

The European Investigation Order Travelling without a 'roadmap'

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Abstract

The European Investigation Order (EIO) seeks to establish a complete system for obtaining evidence in cross-border cases. It represents a further step in the evolution of the mutual recognition agenda and the deepening of criminal cooperation among member states. It has far-reaching implications for individual rights because of its breadth, its application to individuals who are not suspects and the nature of its invasive provisions. Careful justification is required to ensure legitimacy. In analysing this proposal, this paper considers the following aspects:

- the place of the EIO within the mutual recognition programme. It looks at judicial cooperation by way of mutual recognition and the common characteristics shared by such measures. It explores the lessons arising from experience with mutual recognition (specifically the European Arrest Warrant, EAW) and the need for mutual trust; and
- the scope of the EIO – what is it and what does it replace? The paper investigates the EIO's potential scope and application. It asks whether it is really a measure of judicial cooperation and assesses how the EIO departs from existing measures on mutual recognition. It also asks the question, does the EIO go too far? Furthermore, what are the ramifications for human rights? The paper analyses the sufficiency of the safeguards in the EIO. It explores whether the lessons from the EAW have been learnt, e.g. the need for proportionality and the effect of inconsistency in the implementation of human rights standards. It considers whether the Roadmap for Strengthening Procedural Safeguards will assist and takes into account the views of the EU Agency for Fundamental Rights and the European Data Protection Supervisor.

Mutual recognition requires mutual trust, which demands proportionality and fair processes. The EIO overlooks this at its peril. This paper recommends specific protections for the individual, to ensure proportionality and to guarantee the consistent implementation of the EIO in practice, including consistent standards for evidence gathering, data protection law and respect of human rights.

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Debbie Sayers*

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Introduction

Transnational organised crime does not respect theoretical or physical borders. With the reality of the increased mobility of people and trade (and therefore opportunities for crime) across borders, more effective police and judicial cooperation is clearly required. International crime necessitates an international response. Functioning at an international level, however, raises as many legal and political questions as it answers. For the last 20 years, the EU has responded to this issue with an ever-increasing level of cross-border police and judicial cooperation to combat criminal activity. One key development has been the predominance of the mutual recognition mechanism as the go-to method of choice for achieving closer cooperation in criminal matters. The proposed European Investigation Order¹ (EIO) must be seen in this context, as the latest and potentially most far-reaching step, in an already prosecution-dominated agenda.

The EIO will extend the mutual recognition programme to enable nearly all mutual legal assistance to be achieved through a single, mutual recognition instrument. In doing so, it represents not only a further step in the evolution of the mutual recognition agenda, but also a break with the traditional mechanisms of mutual legal assistance. The existing way of obtaining most kinds of evidence from abroad is by using *commission rogatoires* or letters of request. Such processes are found in the treaties governing the present framework on mutual legal assistance: the European Convention on Mutual Assistance in Criminal Matters of 1959 (the '1959 Convention'), the EU Mutual Legal Assistance Convention of 2000 (the 'EU MLA Convention') with its 2001 Protocol, and Arts. 48 to 53 of the Schengen Agreement. The move towards the use of mutual recognition instruments commenced with the Framework Decision (2008/978/JHA) on the European Evidence Warrant (EEW)² and the Framework Decision (2003/577/JHA) on the freezing of assets.³ Currently, taken together, mutual legal assistance

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¹ See Council of the European Union, Note on an Initiative for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters, 9145/10, Brussels, 29 April 2010(b). The initiative came from Belgium, Bulgaria, Estonia, Spain, Luxembourg, Austria, Slovenia and Sweden. Ireland and the UK are participating but Denmark is not.

² Refer to Council of the European Union, Framework Decision 2008/978/JHA of 18 December 2008 on the European Evidence Warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters (OJ L 350/72, 30.12.2008(a)), which was to be implemented in all member states by January 2011.

³ See Council of the European Union, Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (OJ L 196/45, 2.8.2003), which is a preparatory step to transferring evidence.

instruments and treaties provide a wide variety of operational tools – from videoconferencing to surveillance, from gathering witness statements to organising controlled deliveries. The EIO seeks to replicate these existing obligations with two crucial distinctions: first, it removes some of the key protections attached to substantive provisions; and second, it will operate by way of mutual recognition. The breadth, scope and automaticity of its invasive provisions extend far beyond the suspect to individuals who become connected with investigative processes, necessitating an assessment of the impact on individual rights as a critical part of any analysis.

This paper

- considers the place of the EIO on the mutual recognition agenda;
- explores the detail of the EIO, with particular reference to its impact on the rights of the individual; and
- makes recommendations that include improved protections of the individual.

1. The place of the EIO on the mutual recognition agenda

There have been multilateral cooperation arrangements in place among EU countries in relation to criminal matters for at least 40 years. Traditionally, this has entailed requests being addressed from executive to executive through their national ministries. Such requests could be refused, depending on the treaty, for a wide variety of discretionary principles, including territoriality,⁴ speciality,⁵ double criminality,⁶ the political offence exception⁷ and the bar on extraditing nationals.⁸ This kept the executive heavily involved in the process, which was seen as an important protection for citizens. Yet the outcomes were considered slow, cumbersome and often unreliable for prosecution purposes. Change has been wrought from a desire to control crime more effectively, and the pursuit of a sense of security is a priority. This perspective makes it easier to perceive individual safeguards as impediments, as discretionary add-ons, which are permissible in so far as they do not threaten the law-enforcement agenda.⁹

Mutual recognition exemplifies this approach, as it is predominantly prosecutorial and aims at removing protective barriers by introducing speed and a considerable element of automaticity, thereby reducing the grounds for discretion and delay. Decision-making is left mainly to the judiciary of the issuing state (i.e. the state requesting cooperation), whose decisions can be implemented in another state with limited grounds for refusal and without any real consideration of the processes by which decisions were reached.¹⁰ This carries significant ramifications

⁴ The territoriality exception permits the requesting state to retain an opportunity to exercise jurisdiction if, for example, the offence was committed in its own territory.

