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A New and Controversial Scenario in the Gathering of Evidence at the European Level: The Proposal for a Directive on the European Investigation Order

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1. Introduction

A relevant topic at the European level is the extension of the mutual recognition principle – affirmed as a 'cornerstone' of judicial cooperation, in criminal matters as well as in civil matters, during the historic Council of Tampere of 1999 and codified in Article 82(1) of the Treaty on the Functioning of the European Union (TFEU) – to the field of evidence. Its relevance is increased and made topical by the Proposal for a Directive on the European Investigation Order (EIO),[1] launched in April 2010 by a group of Member States, which aims is to replace Framework Decisions 2003/577/JHA on freezing property or evidence and 2008/978/JHA on a European Evidence Warrant (EEW) as well as various instruments on mutual legal assistance in criminal matters in so far as they relate to the obtaining of evidence for the use of proceedings in criminal matters (Paragraph 15 of the Preamble), through the application of the mutual recognition philosophy.

The underlying premise – although statistical data are not adduced to support this – is that the mechanisms of traditional mutual assistance are slow and inefficient.[2] The weaknesses identified are said to include: the channel for the transmission of the request; the range of facts giving rise to cooperation; the number of grounds for refusal; the lack of deadlines; and the possibility given to the Member States to make reservations and declarations. So the objectives of the new instruments are: 'accelerating the procedure, ensuring the admissibility of evidence, simplifying the procedure, maintaining a high level of protection of human rights (especially procedural rights), reducing the financial costs, increasing mutual trust and cooperation between the Member States and preserving the specificities of the national systems and their legal culture'.[3]

The idea behind the EIO – 'to create a single, efficient and flexible instrument for obtaining evidence located in another Member State in the framework of criminal proceedings'[4] so to avoid uncertainty

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1 Council Doc., 9145/10, COPEN 115, CODEC 363, EUROJUST 47, EJN 12, 29 April 2010, Initiative for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters.

2 Council Doc., 9288/10, ADD 2, COPEN 117, EUROJUST 49, EJN 13, PARLNAT 13, CODEC 384, 23 June 2010, Detailed Statement, pp. 9-10. 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. 96, thinks that this conclusion might not be correct.

3 Council Doc., 9288/10 ADD 2, supra note 2, p. 6. Among the policy options the following are enumerated: A) The EU will not undertake any new action; B) the EU will adopt non-legislative measures; C) abrogation of the FD on the EEW; D) the EU will take new legislative action based on the principle of MR. 1) A limited improvement of the EEW; 2) The replacement of all existing instruments by a 'European investigation order' covering all types of evidence. Option D. 2 is considered to be the best option given the objectives pursued.

4 Council Doc. 9288/10, ADD 1, COPEN 117, EUROJUST 49, EJN 13, PARLNAT 13, CODEC 384, 3 June 2010, Explanatory Memorandum, p. 2.

related to the complicated and fragmented normative frame – is not a new one. As originally conceived by the European Commission, the EEW, the main instrument at the European level[5] aimed at implementing the mutual recognition principle in the field of evidence, although related only to some forms of evidence-gathering, was to have been a first step towards a single mutual recognition instrument that would in due course replace all of the existing mutual assistance regime.[6] The second stage was to have been a further instrument providing for the mutual recognition of orders for the obtaining of other types of evidence: evidence which does not yet exist but which is directly available (for example, interviews with suspects…) and evidence which, although it exists, cannot be used without further investigation or analysis (for instance, the taking of evidence from the body of a person, such as DNA samples) or situations where further inquiries need to be made, in particular by compiling or analyzing existing objects, documents or data. In a final stage these separate instruments were to have been brought together into a single consolidated instrument which would include a general part containing provisions applicable to all forms of co-operation.

With a view to implementing this ambitious project in 2009 the European Commission launched a consultation process with the publication of a Green Paper on 'obtaining evidence in criminal matters from one Member State to another and securing its admissibility'[7] where stakeholders were requested to reply to a questionnaire on the future Proposal for a comprehensive instrument for the gathering of evidence and its admissibility in cross-border proceedings. The Commission was expected to present its Proposal for the new instrument in mid-2011 but it has not been launched. Then, in 2010, as mentioned, by virtue of the initiative of a quarter of the Member States to whom Article 76(b) of the TFEU recognizes the power to propose new legislative acts, so circumventing the work of the Commission and with no open consultation, the Proposal on the EIO was published, an instrument which, if adopted, 'will change the face of evidence-sharing in the EU'.[8]

Taking account of the well-known objections to the extension of the mutual recognition principle to the field of evidence, in the absence of a previous harmonization of national rules on the admissibility of evidence in the European Union, the aim of this paper is to examine the content of this new Proposal and to enquire whether it is time to definitely put aside the mutual assistance regime in favour of the mutual recognition philosophy also in the field of evidence. The text will be examined with a view to seeing whether there are sufficient safeguard for the protection of the fundamental rights not only of the defendant, but also of other parties who are incidentally involved in criminal proceedings, such as the victim of the alleged crime. Indeed, a specific matter of concern is that at present the mutual recognition principle does not benefit the defence and there is no real balancing of the interests between the prosecution and the defence.[9]

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5 The Framework Decision on the EEW – like the Framework Decision on the European Arrest Warrant – introduces a list of offences for which no double criminality is required. Germany has made the lack of a definition and the possibility of having obligations with regard to behaviour that is not criminalized under German legislation one of their key issues during the negotiations. As a compromise, Germany is allowed to execute an EEW under the verification of double criminality in case of offences related to terrorism, computer-related crime, racism, xenophobia, sabotage, racketeering, extortion and swindling.

6 See Proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters, 14 November 2003, Para. 39, COM(2003) 688 final. According to the Stockholm Programme (European Council, Brussels, 2 December 2009): 'The European Council considers that the setting up of a comprehensive system for obtaining evidence in cases with a cross-border dimension, based on the principle of mutual recognition, should be further pursued. A new approach is needed, based on the principle of mutual recognition but also taking into account the flexibility of the traditional system of mutual legal assistance. This new model could have a broader scope and should cover as many types of evidence as possible, taking account of the measures concerned.' See, in 2005, the Communication from the Commission to the Council and the European Parliament on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States (Para. 2.1): 'investigation measures such as questioning suspects, witnesses and experts or bank account surveillance or telephone-tapping orders will also have to be covered by MR instruments' (COM(2005) 195 final).

7 Brussels, 11 November 2009, COM(2009) 624 final.

8 C. Heard & D. Mansell, 'The European Investigation Order: Changing the Face of Evidence-Gathering in EU Cross-Border Cases', 2011 *New Journal of European Criminal Law*, no. 2, p. 354.

9 See G. Vernimmen et al., 'Analysis of the future of mutual recognition in criminal matters in the European Union', 20 November 2008, <http://www.advokatsamfundet.se/Documents/Advokatsamfundet_sv/Nyheter/Slutrapport_mutual_recognition_eng.pdf> (last visited 19 December 2013), p. 15.

2. The instruments on evidence-gathering: differences between mutual legal assistance and mutual recognition

In the current framework, the system for gathering evidence among Member States at the European level is mainly based on mutual legal assistance (MLA) instruments. The matter is governed by the Council of Europe Convention on mutual assistance in criminal matters of 1959 (ratified by all of the EU Member States), supplemented by its additional Protocol signed in 1978 (also ratified by all of the EU Member States), the Benelux Treaty of 1962, the Convention for the application of the Schengen agreements of 1990 (CISA) and, lastly, the Convention on mutual assistance between the Member States of the EU from 29 May 2000, with its Protocol of 2001.

Indeed, the principal EU initiative based on the mutual recognition principle, the 2008 Framework Decision on the EEW[10] – approved after a long and complicated process[11]– has been implemented in only two[12] of the then 27 European Union Member States (although the official implementation date was in January 2011), so its practical impact is non-existent. However, the text would have achieved little because it is focused on the exchange of evidence already gathered. As a consequence, for the forms of evidence-gathering not covered by the Framework Decision,[13] the traditional instrument of mutual assistance would have to be used. Among these are: conducting interviews, taking statements or other types of hearings involving suspects, witnesses, experts or any other party; carrying out bodily examinations or obtaining bodily material or biometric data directly from the body of any person, including DNA samples or fingerprints; obtaining information in real time such as through the interception of communications, covert surveillance or the monitoring of bank accounts; conducting analysis of existing objects, documents or data; and obtaining communications data retained by providers of a publicly available electronic communications service or a public communications network (Article 4(2)).

With regard to the Framework Decision of 22 July 2003 on the execution, within the European Union, of orders freezing property or evidence, also based on the mutual recognition principle, this instrument is aimed at the preservation of evidence which is already available in one State so that it may be used by another State as well. It does not provide for the transfer of such evidence. For a transfer the prosecuting State must use the instruments of mutual legal assistance.

From a theoretical point of view, mutual legal assistance and mutual recognition provide different systems for evidence located abroad. Under the mutual legal assistance regime, the State (through the Minister of Justice) has to 'request' judicial assistance from another State which has a broad discretion to refuse to execute the request, for assistance, and is not obliged to respect a deadline, with the consequence of significant delays in executing the request. Moreover, evidence is gathered in conformity with the *locus regit actum* principle, which could create problems in the field of the admissibility of evidence in the requesting State which would have to verify the compatibility of evidence gathered overseas with its legal order.[14]

It should be said that some of the weak points of the mutual assistance regime – the involvement of the political authorities; the delays in executing the request and the strict application of the *lex loci* – have been improved with the course of time. For instance, the Schengen Convention has reduced the grounds by which to refuse the execution of a mutual assistance request and restricted the requirement of double incrimination (Article 51); it has also introduced direct contact between judicial authorities as the ordinary way of forwarding requests for legal assistance, although without prejudice to the request being sent and returned between Ministries of Justice (Article 53(1) and (2)). A big advance in evidence-

10 Framework Decision 2008/978/JHA on the European Evidence Warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350, 30.12.2008, p. 72.

11 A political agreement on the text of the Framework Decision had been reached during the Council in Luxembourg on 1 June 2006.

12 Denmark and Finland.

13 See J.R. Spencer, 'The Problems of Trans-border Evidence and European Initiatives to Resolve Them', 2007 *Cambridge Yearbook of European Legal Studies*, no. 9, p. 477: 'mutual legal assistance within Europe is now regulated by a list of diverse legal instruments, and as the list lengthens, so the fragmentation becomes even worse'.

