] since it makes such definition dependent solely on national laws, which may vary considerably from one Member State to another; in fact, this provision risks undermining uniform application of the Directive across the EU. Perhaps, it would be better to apply derogations just to evidence already existing, data already available and oral evidence, and not also to the undefined category of non-coercive measures, so as to allow a "pure" mutual recognition system only for well-defined types of evidence.

The last and significant critical remark on Directive 2014/41 concerns the actual exercise of defence rights in these new procedures of legal assistance shaped around the principle of mutual recognition. Even though the suspected or accused person, or the lawyer on his behalf, is expressly granted the possibility to request the issuing of an EIO within the framework of applicable defence rights in conformity with national criminal procedure (Art. 1, para. 3), the suspected, the accused person and the lawyer are still prevented from an autonomous direct request of legal assistance

[39] In the final draft, coercive measures such as search and seizure were included in the list under Art. 10. See Interinstitutional File: 2010/0817 (COD), 18918/11, Brussels, 21 December 2011.

[40] Similarly, see *I. Armada*, The European Investigation Order and the Lack of European Standards for Gathering Evidence. Is a Fundamental Rights-based refusal the solution?, New Journal of European Criminal Law 2015, p. 17.

[41] In relation to the check on double criminality, see *L. Bachmaier Winter* (fn. 33), p. 103, who underlines that if evidence can be collected without resorting to the restriction of fundamental rights, the dual criminality requirement could be completely disregarded without affecting the coherence of the standards applicable in the executing Member State. Of the same opinion, see also *P. Rackow-C. Birr*, Recent Developments in Legal Assistance in Criminal Matters, Goettingen Journal of International Law 2010, p. 1117.

[42] *R. Belfiore* (fn. 24), p. 99 et seq.

[43] On the necessity of a more precise provision defining coercive and non-coercive measures, see *A. Mangiaracina*, ULR 2014, p. 120 and 130.

[44] The Directive suggests that: «[n]on-coercive measures could be, for example, such measures that do not infringe the right to privacy or the right to property, depending on national law.» (Whereas nr. 16), and that: «[a]n EIO issued to obtain historical traffic and location data related to telecommunications should be dealt with under the general regime related to the execution of the EIO and may be considered, depending on the national law of the executing State, as a coercive investigative measure.» (Whereas nr. 30).

to a foreign judicial authority.[45] Besides the symbolic value of this unprecedented provision, nothing is destined to change in the current scenario where the defence can already ask the competent authority of the proceedings to put forward a request of mutual legal assistance to a foreign judicial authority. However, the competent judicial authority of the proceedings is not bound by the defence lawyer's request, and national legal systems may not provide for remedies against refusal. Not to mention that such a request may entail disclosure of the defensive strategy before official discovery takes place. In this context, the principle of equality of arms, implied in the guarantee of a fair trial, is severely affected. The same will happen under the new Directive.[46]

Defence lawyers are not even granted the right to participate in the material gathering of evidence abroad after an EIO has been issued by the competent authority, this concurring to undermine efficiency of mutual legal assistance. The absence of the defence lawyer during the execution of an EIO may invalidate the whole execution procedure, i. e. admissibility of evidence in the proceedings in the issuing Member State may be jeopardised where participation of the defence lawyer is an essential requirement under national law. This risk could be prevented if the issuing authority indicates participation of the defence lawyer during the execution of an EIO as a procedure to which the executing authority shall comply with (Art. 9, para. 2). The problem, though, is that participation of the defence lawyer would depend on a discretionary decision of the issuing authority: indeed, the indication of formalities and procedures is not compulsory, and it is up to the issuing authority to select which formalities and procedures to indicate in the EIO.[47] A solution might be to introduce an explicit prognosis on admissibility of evidence – as provided for in the 2003 draft Framework Decision on the EEW[48] – so as to induce the issuing authority to indicate participation of the defence lawyer during the execution of an EIO as a procedure to which the executing authority shall comply with every time that it is possible to foresee that such participation will be likely to determine admissibility of evidence in the proceedings in the issuing Member State. This prognosis would make issuing authorities more responsible when deciding whether or not to require participation of the defence.[49]

[45] As pointed out by *J.S. Hodgson*, NCLR 2011, p. 633 et seq.: «[…a]lthough we would not expect the EAW to be exercised by the defense, this is not the case with the EEW or the EIO. Evidence is not the exclusive preserve of the prosecuting authorities.».

[46] For different considerations, see *A. Mangiaracina*, ULR 2014, p. 124. For some critical remarks, see *L. Bachmaier Winter*, ZIS 2010, p. 587, and *C. Heard-D. Mansell*, NJECL 2011, p. 1121. For some more general critical remarks on shortfalls as far as defence rights in transnational criminal proceedings are concerned, see *S. Gless*, Transnational Cooperation in Criminal Matters and the Guarantee of a Fair Trial: Approaches to a General Principle, Utrecht Law Review 2013, p. 99 et seq.

[47] For similar critical remarks see above, *sub* fn. 10.