⁵ The speciality principle acts as a bar on an extradited person being prosecuted for anything other than the offence for which s/he was extradited.

⁶ This is the principle that extradition or mutual assistance will be refused for acts that are not also defined as crimes in the jurisdiction dealing with the request.

⁷ This exception is a general bar on the extradition of alleged offenders who are sought for political activity and is aimed at preventing persecution.

⁸ This bar has its basis in the link between allegiance and protection of the state and its nationals, the right of a state to prosecute and punish its own nationals, and in a distrust of other criminal justice systems.

⁹ See House of Lords Select Committee on European Union, *Procedural Rights in Criminal Proceedings*, 1st Report of Session 2004-05, HL 28, London: The Stationary Office Ltd., 2005, para. 204.

¹⁰ Peers describes mutual recognition this way: “The effect of mutual recognition is that the executing State has in principle lost some of its sovereign power over the full control over the full enforcement of

because mutual recognition not only challenges territoriality and sovereignty, it also threatens fundamental rights, as individuals are directly exposed to alternative criminal justice processes that may differ substantially from their own.¹¹ Mutual recognition is a transplant from the internal market but it has been inserted into the criminal field with scant regard to the differences in contexts or rationale.¹² In the single market, for example, mutual recognition relates to national regulations or controls and not judicial decisions, and its purpose is to facilitate rights, such as freedom of trade and movement.¹³ Furthermore, in the single market, mutual recognition is frequently supported by harmonised legislation or a degree of similarity among national rules. Peers (2004) describes mutual recognition in the criminal sphere as turning the mutual recognition model “upside down”, with individuals becoming the object rather than the subject of free movement rights.¹⁴ Keijzer (2009) summarises the difference between contexts thus: “[T]he basic point of difference is that the common market is interested in the distribution of well-being; the business of criminal law is meting out suffering.”¹⁵

In relation to criminal matters, to date an ad hoc mutual recognition agenda has been propelled by political expediency, attempting to overcome the barriers of national sovereignty and disparity among systems that impede existing cooperation, by using this apparently straightforward mechanism.¹⁶ Put simply, mutual recognition in criminal matters has been a “journey into the unknown”.¹⁷ But it has not been an easy ride, as mutual recognition has sought to overcome the problems of disparity among European criminal justice systems by effectively ignoring them. This has entailed consequences.

The mutual recognition model in the criminal justice field has encountered problems. The instruments – which include the European Arrest Warrant (EAW) and mutual recognition instruments on the freezing of evidence and assets,¹⁸ on confiscation orders,¹⁹ on financial penalties,²⁰ on evidence warrants, custodial penalties²¹ and alternative sentences²² as well as decisions on pre-trial bail²³ – contain common features:

criminal decisions on its territory” (S. Peers, “Mutual Recognition and Criminal Law: Has the Council got it wrong?”, *Common Market Law Review*, Vol. 41, No. 5, 2004, p. 10).

¹¹ K.A. Nicolaidis and G. Shaffer, “Transnational Mutual Recognition Regimes: Governance without Global Government”, *Michigan Review of International Law*, Vol. 68, 2005, pp. 267-322.

¹² V. Mitsellegas, *EU Criminal Law*, Oxford: Hart Publishing, 2009, pp. 117-18.

¹³ The European Court of Justice introduced the principle of mutual recognition in the area of free movement of goods in Case C-120/78, *Cassis de Dijon* [1979] ECR 649. See Peers (2004), op. cit., p. 5.

¹⁴ Peers (2004), *supra*, p. 24.

¹⁵ N. Keijzer, “The Fate of the Dual Incrimination Requirement”, in E. Guild and L. Marin (eds), *Still not Resolved? Constitutional Issues of the European Arrest Warrant*, Nijmegen: Wolf Legal Publishers, 2009, p. 72.

¹⁶ See M. Mackarel and S. Nash, “Extradition and the European Union”, *International and Comparative Law Quarterly*, Vol. 46, 1997, pp. 955-96. For example, the EU MLA Convention was agreed in 2000 (OJ C 197/3, 12.07.2000), but did not come into force until 2005.

¹⁷ Mitsellegas (2009), op. cit., p. 119.

¹⁸ Council of the European Union (2003), Framework Decision 2003/577/JHA, op. cit.

¹⁹ Council of the European Union, Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, OJ L 328/59, 24.11.2006.

²⁰ Council of the European Union, Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition of financial penalties, OJ L 76/16, 22.3.2005.

²¹ Council of the European Union, Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial

- The first is the judicialisation of decision-making. The mutual assistance sought rests upon the judicial, not executive, acknowledgement of a certificate drawn up and completed by the issuing state. There is little scope to go around the certificate.
- There are limited grounds for refusal to execute a mutually recognised decision with all but the EAW, containing only optional grounds for non-recognition.²⁴ For example, nationality is no longer a bar to extradition.²⁵
- Mutual recognition initiatives do not generally include a specific human rights exception to execution.²⁶ The provisions relating to human rights are re-affirmative, in relation to complying with Art. 6 of the Treaty on European Union (TEU).
- In addition, double criminality is abolished for a list of offences (usually 32) that have not generally been subject to harmonisation and which carry a minimum of three years' imprisonment.²⁷ The absence of dual criminality allows offending behaviour not criminalised in one jurisdiction to be subject to coercive action in another.
- Finally, time limits are set for the execution of such orders with the possibility to extend only in exceptional cases.