14 This is to say that for the English courts it is admissible real evidence obtained from the authorities of another European country in accordance with its criminal procedure but which would not have been obtainable at all under English law: on this point see R. Loof, 'Obtaining, Adducing and Contesting Evidence from Abroad – a Defence Perspective on Cross-Border Evidence', 2011 *Criminal Law Review,* p. 54.

gathering has been marked by the 2000 MLA Convention, which entered into force on 23 August 2005. The most significant improvements are: requests are directly transmitted between judicial authorities, with the exception of a limited number of particular cases (Article 6(1)); the requested State shall execute the request for assistance 'as soon as possible' (Article 4(2)); and more importantly for its consequence for the admissibility of evidence, the requested State has the duty to comply with formalities or procedures expressly indicated by the requesting State, unless they are contrary to its fundamental principles of law (Article 4(1)). Regrettably this Convention has not yet been implemented in several countries, including Italy.

Under the mutual recognition regime, it is the national judicial authority which directly 'orders' a foreign judicial authority to recognize and execute its decision within a deadline and with, it is intended, very limited grounds for refusal. The mutual recognition philosophy requires Member States to accept foreign decisions and to execute them 'as if they were their own', without the need to check the legality of the foreign judicial decision prior to executing it. As a consequence, the execution is governed by the *forum regit actum* principle which makes it easier to admit evidence gathered overseas in the requesting State; moreover, with the absence of any harmonisation of the rules on the law of evidence at the European level, the application of this principle, even with some specifications (such as respect for the *ordre public* of the requested State), is a possible way to overcome the differences between the laws of the issuing and executing State.

Thus if we take into consideration the improvements to the system of mutual assistance, at a practical level the main difference between mutual assistance and mutual recognition is related to the power of the executing authority within the procedure for recognition. If mutual trust is the 'keystone' of mutual recognition, the power of the executing authority cannot be as wide and 'flexible' as within the mutual legal assistance regime.

3. The objections to the extension of the mutual recognition principle in the field of evidence

As is well known the first instrument to implement the mutual recognition principle at the European level is the European Arrest Warrant (EAW), which has replaced extradition by a (simplified) system of surrender between judicial authorities. Although this instrument is working well, experience has shown several problems as a consequence of differences between procedural systems.[15] Concerns have been expressed relating to issues such as 'the abolition of the dual criminality for a list of offences and the principle of legality, the surrender of own nationals (…), the degree of automaticity and the extent to which the execution of an Arrest Warrant may be refused and the impact of mutual recognition on human rights';[16] a further and significant point of criticism has concerned the lack of an assessment of the proportionality of the arrest warrant by the issuing authority.

As said before, mutual trust is a prerequisite for the functioning of the mutual recognition principle, but in the current framework the absence of common procedural rules between Member States may have relevant consequences for the fairness of the proceedings of the executing State which have to accept the foreign decision with a strict list of grounds for refusal. A recurrent question is whether it is appropriate to extend the mutual recognition principle – developed originally in the Common Market with regard to the movement of goods[17] and first applied in the context of extradition – to the field of criminal evidence-gathering and consecutive use.[18] Evidence, or better, evidentiary outcomes, unlike goods, is

15 See JUSTICE, *European Arrest Warrant. Ensuring an Effective Defence*, 2012 p. 22, <http://www.ecba.org/extdocserv/projects/EAW/JUSTICE_EAW.pdf> (last visited 19 December 2013). On the 'flaws' with the operation of the EAW see Fair Trials International, The European Arrest Warrant seven years on – the case for reform, May 2011, <http://www.fairtrials.net/documents/FTI_Report_EAW_May_2011.pdf> (last visited 19 December 2013).

16 V. Mitsilegas, 'The third wave of third pillar law: which direction for EU criminal justice?', 2009 *European Law Review* 34, p. 538.

17 On the development of the mutual recognition principle within the EU see, among others, S. Peers, 'Mutual recognition and criminal law in the European union: has the council got it wrong?', 2004 *Common Market Law Review* 41, pp. 18 et seq.

18 On this topic, among others, see S. Gless 'Mutual recognition, judicial inquiries, due process and fundamental rights', in J.A.E. Vervaele (ed.), *European Evidence Warrant. Transnational Judicial Inquiries in the EU*, 2005, p. 123; 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', 2010 *ZIS,* no. 9, p. 603; M. de Hoyos Sancho, 'Harmonisation of Criminal Proceedings, Mutual Recognition and Essential Safeguards', in M. De Hoyos Sancho (ed.), *El proceso penal en la Uniòn Europea. Garantias esenciales/Criminal Proceedings in the EU. Essential Safeguards*, 2008, pp. 42 et seq.

'the result of a procedural activity'[19] governed by specific rules as to its admission and collection, each being pertinent to one particular judicial system. Moreover, respect for these rules is a condition of the genuineness of the evidentiary outcome: for instance, admitting as evidence, within the Italian system, the written declaration of a witness which has not been obtained under *cross-examination* rules would infringe constitutional principles relating to a 'fair trial' (Article 111).[20] The same is true with admitting as evidence the statement of a suspect who had been questioned by the police without the presence of a lawyer whose primary role is to protect the suspect's right against self-incrimination.[21]

In this regard, it cannot safely be assumed that all Member States comply with the European Convention on Human Rights (ECHR), which provides fair trial guarantees; nor can it be assumed that the case law of the Strasbourg Court has indirectly brought about a progressive harmonization of systems in the field of the law of evidence[22] as it has done in some other fields. As regards the first assumption, there can be little doubt that, within the EU, 'compliance levels are far from uniform and enforcement mechanisms are weak',[23] as is shown by statistical data. As regards the second proposition, it must be remembered that the Strasbourg case law on Article 6 ECHR, providing minimum guarantees of 'fair trial', lays down no general rules on the admissibility of evidence, treating this as a matter for regulation by national law and adding that it is generally for national courts to assess the evidence presented to them. The Court's task, as specified by the Strasbourg judges, is to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair.[24] Furthermore, the Strasbourg Court has declined to accept that 'a conviction is based solely or decisively on the evidence of absent witnesses' (which means that the defence has been unable to cross-examine) must imply a breach of Article 6(3)(d) ECHR. In such a case it is necessary to consider whether there are 'sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place'.[25] Hence, any trend of harmonisation in the field of the admissibility of evidence can be inferred from the Strasbourg jurisprudence,[26] being the 'sole or decisive rule' just a limit for the judge in the assessment of evidence.

Applying the mutual recognition principle in this situation risks legalizing the admission of evidence gathered in another juridical system in violation of certain rules which would otherwise apply (for example, the mandatory presence of a lawyer during the questioning of the suspect to inform him of his rights, such as the right to silence; or a prohibition on the questioning of a suspect who is subjected to the application of a coercive measure by the police). This risk is particularly high with regard to witness evidence, a major source of information in criminal proceedings, with significant consequences for the rights of the defendant.

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19 S. Allegrezza, 'Critical remarks on the Green Paper on Obtaining Evidence in Criminal Matters from one Member State to another and Securing its Admissibility', 2010 *ZIS,* no. 9, p. 573. For the definition of evidence as a '*legal construct*' see Gless, supra note 18, p. 123.

20 There would also be serious admission problems in trials in the UK as regards written statements taken by a *juge d'instruction* from witnesses in France: see Spencer, supra note 18, p. 605. On this topic see, a.o., K. Ambos, 'Transnationale Beweiserlangung – 10 Thesen zum Grünbuch der EU Kommission „Erlangung verwertbarer Beweise in Strafsachen aus einem anderen Mitgliedstaat"', 2010 *ZIS*, no. 9, pp. 563 et seq.; B. Hecker, *Europäisches Strafrecht*, 2010, pp. 430 et seq.

21 It is relevant the principle affirmed by the ECtHR, 27 November 2008, *Salduz v. Turkey*, Para. 55: '(…) Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right.' Concerning this aspect it is worth mentioning the Directive on the right of access to a lawyer in criminal proceedings of 22 October 2013 that will oblige all Member States to guarantee early access to a lawyer.

22 A. Balsamo & A. Lo Piparo, 'Principio del contraddittorio, utilizzabilità delle dichiarazioni predibattimentali e nozione di testimone tra giurisprudenza europea e criticità del sistema italiano', in A. Balsamo & R. Kostoris (eds.), *Giurisprudenza europea e processo penale italiano*, 2008, p. 338. *Contra* O. Mazza, 'Il principio del mutuo riconoscimento nella giustizia penale, la mancata armonizzazione e il mito taumaturgico della giurisprudenza europea', 2009 *Rivista diritto processuale*, pp. 398 et seq.

23 J.S. Hodgson, 'Safeguarding suspects' rights in Europe: a comparative perspective', 2011 *New Criminal Law Review*, no. 4, p. 618: 'Judgments against a country are not only for one-off breaches of an otherwise fair procedure, but also for systemic institutional violations of ECHR principles.'

24 See, a.o., ECtHR 15 December 2011, *Al-Khawaja and Tahery v. U.K.*, Para. 118; ECtHR 13 October 2005, *Bracci v. Italy*, Para. 50; ECtHR 14 February 2002, *Visser v. the Netherlands*, Para. 50; ECtHR 27 February 2001, *Lucà v. Italy*, Para. 38; ECtHR 12 July 1988, *Schenk v. Switzerland*, Para. 46; ECtHR 14 December 1999, *A.M. v. Italy*, Para. 24.

25 See ECtHR 15 December 2011, *Al-Khawaja and Tahery v. U.K.*, Para. 147. For a comment see J.R. Spencer, 'Hearsay Evidence at Strasbourg: a Further Skirmish, or the Final Round?', 2012 *Archbold Review*, no. 1, pp. 5-8.

26 S. Allegrezza, 'Cooperazione giudiziaria, mutuo riconoscimento e circolazione della prova penale nello spazio giudiziario europeo', in T. Rafaraci (ed.), *L'area di libertà sicurezza e giustizia: alla ricerca di un equilibrio fra priorità repressive ed esigenze di garanzia*, 2007, pp. 713 et seq.

Similar doubts arise in connection with the interception of communications which interferes with the right to private life and correspondence – both protected by Article 8 ECHR – as these guarantees vary from one system to another. The law regulating intercepts – crimes for which they may be used, who may authorize such use, mechanisms to control respect for certain regulations (e.g. the duty to disclose certain materials to the defendant) – impacts on the above-mentioned rights.

In the current scenario, in order to avoid the risk of infringing the 'fairness' of national proceedings, with relevant consequences for the rights of the accused (and the victims), the mutual recognition principle in the field of evidence should be preceded by the harmonisation of national legal systems,[27] interpreted as the creation of 'common minimum rules'. The necessity to enhance mutual trust among Member States, and to facilitate the application of the mutual recognition principle, led the European Commission to publish, in 2004, a Proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union[28] with the aim of setting 'common minimum standards' applicable to criminal proceedings throughout the EU. The Proposal was not successful, however. It met with opposition from some Member States on many grounds: the main objection was the lack of a legal basis in Article 31(1)(c) of the Treaty on European Union (TEU), which enabled common action to be taken on judicial cooperation in criminal matters 'ensuring compatibility in rules applicable in Member States as may be necessary to improve such cooperation';[29] moreover, according to some States, the draft breached the principle of subsidiarity, it could lower standards of protection and, lastly, implementing common standards would be technically difficult.[30] Some six years later, in 2009, the European Council adopted a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings.[31] This deals with the following rights: translation and interpretation; information on rights and information about the charges; legal advice and legal aid; communication with relatives, employers and consular authorities; special safeguards for suspected or accused persons who are vulnerable; a Green Paper on pre-trial detention.

