

# The European Investigation Order and the Charter of Fundamental Rights

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**EIPA**

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# Gathering evidence – Historical EU legal framework

Mutual Legal Assistance

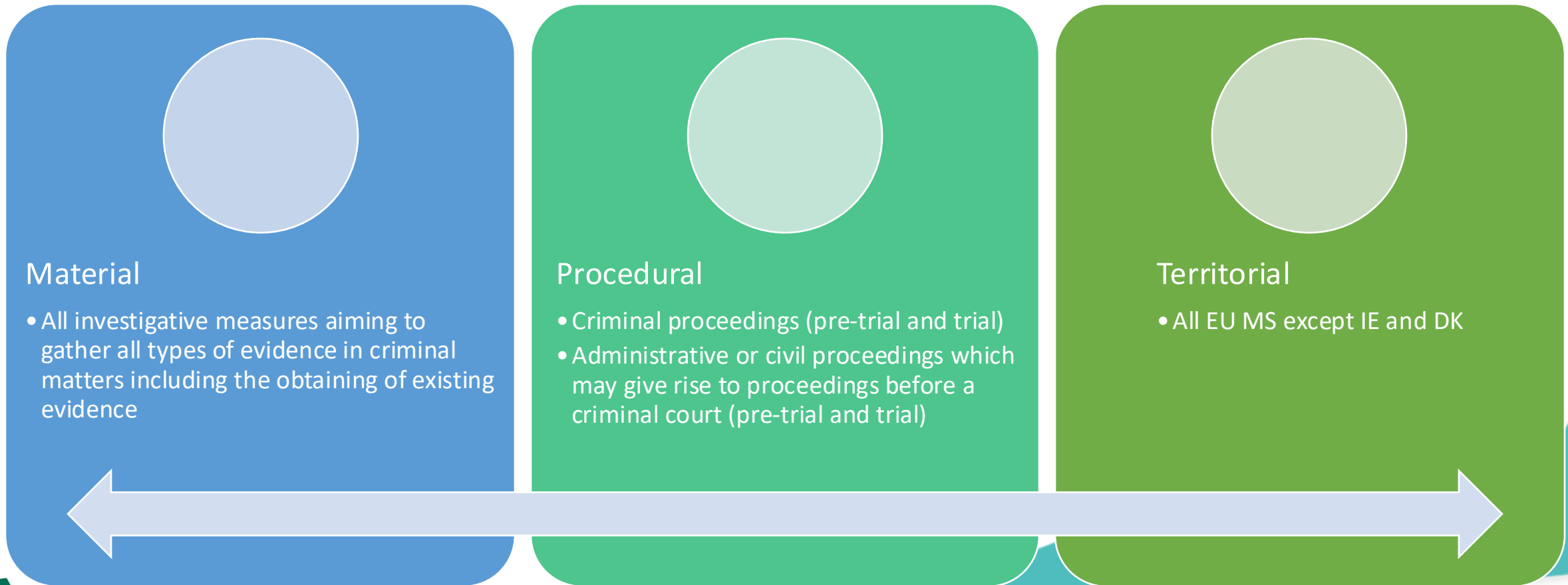
FD 2003/577 on freezing orders (not in force)

FD 2008/978 on European Evidence Warrant (not in force)

Directive 2014/41 regarding the European Investigation Order

Regulation 2023/1543 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings

# EIO Scope



# The EIO (Directive), Part I

## What is it?

- A judicial decision issued in or validated by the **judicial authority** in one EU country to have **investigative measures to gather or use evidence** in **criminal matters** carried out in another EU country: Art. 1(1), EIO Dir.
- Based on **mutual recognition**.
- **Rights of the defence** in criminal proceedings (cf. Art. 48, CFREU, Art. 6 TEU) to be **respected and ensured**: Art. 1(4).

## What does it do?

- Creates a single, comprehensive framework for obtaining evidence, thereby—
- Facilitating evidence-gathering activities in cross-border criminal investigations; and
- Providing a more efficient system with direct contact between judicial authorities, and with clear deadlines for recognition and execution.
- Covers 'any investigative measure' to obtain evidence: Art. 3.

# The EIO Directive

## Directive (EU) 2014/41

### Principle of **mutual recognition**

- (Limited) oversight over requirements to issue an EIO
- Possible recourse to different type of investigative measure
- Principle of equivalence
- Grounds for refusal → including fundamental rights

### **Legal remedies** equivalent to those in a similar domestic case

- Division model (with mitigations)
- Scope of control?

## KEY FEATURES

- ▶ EU Directive on the EIO (2014/41) of 3 April 2014
- ▶ Mutual recognition of judicial decisions
- ▶ Replaces Letters of Request for investigative measures
- ▶ Deadline for transposition: 22 May 2017
- ▶ Obtains evidence located in another EU Member State
- ▶ Simplifies and accelerates cross-border criminal investigations

## LIFE CYCLE OF AN EIO

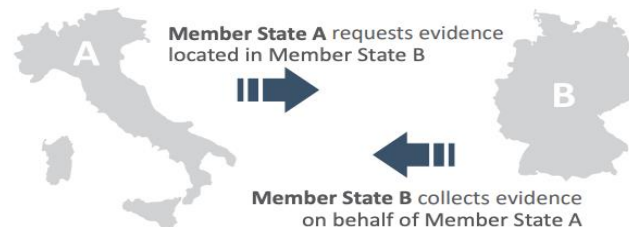


- 1 - **DRAFTING** of EIO by judicial authority in Member State A
- 2 - **TRANSMISSION** of EIO to judicial authority in Member State B
- 3 - **RECOGNITION** of EIO in Member State B
- 4 - **EXECUTION** of EIO in Member State B



EUROJUST IDENTIFIES CHALLENGES  
AND BEST PRACTICE IN EIO CASES

## HOW IT WORKS



### Examples of investigative measures:

- ▶ Obtaining existing evidence
- ▶ Hearings of witnesses and suspects
- ▶ (House) searches
- ▶ Checks on bank accounts/financial operations
- ▶ Interception of telecommunications
- ▶ Temporary transfer of persons in custody
- ▶ Preservation of evidence

Creates a single comprehensive instrument with a large scope

Sets strict deadlines for gathering the evidence requested

Limits the reasons for refusing such requests

Reduces paperwork by introducing a single standard form

Protects the fundamental rights of the defence

# The EIO (Directive), Definitions

Some definitions (as per Art. 2, EIO Dir.):

- **“issuing State”**: Member State in which EIO is issued;
- **“executing State”**: Member State executing the EIO, in which the investigative measure is to be carried out;
- **“issuing authority”** means either—
  - a judge, a court, an investigating judge or a public prosecutor competent in the case concerned; or
  - ‘any other competent authority as defined by the issuing State which, in the specific case, is acting in its capacity as an investigating authority in criminal proceedings with competent to order the gathering of evidence in accordance with national law.’
  - Note CJEU case law: C-584/19 *Staatsanwaltschaft Wien*, C-66/22 *Staatsanwaltschaft Graz*
- **“executing authority”**: authority having competence to recognise EIO and ensure its execution in accordance with the Directive and the procedures applicable under national law.

# Competent authorities

## Issuing authority

- judge, court, **public prosecutor** or investigating judge (= **judicial authorities**)
- non-judicial authorities + **validation by a judicial authority**
- **public prosecutor** regardless of any relationship of legal subordination that might exist between that public prosecutor or public prosecutor's office and the executive of that Member State and of the exposure of that public prosecutor or public prosecutor's office to the risk of being directly or indirectly subject to orders or individual instructions from the executive when adopting a European investigation order ([Case C-584/19](#)) ≠ EAW

## Executing authority

- authority competent to recognize an EIO and ensure its execution
- **court authorization** if so required by national law

**Double authorization** if so required by the law of the issuing and executing MS?

What the **extent of judicial review** in the executing MS?