This model allows for speedier and more automatic methods of cooperation; but ignoring the problems caused by diversity does not make them go away. Instead, clear problems have arisen, as mutual recognition has directly exposed individuals to other European criminal justice systems. This, as Guild and Marin (2009) have noted, has placed the question of state compliance with fundamental rights obligations “under the spotlight”.²⁸ In light of experience

sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ L 327/27, 5.12.2008(b).

²² Council of the European Union, Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ L 337/102, 16.12.2008(d).

²³ Council of the European Union, Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, OJ L 294/20, 11.11.2009(a).

²⁴ Grounds variably include immunity, *ne bis in idem*, judgment in absentia, technical problems with the certificate that may lead to postponement, time barred, and in some cases that the person is below the age of criminal responsibility in the executing state.

²⁵ An exception is a transitional derogation for Austria, in conjunction with dual criminality.

²⁶ There is a specific provision on human rights in the Framework Decision on the mutual recognition of financial penalties, which enables the execution of the penalty to be opposed if the certificate describing the issuing state's judgment “gives rise to an issue that fundamental rights or fundamental legal principles as described by A6 TEU have been infringed” (Council of the European Union (2005), Framework Decision 2005/214/JHA, *op. cit.*). The provision is unique but “if this provision is read literally, it will be impossible to apply in practice: there appears to be no way that the certificate which is simply a standard form with boxes to be ticked...could as such give rise to concerns” – see S. Peers, *Justice and Home Affairs*, Oxford: Oxford University Press, 2006, p. 482.

²⁷ Art. 5 of the Framework Decision on the mutual recognition of financial penalties (Council of the European Union, Framework Decision 2005/214/JHA, *op. cit.*) contains a longer list of 39 offences, which due to the nature of the instrument, do not require an imprisonment threshold. In Art. 14 of the EEW the abolition does not apply if the EEW requires search and seizure.

²⁸ E. Guild and L. Marin, “Still not resolved? Constitutional Challenges to the European Arrest Warrant: A Look at Challenges Ahead after the Lessons Learned from the Past”, in E. Guild and L. Marin (eds),

with the EAW, we have started to ask the question, do we actually perceive other systems to be capable of producing fair outcomes? If we do not, this fear of potential unfairness will continue to create genuine problems for the effective working of all mutual recognition instruments in two ways:

- The defendant may not receive adequate or equivalent protection if exposed to different and varying legal processes.
- Mutual recognition instruments may not be used as expected if the legal actors in criminal justice systems do not trust each other.

Maduro (2007) is correct in summarising it this way: “The problem is that the same variable that pushes for mutual recognition (the difficulty to achieve a political consensus on common rules) also makes it more difficult to enforce it (because of the lack of sufficient mutual trust).”²⁹ According to Vernimmen-Van Tiggelen and Surano (2008), the experience of the last decade has proved that “[mutual] trust is still not spontaneously felt and is by no means always evident in practice”.³⁰ Diversity among systems undermines trust and this has been patently demonstrated by the nature of the EAW’s transposition at the national level.³¹ In addition, it has also been reflected in a spate of Constitutional Court cases.³²

This absence of trust could be attributed to failure to support the mutual recognition agenda with procedural standard-setting to ensure equivalence and increase confidence. Such flanking measures were anticipated as far back as the Tampere Conclusions in 1999, which concluded that some element of “necessary approximation” of procedural standards was required to support mutual recognition. This was confirmed by a Commission Communication and further articulated by a “Programme of measures” back in 2000.³³ The Programme recommended protective measures (“parameters”) to be developed coterminously. These parameters included

Still not Resolved? Constitutional Issues of the European Arrest Warrant, Nijmegen: Wolf Legal Publishers, 2009, p. 7.

²⁹ M.P. Maduro, “So close and yet so far: The paradoxes of mutual recognition”, *Journal of European Public Policy*, Vol. 14, No. 5, 2007, pp. 814-25.

³⁰ G. Vernimmen-Van Tiggelen and L. Surano, *Analysis of the future of mutual recognition in criminal matters in the European Union*, Institute for European Studies, Université Libre de Bruxelles, Brussels, 2008, pp. 15 and 20 (http://ec.europa.eu/justice/doc_centre/criminal/recognition/docs/mutual_recognition_en.pdf).

³¹ European Commission, “Annex”, *Report from the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, COM(2007) 407 final, Brussels, 11 July 2007. Sievers’ comparison of the German and UK EAW implementation processes highlights the significant disquiet over the assumed inferiority of other systems, the continued prevalence of stereotypes about ‘foreign’ systems, the list of 32 offences and the lack of parliamentary scrutiny generally for such measures (J. Sievers, “Too different to trust? First experiences with the European Arrest Warrant”, in E. Guild and F. Geyer (eds), *Security versus Justice?*, Farnham: Ashgate, 2008, pp. 124-26).

³² Refer to the judgment of the Polish Constitutional Tribunal, P 01/05, 27 April 2005; Berg, 18 July 2005 2 BvR 2236/04; Bundesgesetzblatt Jahrgang 2006 Teil I n. 36, 25 Juli 2006; *Att-Gen of the Republic v Konstantinou* [2007] 3 CMLR 42; Decision of the Czech Constitutional Court, 3 May 2006, No. Pl. ÚS 66/04. The EAW also reached the European Court of Justice with the case of *Advocaten voor de Wereld VZW v. Leden van de Ministerraad Advocaten voor de Wereld* (C-303/05) [2007] 3 CMLR 1 .