In execution of the Roadmap, and on the legal basis of Article 81 TFEU, three relevant measures have been adopted: Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings, Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings and, lastly, Directive 2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest.[32] Furthermore, on 27 November 2013, the European Commission published a package of Proposals to further strengthen procedural rights at the European level, namely: a Directive to strengthen the presumption of innocence and the right to be present at trial in criminal proceedings; a Directive on special safeguards for children suspected or accused of a crime; a Directive on the right to provisional legal aid for citizens suspected or accused of crimes and for those subjected to a EAW. These Proposals are complemented by two Recommendations for the Member States: the first on procedural safeguards for vulnerable people suspected or accused in criminal proceedings; the second on the right to legal aid for suspects or accused persons in criminal proceedings.[33]

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27 L. Bachmaier Winter, 'Transnational Criminal Proceedings, Witness Evidence and Confrontation: Lessons from the ECtHR's Case law', 2013 *Utrecht Law Review* 9, no. 4, p. 145.

28 Brussels, 28 April 2004, COM(2004) 328 final. In 2003 the European Commission issued a Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union (Brussels, 19 February 2003, COM(2003) 75 final). On this topic, among others, see C. Brants, 'Procedural Safeguards in the European Union: Too little, too late?', in J.A.E. Vervaele (ed.), *European Evidence Warrant. Transnational Judicial Inquiries in the EU*, 2005, pp. 103 et seq.; E. Cape et al., 'Procedural rights at the Investigative Stage: Towards a Real Commitment to Minimum Standards', in *Suspects in Europe. Procedural Rights at the Investigative Stage of the Criminal Process in the European Union*, 2007, pp. 3 et seq.

29 For the debate on this point see House of Lords, European Union Committee, 1st Report of Session 2004-2005, Procedural Rights in Criminal Proceedings, 7 January 2005, Paras. 29-41, <http://www.publications.parliament.uk/pa/ld200405/ldselect/ldeucom/28/28.pdf> (last visited 13 January 2014).

30 Hodgson, supra note 23, p. 650. Some States were also not convinced of the added value of the Proposal in relation to the ECHR: W. De Bondt & G. Vermeulen, 'The Procedural Rights Debate. A Bridge Too Far or Still Not Far Enough', 2010 *Eucrim*, no. 4, p. 164.

31 Brussels, 24 November 2009, 15434/09.

32 Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European Arrest Warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, 6.11.2013, pp. 1 et seq.

33 Documents are available at <http://ec.europa.eu/justice/newsroom/criminal/news/131127_en.htm> (last visited 30 November 2013).

Although considerable progress has been made with the approval of these Directives and will probably be made after the accession of the EU to the ECHR, the elaboration of 'common minimum rights' at the European level is still an ongoing process, as demonstrated by the new package of measures. Furthermore, the Roadmap does not touch upon all the issues that are relevant in the field of evidence.[34] Indeed, despite the fact that the European Council considers the catalogue of measures contained in the Roadmap as non-exhaustive, and despite the fact that the Commission, as long ago as 2003, stressed that fairness in the handling of evidence should be covered by a separate measure after further examination, specific legal initiatives related to the collection and use of evidence have yet to be adopted in the EU.

As a consequence, the extension of a 'blind' mutual recognition philosophy to the field of evidence is problematic, unless some additional guarantees are provided at the execution stage, as will be clear by an examination of the content of the EIO and as has been clear by the negotiations for the approval of the Framework Decision on the EEW. In that context two main issues have been examined: 'whether the issuing State can obtain evidence which is admissible and/or can be obtained lawfully in the executing State, when this is not necessarily the case under the law of the issuing State (a kind of a "fishing expedition"); and whether the issuing State can oblige the executing State to use coercive measures to obtain evidence which may be unlawful under the laws of the latter'.[35] Concerns regarding these issues and their potential impact on the position of the individual have been addressed in the text of the EEW by limiting – as noted above – its ambition and scope, and by introducing a series of safeguards with regard to its recognition and execution.

4. The Proposal for a Directive on the European Investigation Order: the undefined notion of 'investigative measure'

The text of the EIO, published in June 2010[36] and significantly amended during the course of discussions at the Council, is still in the process of being legislated: an indicative plenary sitting date is scheduled for 26 February 2014. A general approach was agreed in the Council concerning Articles 1-18 in June 2011[37] and concerning Articles 19-34 in December 2011,[38] and then the text was further discussed. On the 5th of December 2013 a Draft Report has been adopted by the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament with 42 votes in favour and one against.[39]

It should be stressed that the EIO currently under discussion – unlike the one the Commission originally envisaged in 2009 – would only deal with the gathering and transfer of evidence between EU Member States. The next stage, the admissibility of evidence in the issuing State, would continue to be regulated by domestic law[40] and is only indirectly touched upon by the contents of the Proposal.

The EIO is defined (Article 1) as a judicial decision issued or validated by a judicial authority of a Member State (the issuing State) in order to have one or more specific investigative measures carried out in another Member State (the executing State) with a view to obtaining evidence in accordance with the provisions of this Directive. The instrument covers criminal proceedings of all types (apparently covering minor offences, so raising issues of proportionality) as well as some administrative proceedings having a criminal dimension.[41]

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34 D. Staes, 'The interrogation of witnesses abroad in execution of a European Investigation Order. An examination from the eyes of the defence', 2011, <http://run.unl.pt/bitstream/10362/6214/1/Staes_2011.PDF> (last visited 13 January 2014), p. 70.

35 Mitsilegas, supra note 16, pp. 539 et seq.

36 OJ C 165, 24.6.2010, pp. 22 et seq.

37 Council Doc., 11735/11, COPEN 158, EUROJUST 99, EJN 80, CODEC 1047, 17 June 2011.

38 Council Doc., 18918/11, COPEN 369, EUROJUST 217, EJN 185, CODEC 2509, 21 December 2011.

39 European Parliament, Committee on Civil Liberties, Justice and Home Affairs, 2010/0817 (COD), 4 December 2013, Amendment 200, Draft Report Nuno Melo.

40 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. 288.

41 According to Art. 4 the EIO may be issued: '(a) with respect to criminal proceedings brought by, or that may be brought before, a judicial authority in respect of a criminal offence under the national law of the issuing State; (b) in proceedings brought by administrative authorities in respect of acts which are punishable under the national law of the issuing state by virtue of being infringements of the rules of law and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters; (c) in proceedings brought by judicial authorities in respect of acts which are punishable under the national law of the issuing state by

The scope of the EIO is much wider than that of the EEW, allowing States to request evidence not yet in existence. It would make it possible to request to interview suspects or witnesses or to obtain information in real time by intercepting and monitoring telephone or email communications or by monitoring bank account activities. States could also be required to obtain DNA samples or fingerprints and to send the information to the issuing State within fixed deadlines. Specific provisions are related to the temporary transfer of persons, hearing by videoconference, covert investigations (etc.).

The only measure which is not covered by the EIO is the setting up of a joint investigation team and the gathering of evidence by a joint investigation team as provided in Article 13 of the Convention of 29 May 2000 and in Framework Decision 2002/465/JHA. In the original draft the EIO would also not have applied to certain forms of telecommunication interceptions[42] although in the latest draft these have been included.[43] This is an area which is regulated by the 2000 MLA Convention (Articles 17-22) and which raises many concerns with regard to respect for human rights obligations.[44]

The draft does not define the concept of an 'investigative measure'[45] so it is questionable which measures, other than the those enumerated in Chapter IV, are covered by the text. Legal certainty and uniformity across the Member States would require a clear definition on this point. This is particularly so because the term 'investigative measures' is a general one and potentially includes coercive measures, a wide expression which cannot be merely identified with measures that imply the use of coercive power.[46] Indeed, there are measures which do not involve the use of coercion but interfere with fundamental rights[47] (for instance, intercepting communications). These measures, which are taken into consideration in the text of the draft , although without a definition, vary as between the Member States, and are normally the object of a specific regulation characterized by additional guarantees. For instance, the 1959 Convention with regard to requests for assistance relating to the search and seizure of property allowed for the requested State to make its assistance dependent on respect for the dual criminality requirement (Article 5(1)(a)), which is not a general requirement of letters rogatory. The Preamble to the text agreed in December[48] contains a statement that 'non-coercive measures could for example be such measures that do not infringe rights to privacy or property, depending on national law' (Paragraph 10f): arguing *a contrario* it should follow that coercive measures are measures of a kind which infringe rights to privacy or property. But this definition is not satisfactory, there being many other rights which may be infringed by coercive measures.

The mechanism of the EIO is based on that of the European Arrest Warrant. The judicial authority would issue standard form requests seeking evidence from other Member States, with a time limit and, it is intended, very limited grounds for refusal. As will be examined later (see Sections 4.5 and 4.6), in the light of the differences between legal systems, the degree of automaticity in the execution of the warrant, as a consequence of the principle of mutual recognition, is a crucial point.

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virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters; and (d) in connection with proceedings referred to in points (a), (b), and (c) which relate to offences or infringements for which a legal person may be held liable or punished in the issuing state [sic].'

42 The original draft of the Proposal did not cover: the ordinary interception of telecommunications with immediate transmission; the interception of satellite telecommunications; the interception of telecommunications in cases where the requesting State does not need the technical assistance of the Member State where the target is located.

43 See Council Doc. 11735/11, supra note 37, p. 13.

44 JUSTICE, *Briefing on The European Investigation Order For Council and Parliament*, August 2010, pp. 22-23, <http://www.statewatch.org/news/2010/aug/eu-justice-briefing-eio.pdf> (last visited 13 January 2014).

45 According to S. Peers, *The proposed European Investigation Order: Assault on human rights and national sovereignty*, Statewatch, May 2010, p. 5, <http://www.statewatch.org/analyses/no-96-european-investigation-order.pdf> (last visited 13 January 2014), the following cannot be considered as investigative measures: (a) the restitution of property (mentioned in Art. 8 of the 2000 EU Convention) plus a series of issues mentioned in Art. 49 of the Schengen Convention: (b) proceedings for claims for damages arising from wrongful prosecution or conviction; (c) clemency proceedings; (d) civil actions joined to criminal proceedings, as long as the criminal court has not yet taken a final decision in the criminal proceedings; (e) in the service of judicial documents relating to the enforcement of a sentence or a preventive measure, the imposition of a fine or the payment of costs for proceedings; (f) in respect of measures relating to the deferral of delivery or suspension of enforcement of a sentence or a preventive measure, to conditional release or to a stay or interruption of enforcement of a sentence or a preventive measure.