# EIO Structures and Mechanisms: Consent and Form—Art. 5

## Content and Form of EIO: Art. 5, EIO Dir.

- Form in Annex A of Directive →
- Must contain, in particular:
  - Data about issuing authority;
  - **Object** of and **reason** for EIO;
  - Necessary information available on person(s) concerned;
  - **Description** of the criminal act subject to investigation or **provisions of criminal law** of issuing State;
  - **Description** of the **investigative measure(s)** requested and **evidence**

### ANNEX A EUROPEAN INVESTIGATION ORDER (EIO)

This EIO has been issued by a competent authority. The issuing authority certifies that the issuing of this EIO is necessary and proportionate for the purpose of the proceedings specified within it taking into account the rights of the suspected or accused person and that the investigative measures requested could have been ordered under the same conditions in a similar domestic case. I request that the investigative measure or measures specified below be carried out taking due account of the confidentiality of the investigation and that the evidence obtained as a result of the execution of the EIO be transferred.

#### SECTION A

Issuing State:.....

Executing State:.....

#### SECTION B: Urgency

Please indicate if there is any urgency due to

☐ Evidence being concealed or destroyed

☐ Imminent trial date

☐ Any other reason

Please specify below:

Time limits for execution of the EIO are laid down in Directive 2014/41/EU. However, if a shorter or specific time limit is necessary, please provide the date and explain the reason for this:

#### SECTION C: Investigative measure(s) to be carried out

1. Describe the assistance/investigative measure(s) required AND indicate, if applicable, if it is one of the following investigative measures:

☐ Obtaining information or evidence which is already in the possession of the executing authority

☐ Obtaining information contained in databases held by police or judicial authorities

☐ Hearing

☐ witness

☐ expert

☐ suspected or accused person

☐ victim

☐ third party

☐ Identification of persons holding a subscription of a specified phone number or IP address

# EIO Structures and Mechanisms: Conditions for Issuing—Art. 6

**Two** conditions:

- (a) issuing of EIO is **necessary** and **proportionate** for the purposes of the proceedings, taking into account the rights of the suspect or accused; and
- (b) the investigative measure(s) indicated **could have been ordered** under **the same conditions in a similar domestic case**.

Conditions to be assessed by the issuing authority in each case.

Where executing authority has reason to believe conditions have **not been met**, they may consult issuing authority on importance of executing EIO: Art. 6(3).

- EIO should be chosen where ‘the execution of an investigative measure seems **proportionate, adequate and applicable** to the case in hand’: Recital 11
- After consultation, issuing authority may decide to **withdraw EIO**.

# Conditions for issuing (Art 6)

- Necessary and proportionate
- Taking into account the rights of the suspected or accused person
- Possible in a similar domestic case
- Not automatic exclusion of minor offences
- Availability of legal remedies in the issuing state to challenge the EIO?
  - [CJEU, C-852/19](#), Gavanozov II

# EIO Structures and Mechanisms III: Recognition and Execution—Art. 9

## General rule:

Executing authority to **recognise an EIO**, without any further formality being required (**principle of mutual recognition**), as if measure had been ordered by domestic authority: Art. 9(1).

- **Unless:** grounds for non-recognition or non-execution (Art. 11), or postponement (Art. 15).

Question: what role for the **executing authority**?

- Executing authority has a **margin of appreciation** on whether conditions for issuing EIO have been met.
- *Prima facie* proportionality assessment... But: doubts as to whether this is applicable in practice → MEIOR.

# EIO Structures and Mechanisms: Different Type of Investigative Measure—Art. 10

Executing authority ‘shall have, wherever possible, recourse to an investigative measure other than that provided for in the EIO’: Art. 10(1).

- Another form of margin of appreciation.

## Conditions:

- Investigative measure indicated **≠ exist** under law of executing State; **or**
- Investigative measure indicated **≠ available** in similar domestic case.

Executing authority may also have recourse to different investigative measure where different investigative measure would **achieve same result by less intrusive means** than the investigative measure indicated in EIO: Art. 10(3).

Issuing authority must be informed: can withdraw/supplement EIO: Art. 10(4).

**Note:** if investigative measure indicated **≠ exist**, **≠ available** and recourse to different measure **≠ possible** → **no execution**: Art. 10(5).

# Execution (Arts 9 + 10)

- Time limits
- Recognition within 30 (+30) days
- Execution in principle within 90 days
- Recourse to an alternative measure if
  - investigative measure does not exist or would not be available in a similar national case, or
  - alternative measure would achieve the same result by less intrusive measure
- **Applicable law** = law of the executing state (*lex loci*) possible with certain formalities expressly indicated by the issuing authority (*lex fori*) provided that such formalities are not contrary to the fundamental principles of law of the executing MS

# Safeguards

➤ Right of the suspect/accused person to request the issuing of an EIO *in conformity with national criminal procedure* (Art 1(3))

- Is the issuing authority obliged to accept the request?
- Should the issuing MS provide for such a right albeit not available in domestic cases?

➤ **Issuing stage**

- EIO issued or validated by a **judicial authority**
- **Conditions for issuing an EIO:** proportionality/necessity/taking into account the rights of suspect and accused person

➤ **Executing stage**

- Recourse to **less intrusive** measure (Art 10(3))
- **Refuse the recognition** of an EIO if incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter (11(1)(f))

# EIO Structures and Mechanisms:

## Grounds for Non-Recognition, Non-Execution—Art. 11

EIO may be **refused** where:

- Immunity/privilege or rules on determination and limitation of criminal liability (freedom of the press + expression in other media);
- Execution would harm essential national security interests, jeopardise source of the information, or involve use of classified information;
- Issued re: minor or administrative offences (only potential, subsequent competence of criminal court) and measure not available in similar domestic case;
- Execution would be contrary to *ne bis in idem*;
- No territorial link to issuing State, but (at least partial) link to executing State;
- **Incompatibility with fundamental rights (Art. 6 TEU + Charter);**
- Conduct for which EIO issued ≠ offence in executing State; and
  - **Note:** exception here list of 32 offences set out in Annex D. Include corruption, rape, terrorism, trafficking, laundering, murder, etc.
- Measure available only for offences punished by a certain threshold.





# EIO Complexities + Issues, Part I

There are many, but especially—

1. Limitations to mutual recognition (“MR”)
2. Fundamental rights protection under the EIO Directive
3. Legal remedies

## 1. Limitations to mutual recognition

- Provisions of EIO Directive allow executing authority to—
  - shift from indications in EIO, for reasons of proportionality; and
  - refuse recognition or execution on various grounds, incl. fundamental rights.
- Has this shifted our understanding of mutual recognition? **Yes** → cannot be blind but must be earned.
  - How? Through protection of fundamental rights.
  - Cf. *Gavanozov II*

# EIO Complexities + Issues, Part II

## 2. Fundamental rights protection under the EIO Directive

- Art. 1(4): Directive shall not modify **obligation to respect fundamental rights and legal principles** as enshrined in Art. 6 of TEU, including defence rights.
- Art. 11(f): EIO may be refused where 'there are substantial grounds to believe that the execution of the investigative measure... would be **incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter**.'

### *Gavanozov II* (C-852/19):

- CJEU asked if national legislation which ≠ provide for any legal remedy against issuing of EIO for, *inter alia*, search and seizures, compatible with EIO Directive.
- CJEU: **No. EIO cannot be issued** if appropriate legal remedies ≠ available → trigger ground for refusal (Art. 11(f)) *vis-à-vis* fundamental rights violation.
  - Persons concerned must be able to contest need for and lawfulness of measures ordered with EIO, and to seek redress if unlawfully order.