³³ See European Commission, Communication on the mutual recognition of final decisions in criminal matters, COM(2000) 495, Brussels, 26 July 2000(b); see also European Commission, Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C 12/10 of 15.1.2001, p. 10.

“mechanisms for safeguarding the rights of...suspects” (parameter 3) and “the definition of common minimum standards necessary to facilitate the application of the principle of mutual recognition” (parameter 4).³⁴ In reality, these elements were effectively hived off as political considerations shaped the uneven development of mutual recognition initiatives. The agenda, thus far, has developed without establishing minimum procedural standards of individual protection, save for the belated return to the procedural safeguards agenda with the Swedish Presidency’s Roadmap published in 2009.³⁵ The Stockholm Programme confirmed its commitment to developing such standards.³⁶ Why then, is the EIO being pursued when such basic safeguards are still not in place?

2. The EIO: Its scope and impact

Against this complex background, the EIO represents a further bold departure from the norms of traditional, mutual legal assistance. It also goes further than the mutual recognition initiatives in existence, because of its scope, its capacity to invade the privacy of anyone associated with a criminal investigation, its intrusion into the sphere of real-time police operational matters and the absence of sufficient generic protections (e.g. judicial control and grounds for refusal) and specific safeguards (e.g. data protection). Indeed, one could legitimately ask whether the EIO is a mechanism of judicial cooperation at all or if we are being asked to accept a tool for interstate police cooperation in the guise of mutual recognition?³⁷ Unfortunately, the EIO appears to be a myopic measure lacking in foresight or perspective. In detaching itself from the lessons learnt from the mutual recognition journey to date, and by ignoring the move to strengthen procedural protections, it charts its own course, potentially finding itself if not shipwrecked, at the very least in inhospitable waters. This conclusion is drawn for four reasons, as outlined below.

First, the EIO simultaneously builds on and attempts to integrate two distinct processes: interstate treaties on mutual legal assistance, which provide broad tools for cooperation subject to specific protections; and the alternative mutual recognition process, which to date has relaxed traditional methods of mutual legal assistance in relation to specific parts of the criminal justice process. The use of an alternative legal mechanism for this measure requires justification. Only ten years ago, the European Commission’s Explanatory Report on the EU MLA Convention asserted, “the Council felt that mutual assistance between the Member States already lay on solid foundations, which had largely demonstrated their effectiveness”.³⁸ We must question whether this situation has actually changed so dramatically.

Second, the EIO follows hot on the heels of the European Evidence Warrant, whose implementation date has only just passed and whose efficacy has not been tested. The EEW extended the principle of the European Arrest Warrant to facilitate speedier cooperation in the transfer of limited types of “object[s], documents and data” among member states in criminal

³⁴ European Commission (2001), Programme of measures, *supra*.

³⁵ Council of the European Union, Resolution of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C 295/1, 4.12.2009(b).

³⁶ European Council, Stockholm Programme – An open and secure Europe serving and protecting citizens, OJ C 115/01, 4.5.2010.

³⁷ S. Peers, “The Proposed European Investigation Order”, Statewatch Analysis – Update, November, Statewatch, London, 2010(b) (<http://www.statewatch.org/analyses/no-112-eu-eio-update.pdf>).

³⁸ European Commission, Explanatory Report on the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 379/02, 29.12.2000(a).

proceedings.³⁹ It specifically excludes the interviewing or taking of statements from suspects, witnesses or victims, the interception of communications, the taking of DNA or bodily samples, evidence gathered as a result of ongoing monitoring or surveillance, or evidence that requires analysis to be conducted.⁴⁰ The EEW took eight years to come into being and its difficult history highlights the problems of pursuing prosecution initiatives in this area.⁴¹ The EIO now seeks to replace this and the other mutual recognition measure connected to evidence gathering, the Framework Decision on orders freezing evidence or property.⁴² The Stockholm Programme included a commitment to replace the EEW with the proposal of a “comprehensive” instrument for the transfer of all forms of evidence.⁴³ It referred to the existing system as “fragmented”, complaining that the present arrangements permitted access to only limited categories of evidence with a large number of grounds for refusal.⁴⁴ Yet without time to assess the operation of the EEW, can we be sure another mutual recognition instrument is the answer?

Third, the Stockholm Programme directed the Commission to produce a proposal on evidence gathering in cases with a “cross-border dimension” and to explore the issue of evidential admissibility. The Commission published a Green Paper and commenced a consultation process.⁴⁵ This process, however, was directly curtailed by the EIO initiative by member states.⁴⁶ The member states’ proposal does not consider admissibility issues and its grounding in Art. 82 of the Treaty on the Functioning of the European Union (TFEU) has been questioned, as many features of the mechanism appear to be more appropriately described as operational police cooperation.⁴⁷ Thus, the proposal potentially lacks both a clear legal basis for its wide scope and

³⁹ The EEW is limited to obtaining those “object[s], documents and data” from another member state that are already in existence – Art. 1(1). See J.R. Spencer, “The Problems of Trans-border Evidence and European Initiatives to Resolve Them”, *Cambridge Yearbook of European Legal Studies*, Vol. 9, Oxford: Hart Publishing, 2007, pp. 477, 478.

⁴⁰ Art. 4(2).

⁴¹ C. Murphy, “The European Evidence Warrant: Mutual Recognition and Mutual (Dis)Trust?”, in C. Eckes and T. Konstantinides (eds), *Crime within the Area of Freedom, Security and Justice: A European Public Order*, Cambridge: Cambridge University Press, 2011.

⁴² See Council of the European Union (2003), Framework Decision 2003/577/JHA, *op. cit.*, which is limited to measures preserving property prior to transfer.