46 On these kinds of measures see S. Ruggeri, 'Investigative Powers Affecting Fundamental Rights And Principles For a Fair Transnational Procedure In Criminal Matters. A Proposal Of Mutual Integration in the Multicultural EU Area', 2012 *Crimen*, pp. 148 et seq.

47 On this topic see K. Ligeti (ed.), *Towards a Prosecutor for the European Union*, vol. 1, 2012.

48 European Parliament, Committee on Civil Liberties, Justice and Home Affairs, 2010/0817 (COD), supra note 39.

The execution of the EIO would be carried out – within a deadline, so to avoid any delay connected to the mutual assistance regime – in accordance with the formalities and procedures expressly indicated by the issuing State, unless such formalities and procedures conflict with the fundamental principles of the law of the executing State (Article 8(2)). This provision, which reflects Article 4(1) 2000 MLA Convention, combining the application of the *lex loci* (typical of mutual recognition philosophy) with the *lex fori*[49] (typical of the mutual assistance system) is important because it makes the evidence more readily admissible in the requesting State[50] although the aim is not to harmonize national systems. The text does not reproduce the clause laid down in Article 12 EEW, which exempts the executing authority from the need to comply with foreign formalities in relation to coercive measures. So the only way to avoid the execution of a coercive measure is to ascertain that the measure requested is in conflict with fundamental principles of the executing State.[51]

Article 8(3) contains a provision which is not found in other EU instruments based on mutual recognition philosophy.[52] This expressly provides that the issuing authority may request that one or more authorities of the issuing State assist in the execution of the EIO in support of the competent authorities of the executing State (Article 8(3)). The auxiliary verb 'may' suggests that this is only a possibility. However, in order to make the possibility offered by this rule effective, the attendance of the judicial authority of the issuing State should be interpreted as active participation, although such participation does not imply any law enforcement powers (as specified by Article 8(3a)),[53] particularly where oral evidence is taken (this means that the authority of the issuing State should have the competence to examine the witness). So this provision is potentially important in securing the admissibility of evidence in the requesting State. Unfortunately the Article does not require the participation of a lawyer – a topic addressed during the discussion[54] – or of private parties.[55] This underestimates the role of the defence in ensuring that foreign procedural formalities are properly applied.[56]

4.1. Specific investigative measures provided by the EIO

Chapter four of the draft encompasses specific provisions for certain investigative measures.[57] These include the temporary transfer of persons held in custody for the purpose of 'conducting' an investigative measure (Articles 19-20); the hearing by videoconference (or other audio-visual transmission) and telephone conference (Articles 21-22); information on bank accounts and on banking transactions (Articles 23-24);[58] while controlled deliveries, originally provided by Article 26, have been deleted in the latest text (although they are still mentioned in Paragraph 14 of the Preamble).[59] Another provision (Article 27) encompasses investigative measures which involve the gathering of evidence in real time, continuously and over a specified period. Moreover, in the course of negotiations the following have been added: Article 27a which provides for covert investigations; Articles 27b and 27d, both of which are related to the interception of telecommunications; and Article 27e on provisional measures ('any measure with a view to provisionally preventing the destruction, transformation, moving, transfer or disposal of items that may be used as evidence'). Some of these measures are at present regulated by

49 Ruggeri 2013, supra note 40, p. 301.
50 Council Doc. 9288/10, ADD 1, supra note 4, p. 9.
51 Ruggeri 2013, supra note 40, p. 301.
52 Council Doc. 9288/10, ADD/1, supra note 4, p. 9. Art. 4 of 1959 MLA Convention provides that 'officials and interested persons may be present if the requested Party consents'.
53 European Parliament, Committee on Civil Liberties, Justice and Home Affairs, 2010/0817 (COD), supra note 39, p. 15.
54 Council Doc. 12201/10, COPEN 117, EUROJUST 68, EJN 24, CODEC 687, 20 July 2010, p. 9.
55 It is to underline that Art. 4 of the 1959 MLA Convention provides for the participation of an 'interested person', so including 'private parties': M.R. Marchetti, 'Dalla Convenzione di Assistenza Giudiziaria in materia penale dell'Unione europea al mandato europeo di ricerca delle prove e all'ordine europeo di indagine penale', in T. Rafaraci (ed.), *La cooperazione di polizia e giudiziaria in materia penale nell'Unione europea dopo il Trattato di Lisbona*, 2011, p. 163.
56 Ruggeri 2013, supra note 40, p. 301.
57 The Proposal does not provide guidance on requests for a range of important evidence such as fingerprinting and DNA. According to the Law Society, *Proposal for a European Investigation Order. Law Society of England and Wales preliminary remarks*, June 2010, <http://international.lawsociety.org.uk/files/LSEW%20Position-European%20Investigation%20Order%20-%20June%202010%20Final_0.pdf> (last visited 13 January 2014), p. 6, there should be provisions for different forms of evidence.
58 Art. 25 on the monitoring of banking transactions has been deleted in the text of 4 December 2013.
59 European Parliament, Committee on Civil Liberties, Justice and Home Affairs, 2010/0817 (COD), supra note 39.

the 2000 MLA Convention and its Protocol of 2001, whereas the temporary transfer of persons held in custody is regulated by the 1959 MLA Convention: the objectives of these (additional) rules is 'to provide more details than for the general regime' and some 'additional grounds for refusal'.[60] It might be useful to have a quick glance at some of these provisions to assess whether they recognize any role for the defence.

As stressed above, there are now provisions on the hearing of witnesses which, normally, forms the core evidence in criminal proceedings. In line with the 2000 MLA Convention there are regulations on the taking of evidence by videoconference, in the first place with regard to the examination of a person as a witness or an expert by the competent authority of the issuing State.

It is also possible to apply for the hearing of a suspect or accused person;[61] in this case, in addition to the general grounds for non-recognition or non-execution referred to in Article 10, the execution of the EIO 'may' be refused if 'the suspected or accused person does not consent', or the execution of such a measure in a particular case would be contrary to 'the fundamental principles of the law of the executing State'. Another possible ground for refusal, on which it has not reached consent, was provided if the executing State 'does not have the technical means for a videoconference'. A competent authority of the executing State needs to be present during the hearing and shall be responsible to ensure respect for the fundamental principles of the law of the executing Member State. The hearing shall also be conducted directly by, or under the direction of, the competent authority of the issuing State in accordance with its own laws. The person to be heard must be informed in advance of the hearing of the procedural rights which would accrue to him, including the right not to testify, under the law of both of the executing and issuing State (Article 21(6)(e)).

Regrettably, there is no provision requiring the presence of counsel during the hearing by videoconference. Although the Commission argued that, in order to protect the rights of the defence, 'defence lawyers must have the possibility to question witnesses and experts during the hearing by videoconference if the information gathered by these means is to be introduced into the criminal trial',[62] a specific rule has not been introduced in this regard.

It is also possible to use a telephone conference for the hearing of a person as a witness or expert by a judicial authority; but in this case the consent of the witness is not required as provided by the 2000 MLA Convention (Article 11(2)). Justifiably, this instrument is not applicable to suspects or accused persons (Article 22). Indeed, telephone hearings are not as reliable as videoconferences because it is difficult for the court to assess the credibility of the witnesses without seeing them.[63] Within judicial systems based on the principle of 'adversarial proceedings', the importance of body language from the judge's point of view in order to assess the credibility of suspects or accused persons, as they have the tendency to lie (in some countries it is recognized as a right), cannot be overlooked. So their use should be limited to taking evidence from expert witnesses, because in this case the risk of false testimony is minimal. However, even in this case, to reduce this risk, it is a good thing that the current text permits this measure as an *extrema ratio* 'where it is not appropriate or possible for the person to be heard to appear in its territory in person, and after having examined other suitable means' (Article 22(1)).[64] At an operational level, the defence needs an adequate and sufficient opportunity to challenge the witness. So it is a matter of concern that the EIO Proposal does not require the presence of the defence at a hearing by video or telephone conference. Indeed, at present there is not even a requirement for the accused person (or his lawyer) to be notified about the time and the venue of the hearing.[65] This is a gap in the text that should be filled in so that an effective protection of the right of the accused can be guaranteed.

Another measure which could interfere with the fundamental rights of the individual is the temporary transfer of persons held in custody for the purpose of conducting an investigative measure (Article 19) – a matter which is also regulated by Article 9 of the 2000 MLA Convention. Here, the concept of a person 'in custody' needs to be defined so as to ensure the equal treatment of individuals

60 Council Doc. 9288/10, ADD/1, supra note 4, p. 17.
61 European Parliament, Committee on Civil Liberties, Justice and Home Affairs, 2010/0817 (COM), supra note 39.
62 European Commission, Comments on the Initiative regarding the European Investigation Order in criminal matters, p. 29, <http://ec.europa.eu/justice/news/intro/doc/comment_2010_08_24_en.pdf> (last visited 13 January 2013).
63 A. Lach, 'Transnational Gathering of Evidence in Criminal Cases in the EU de lege lata and de lege ferenda', 2009 *Eucrim*, no. 3, p. 108.
64 European Parliament, Committee on Civil Liberties, Justice and Home Affairs, 2010/0817 (COD), supra note 39.
65 Staes, supra note 34, p. 31.

across Member States.[66] However, it should be said that some amendments have improved the text. For instance, a welcome new provision is inserted by Article 19(2)(a), according to which 'where the executing State considers it necessary in view of the person's age or physical or mental conditions, the opportunity to state the opinion on the temporary transfer shall be given to the legal representative of the person in custody'. The amendment approved by the LIBE Committee according to which 'at the request of the issuing State or the person to be transferred, the executing State shall ensure that the person is assisted by an interpreter and receives translations of any important documents in accordance with Directive 2010/64/EU (…) receive information in accordance with the Directive (…) on the right to information in criminal proceedings and receives legal advice in accordance with the national law of the issuing State' is not reproduced. However, the Preamble (Paragraph 10e) states that the EIO should be interpreted taking into account the Directive on the right to interpretation, the Directive on the right to information and the Directive on the right of access to a lawyer: so guarantees that are recognised by these Directives have to be applied by Member States.

4.2. The role of the defence

The position of the defence is a subject which is often neglected within the mutual assistance system. The current draft of the proposed EIO aims to improve its position but it falls short of creating equality of arms[67] with the public prosecutor. In the initial draft, in line with previous instruments applying the mutual recognition principle, the issuing authority could be: (a) a judge, a court, an investigating magistrate or a public prosecutor; and (b) any other judicial authority as defined by the issuing State which, in the case in hand, is acting as an investigating authority and is competent to order the gathering of evidence in accordance with national law (Article 2).