# EIO Complexities + Issues, Part III

## 3. Legal remedies

- Member States shall ensure legal remedies in domestic case are applicable to investigative measures
- Substantive reasons for **issuing EIO** may be challenged without prejudice to guarantees of fundamental rights
  - Remember! **Recognition and execution** of EIOs
- **General rule:** legal challenge against EIO ≠ suspension of EIO
  - Exception: if suspension provided for in similar domestic case(s): Art. 14(6)

### SECTION J: Legal remedies

1. Please indicate if a legal remedy has already been sought against the issuing of an EIO, and if so please provide further details (description of the legal remedy, including necessary steps to take and deadlines):

2. Authority in the issuing State which can supply further information on procedures for seeking legal remedies in the issuing State and on whether legal assistance and interpretation and translation is available:

Name: .....

Contact person (if applicable): .....

Address: .....

Tel. No: (country code) (area/city code) .....

Fax No: (country code) (area/city code) .....

E-mail: .....

See also: Section J, Annex A Form (above).

# Availability of legal remedies

‘Article 6 of Directive 2014/41, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union and Article 4(3) of the Treaty on European Union, must be interpreted as **precluding the issuing**, by the competent authority of a Member State, **of a European investigation order**, the purpose of which is the carrying out of searches and seizures as well as the hearing of a witness by videoconference, **where the legislation of that Member State does not provide any legal remedy against the issuing of such a European investigation order**’ ([CJEU, C-852/19](#), Gavanozov II)

# Legal remedies

- Legal remedies **equal** to those available in a similar domestic case (Art 14(1))
- Exercise of legal remedies **in accordance with national law**
- But the **substantive reasons** for issuing an EIO may **only** be challenged ***before the courts of the issuing MS*** (Art 14(2))
  - **What is the extent of *ex post* judicial review in the executing MS?**
- Information of the person concerned about the available legal remedies (in both the issuing and executing MS) subject to confidentiality requirements (Arts 14(3) + 19)

# Available legal remedies

➤ Legal remedies **equal** to those available in a similar domestic case (Art 14(1))

= it does not require Member States to provide additional legal remedies to those that exist in a similar domestic case

➤ But the CJEU has ruled that

‘Article 14 of Directive 2014/41, read in conjunction with Article 24(7) of that directive and Article 47 of the Charter, must be interpreted as **precluding legislation** of a Member State which has issued an EIO that **does not provide for any legal remedy against the issuing of an EIO**’ ([CJEU, C-852/19, Gavanozov II](#))

# Case-law

# C-6C-66/20 – XK

## Factual background and key circumstances

- An EIO was issued by the **German Tax Office** (Münster) → **Trento's Public Prosecutor** (Italy), requesting a search of a business premise in a tax evasion case involving an individual (XK).
- The German authority (an *administrative* body) did **not have the EIO validated** by a judicial authority, as required under **Article 2(c)(ii) of Directive 2014/41/EU**.
- The Italian Public Prosecutor questioned whether such a **non-validated EIO** from a non-judicial authority was **lawful** and referred the question to the ECJ.

Can an administrative authority like the German Tax Office be considered an “issuing authority” under **EIO Directive**, **without** judicial validation of the EIO?

- **Directive 2014/41/EU – Article 2(c)(ii)** → Allows administrative authorities to issue EIOs **only if validated** by a judicial authority (judge, prosecutor, etc.).



# C-6C-66/20 – XK

## Findings

- Preliminary question → whether the **Procura di Trento** qualifies as a “**court or tribunal**” entitled to make a reference under Art. 267 TFEU.
- The ECJ found the request **inadmissible**:
  - The *Procura* was not acting in a judicial capacity but as an **executing authority** under **Directive 2014/41**;
  - A body may refer under **Article 267 TFEU** *only if* exercising a **judicial function** and **ruling in a dispute**. This was not the case here.
  - The Court did **not** address whether the EIO required validation due to inadmissibility.

When the office of an Italian public prosecutor, such as the Public Prosecutor’s Office, Trento, acts as an authority for the execution of an EIO within the meaning of Article 2(d) of Directive 2014/41, it does **not** act in proceedings which are **intended to result in a judicial decision**.

# C-16/22 – Sta C-16/22 – Staatsanwaltschaft Graz

## Factual background and key circumstances

- The **Düsseldorf Tax Office** for Criminal Tax Matters (**Germany**) investigated a suspected EUR 1.6 million tax fraud and **issued an EIO to Austria**.
- The EIO sought **banking information** on the suspect (MS) from an Austrian bank.
- The EIO was **not validated by a judicial authority**. It was issued *directly* by the German tax office, which claimed the status of “**judicial authority**” under German law.
- Austrian Proceedings → MS **appealed** the EIO’s **execution**, arguing the issuing authority **lacked judicial character** under EIO Directive.
- The *Oberlandesgericht Graz* asked the ECJ whether such a tax office qualifies as a “judicial authority” or “issuing authority” under **Article 1(1)** and **Article 2(c)(i)** of the EIO Directive.

## Findings

Main question → Can a tax authority that assumes prosecutorial powers under national law be treated as a “judicial authority” or “issuing authority” under **Article 2(c)(i)** of **Directive 2014/41/EU**?

- The ECJ found that:
  - The tax office **cannot** be classified under **Article 2(c)(i)** – it is **not** a court, judge, investigating judge, or public prosecutor.
  - EIO Directive distinguishes between **judicial authorities** (Art. 2(c)(i)) and **other authorities** (Art. 2(c)(ii)) – categories are **mutually exclusive**.
  - A tax authority **may** fall under Art. 2(c)(ii), but **only if the EIO is validated by a judicial authority**.
- Finding → The German tax office, as **part of the executive**, may **not** issue an EIO autonomously without judicial validation. It cannot therefore be considered neither an “issuing authority” nor a “judicial authority” within the meaning of the EIO Directive.
- Exception → But such an authority is, on the other hand, **capable** of falling within the concept of an “**issuing authority**” within the meaning of Article 2(c)(ii) of that Directive, **provided that the conditions set out in that provision are met**.

# Case C-724/19 – HP

## Factual background and key circumstances

- **Bulgarian** authorities investigated suspected terrorist financing and participation in a criminal organization.
  - A Bulgarian public prosecutor issued **four EIOs** to obtain **traffic and location data** on HP from **Austria, Germany, Sweden**, and **Belgium**.
  - **BUT** → In Bulgaria, such data can be collected only by judicial order in similar domestic cases.
  - The EIOs were issued **without prior judicial authorization**, contrary to Bulgarian procedural norms for similar internal investigations.
- Questions referred → The Bulgarian court asked whether (1) this practice complied with the **EIO Directive**, and (2) the recognition of the EIO by other Member States could “*cure*” the procedural defect.

# Case C-724/19 – HP

## Findings

- First question → The ECJ emphasizes a **teleological** and **contextual** reading of the EIO Directive, focusing on **Articles 6(1)(a) and (b)**.
  - (A) Necessity and proportionality
    - Article 6(1)(a) requires the **issuing** authority to assess if the measure is **necessary** and **proportionate**, considering suspects' rights.
    - Such an assessment *presumes* the authority can lawfully order the **same measure domestically**.
  - (B) Domestic equivalence principle:
    - **Article 6(1)(b)** → An EIO may only be issued where the investigative measure “*could have been ordered under the same conditions in a similar domestic case*.”
    - Therefore, if Bulgarian law reserves the power to a judge, the **prosecutor lacks competence** to issue the EIO.
  - (C) Rejection of functional equivalence
    - The Court **rejects** any “functional” approach allowing a prosecutor to issue an EIO if they could request it internally from a judge.
    - Emphasizes the formal symmetry between internal and cross-border procedural safeguards.