⁴³ See European Council (2010), *op. cit.*; see also the European Commission, Communication on delivering an Area of Freedom, Security and Justice for Europe’s citizens: Action plan implementing the Stockholm Programme, COM(2010) 171, Brussels, 2010(a), para. 3.1.1.

⁴⁴ European Commission, “Making it easier to obtain evidence in criminal matters from one Member State to another and ensuring its admissibility”, Memo/09/497, Brussels, 11 November 2009(a).

⁴⁵ European Commission, Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, COM(2009) 624, Brussels, 11 November 2009(b).

⁴⁶ Council of the European Union (2010b), *op. cit.*

⁴⁷ Art. 82(1)(a) allows the Council to “lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions”. It has been suggested that there may be a need to extend the legal basis selected for this initiative to Art. 82(1)(d) to facilitate cooperation between judicial or equivalent authorities of the member states in relation to proceedings in criminal matters and the enforcement of decisions. See the follow-up document of the meetings of the Working Party on 7-8 February 2011, 8 March 2011 and 1 April 2011 in Council of the European Union, Note from the Presidency delegations, 8474/11, Brussels, 19 April 2011(a). See also the criticism by S. Peers (2010b), *op. cit.* For example, Arts. 87(3) and 89 deal with operational police cooperation and are subject to a special legislative procedure, requiring unanimity and only consultation with Parliament. They are also subject to enhanced cooperation.

an assessment of its impact. An Opinion by the European Agency of Fundamental Rights (FRA) has also criticised the EIO for lacking any evidential base.⁴⁸

Finally, this is a prosecution mechanism. It provides no competence for the defence to apply for evidence nor does it seek to situate itself within the wider context of mutual recognition initiatives or the plans for increased rights protection acknowledged by the Stockholm Programme and the Roadmap. A key problem is that much of what can be done under the EIO, particularly in terms of covert police cooperation, could be done without an individual knowing about it and with very little in the way of judicial oversight or control. Many specific protections in relation to individual investigative measures that were previously contained in instruments on mutual legal assistance are missing. The EIO also raises issues concerning state sovereignty because of its very limited territoriality exception, limited double criminality and the possibility of police officers from other member states playing more than a passive role in other criminal justice systems.

Thus, it is clear that the proposal requires critical examination. This should include wide debate and democratic input about the nature of the mutual recognition agenda. The Lisbon Treaty specifically provides new methods of working that should improve the potential for more effective legislation, which may enable a more consistent base for cooperation and for democratic input and control. This may in turn increase the opportunity for legislation that will assist in protecting rights and building mutual trust. Yet that can only be achieved with the willingness of the member states, and it may not be easy while intergovernmentalism remains a key feature of this sensitive field, as greater integration has been accomplished only by introducing a series of exceptions and ‘opt outs’ to ensure continued control over these policy areas.⁴⁹ The reality is that progress continues to depend on member state willingness to adopt the necessary law.

Below we turn to deal with the specifics of the EIO based on the current draft,⁵⁰ under three general and overlapping themes.

2.1 The scope of the proposal

The scope of the EIO is potentially enormous. Art. 3 confirms that it applies to “any investigative measure”. This excludes very little save explicitly for the setting-up and gathering of evidence within a joint investigation team.⁵¹ The EIO can apply to the taking of statements from suspects or witnesses, the interception of communications, the monitoring of financial transactions, and analyses of documents, DNA samples and fingerprints. Some measures could constitute operational police cooperation. Initially, the interception of communications was also excluded but this has been dropped from the new draft, making covert surveillance an increasingly likely purpose of the order. It also excludes cross-border observations as referred to

⁴⁸ European Union Fundamental Rights Agency (FRA), Opinion on the draft Directive regarding the European Investigation Order, FRA, Vienna, 17 February 2011, p. 14 (<http://fra.europa.eu/fraWebsite/attachments/FRA-Opinion-EIO-Directive-5022011.pdf>).

⁴⁹ See D. Kietz and R. Parkes, *Reprogramming the EU’s Home Affairs Policy*, German Institute for International and Security Affairs (SWP), Berlin, 2008.

⁵⁰ See the follow-up document of the meetings of the Working Party on 7-8 February 2011, 8 March 2011 and 1 April 2011 (Council of the European Union (2011a), Note from the Presidency delegations, 8474/11, op. cit.) and Council of the European Union, Note on the text submitted for partial general approach, 10749/2/11 Rev 2, Brussels, 8 June 2011(b).

⁵¹ Art. 3 and recital 8 of the current draft suggest that measures like this “require specific rules which are better dealt with separately”.

in Art. 40 of the Schengen Agreement.⁵² Under Art. 4, the EIO will apply (as have previous instruments on mutual legal assistance) to all types of criminal proceedings and administrative proceedings that may give rise to criminal proceedings. While many of the measures permitted by the EIO derive from previous instruments, they frequently go further, extending their scope by removing protections. For example, restrictions relating to controlled deliveries are set out in Art. 12 of the EU MLA Convention but vanish from Art. 26 of the EIO, although the creation of additional rules is recommended in recital 14.⁵³ Furthermore, such provisions are now situated within the context of mutual recognition, depriving them instantly of additional controls and oversight.

Indeed, there is very little by way of judicial control, because there is a wide definition of who will be able to issue an EIO and who is able to approve its execution. Art. 2 confirms that it may be issued by a “competent authority” rather than a judicial authority. The current draft now includes a judicial validation obligation if issued by a non-judicial authority under Art. 5(a)(3); although this sufficed for the EEW, it may need further clarification in view of the breadth and intrusiveness of this proposal. For example, there is a need to secure the independence of this process, as the issuing body should not be the same body requiring evidence that issues the request. Equally, what of the judicial nature of the executing authority? At present, the executing authority is only defined by its competence to execute the order. There is a good argument for judicial intervention on either side to ensure compliance with human rights and the fundamental principles of national law and for proper consideration of the grounds for refusal given the scope of the instrument.