This latter definition was very broad. The Explanatory Memorandum[68] suggests that it is intended to encompass systems where a police authority has the power to order the investigative measure concerned at the national level. This was heavily criticized in the course of the negotiations because the police authority 'is not sufficiently objective, independent or legally qualified to decide whether the issue of a request for evidence to be gathered by another Member State is appropriate'.[69] The current draft attempts to answer these criticisms by providing that before transmission the EIO must be validated by a judicial authority (such as a judge, a court, an investigating judge or a public prosecutor in the issuing State, see Articles 1 and 2(a)(ii)).[70] This validation procedure is required to ensure a certain degree of independence and will do so provided that during the validation there is 'a genuine examination of the necessity, proportionality and legality of the request and it is not a mere 'rubber-stamping' exercise'.[71] The presence of a proportionality test (see infra Section 4.3) in the validation procedure[72] will help to ensure this.

In the text agreed by the Council in December 2011 there was no provision for defence counsel to ask for an investigation order:[73] while the exclusion of the defence in issuing an EAW makes sense, the same does not happen in the context of evidence, where the prosecutor and the defence should have the same opportunity.[74] Under the mutual legal assistance regime defence counsel wishing to collect evidence located in a foreign country must submit a formal request to the public prosecutor

66 D. Sayers, 'The European Investigation Order. Travelling without a "roadmap"', *Justice and Home Affairs, Liberty and Security in Europe Papers,* 30 June 2011, p. 21, <http://www.ceps.eu/book/european-investigation-order-travelling-without-%E2%80%98roadmap%E2%80%99> (last visited 13 January 2014).

67 On this principle, see recently S. Gless, 'Transnational Cooperation in Criminal Matters and the Guarantee of a Fair Trial: Approaches to a General Principle', 2013 *Utrecht Law Review* 9, no. 4, pp. 92 et seq.

68 Council Doc. 9288/10, ADD/1, supra note 4, p. 4.

69 See, for instance, JUSTICE 2010, supra note 44, p. 8.

70 European Parliament, Committee on Civil Liberties, Justice and Home Affairs, 2010/0817 (COM), supra note 39.

71 Heard & Mansell, supra note 8, p. 357.

72 European Parliament, Committee on Civil Liberties, Justice and Home Affairs, 2010/0817 (COM), supra note 39, Art. 2(a)(ii).

73 See Allegrezza, supra note 19, p. 577: 'the main problems would concern language and costs'.

74 In Italy, since 2000 (by Law n° 367) the defence can collect, independently from the prosecution, some forms of evidence (such as interviews with persons who have knowledge of the facts of the case) during the preliminary investigation; prior to this legislation it had to make a formal request to the prosecutor, with the risk of prejudicing its strategy The defence has a similar power in United Kingdom. This is an area where there are no common rules among the Member States. In Germany, for instance, the defence may suggest lines of enquiry to the public prosecutor or the pre-trial judge but such a request may be refused without reasons and with no right of appeal: see Cape et al., supra note 28, p. 19.

(during the preliminary investigation) or to the judge (during the proceedings), who will act through the instrument of letters rogatory.[75] The judicial authority could refuse to execute the request without a formal explanation, so undermining the rights of the defence, especially when there are strong reasons to believe that the evidence requested would be helpful to the accused. In the absence of a specific provision in the text of the EIO the defence would be obliged to act through the public authority which could refuse to issue the EIO with any explanations.

During the discussion at the trilogue on 16 April 2013 it was suggested[76] to improve the draft by adding the following rule to Article 1: 'The issuing of an EIO may be requested by a suspect or accused person (or by a lawyer on his behalf), within the framework of applicable defense rights in [conformity with][77] national criminal procedure'. This rule has been added in the latest draft (Article 1(2a)). This provision is particularly important because it puts the defence in the same position as the public prosecutor in the collection of evidence, thereby achieving 'equality of arms'. The proposed text refers to rights in national criminal procedure. Here it should be stressed that in Italy, although some investigative activities can be carried out by the defence, national case law holds that defendants are not competent to investigate abroad. If Italian law did permit the defence to collect evidence abroad, then a potentially awkward issue would arise as to the procedural rules which would then apply – because under Italian law evidence collected by the defence is only admissible if certain specified formalities were observed during the collection.

If a specific rule on the right of the defence to request the issuing of an EIO is a step towards 'equality of arms', it should be pointed out that the current draft under discussion[78] does not require the issuing authority to inform the suspect or his/her defence lawyer that an EIO has been issued.[79] This is something which in practice undermines the possibility of the defence to participate in the gathering of evidence. In some cases, such as where the measure requested needs to come as 'a surprise' (such as a search or a seizure) the failure to notify the defence in advance would obviously be justified (although even here the defence should be informed as soon as possible thereafter). But, by contrast, where a witness is to be examined, then unless there is a need for his/her protection, a failure to inform the defence of the date and place of the examination could be damaging to the rights of the defence. In such a case the presence of a body called 'Eurodefensor',[80] charged with supervising the legality of the measures, could counterbalance the need to ensure an effective investigation. In other cases it would be preferable to insert a specific provision requiring the defence lawyer to be notified about the date and the place of the questioning of the witness.

Surely the current draft needs to be amended by inserting a provision requiring the executing authority to keep records of how evidence is gathered (and stored, analysed and transferred to the requesting State). Otherwise there is the risk that the defence could be unaware of, or unable to contest

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75 See Cass., sez. I, 29 May 2007, Kaneva e altri, in 2008 *Riv. it. dir. e proc. pen.*, pp. 1382 et seq. It is the same in Germany: see P. Rackow, 'Diritti e poteri della difesa nella fase delle indagini preliminari secondo il codice di procedura penale tedesco', in L. Filippi (ed.), *La circolazione investigativa nello spazio giuridico europeo: strumenti, soggetti, risultati*, 2010, p. 291. In the United Kingdom a request for a letter of request can equally be made by the defence as by the prosecution. In practice, it is used as a provision (Section 7, Subsection 5 of the Crime (International Co-operation) Act 2003 ('C (IC)A 2003')) according to which prosecuting authorities designated by the Home Secretary can send requests without applying to a court. But there is no 'designated defence authority' with this privilege. See Loof, supra note 14.

76 Council doc. 8754/13, COPEN 67, EUROJUST 35, EJN 30, CODEC 874, 24 April 2013, Text suggestions in view of the Trilogue on 14 May 2013, p. 2. See, also Council doc. 9747/1/13, REV 1, COPEN 79, EUROJUST 38, EJN 33, CODEC 1131, 29 May 2013, p. 2.

77 Council Doc. 9747/1/13, supra note 76, p. 2.

78 European Parliament, Committee on Civil Liberties, Justice and Home Affairs, 2010/0817 (COD), supra note 39.

79 Fair Trials International's Response to a European Member State's legislative initiative for a Directive on a European Investigation Order, p. 12: 'individuals whose evidence (such as DNA samples) has been transferred to an issuing State, leading to their elimination as suspects, should have the right to be informed of this', in <http://www.fairtrials.net/documents/FTI_Submission_on_the_European_Investigation_Order_1.pdf> (last visited 13 January 2014).

80 On this institution see, a.o., C. Nestler, 'European Defence in trans-national criminal proceedings', in B. Schünemann (ed.), *A Programme for European Criminal Justice*, 2006, pp. 415 et seq.; B. Schünemann, 'Observations on the Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility', 2009, <http://ec.europa.eu/justice/news/consulting_public/0004/civil_society/eurodefensor_en.pdf> (last visited 13 January 2014), p. 4. See, also, M. Kaiafa-Gbandi, 'Harmonisation of Criminal Procedure on the Basis of Common Principles. The EU's Challenge for Rule-of-Law Transnational Crime Control', in C. Fijnaut & J. Ouwerkerk (eds.), *The Future of Police and Judicial Cooperation in the European Union*, 2010, p. 397: the Eurodefensor 'should not only be notified of investigatory measures being higher degree violations of fundamental rights, but should also attend to the safeguarding of the defendant's rights if the defendant or his counselor is not informed of or is not summoned to the investigative activities'.

the contamination or loss of evidence. It would also be impossible to check whether the procedures requested by the issuing authority have been respected if the defence is not among those entitled to take part to the investigative act (Article 8).

Lastly, in order to make the right of the defence effective it is also necessary to have a rule on legal aid so as to avoid the risk, in cross-border cases, of unequal treatment for indigent defendants. The Proposal for a Directive on legal aid, recently published by the European Commission (supra Section 3), can be a first step in this regard.

There is no mention in the text of victims of crime, who may also have a role at the investigative stage.[81] As previously mentioned, the latest draft makes a specific reference to the suspect or accused person (or to the lawyer), but not to the victim, who is not among those authorised to request the issuing of an EIO. The Preamble to the current draft (Paragraph 10e) – as underlined above – states that the Directive should be implemented taking into account the Directive on the right to interpretation and translation in criminal proceedings; the Directive on the right to information in criminal proceedings, and the Directive on the right of access to a lawyer. However, there is no reference to Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime. If the interests of the victim are to be safeguarded, then they, too, need some official agent to act on their behalf: a victim-orientated version of the proposed Eurodefensor.

Closely related to the rights of the defence is the topic of personal data protection: as noted above, sensitive data, such as DNA data, fingerprints, and information on bank accounts could be exchanged by using the EIO.

Article 12(2) provides that the executing State can specify whether the evidence should be returned to it once it is no longer required by the issuing State. This provision has been criticized because it is too vague; nothing is said concerning the power of the issuing State to make copies of evidence, and if so whether it is entitled to retain and store such copies, or concerning what the issuing State should do with the evidence where the executing State does not request its return.[82] This is a delicate topic because the storage of data related to the private life of an individual without a regulation thereon can interfere with Article 8 ECHR. In the Preamble of the current draft there are some provisions on the protection of persons in relation to the processing of personal data (Paragraph 17a, b and c). According to Paragraph 17c: 'Personal data obtained under this Directive should be processed when necessary and proportionate for purposes compatible with the prevention, investigation, detection and prosecution of crime or enforcement of criminal sanctions and the exercise of the right of defence (…).' The recognition of the proportionality principle in the processing of personal data is significant but in order to be effective this provision should be included in the text of the draft where, it must be noted, a specific rule has been introduced which requires Member States to respect the provisions laid down in Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data and the principles of the Council of Europe Convention of 28 January 1981 for the protection of Individuals with regard to the Automatic Processing of Personal Data and its Additional Protocol (Article 18a).