# Case C-724/19 – HP

## Findings

- Second question
  - **Articles 9(1) and 9(3)**: Executing authority *may* refuse execution if issuing authority **is not competent**.
  - Allowing recognition to **validate** an improperly issued EIO would **undermine mutual trust** and **grant the executing State *de facto* review powers over issuing standards** – this is **contrary** to the Directive's design.
- Answer → Recognition by the executing State **cannot substitute** for the **absence of judicial authorization** required in the issuing State

# [The Gavanozov II case law]

## C-852/19 Gavanozov II

The person concerned must have a **means of challenging the issuance** of an **EIO** concerning the measures in question

National law which does not provide for such a remedy is contrary to Union law

- This in itself, according to AG Bot, should trigger the ground for refusal in Article 11(f) of Directive (EU) 2014/41

Authorities of states whose law does not provide any means of challenging the issuance of an **EIO may not use the EIO mechanism** for transnational evidence-gathering

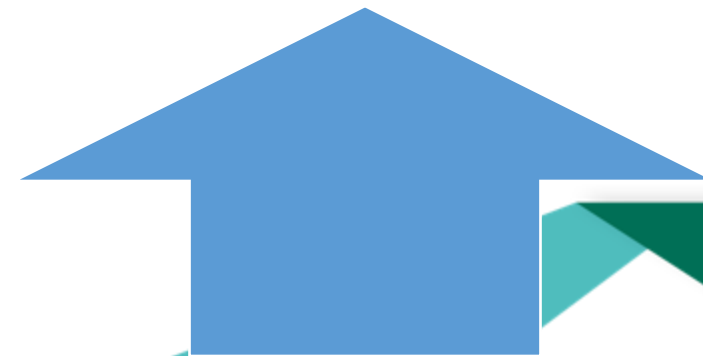
# Mutual recognition 2.0



Effectiveness and  
efficiency



Fundamental rights — effective  
judicial protection





# [The Gavanozov II case law]

## C-852/19 Gavanozov II

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# Judicial authority

EU concept of **court or tribunal** (Art. 267 TFEU): established by law, permanent, compulsory jurisdiction, *inter partes* procedures, apply rule of law, **independent** (*Margarit Panicello* C-503/15, § 27; *ASJP* C-64/16, § 38)

EAW case law: not just judges or courts of MS, but also other **authorities administering justice** (separation of powers) thus: police services excluded (*Poltorak* C-452/16 PPU, §§ 33-34)

Where **public prosecutor** responsible for administration of justice → judicial authority (*Özçelik* C-453/16 PPU, § 34)

Prosecutor must however be **independent from executive** power (*OG and PI* C-508/18 and C-82/19 PPU; *PF* C-509/18)

Concept of **judicial authority** in EIO Directive the comprises judges, courts, investigating judges and public prosecutors (*Staatsanwaltschaft Wien* C-584/19)

# Independence in EIO proceedings

- EIO does not interfere with personal liberty → “full” independence not necessary: **prosecutor that may be influenced by the executive** can be issuing authority (*Staatsanwaltschaft Wien C-584/19*)
  - Prosecutors as executing authority not ‘court or tribunal’ ex Art. 267 TFEU: no **preliminary ruling mechanism** (*XK C-66/20*, § 38)
    - Lack of *inter partes* procedure requirement
    - Investigative measures provisional in nature: no final decision

**Principle of equivalence:** prosecutor cannot issue an EIO for an investigative measure for which in a similar domestic case the authorisation of a judge would be required (*HP C-724/19*)

**Tax authorities** (part of the executive) may when they act as prosecutors in domestic proceedings issue EIOs **but** they need **validation** from judge, court, investigating judge, or prosecutor

- Principle of separation of powers (*Staatsanwaltschaft Graz C-16/22* § 35)

# Independence and cooperation

Effective judicial review to ensure compliance with provisions of EU law is of the essence of the **rule of law** (*Rosneft* C-72/15 § 73)

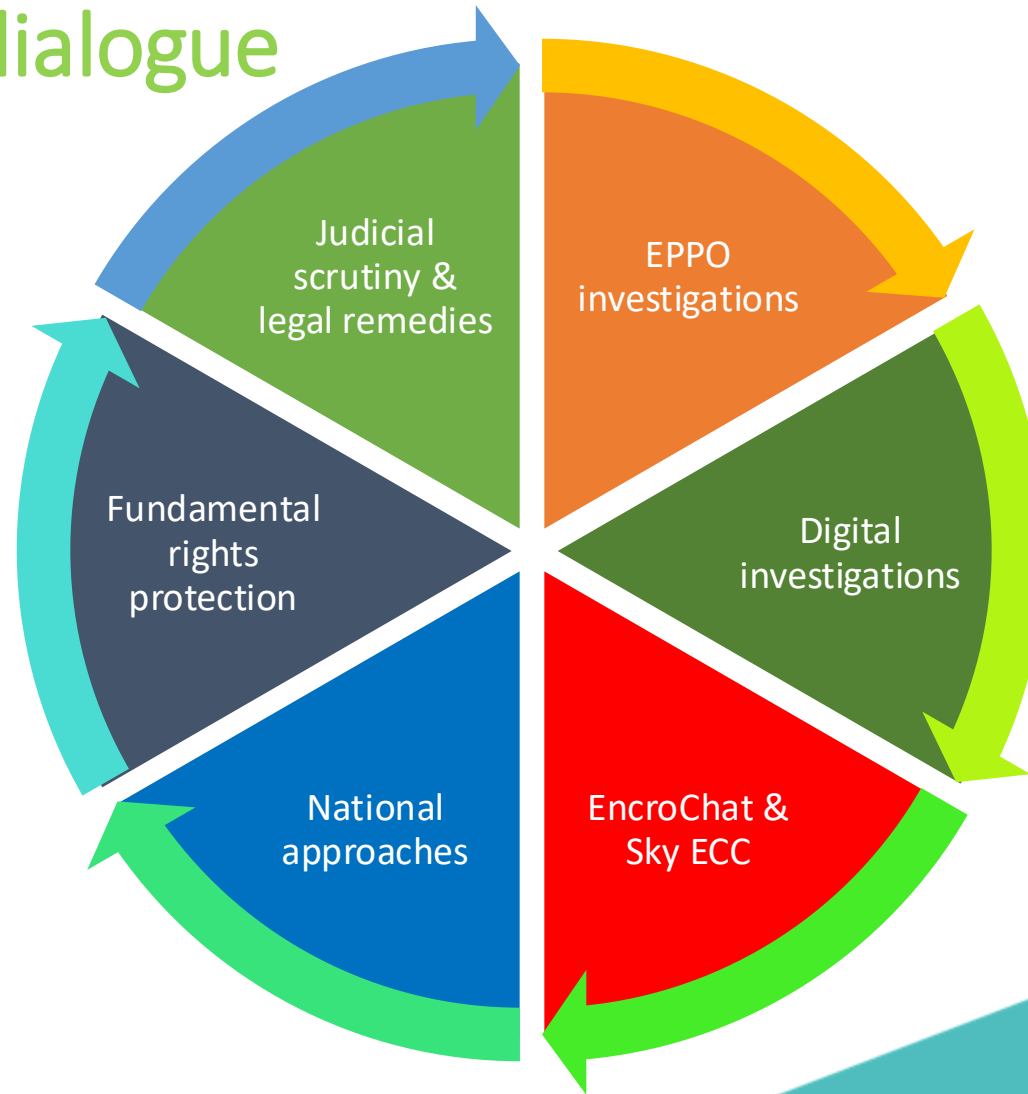
Fundamental rights + rule of law dimension: essential element of **values** enshrined in **Art. 2 TEU**

EU MS sharing the values set forth in Art. 2 TEU justifies the existence of **mutual trust** (*LM*, C-216/18 PPU § 35; *Achmea*, C-284/16 § 34)

Mutual trust allows for **mutual recognition** (*LM*, C-216/18 PPU § 35; *Tupikas* C-270/17 PPU § 49)

Judicial independence and protection indispensable for **judicial cooperation** (*Bob Dogi*, C-241/15 § 64)

# A transversal dialogue



# Part II

## CJEU Case C-670/22, *M.N.: Encrochat*

### The facts

The case concerned the retrieval of German user data stored on a Europol server by the German Federal Criminal Police Office. The French police had been able to infiltrate the encrypted telecommunications service EncroChat, whose devices were often being used by criminals. This French operation led to several follow-up investigations, also in Germany.