In addition, although Art. 3 does not require the investigative measure ordered to be available under the issuing state, a new proportionality clause in Art. 5(a) confirms that it can only be issued when it “could have been ordered under the same condition in a similar national case”. The current text also requires the issuing state to ensure that the issue of an EIO is “necessary and proportionate”.⁵⁴ Nevertheless, there is a huge difference between what theoretically ‘could’ be issued and what, in practice, would be issued by a court or judge. This clause may become a self-validating stamp. There is also nothing to limit EIO requests for cross-border cases. In a globalised society, an EIO could be used to ‘forum’ shop for evidence available at home and abroad that may be more difficult to obtain domestically (e.g. through the monitoring of bank accounts or covert surveillance).

These concerns about scope are heightened in view of the recently proposed and very limited territoriality exception. In previous instruments on mutual recognition, such as the EAW, the territoriality exception gave the requested state the opportunity to exercise jurisdiction through the principle of territoriality if, for example, the offence was committed in its own territory.⁵⁵

⁵² See recital 9.

⁵³ The EU MLA Convention of 2000 permits this for “criminal investigations into extraditable offences” but the draft EIO imposes no such constraint. The decision was to be taken by “the competent authorities of the requested Member State”, whereas with the EIO this decision rests with the issuing member state.

⁵⁴ Council of the European Union (2011b), Note on the text submitted for partial general approach, *op. cit.*

⁵⁵ Art. 4(7) puts it thus: “where the European arrest warrant relates to offences which: (a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such or (b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory”. See also Art. 13(1)(f) of the EEW.

Although a proposed Art. 10(1)(f) now introduces a discretionary ground for refusal on the basis of territoriality, it does so in strictly limited situations, i.e. refusal is permitted

where the EIO relates to a criminal offence which is alleged to have been committed exclusively outside the territory of the issuing State and wholly or partially on the territory of the executing State, the EIO seeks the use of a coercive measure and the conduct in connection with which the EIO is issued is not an offence in the executing State.

This leaves the executing state with no power to refuse an EIO in relation to any offences that are also recognised as offences within its own law. This, together with its muted double criminality provisions, challenge a state's power to control legal intrusions from other states. Sovereignty challenges also arise from the provisions of the EIO that explicitly permit foreign police officers to have a role in assisting the execution of the EIO (which can include exercising law enforcement powers if this is allowed by the law of the executing state).⁵⁶ This includes permitting officers from the issuing state to apply for additional EIOs if they are present while the matter is investigated.⁵⁷ There is no stated requirement for judicial validation in this context. This type of work could be covert, and the legal and democratic constraints on national police may be limited enough. The constraints on non-national police may be non-existent.⁵⁸

2.2 Limited grounds to refuse to execute the EIO

The European Council has recently outlined a partial general approach to the EIO.⁵⁹ The text is described as a “compromise package” and specifically addresses the grounds for non-recognition or non-execution. The grounds for refusal in the current draft EIO are still limited.⁶⁰ Art. 10(1) sets out the general, discretionary grounds: the existence of an immunity or privilege;⁶¹ potential harm to national security interests; that the measure would not be authorised in similar national proceedings (although this does not apply to criminal proceedings outlined in Art. 4(a) of the EIO); the *ne bis in idem* principle, which has been further restricted; and a limited territoriality exception.⁶² This means that generally, in criminal proceedings, although an EIO cannot be issued if the measure is not available in the issuing state, there is nothing to prevent it from being *executed* on the grounds that a similar measure would not be authorised in the executing state. Consequently, police forces may have to execute measures they would not execute in domestic cases. The *ne bis in idem* exception has also been undermined by a condition of “compulsory consultation”, which applies “unless the issuing

⁵⁶ Art. 8(3)(a).

⁵⁷ Art. 7(2).

⁵⁸ Arts. 16 and 17 cover criminal and civil liability regarding officials, including those from the issuing state who “shall be regarded as officials of the executing State with respect [to] offences committed against them or by them”. But there may be a need for more specific provisions to prevent immunity behind the scenes and to allow accountability in light of the absence of judicial accountability.

⁵⁹ See Council of the European Union (2011b), Note on the text submitted for partial general approach, op. cit. This develops the Proposals of the Presidency on Arts. 9 and 10 (Council of the European Union, Note on Proposals from Presidency, 9500/11, Brussels, 29 April 2011(c)).

⁶⁰ Ibid.

⁶¹ The Note on the text submitted for partial general approach (Council of the European Union, 2011b, op. cit.) adds “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”.

⁶² See Art. 10. The FRA has commented that the introduction of double jeopardy as a sole specific human rights exception could lead to a hierarchy of rights.

authority provides an assurance that the evidence transferred as a result of an execution of an EIO shall not be used to prosecute a person whose case has been finally disposed of in another Member State for the same facts".⁶³ The limitations in the new Art. 10(1)(f) on territoriality have already been discussed.