4.3. The principle of proportionality as a condition for issuing the EIO

The original draft of the Proposal made no mention, among the conditions for the issuing of the EIO, of the principle of proportionality,[83] a concept which, although undefined at the European level, has crucial importance in the field of judicial cooperation. Indeed, experience with the EAW whose text contains no provision relating to proportionality in issuing the arrest warrant has shown this omission to be a

81 On the role of the victims during the preliminary investigation in Italy and in Germany see L. Parlato, *Il contributo della vittima tra azione e prova*, 2012.

82 JUSTICE 2010, supra note 44, p. 14.

83 L. Bachmaier Winter, 'European investigation order for obtaining evidence in the criminal proceedings. Study of the proposal for a European Directive', 2010 *ZIS*, no. 9, pp. 584-585, believes that the elimination of the reference to the proportionality principle does not constitute any relevant change, as it is taken for granted that every judicial authority will check those conditions before issuing the EIO. On the requirement of proportionality see, again, Bachmaier Winter, supra note 2, pp. 88 et seq.

'weakness'[84] as demonstrated by the excessive use of the EAW for 'trivial crimes'[85] by countries such as Poland.

In relation to this issue the European Council[86] stated that, before deciding to issue a warrant, Member States should consider proportionality by assessing a number of important factors. In particular, these should include an assessment of the seriousness of the offence, the possibility of the suspect being detained, and the likely penalty to be 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.

Reflecting the current discussions on a possible amendment of the Framework Decision on EAW in this respect, the current draft specifies that an EIO should be issued if 'necessary and proportionate' (Article 5a(1)(a)),[87] as is currently laid down in Article 7 of the EEW.[88] The same assessment is requested in the validation procedure (Article 2(a)(ii)). A proportionality test would make it legitimate to issue an EIO only in respect of serious crimes, given the impact upon the individuals concerned and the resources involved in executing the request. With this in mind the European Parliament[89] had suggested inserting the formula 'in accordance in particular with Articles 48 and 52 of the Charter of Fundamental Rights of the EU': the reference to the need for the issuing authority to respect the rights established in Article 48 of the Charter, such as the requirement of Article 52, is now provided in Paragraph 10b of the Preamble. This would require the issuing State to consider the principle of proportionality as related not (only) to economic issues but (especially) whether it is appropriate, given the importance of protecting the rights of the defence. Doubtless the principle of proportionality has to be assessed *in concreto*, taking into account all the circumstances of the case and, in particular, 'the intrusiveness of the investigative measure(s) requested and the resources required to carry out such measure(s), in relation to the seriousness of the case'.[90]

Another condition for the issuing of an EIO, added in the text agreed in December 2011, and repeated in the latest draft, is that the investigative measure sought could have been ordered under the same conditions in a similar national case (Article 5a(1)(b)). This should prevent *forum shopping*, namely prosecutors using the EIO to obtain a piece of evidence that would not be available in their own system so as to gain an unfair advantage from differences between countries' 'procedural systems'.[91]

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84 See *Final Report on the fourth round of mutual evaluations, The practical application of the European Arrest Warrant and corresponding surrender procedures between Member States,* 11 May 2009, pp. 13-14, Para. 3.9.: 'The application of a proportionality test in issuing an EAW was a recurrent issue during the evaluation exercise. Basically, this proportionality test is understood as a check additional to the verification of whether or not the required threshold is met, based on the appropriateness of issuing an EAW in the light of the circumstances of the case. The idea of appropriateness in this context encompasses different aspects, mainly the seriousness of the offence in connection with the consequences of the execution of the EAW for the individual and defendants, a cost/benefit analysis of the EAW execution (…) and the possibility of achieving the objective sought by other less troublesome means for both the person and the executing authority. The findings of the evaluation show that the way this issue is dealt with in the Member States varies greatly. Some Member States apply a proportionality test in every case, whereas others consider it superfluous. Even in those Member States where a proportionality test exists, there is often uneven practice concerning the circumstances to be taken into consideration and the criteria to be applied. The expert teams widely considered that, in principle, the proportionality test was the right approach and that some provisions, guidelines or other measures should be put in place at European level to ensure coherent and proportionate use of the EAW. There seemed to be a wide consensus (although not unanimity) that no proportionality check should be carried out at the level of the executing authorities. While this subject has been widely discussed in the Council working parties, the evaluation reports repeatedly call for renewed efforts to be made to reach a unified approach in order to strengthen a mutual confidence between the Member States. Recommendation 9: The Council (…) asks its preparatory bodies to continue discussing the issue of the institution of a proportionality requirement for the issuance of any EAW with a view to reaching a coherent solution at European Union level.'

85 J. Vogel & J.R. Spencer, 'Proportionality and the European Arrest Warrant', 2010 *Criminal Law Review*, no. 6, pp. 481-482.

86 Revised Version of the European Handbook on how to issue a European Arrest Warrant, 17195/1/10, REV 1, COPEN 275 EJN 72 EUROJUST 139, Brussels, 17 December 2010, pp. 14 et seq. See, also, House of Lords-House of Commons, Joint Committee on Human Rights, 'The Human Rights Implications of UK Extradition Policy', Fifteenth Report of Session 2010-2012.

87 See, also, Para. 10a of the Preamble: 'The EIO should be chosen where the execution of an investigative measure seems proportionate, adequate and applicable to the case in hand. The issuing authority should therefore ascertain whether the evidence sought is necessary and proportionate for the purpose of proceedings, whether the measure chosen is necessary and proportionate for the gathering of this evidence, and whether, by means of issuing the EIO, another MS should be involved in the gathering of this evidence.'

88 The EEW is issued only when the issuing authority is satisfied that 'obtaining the objects, documents or data sought is necessary and proportionate for the purpose of proceedings referred to in Article 5'.

89 Council Doc., 9747/1/13, supra note 76, p. 4.

90 Council Doc. 6814/11, COPEN 26, EUROJUST 22, EJN 15, CODEC 270, 4 March 2011, Opinion of Eurojust regarding the draft Directive, p. 7.

91 Heard & Mansell, supra note 8, p. 357.

4.4. The principle of proportionality as a 'hidden' ground for refusal

In the context of judicial cooperation, it is still a matter of controversy whether the executing State could apply the test of proportionality to refuse to execute the request of the issuing State and, in case of a positive answer, what should be the decision of the requested authority. In this regard Paragraph 11 of the Preamble to the Framework Decision on the EEW clearly provides that the responsibility for ensuring compliance with the principle of proportionality of the EEW should lie with the issuing authority and that the grounds for non-recognition or non-execution should therefore not cover this.

This question has been addressed by the Stuttgart Court[92] in a decision which, again, dealt with the execution of the EAW in a case where the court believed that this would be disproportionate. According to the court, a person must not be extradited if the extradition would infringe fundamental rights and fundamental legal principles as enshrined in Article 6 TEU. The principle of the proportionality of criminal offences and penalties is a general principle of Union law. In particular, it is included in Article 49(3) of the Charter of Fundamental Rights of the European Union (EU Charter) which states that 'the severity of penalties must not be disproportionate to the criminal offence'; therefore, any execution of the EAW must respect the EU Charter. After this decision, other countries have applied the test of proportionality to refuse the execution of the EAW,[93] but there is no uniformity on this across the Member States, with relevant consequences at the practical level.

With regard to the EIO this is to say that during the discussions, some Member States – such as Germany and the United Kingdom[94] – asked to insert the proportionality test as a new and *ad hoc* ground for refusal by the executing authority.[95] But this suggestion was resisted, because of the concerns expressed by some Member States that this would 'undermine the EU cooperation based on mutual recognition and mutual trust'.[96] Ultimately, a different solution was adopted.

Although in the text of the draft there is no specific ground for refusal based on the principle of proportionality, it is not possible to deny that it works well. The key provision is Article 9 called 'recourse to a different type of investigative measure'. According to this provision the executing State shall, 'wherever possible', use a different investigatory measure from the one specified in the EIO, unless it is included in the list of the subsequent Paragraph (1a) which substantially refers to non-coercive measures. This would occur where the investigatory measure indicated in the EIO does not exist in the executing State (Article 9(1)(a)), or would not be available[97] in a similar domestic case in the executing State (Article 9(1)(b)). Article 9(3) provides that where either of these conditions is fulfilled and there is no other investigative measure which would have the same result, the executing authority must notify the issuing authority that it is unable to comply. This rule, especially when the executing State has to verify if the measure requested is 'available', appears to create a ground for refusal separate from those set out in Article 10 and based on the application of the principle of proportionality.

However, the key provision is Article 9(1b)[98] which states that the executing State may also have recourse to a different investigative measure if it will produce the same result by less intrusive means; it

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92 Higher Regional Court Stuttgart, 25 February 2010, see Vogel & Spencer, supra note 85, p. 476. For a comment see L. Romano, 'Principio di proporzionalità e mandato d'arresto europeo: verso un nuovo motivo di rifiuto?', 2013 *Diritto penale contemporaneo*, no. 1, pp. 250 et seq.

93 High Court of Ireland, *The Minister for Justice and Law Reform v Ostrowski*, 8 February 2012, [2012] IEHC 57: 'Nevertheless, having weighed all of the relevant circumstances in the balance, and having afforded each circumstance its appropriate weight, I have not been satisfied overall that it would be a proportionate measure to order the surrender of the respondent on foot of the European arrest warrant presently before me. I have concluded rather that in the particular circumstances of the respondent's case it would represent a disproportionate interference with his fundamental rights, and particularly his right to liberty, his right to enjoy physical and mental health, and his right to respect for family life, to surrender him at this time.' In the UK, an amendment to the Extradition Act 2003 is provided by the Anti-social Behaviour, Crime and Policing Bill (currently under scrutiny) to ensure that an EAW can be refused for minor crimes (Clause 138 'Proportionality'). See <http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0007/14007.pdf> (last visited 25 November 2013).

94 Council Doc. 12862/10, COPEN 168, EJN 30, EUROJUST 79, CODEC 745, 30 August 2010, Follow-up document of the meeting on 27-28 July, 2010, p. 6.

95 Council Doc. 15531/10, COPEN 241, EJN 58, EUROJUST 122, CODEC 1136, 29 October 2010, Orientation Debate, p. 6.

96 Council Doc. 15531/10, supra note 95, p. 6.

97 According to the Preamble (Para. 10): 'Availability refer to occasion where the requested measure exist under the law of the executing State but is only lawfully available in certain situations for example when the measure can only be carried out for offences of a certain degree of seriousness; against persons for which there is already a certain level of suspicion; or with the consent of the person concerned.'