The service company EncroChat provided encrypted mobile phones that were often used by criminals, e.g., for the purpose of illegal drug trafficking – as in the case before the Regional Court of Berlin. With the assistance of Dutch experts and authorisation by a French investigative judge, the French police were able to install a Trojan software on the terminal devices via a simulated update and thus read the chat messages of thousands of users in real time, including those who used the network for criminal activities. This led to several follow-up investigations, including in Germany.

The German Federal Police Office (*Bundeskriminalamt – BKA*) was able to retrieve the intercepted data relating to EncroChat users in Germany from a Europol server. By means of European Investigation Orders (EIOs), the General Public Prosecution Service of Frankfurt sought *ex post* authorisation for the transmission and use of these data in German criminal proceedings.

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europol.europa.eu/media-press/newsroom/news/dismantling-encrypted-criminal-encrochat-communications-lea...

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**NEWS**

# Dismantling encrypted criminal EncroChat communications leads to over 6 500 arrests and close to EUR 900 million seized

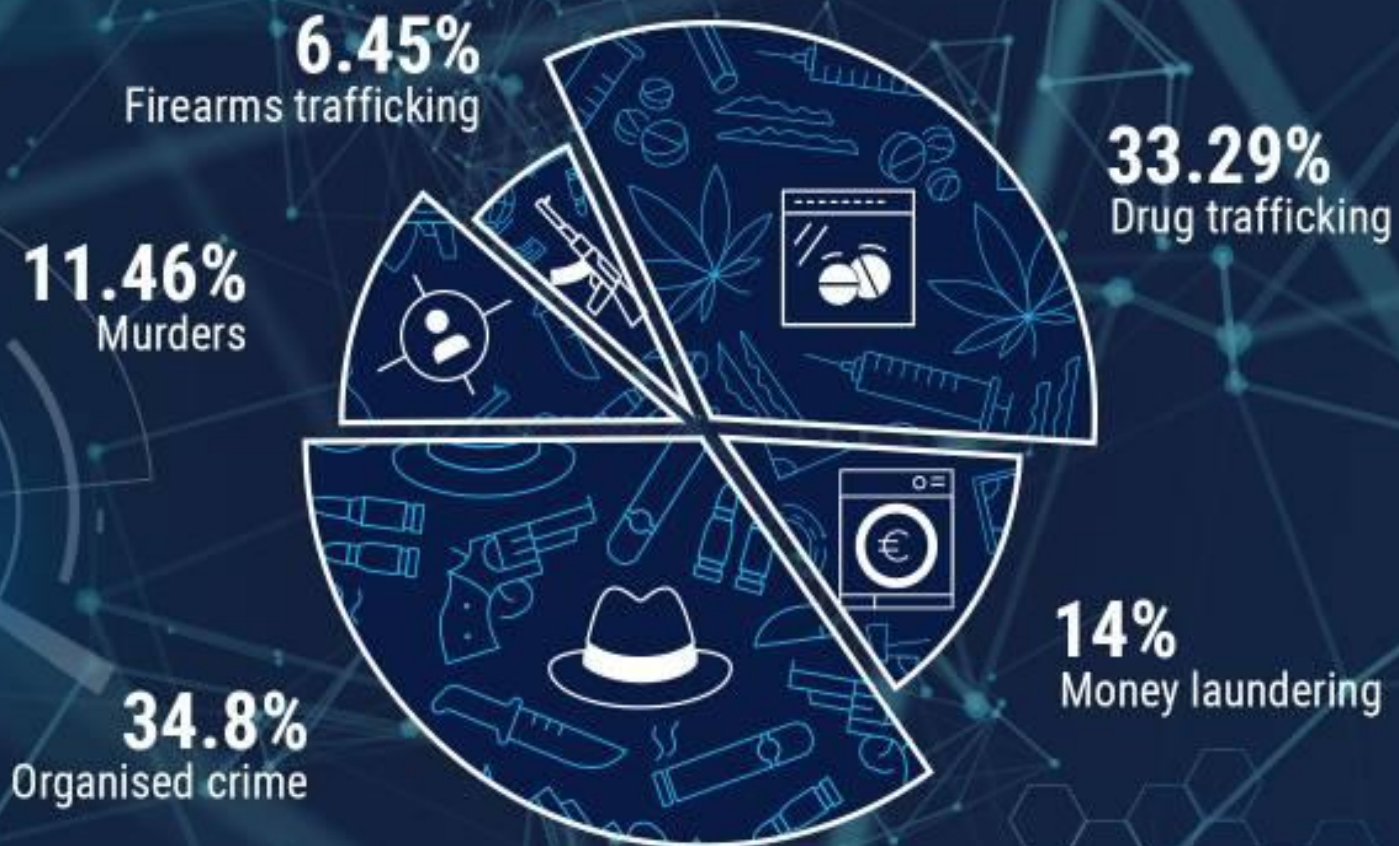
Judiciary and law enforcement present first overview of results

27 JUN 2023

The dismantling of the encrypted communications tool EncroChat, widely used by organised crime groups (OCGs), has so



## EncroChat by Crime Area



## EncroChat in Numbers



# CJEU Case C-670/22, *M.N.: Encrochat*

## The questions

The Regional Court of Berlin submitted a series of questions on the lawfulness of the EIOs to the ECJ relating to the following issues:

- The German public prosecutor's competence to issue an EIO;
- The admissibility of the EIO pursuant to Art. 6(1) EIO Directive;
- Correct application and interpretation of Art. 31 EIO Directive, which regulates the **surveillance of telecommunications** without the technical assistance of a Member State;
- The consequences of a possible infringement of EU law for the national criminal proceedings.

# CJEU Case C-670/22, *M.N.: Encrochat*

## The questions

The first three questions from the referring court revolved around the interpretation of Article 6 (1) (a) and (b) of the EIO Directive,

(i) whether, in the event of evidence transmission, the EIO needs to be issued by a judge,

(ii) whether the issuance of an EIO is permitted for the transfer of data acquired from the interception of telecommunications, even if there is no individualised suspicion based on reasonable grounds for the commission of serious crimes and no data integrity verification,

(iii) whether the issuance of an EIO is permitted for the transfer of data acquired in the executing State by an investigative measure, which would be unlawful in a similar domestic case of the issuing State.



# CJEU Case C-670/22, *M.N.: Encrochat*

## The CJEU decision

1. whether, in the event of evidence transmission, the EIO needs to be issued by a judge, the CJEU affirmed the view expressed in the academic literature interpreting Article 6 (1) in conjunction with Article 2 (c) of the EIO Directive:

- the term 'issuing authority' includes **any public authority, competent under the law of the issuing State for the transmission of already collected evidence in a similar domestic case.**
- to the extent that under the law of the issuing State, public prosecutors are competent to order the transmission of evidence already in possession of national authorities, these public prosecutors fall within the term 'issuing authority'.
- An authorisation by a judge is, hence, not necessary.

# CJEU Case C-670/22, M.N.: Encrochat

## The CJEU decision

As to the second question, the ECJ verified whether and, if so, under what conditions Art. 6(1) of the EIO Directive precludes a public prosecutor from issuing an EIO for the transmission of evidence already in the possession of the competent authorities of the executing State in which that evidence was acquired. Evidence in said case had been acquired via the interception – by those authorities on the territory of the issuing State – of telecommunications of all the users of EncroChat mobile phones that enabled end-to-end encrypted communication through special software and modified hardware.