[48] The proposal for a Framework Decision on the EEW of 2003 expressly provided that an EEW had to be issued only when the issuing authority was satisfied that the objects, documents and data were likely to be admissible in the proceedings for which they were sought. This provision has been eventually erased in the final text of the Framework Decision on the EEW and has not been reproduced in Directive 2014/41.

[49] However, see *L. Bachmaier Winter* ZIS 2010, p. 583 et seq., who believes that providing for a preliminary check on the admissibility of evidence by the issuing authority would not add anything to what the issuing authority must do anyway.

It is true that, following the adoption of Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings,[50] Member States have to ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when questioned [Art. 3, para. 3 (b)]. Member States also have to ensure that suspects or accused persons have, as a minimum, the right for their lawyer to attend the investigative or evidence-gathering acts consisting of identity parades, confrontations and reconstructions of the scene of a crime, where these acts are provided for under national law and if the suspect or accused person is required or permitted to attend the act concerned in accordance with procedures under national law, provided that such procedures do not prejudice the effective exercise and essence of the right concerned [Art. 3, para. 3 (c)]. Of course, participation of lawyers as provided for under Directive 2013/48 should also be granted when questioning and the other mentioned investigative or evidence-gathering acts take place in a Member State other than the one where criminal proceedings have been initiated, unless derogations apply – in exceptional circumstances and at the pre-trial stage – (Art. 3, para. 6). However, only the mentioned acts are concerned by Directive 2013/48, and national procedural laws, which may sensibly differ one from another, still apply.

The absence of the defence lawyer during the execution of an EIO in the executing Member State may also frustrate the right to an effective legal remedy as granted by Directive 2014/41 (Art. 14) and provided for by Art. 47 of the Charter of Fundamental Rights of the European Union. Whereas the substantive reasons for issuing an EIO may be challenged only in an action brought in the issuing Member State, without prejudice to the guarantees of fundamental rights in the executing Member State, recognition and execution of an EIO may be challenged only in an action brought in the executing Member State (Art. 14);[51] but, if the material execution of an EIO in the executing Member State is not carried out in the presence of the defence lawyer, the latter may unlikely be able to challenge possible irregularities in the material execution of an EIO according to the law of the executing Member State.[52]

V. Final remarks

The Directive on the EIO has been much expected. The hope was that the European legislator could take the best from previous experience and innovate where needed. This hope has been partially disappointed.

[50] OJ 2013 L 294/1. Together with Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings (OJ 2010 L 280/1) and Directive 2012/13/EU on the right to information in criminal proceedings (OJ 2012 L 142/1), this measure is meant to strengthen the procedural rights of suspected or accused persons in criminal proceedings, according to Council Resolution of 30 November 2009.

[51] On matters concerning legal remedies, see: *J. Blackstock* NJECL 2010. p. 494 et seq., and *B. Schünemann* (fn. 10), p. 33.

[52] See *A. Mangiaracina* ULR 2014, p. 124-125. See also *L. Bachmaier Winter*, Transnational Criminal Proceedings, Witness Evidence and Confrontation: Lessons from the ECtHR's Case Law, Utrecht Law Review 2013, p. 141, who underlines that «[t]o strengthen the protection of defence rights, the defence should be accorded the possibility to check how the evidence was obtained in the executing State.».

On the plane of efficiency of legal assistance, the realisation of a comprehensive system is to be welcomed, especially since it is based on a new iteration of the principle of mutual recognition, where the flexibility clause plays a significant role: it safeguards the law of the executing Member State while preventing the executing authority from refusal of the requested measure where the latter does not exist under national law, does not apply in a similar domestic case, or is disproportionate to the result. In addition, provisions on specific investigative measures that are new in the panorama of judicial cooperation in the EU (Art. 26, 27 and 28) are to be welcomed since they can be of great importance for effective cross-border investigations.

However, this system presents a *vulnus* where it allows the executing authority to question legality and proportionality of the requested measure in relation to the purpose of the proceedings, as assessed by the issuing authority. Indeed, it introduces a ground for refusal that grants the executing authority too wide discretion, which is typical of the most traditional judicial cooperation, and should be extraneous to mutual recognition.

Furthermore, the European legislator has missed the opportunity to draw a clear-cut distinction between coercive and non-coercive measures. Such a distinction could help in developing a shared meaning of coercion across the EU which would result in a uniform application of the Directive. It could also better justify the application of grounds for refusal meant to preserve national sovereignty in the face of legal assistance, to be limited to coercive measures only.

On the plane of defence rights, the need to strike a fair balance between efficient legal assistance and the respect of individual rights has been disregarded. The objective of strengthening mutual assistance between Member States has prevailed, once again, over the objective of enhancing the role of the accused in criminal proceedings having a cross-border dimension. Even if the accused persons and defence lawyers are taken into consideration *expressis verbis* in the EIO Directive, their chances to benefit from legal assistance and be part of it are minimal and only occasional.

In conclusion, the European legislator has failed to adopt an ambitious measure that could realise a fully-fledged system for the gathering of evidence across the EU based on the principle of mutual recognition, where defence lawyers would eventually be acknowledged as key actors.