98 European Parliament, Committee on Civil Liberties, Justice and Home Affairs, 2010/0817 (COD), supra note 39.

also applies if the measure requested is a coercive one. This provision clearly implies that the executing State should 'carry out a kind of proportionality test, assessing the intrusiveness of the measures requested and looking at other measures at its disposal with different degrees of intrusiveness,'[99] (in the Preamble, Paragraph 10, there is a specific reference to measures 'implying less interference in the fundamental rights of the person concerned') but it does not require a check of the necessity and proportionality of the different measure by the issuing authority, and so it weakens the level of individual guarantees.[100]

4.5. The grounds for refusal: 'a muddle'

In the perspective of an effective protection of the rights of defendants the grounds for refusing to execute the EIO are an important test. The original draft of the Proposal intentionally provided a more restrictive list of grounds for non-recognition or non-execution than the long list of grounds provided in the case of the EEW (and also the EAW). In particular, there were only four cases (of which only three, a, b, and d, have been retained in the current text). Neither of these would have been mandatory: the first (a) refers to an immunity or privilege under the law of the executing State which makes it impossible to execute the EIO;[101] the second (b), copied by Article 9(1) of the EEW, makes it possible to refuse the execution if this would harm essential national security interests,[102] jeopardise the source of the information or involve the use of classified information relating to specific intelligence activities; the third (c) – which, as noted, has been deleted and transformed into a separate provision – makes it possible to refuse the execution if, in the cases mentioned in Article 9(1)(a) and (b), there is no other investigative measure available which would make it possible to achieve a similar result; the last (d) makes it possible to refuse the execution if the EIO has been issued in proceedings referred to in Article 4(b) and (c) (administrative proceedings having a criminal dimension) and the measure would not be authorised in a similar national case.

This choice was based on the reasoning that under a system of mutual recognition it is necessary to restrict the grounds for refusal. It led legal writers[103] and human rights organizations to complain, from a human rights perspective, about the absence of certain grounds for refusal which are potentially relevant, in the field of gathering evidence as well as extradition: the principle of *ne bis in idem*, the principle of territoriality and double criminality.

The *ne bis in idem* principle – recognized by Article 54 of the Convention implementing the Schengen Agreement and also by Article 50 of the EU Charter – is a fundamental principle of European law. If the prosecution of an offence has been finally concluded in one Member State, then *ne bis in idem*, as interpreted by the ECJ in its multiple decisions, prevents the investigation of the same offence by another Member State.[104] During the negotiations the *ne bis in idem* principle was inserted as a ground for refusal (lett. e), but the text in its form did not appear to be satisfactory. First, this ground for refusal, like the others enumerated in Article 10(1) of the text approved by the Council in June 2011, was not mandatory,[105] which might result in different treatment across the Member States. Another concern about

99 Heard & Mansell, supra note 8, p. 359: 'this is a positive move, thought it introduces a degree of complexity into a regime intended to add simplicity to cross-border evidence requests'. For F. Zimmermann et al., 'Mutual Recognition and its Implications for the Gathering of Evidence in Criminal proceedings: a Critical Analysis of the Initiative for a European Investigation Order', 2011 *European Criminal Law Review*, p. 69, the executing authority is in a better position to judge the act's proportionality.

100 Ruggeri 2013, supra note 40, p. 291 and p. 298: the application of this provision to any investigative measure, whether or not it is coercive, is questionable.

101 With regard to this ground for refusal, conceived as optional, it has been affirmed that: 'This may satisfy the executing state's interest in preserving the integrity of its legal order. But from the point of view of citizens' rights it is not apparent why their application should be placed fully within the discretion of that state. Even if the affected persons rely on these legal positions, it would then depend on the discretion of the executing state whether their rights apply – although observance of those rights would be mandatory in a purely domestic proceeding in the executing state.' See European Criminal Policy Initiative, 'A Manifesto on European Criminal Procedure', 2013 *ZIS*, no. 11, p. 436. In the current draft it has been added: 'or there are rules on determination and limitation of criminal liability relating to freedom of the press and freedom of expression in other media, which make it impossible to execute the EIO'.

102 Zimmermann et al., supra note 99, p. 69, believe that this ground for refusal of a 'more or less political character' is a 'bit outmoded'.

103 For Peers, supra note 45, pp. 7-8 'the combined abolition of dual criminality and territoriality requirements represents both a fundamental threat to the rule of law in criminal law matters (…) and an attack on the national sovereignty of Member States, which would in effect lose their power to define what acts are in fact criminal if committed on the territory of their State'.

104 J. Blackstock, 'The European Investigation Order', 2010 *New Journal of European Criminal Law*, no. 1, pp. 491-492.

105 J.A.E. Vervaele, 'Il progetto di decisione quadro sul mandato di ricerca della prova', in G. Illuminati (ed.), *Prova penale e Unione Europea*, 2009, p. 158, with regard to the EEW affirmed that: 'ciò non è perfettamente compatibile con il riconoscimento del ne bis in idem quale principio generale del diritto dell'Unione, affermato anche dalla Corte di Giustizia' ['this is not completely in conformity with the recognition of *ne bis in idem* as a general principle of the EU, also affirmed by the European Court of Justice']; J.A.E. Vervaele, 'Ne bis in

the text was the failure to include, among the grounds for refusal, the case of an ongoing investigation against the same person for the same offence,[106] unlike the position taken in the EAW (Article 4(2)). Moreover, the ground for refusal based on the *ne bis in idem* principle did not apply where the issuing authority had provided an assurance that the information transferred as a result of the EIO will not be used to prosecute a person whose case on the same facts has been finally disposed of in another Member State. On one possible reading of the text, the assurance is limited to a prosecution in the issuing Member State and does not cover the investigation stage, an interpretation which risks the EIO being used as a coercive measure during the investigative stage even if the person is under investigation in another country for the same offence. The current draft still provides for *ne bis in idem* as an optional ground for refusal; as regards the assurance it is not repeated in the text of the draft – which merely states that 'the execution of the EIO would be contrary to the principle of *ne bis in idem*' – but it has been provided just in the Preamble (Paragraph 12b) where it is also specified that given the preliminary nature of the EIO, *ne bis in idem* is not aimed at avoiding double investigation.

Other provisions of the text which have undergone relevant changes during the negotiations are the principle of territoriality and the double criminality clause.[107] With regard to the former, strictly connected with the concept of sovereignty, and originally excluded, under the current draft the executing State is entitled to refuse to recognize or execute the EIO if two[108] cumulative conditions apply: (a) it relates to a criminal offence alleged to have been committed exclusively outside the territory of the issuing State and wholly or partially on the territory of the executing State; and (b) the conduct in connection with which the EIO is issued is not an offence in the executing State (lett. f) In this case, such as in cases referred to in Paragraph 1(a), (b) and (e), before deciding whether or not to execute an EIO, the executing authority shall consult the issuing authority and shall, where appropriate, ask it to supply any necessary information.

With regard to the latter, the absence of a double-criminality test – as in the first draft – means that the executing State would have to comply with an EIO even though the act for which assistance is requested is not a criminal offence under its national law. The problem is particularly acute in the case of an EIO adopted for a coercive measure (for instance, telephone tapping) which impacts on the fundamental rights of the executing State: to execute this request would infringe the 'coherence of the criminal justice system of the executing State'.[109]

The current draft also provides additional grounds for refusal based on the double criminality requirement if the measures requested are intrusive or coercive.[110] This 'two-level procedure' based on the intrusiveness of the measure, although welcomed, could cause a degree of confusion as regards its field of application and coordination among rules.

It should be noted that Article 9(1) – which provides the possibility to use a different measure than the one requested when it does not exist or is not available in the requested State – is not applicable to a list of measures such as Article 9(1a): (a) the obtaining of information or evidence which is already in the possession of the executing authority and this information or evidence could have been obtained, in accordance with the law of the executing 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 State; (d) any non-coercive investigative measure as defined under the law of the executing State; (e) the identification of persons holding a subscription of a specified phone number or IP address. Moreover, in these cases, the recognition or execution of the EIO cannot be refused on the basis of the double criminality principle (Article 10(1a)). This means that for these measures which fundamentally

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Idem: Towards a Transnational Constitutional Principle in the EU?', 2013 *Utrecht Law Review* 9, no. 4, pp. 211 et seq.

106 Ruggeri 2013, supra note 40, p. 297.

107 See the position of the German Bundestag on the Initiative for a Directive of the European Parliament and the Council regarding a European Investigation Order in criminal matters, 6 October 2010.

108 In the text agreed in June 2011 another condition was that the EIO is related to a coercive measure.

109 Bachmaier Winter 2010, supra note 83, pp. 584-585, is of the opinion that the dual criminality requirement can only be dispensed with if the evidence can be collected without resorting to the restriction of fundamental rights.

110 Council Doc. 15531/10, supra note 95, pp. 3-4.

exist in all the Member States only some of the general grounds for refusal have to be applied; but it is questionable how the executing State has to reply if the measure requested, although enumerated in Article 9(1a), does not in fact exist.[111]

However, where the investigative measure indicated by the issuing authority in the EIO is something other than one of those enumerated in Article 9(1a), recognition or execution may be refused on some additional grounds. The first is related to dual criminality: (a) if the conduct for which the EIO has been issued does not constitute an offence under the law of the executing State, unless it concerns an offence listed within the categories of offences set out in Annex X, as indicated by the issuing authority in the EIO, provided this is punishable in the issuing State by a custodial sentence or a detention order for a maximum period of at least three years. The second ground, (b), is that under the law of the executing State the use of the measures is restricted 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.

These additional grounds are required for coercive measures that may not exist in all Member States or may not apply to offences of comparable gravity, where it is important to respect the principle of double criminality. If so, it appears correct that in the latest draft the additional requirements provided by Article 10(1)(h) and (i), related to dual criminality, are not excluded for search and seizure, as it was agreed in the text by the Council,[112] there being no doubt that these measures also belong to the category of coercive measures.

Given the diversity among legal systems, it is surely necessary to clarify which measures are considered as coercive for the purpose of these provisions, so as to avoid different treatment.

4.6. A breach of fundamental human rights as a ground for refusal?

During the discussions, the debate focused on the introduction[113] of a ground for refusal based on a breach of fundamental human rights.[114] The text of the Framework Decision on the EAW does not include, among the possible grounds for refusal, that the surrender of the requested person would violate his human rights (and neither does the text of the Framework Decision on the EEW). However, at the national level, in the United Kingdom a 'human rights' clause is provided by Section 21 of the Extradition Act 2003, which requires the judge to 'decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998'.[115] This rule gave the Supreme Court the possibility to refuse the execution of an EAW in a fraud case where delivering the requested person (a mother with five young children) would inflict damage on the children (in this decision the proportionality test was applied).[116] By contrast, in another case, the Divisional Court[117] rejected the objection that Polish prison conditions were so bad that sending people to Poland would put them at risk of 'inhuman and degrading treatment', thereby infringing Article 3 ECHR.