Confronting questions (ii) and (iii) in line with the principle of mutual recognition, **it established that issuing authorities cannot subject already conducted measures to their domestic proportionality and necessity standards, nor can they challenge their lawfulness anew.**

- the German authorities could only assess the proportionality and necessity of the transmission itself, not the measure used by the French authorities to acquire the evidence.
- the possibility of reassessment is guaranteed against both the issuance and the execution of the EIO, under the ‘separation model’ of legal remedies outlined in Article 14 of the Directive.
- Under this framework:
  - challenges to the issuance of an EIO could be brought before the courts of the issuing State
  - while legal remedies against its recognition and execution are to be sought before the judicial authorities of the executing State.

# CJEU Case C-670/22, *M.N.: Encrochat*

## The CJEU decision

Looking at the required review of the necessity and proportionality of issuing the EIO (Art. 6(1)(a) of the EIO Directive), the ECJ found that the assessment must be carried out in the light of the national law of the issuing State, taking into account that evidence already in the possession of the competent authorities of the executing State has been transmitted. Against this backdrop, the ECJ provided the following two clarifications:

- It is not necessary that, at the time when the EIO in question is issued, suspicion, based on specific facts, of a serious offence in respect of each person concerned exists if no such requirement arises under the national law of the issuing State (here: German StPO);
- It is irrelevant that the integrity of the data gathered by the interception measure cannot be verified because of the confidentiality of the technology underpinning that measure, provided that the right to a fair trial is guaranteed in the subsequent criminal proceedings.

# CJEU Case C-670/22, *M.N.: Encrochat*

## The CJEU decision

Looking at the requirement that the EIO “could have been ordered under the same conditions in a similar domestic case” (Art. 6(1)(b) of the EIO Directive), the judges in Luxembourg reiterated that a distinction must be made between two differing situations. -

- The first situation concerns circumstances in which the investigative measure indicated in the EIO consists of obtaining existing evidence already in the possession of the competent authorities of the executing State, that is to say, the transmission of that evidence to the competent authorities of the issuing State.
- The second situation concerns circumstances in which the collection of evidence is sought via a specific investigative measure, i.e., the evidence does not yet exist. Since the first situation applies in the present case, the ECJ ruled that the issuing of an EIO is not subject to the same substantive conditions as those that apply in the issuing State in relation to the gathering of that evidence. Moreover, the fact that, in this case, the executing State (here: France) gathered evidence on the territory of the issuing State (here: Germany) and in its interest is irrelevant in that respect.



# CJEU Case C-670/22, *M.N.: Encrochat*

## The CJEU decision

### Who must be notified under Art. 31 of the EIO Directive, if at all?

In another set of questions, the Regional Court of Berlin asked, in essence, whether Art. 31 of Directive 2014/41 must be interpreted as meaning that a measure entailing the infiltration of terminal devices for the purpose of gathering the traffic, location and communication data of an internet-based communication service constitutes an “interception of telecommunications”, within the meaning of that article. And, if answered in the affirmative, whether this interception must be notified to a judge of the Member State on whose territory the subject of the interception is located.

The ECJ first clarified that the concept of “telecommunications” used in Art. 31 of the EIO Directive must be given an independent and uniform interpretation throughout the EU. Considering the wording, context, and objective of Art. 31, the ECJ found that the infiltration of terminal devices for the purpose of gathering communication data as well as traffic or location data from an internet-based communication service indeed constitutes an “interception of telecommunications” within the meaning of Art. 31(1) of Directive 2014/41.

Secondly, as to the question of which authority must be notified, the ECJ observed that both the wording of Art. 31(1) (“competent authority”) and the EIO form leave this question open. It follows that the Member States on whose territory the subject of the interception is located must designate the authority for the purpose of notification. However, the intercepting Member State (here: France) can submit the notification to any appropriate authority of the notified Member States (here: Germany) if it is not in a position to identify the competent authority in that State.

# CJEU Case C-670/22, *M.N.: Encrochat*

## The CJEU decision

### What is the scope of protection of Art. 31 of the EIO Directive?

In the context of Art. 31 of the EIO Directive, the Regional Court of Berlin also asked whether this provision intends to protect the rights of users affected by a measure for the “interception of telecommunications” within the meaning of that article, and whether that protection would extend to the use of the data thus collected in the context of a criminal prosecution initiated in the notified Member State.

The ECJ pointed out that the interception of telecommunications amounts to an interference with the right to respect for the private life and communications – enshrined in Art. 7 CFR – of the target of the interception. Thus, Art. 31 intended not only to guarantee respect for the sovereignty of the notified Member State but also to ensure that the guaranteed level of protection in that Member State with regard to the interception of telecommunications is not undermined, in short: it also protects the rights of the affected users.



# CJEU Case C-670/22, *M.N.: Encrochat*

## A new exclusionary rule?

- the referring court asked whether, in accordance with the principle of effectiveness, evidence acquired through the mechanism of an EIO should be excluded from criminal proceedings if it was collected in violation of EU law.
- the Court introduced a new approach to evidence admissibility, departing from its traditional unequivocal deference to national procedural laws of the Member States.

This revolutionary position was not adopted lightly and without due consideration.

- it lies within the national laws of the Member States to determine the rules governing admissibility and evaluation of evidentiary material in criminal proceedings. Following its long-established reasoning, it underlined that, in light of the principle of procedural autonomy, Member States are entrusted with the competence to establish procedural rules for actions aiming at safeguarding rights deriving from EU law, on condition that they conform with the principles of equivalence and effectiveness.

## CJEU Case C-670/22, *M.N.: Encrochat*

### A new exclusionary rule?

- the Court did not hesitate to take a step further, differentiating itself from the opinion of the Advocate General, and boldly shaping a novel exclusionary rule. Based on Article 14 (7) of the Directive, it is emphasised that evidence ‘must be excluded’ from the criminal proceedings if the defendant is not in a position to comment effectively on the way it was collected. This obligation imposed on national courts to ‘disregard’ evidence obtained in breach of EU law stems from the duty to safeguard the rights of the defence and the fairness of the proceedings as enshrined in Article 47 of the EU Charter of Fundamental Rights. This premise counterbalances the Court’s flexibility on the issuance and execution of an EIO under national laws, as it renders the defendant’s opportunity to challenge the evidence collected a prerequisite for its admissibility. .

# CJEU Case C-670/22, *M.N.: Encrochat*

## A new exclusionary rule?

### Does EU law require the exclusion of unlawfully obtained evidence?

With this last question, the Regional Court of Berlin queried whether the principle of effectiveness requires national criminal courts to disregard information and evidence obtained in breach of the requirements of EU law in criminal proceedings against a person suspected of having committed criminal offences.

The ECJ reiterated its case law on the admissibility of information obtained contrary to EU law in criminal proceedings. As a rule, the principle of procedural autonomy enables the Member States' powers to establish procedural rules for actions intended to safeguard the rights that individuals derive from EU law. However, this rule has two limits:

- The national rules cannot be less favourable than the rules governing similar domestic actions (the principle of equivalence);
- They cannot render impossible in practice or make excessively difficult the exercise of rights conferred by EU law (the principle of effectiveness).

Referring to Art. 14(7) of the EIO Directive, the judges in Luxembourg clarified in this respect that, in criminal proceedings against a person suspected of having committed criminal offences, national criminal courts are required to disregard information and evidence if that person is not in a position to comment effectively on that information and on that evidence and the said information and evidence are likely to have a preponderant influence on the findings of fact.