Art. 10 becomes even more complicated at this point, however. A layered approach seeks to distinguish between coercive and non-coercive measures. This distinction is significant as it impacts on whether double criminality is a permissible ground for refusal to execute an EIO. Yet the term 'coercive measure' is not defined. At present, Art. 10(1)(a) lists those measures for which the grounds for refusal lie solely in Art. 10(1) (the hearing of a witness, victim or suspect) and it defines non-coercive investigative measures, including evidence already in existence or on police databases. For these measures, there is no double criminality protection. Even in relation to search and seizures (which must surely be coercive), under Art. 10(1)(a) an EIO cannot be refused on double criminality grounds if the offence appears on the traditional list of 32 offences in the Annex and is punishable in the issuing state by a custodial sentence or a detention order for a maximum period of at least three years. The grounds for refusal of coercive measures are set out in Art. 10(1)(b) and they include double criminality (save for those offences on the list in the Annex) or the fact that the use of the measure is restricted under the law of the executing state to a list or a category of offences punishable by a certain threshold, which does not include the offence covered by the EIO. Thus, in practice an EIO is unlikely to attract double criminality or territoriality protections, and in criminal proceedings there will be limited scope to refuse to execute a measure that would not be authorised in a similar national case.

The clear intention is to restrict the executing state's capacity to refuse the EIO even if the measure is not one that would normally be undertaken in a national case. But a differential approach, which distinguishes between the undefined substance of the measures and the type of protection they offer, does nothing for legal certainty and is likely to lead to confusion and inconsistency in transposition. The potential for inconsistency increases if we note that in spite of the EIO's attempts to restrain and tighten the general grounds for refusal, there are additional, specific grounds for refusal dotted around the text of the draft EIO, which create a significant risk of inconsistency on transposition. For example, a variety of clauses permit refusal if a request is contrary to the fundamental principles of national law.⁶⁴ The same could be said with regard to the discretionary consent provisions in Arts. 19 and 20 concerning prisoner transfer. Similarly, under Art. 27, an EIO issued to gather evidence in real time may be refused if its execution would not be authorised in a similar national case.⁶⁵ Additionally, Art. 9 allows the executing state to vary the method if the investigating measure is not accepted under national law. This could give rise to inconsistency. There could for example be disagreement, domestically, about which principles might be considered 'fundamental'. There is a need for greater clarity, coherence and consistency with previous instruments in all these refusal provisions.

It should also be noted that, in addition to refusing to execute the proposal, the executing state must in some circumstances substitute a different investigative measure under Art. 9 if either the

⁶³ Refer to Council of the European Union (2011b), Note on the text submitted for partial general approach, *op. cit.* This is supported by recital 12(a), which demonstrates that the key concern is not to strengthen rights but to "ensure that application of this ground for non recognition or non execution is not misused".

⁶⁴ See Art. 8(2) or Art. 23.

⁶⁵ Art. 27.

investigative measure sought does not exist in national law or it would not be available under national law. It may also be allowed to use a substitute measure if the ends can be achieved by a less intrusive measure. In both situations, it must inform the issuing state first, which may decide to withdraw the EIO altogether.

2.3 Inadequate attention to human rights

The EIO does not attempt to set the EIO within the context of an obligation to protect the rights of EU citizens or to connect the measure to the existing Roadmap. There is mention of human rights in recital 17 and Art. 1(3), which mirror other EU mutual recognition agreements. Still, like the EAW, the EIO does not make possible human rights violations a specific ground for refusal to execute. The experience with the EAW demonstrates that this has led to variations in transposition. The FRA suggests that any clause should function within well-established parameters and that it could act as a ‘safety valve’.⁶⁶ Even so, this would not make it reasonable to expect a fully-fledged investigation in every case. However such a protection is phrased, it is important to recall that both the executing and issuing states are equally implicated in any actions that violate rights.

The EIO also lacks specifically articulated protections in relation to the right to fair trial (e.g. access to a lawyer, the admissibility of evidence, the presumption of innocence and equality of arms). This is demonstrated by the video and teleconferencing provisions under Arts. 21 and 22.⁶⁷ These provisions reflect similar clauses in Art. 11 of the EU MLA Convention and Art. 9 of the Second Additional Protocol to the 1959 Convention, save for a couple of notable alterations. First, the provision that “the hearing shall be conducted directly by, or under the direction of, the judicial authority of the requesting Member State in accordance with its own laws” has since been altered to say “issuing authority”. Second, the reference in Art. 10(9) of the EU MLA Convention to the measure being subject to agreement among the member states concerned and conducted in accordance with their national laws and relevant international instruments, including the European Convention on Human Rights (ECHR), is omitted. Furthermore, the EU MLA Convention specifies that “[h]earings shall only be carried out with the consent of the accused person. Such rules as may prove to be necessary, with a view to the protection of the rights of accused persons, shall be adopted by the Council in a legally binding instrument.” The refusal of consent of the accused person is now only an optional ground for refusal. This is significant as it has long been recognised that the “position of an accused person differs substantially from that of a witness or expert”.⁶⁸ The EIO fails to recognise this distinction. Finally, Art. 11 of the EU MLA Convention sets out specific grounds for telephone conferencing, which requires the consent of the expert or witness.⁶⁹ The EIO in Art. 22 makes no such requirement.

Arts. 19 and 20 also demonstrate a lack of understanding of the rights of the individual. They allow a person in custody to be transferred (to the issuing or executing state) for evidence-gathering purposes. The EU MLA and the 1959 Conventions make provision for this but they

⁶⁶ FRA (2011), Opinion on the draft Directive regarding the European Investigation Order, op. cit.

⁶⁷ Unless the use of video or teleconferencing is not permitted under the “fundamental principles of national law” or because of an absence of technical means.

⁶⁸ See European Commission (2000a), Explanatory Report, op. cit.