Turning to the EIO in the text approved by the Council in 2011, Article 1(3) stated that the Directive 'shall not have the effect of modifying the obligation to respect the fundamental rights and legal principles as enshrined in Article 6 of the Treaty (…)' and Preamble 17 referred to respect for fundamental rights and principles recognised by Article 6 of the EU Treaty and by the Charter of Fundamental rights of

111 On this point see L. Bachmaier Winter, 'La propuesta de Directiva europea sobre la orden de investigaciòn penal: valoraciòn critica de los motivos de denegaciòn', 2012 *Diaryo La Ley N° 7976*, p. 54.

112 Art. 10(1a)(f), Council doc. 11735/11, supra note 37.

113 Council Doc. 12862/10, supra note 94, p. 7.

114 See the Opinion of the European Union Agency for Fundamental Rights on the draft Directive regarding the European Investigation Order, 14 February 2011, p. 11 and p. 14, <http://fra.europa.eu/en/opinion/2011/fra-opinion-draft-directive-regarding-european-investigation-order-eio> (last visited 23 January 2014); JUSTICE, supra note 44, p. 14; *Proposal for a European Investigation Order. Law Society of England and Wales preliminary remarks*, June 2010, p. 6, <http://international.lawsociety.org.uk/files/LSEW%20Position-European%20Investigation%20Order%20-%20June%202010%20Final_0.pdf> (last visited 23 January 2014), who also suggest adding the following categories: (a) the exclusion of evidence requests that could lead to the identification of informants; (b) the exclusion of information covered by legal professional privilege.

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

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

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

the European Union, such as other EU mutual recognition instruments. However, this could not be considered as a sufficient safeguard at the European level, as is shown by the way in which the EAW[118] has been interpreted by the European Court of Justice (ECJ).

According to the European Union Agency for Fundamental Rights (FRA) the introduction of a fundamental rights-based ground of refusal 'should ideally be complemented by explicit parameters. Such parameters could limit the refusal ground to circumstances where an EU Member State has a well-founded fear that the execution of an EIO would lead to a violation of fundamental rights of the individual concerned. In this way a fundamental rights-based refusal ground could serve as a safety-valve, facilitating EU Member State's compliance with fundamental rights obligations flowing from EU primary law without Member States having to deviate from EU secondary law'.

What is provided in the most recent version of the Directive, besides the provisions of Article 1(3) and Paragraph 17 of the Preamble,[119] is a specific ground for refusal if: 'there are substantial grounds to believe that the execution of the investigative measure contained in the EIO would be incompatible with the executing Member State's obligation in accordance with Article 6 TEU and the Charter of Fundamental Rights of the European Union'.[120] This is a consequence of the recognition that among Member States the presumption of compliance with fundamental rights is 'rebuttable' (Paragraph 12c of the Preamble). In such a case, before deciding not to recognize or not to execute an EIO, the executing authority is required to consult the issuing authority and shall, where appropriate, ask it to supply any necessary information. This means that there would have to be a real risk that the person's right would be infringed by the execution of the measure requested.

This clause is surely insufficient: a general ground for the refusal to execute the EIO because the measure requested interferes with the constitutional rights of the executing State should be inserted, otherwise it would be impossible to reject the request on this account (in this regard the reference to respect for the principles provided by the Member States' constitutions added in Paragraph 17 of the Preamble does not appear to be sufficient). This is clear from the recent ECJ decision in relation to the EAW,[121] where the instrument does not provide, as noted before, a specific ground for refusal based on human rights.

In this case the Court did not accept the interpretation of Article 53 of the Charter adopted by the national court, according to which this provision gives general authorization to a Member State to apply the standard of protection of fundamental rights guaranteed by its Constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of a provision of EU law. Such an interpretation would, in particular, allow a Member State to subject the execution of a European Arrest Warrant relating to a conviction *in absentia* to conditions making it compatible with rights recognised by the Constitution of that Member State, despite the fact that the condition in question is not provided for by Article 4(a) of the FD 2002/584 (Paragraph 56). Such an interpretation would undermine the principle of the primacy of EU law in as much as it would allow

118 ECJ, Grand Chamber, 29 January 2013, Case C-396/11, *Radu*.

119 In Art. 1(3) of the latest draft there is a specific reference to 'the right of defence of persons subject to criminal proceedings'; moreover, in Par. 17 of the Preamble is added that the Directive observes the principles recognised 'by international law and international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by Member States' constitutions in their respective field of application'.

120 European Parliament, Committee on Civil Liberties, Justice and Home Affairs, 2010/0817 (COD), supra note 39.

121 ECJ, 26 February 2013, Case C-399/11, *Melloni*, in accordance with the Conclusions of Advocate General Bot, 2 October 2012, Paras. 96 et seq. The Tribunal had referred the following questions: '1. Must Article 4a(1) of Framework Decision 2002/584/JHA, as inserted by Council Framework Decision 2009/299/JHA, be interpreted as precluding national judicial authorities, in the circumstances specified in that provision, from making the execution of a European arrest warrant conditional upon the conviction in question being open to review, in order to guarantee the rights of defence of the person requested under the warrant? 2. In the event of the first question being answered in the affirmative, is Article 4a(1) of Framework Decision 2002/584/JHA compatible with the requirements deriving from the right to an effective judicial remedy and to a fair trial, provided for in Article 47 of the Charter (…), and from the rights of defence guaranteed under Article 48(2) of the Charter? 3. In the event of the second question being answered in the affirmative, does Article 53 of the Charter, interpreted schematically in conjunction with the rights recognised under Articles 47 and 48 of the Charter, allow a Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the requesting State, thus affording those rights a greater level of protection than that deriving from European Union law, in order to avoid an interpretation which restricts or adversely affects a fundamental right recognised by the constitution of the first-mentioned Member State?'

a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's Constitution (Paragraph 58).

This judgment shows the tension between fundamental rights and the mutual recognition principle, which was resolved, in this case, in favour of the latter. This experience with the EAW, and its attendant weakness, should be a point of departure for avoiding the infringement of fundamental rights in the different context of evidence.

5. Conclusions

The many changes made to the original draft of the Proposal during the discussion in the Council have unquestionably improved the content of the EIO which, as noted above, can be issued also for investigative measures which may infringe the fundamental rights of individuals (such as a 'coercive' measure). It is for an express reference to the principle of proportionality as a condition for the issuing of the EIO with regard to all kinds of investigative measures; if this principle will be correctly applied, the experience of an EAW issued also for trivial crimes, with its negative consequences for individual rights and mutual trust among Member States, should not be repeated. As regards the possibility for the executing authority to apply an investigative measure other than the one requested, by less intrusive means (Article 9(1b)), it is clearly the recognition of a proportionality test by the executing authority (Article 9(1a)), not provided by the EEW. This power of replacement is certainly positive for the defendants involved; but it is questionable if the executing authority has the knowledge to make this kind of assessment, whose application depends on the consideration of the concrete circumstances of the case (although the issuing authority is obliged to give information on the object and reasons for the EIO – Article 5(1)(aa)); if we also consider that the principle of proportionality is a concept which is not still harmonised at the European level, it is evident the risk of an application of the rule not uniform across Member States. As a consequence there will be different treatment for defendants involved with the investigative measures, which may create problems especially in the case of coercive measures.

Also welcomed is the addition of new grounds for refusal – although they are optional – such as the *ne bis in idem* principle which is recognized as a fundamental principle to protect individuals within the EU; but, as is well known, its application does not prevent the possibility for individuals to be targeted by parallel prosecutions in different Member States and so by different investigative measures, a relevant topic which is not addressed in the draft.[122] With regard to the double criminality principle, a key issue also during the negotiations on the EEW, in the current text of the EIO it has been introduced as a further requirement to execute the EIO when the measure requested is, mainly, a coercive one. Some criticism had been expressed with regard to the list of measures which were excluded by this additional requirement: it is because coercion can be used as a means for carrying out even non-coercive measures.[123] In this respect it is a good thing that search and seizure are not on the list of measures for which an assessment of the double criminality requirement is excluded. However, a clear definition of the concept of coercive measures is necessary given their impact on the fundamental rights of defendants (such as the right to remain silent).

The addition of new grounds to refuse the execution of the EIO, although this has improved the Proposal, clearly represents the failure of the mutual recognition philosophy which, as conceived, requires a strict list: it is mainly for the specific provision of a ground for refusal based on the human rights clause. This highlights, in the current scenario, the absence of 'mutual trust' among Member States, especially when the measure requested may interfere with the fundamental rights of defendants.

Other significant gaps still remain in the protection of the fundamental rights of defendants (and of victims, who are totally ignored). The wide differences in criminal procedure across Member States, notwithstanding the Directives adopted within the 2009 Roadmap, are still an obstacle to the extension of the mutual recognition principle to the gathering and transfer of evidence. Moreover, the gathering of evidence is an activity which is performed at the investigative stage, characterized in many countries by

122 Art. 14(1) only provides that the recognition or execution of the EIO may be postponed in the executing State where 'its execution might prejudice an ongoing criminal investigation or prosecution until such time as the executing State deems reasonable'.
123 Ruggeri 2012, supra note 46, p. 159.

the supremacy of the public prosecutor (or in some countries, including England and Wales, the police); in the text of the Proposal, notwithstanding the possibility for the defence to play a 'proactive' role, there is no provision for the lawyer to participate in the activities carried out by the authorities of the foreign State (alongside the 'public' authorities of the issuing State). As a consequence the defence, which has not had the possibility to check how the evidence was obtained in the executing State, cannot really protect the interests of defendants (the same is true for the victims). As suggested, to counterbalance the power of the prosecutor in cross-border cases there is a need for an Office of the Eurodefensor,[124] charged with supporting and protecting the rights of defendants who are not informed of the investigation against them, and to take part in the gathering of evidence (a similar structure should be adopted to protect the interest of victims at this stage).

For certain measures, such as the interception of telecommunications and information on bank accounts, which are particularly intrusive, and others such as the hearing by videoconference – which are in conformity with the ECHR as long as the arrangements for the giving of evidence are compatible with the requirements of respect for due process[125] – it is surely necessary to create a body of common rules applicable across all Member States, as proposed in the *Corpus Juris* Project.[126] This approach would better help to protect the fundamental rights of persons involved in cross-border investigations and to safeguard the fairness of national criminal proceedings, while waiting for improvements in the standard of protection concerning the rights of persons involved in a cross-border investigation, which, as noted before, is still an ongoing process at the European level. ¶

124 See note 80, supra.

125 ECtHR, 5 October 2006, *Viola v Italy*, Para. 67.

126 Spencer, supra note 18, pp. 605-606. See also Ligeti, supra note 47, passim. On the *Corpus Juris* see M. Delmas-Marty & J.A.E. Vervaele, *The implementation of the Corpus Juris in the Member States*, 2000.