## Part III

## CJEU Case C-583/23 Delda

On 1 March 2021, the Spanish judicial authorities issued a European Investigation Order ('the European Investigation Order at issue') addressed to the French authorities requesting them to serve on AK, who was serving a custodial sentence in France, an indictment issued on 30 September 2009 by the Juzgado Central de Instrucción nº 4 de la Audiencia Nacional (Central Court of Preliminary Investigation No 4, National High Court, Spain). (5) That indictment also included an order that AK be remanded in custody pending trial and an order requiring a bail payment. By that European Investigation Order, the Spanish judicial authorities also asked that AK be allowed, in the presence of her lawyer, 'to state her case as to the matters in question'.

On 19 July 2021, an investigating judge at the tribunal judiciaire de Paris (Court of Paris, France) served AK with that indictment in the presence of her lawyer, gave her and her lawyer a copy of it in Spanish and took statements from her, all of which was minuted in the official record. (6)

The following day, AK lodged an application with the Indictment Division of the cour d'appel de Paris (Court of Appeal, Paris) for that hearing to be declared invalid, arguing, in essence, that the service of an indictment which includes an order that an accused person be remanded in custody pending trial and an order requiring a bail payment, cannot be sought in the context of a European Investigation Order.



## CJEU Case C-583/23 Delda

The ECJ had to decide whether French authorities were to refuse the execution of a Spanish order that requested first **to serve on an accused person an indictment** related to her, accompanied by an order that that person be remanded in custody and make a bail payment and, second, to allow that person to make observations on the matters set out in that indictment.

In essence, the ECJ had to define the concept of "investigative measure" for law enforcement purposes within the meaning of Arts. 1 and 3 of Directive 2014/41. Considering the wording of the term, its context and the purpose of the EIO, the ECJ clarified that the investigative measure must aim to ensure that the issuing Member State obtains "evidence". And evidence is identified as objects, documents or data pursuant to the EIO Directive.

In application of this definition, the ECJ concludes that neither an order by which a judicial authority of one Member State requests a judicial authority of another Member State to serve on a person an indictment relating to him/her nor an order to request a judicial authority of a Member State to remand a person in custody pending trial or to require the person concerned a bail payment, does constitute a European Investigation Order.

# The working of the EIO

## **“EIO works well”!**

- EIO proceedings generally function quite smoothly
- in relation w/ classic MLA instruments

## **Practical issues are, however:**

- Dialogue does oftentimes not work: no direct connection
- Timing is often problematic: takes very long, no updates
- Language, incomprehension

## **Judicial cooperation with different speeds**

- Serious/High profile cases v low profile/minor cases
- Specialised authorities v not specialised (or less specialised) authorities

## **Concerns from defence lawyers– marginal role**

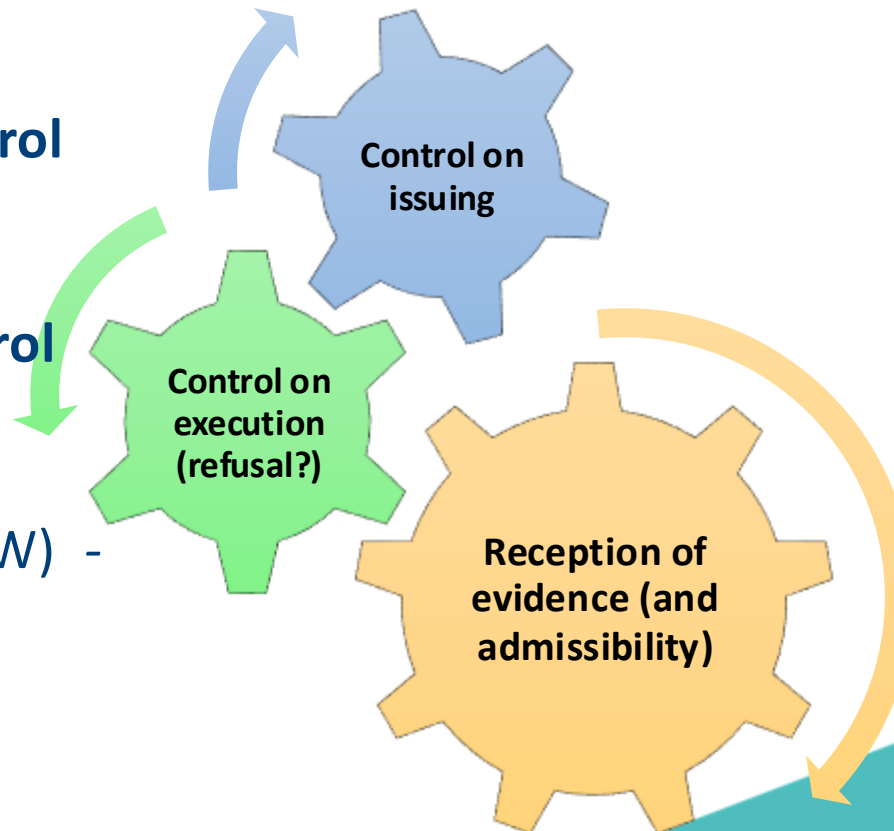
# STRUCTURES OF CONTROLS

- 3 MOMENTS OF CONTROL

- Issuing phase – Strong control

- Executing phase – MR control

- Reception phase (not in EAW) -  
Admissibility/Lawfulness  
control



# JUDICIAL CONTROLS

No clear common concept of judicial control and/or remedy in functioning of EIO

- Issues worked out at national level
  - Where sometimes conceptual differences emerge countries
  - Procedural autonomy?

Lack of thorough controls (particularly at executing and receiving phase) – *see following slide*

- It is though questionable whether executing authority is *de facto* in the position to assess more than macroscopic defects in the EIO

Gavanozov II judgement does not seem to have impacted the everyday practice of judicial cooperation

- Reliance on mutual trust (!)

# JUDICIAL CONTROLS (II)

## Issuing phase

- Asymmetries in assessment of proportionality

## Executing phase

- Uneven controls, due to:
  - different measures requested
  - different structures of judicial controls and remedies at national levels
  - Different approaches to remedies against EIO
  - Unclear situation concerning confidentiality of EIO requests and possibility for parties to challenge

## Reception phase

- Problematic control on evidence admissibility
  - impractical and very weak (at times non existent)

# Further open issues

## EIO and videoconferencing

- possible under Article 24
  - but quite some natl resistance
  - Meanwhile cases with attempts to use Art. 24 EIO to ensure presence at trial
  - Possible to stretch applicaiton of the EIO?

## Regulation 2023/2844

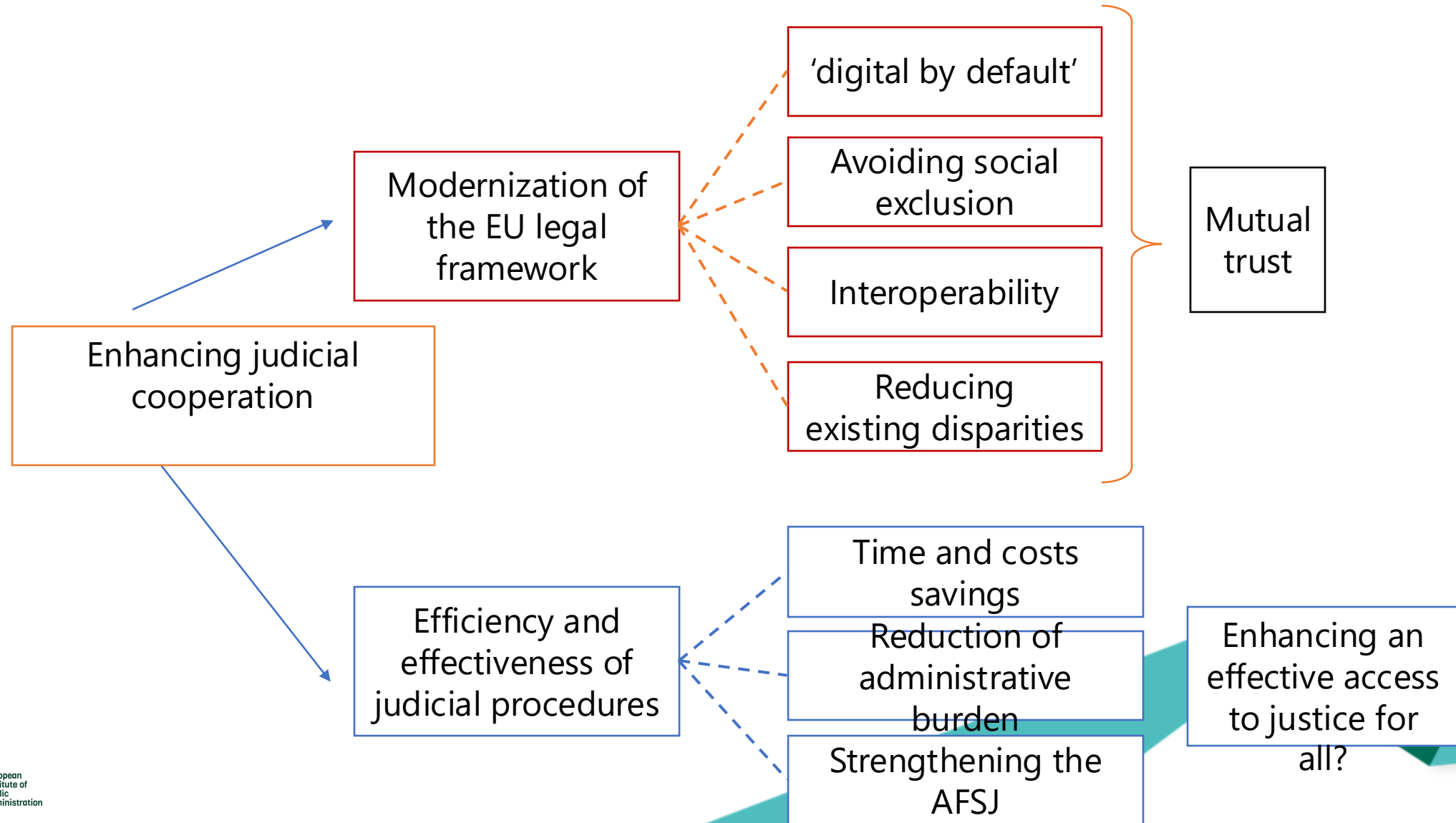
- securing reliable and time-efficient communications between courts and competent authorities for effective judicial cooperation and guaranteeing access to justice in cross border cases in EU
- legal framework of electronic trasmission of documents; rules on use of videoconferencing in criminal proceedings; rules on electronic trust services, acceptance of electronic documents (e-seals, e-signatures)
- Recital 43 – not applicable to hearings for taking evidence

# EU Legal framework on digitalisation: historical continuity



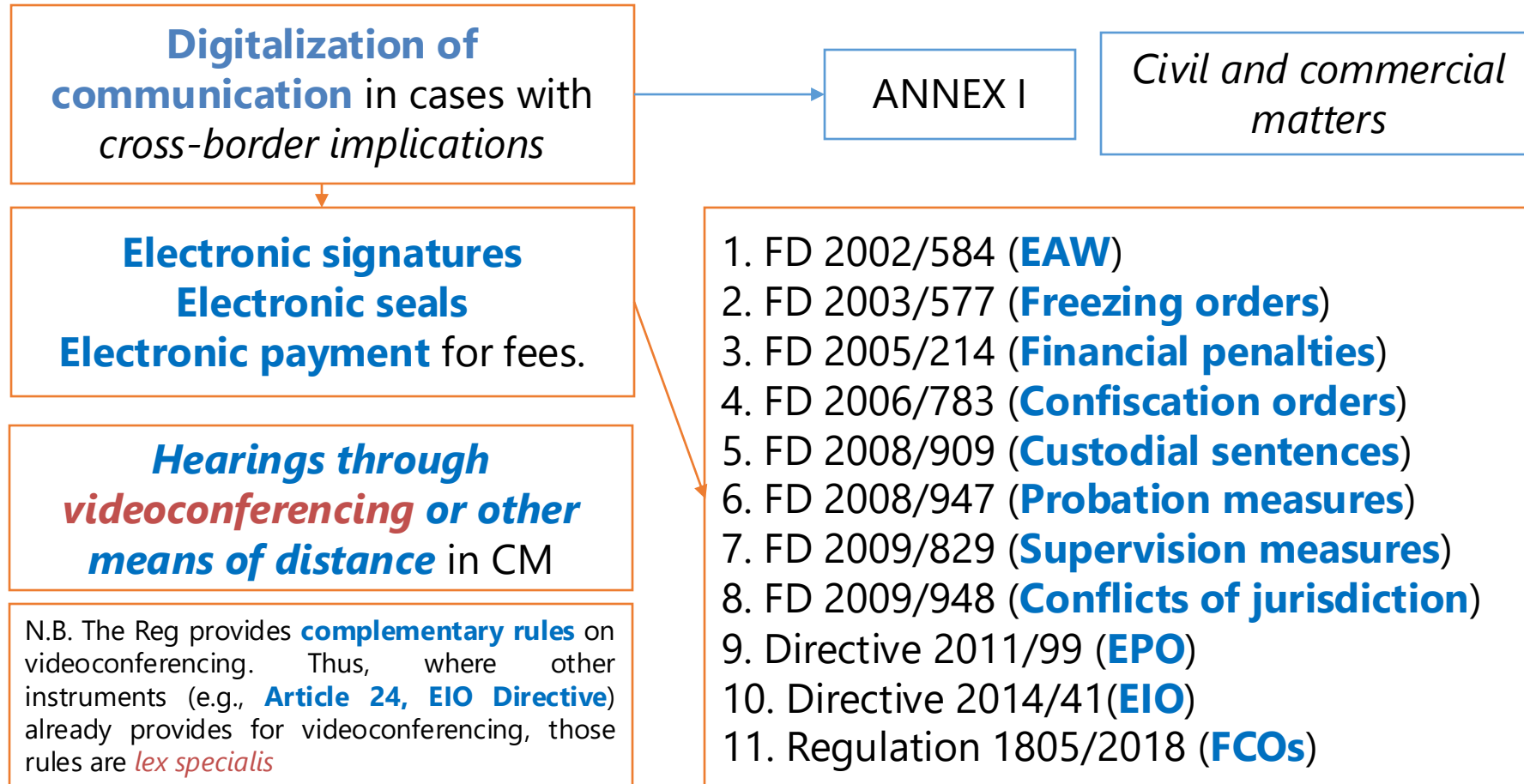
- Silence of the **Charter**
- Silence of **Stokholm directives**
- **2023: European Declaration on Digital Rights and Principles for the Digital Decade** (2023/C 23/01)
- **2020: Digital Agenda**
- **CAAS 2000: Videoconference** (Cross-border)
- **Regulation (EU) 2023/2844** on the *digitalization of judicial cooperation and access to justice in cross-border criminal matters* (**13.12.2023 – eJustice Regulation**)
- 
- **Directive (EU) 2023/2843** *amending certain acts of EU law as regards digitalisation of judicial cooperation*  
(**13.12.2023 – eJustice Directive**)

# The e-Justice Regulation: a double soul?





# The e-Justice Regulation: general aspects (III)



# Questions:

- what is your experience with the EIO?
- how efficient are the current procedures?
- how digitalised?
- are the CJEU decisions in line with FR protection?
- what about a higher level of protection?
- Do you think we need to increase the minimum level of harmonisation at the EU level concerning criminal evidence?
- What parts of the EIO legislation would need to be updated?
- What parts of criminal procedure would need more harmonisation?

*Thank you for your attention!*