⁶⁹ See Art. 11(2) of the EU MLA Convention, which states that “a hearing may be conducted by telephone conference only if the witness or expert agrees that the hearing take place by that method”.

set out additional protections.⁷⁰ Art. 20 of the EIO goes beyond previous requirements to say it can be requested for “an investigative measure”. The grounds for refusal are those set out in Art. 10(1), although this is clearly a coercive measure that may be implemented without consent and could cause hardship.⁷¹ It is important that, without judicial oversight, this does not become ‘backdoor extradition’. Specific proposals are made in relation to protecting the rights of the detained person in the recommendations section below.

Currently, the EIO also fails to adequately set out privacy rights and data protections.⁷² Recital 17(a) now states that the “personal data processed, when implementing this Directive, should be protected in accordance with the provisions on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters and with relevant international instruments in this field”. The European Data Protection Supervisor (EDPS) has welcomed this reference but has acknowledged that the Framework Decision on Data Protection is “not fully satisfactory” in terms of protection.⁷³ The EDPS confirms that the EIO has “once again raise[d] the fundamental issue of the incomplete and inconsistent application of data protection principles in the field of judicial cooperation in criminal matters”.⁷⁴ The EDPS has called for a specific provision because “[s]etting a (high) common standard for data protection in this sensitive area will promote mutual confidence and trust between Member States and reinforce the judicial cooperation based on mutual recognition, improving data quality in the exchange of information”.⁷⁵ It recommends specific safeguards that are also discussed in the recommendations section below.

Finally, the provisions in relation to accessing information from bank accounts do not refer to data protections or the need to respect privacy rights.⁷⁶ The EU MLA Protocol of 2001 dealt with banking information, but with detailed, specific assistance conditions.⁷⁷

⁷⁰ Art. 9 of the EU MLA Convention says that “the agreement shall cover the arrangements for the temporary transfer of the person and the date by which he or she must be returned to the territory”. The transfer was subject to agreement between the states and limited to situations where an investigation was actually taking place and the presence of the person in custody was required in relation to it. Under Art. 11 of the 1959 Convention, transfer was limited to request for the person’s “personal appearance as a witness or for purposes of confrontation”. Again, the person had to be sent back within the period stipulated by the requested party. Under Art. 27(2) of the EU MLA Convention, states could also make the consent of the individual a legal requirement.

⁷¹ Art. 20(2) allows execution to be refused, on a discretionary basis, if the person in custody does not consent or transfer will prolong his or her detention.

⁷² The right to data protection is set out in Art. 16 TFEU and Art. 8 of the EU Charter of Fundamental Rights, and data processing must be in conformity with these rules.

⁷³ Council of the European Union (2008a), Framework Decision 2008/978/JHA, *op. cit.*

⁷⁴ See the Opinion of the European Data Protection Supervisor, para. 28 in Council of the European Union, Note from Peter Hustinx, European Data Protection Supervisor, Opinion on the European Investigation Order, 15122/10, Brussels, 18 October 2010(c).

⁷⁵ *Ibid.*, para. 28, p. 8.

⁷⁶ Arts. 23-25.

⁷⁷ See Arts. 1(5), 2(4) and 3(3) of Council of the European Union, Act of 16 October 2001 establishing, in accordance with Article 34 of the Treaty on European Union, the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 326/2, 21.11.2001.

3. Recommendations

Before making specific recommendations in relation to the EIO, three broad, contextual issues must be addressed.

First, with the EIO, mutual recognition moves the untested application of the principle from the exchange of existing evidence to active evidence gathering. This is a step into uncharted waters without time to acquire knowledge from the experience of the EEW. The EIO is a departure from the traditional paradigm of recognition of judicial decisions to requests for active participation in criminal investigations with little in the way of refusal grounds. It is also a departure from the traditional method of mutual legal assistance without any evidence-based assessment of the need for such a proposal. The demands of legitimacy require any proposal that is likely to impact on human rights in the way described above to be supported by very clear evidence of its necessity and proportionality. This does not mean that mutual recognition cannot ever replace more traditional, treaty-based methods of mutual legal assistance, but that the proposal is premature in a context in which it is unsupported by evidence of necessity or assisted by the experience of similar, less intrusive mechanisms or flanked by approximated procedural protections. It has already been demonstrated that the confidence necessary for the effective implementation of the principle of mutual recognition must be earned and cannot be presumed. It must surely be right then to see the EIO, at present, as an “overhasty extension of the principle of mutual recognition to the obtaining of evidence”.⁷⁸ To change the status quo without evidence to support the need for change may actually be counterproductive to further integration in this area.

Second, there has been an incomplete assessment of the impact on human rights. The Directive on Interpretation and Translation (2010/64/EU) confirmed the need to plug some of the gaps in protection, which the mutual recognition agenda has highlighted.⁷⁹ These gaps persist despite participation in the ECHR. So, while there can be no argument that combating serious cross-border crime is a legitimate priority, this cannot continue to be done at the expense of fundamental rights. Mutual trust requires “not only trust in the adequacy of other member states’ rules, but, also trust that those rules are correctly *applied*” (emphasis added).⁸⁰ The EIO proposal seems to overlook this and it does so at its peril. The disregard for human rights is evidenced by the absence of any thorough ‘impact assessment’ relating to fundamental rights. The only assessment undertaken so far has failed to present a genuine ‘rights audit’. The Council’s Detailed Statement on the EIO references the rights to liberty and security and the right to “good administration”.⁸¹ The idea of security is nonetheless seen solely from the perspective of the state rather than individual security. For example, the Detailed Statement argues that “the lack of action to improve the current situation will jeopardize the right of the citizen to good administration and to security and freedom, since the disorganization of the

⁷⁸ See German Bundestag, Recommendation for a decision and report of the Committee on Legal Affairs (6th Committee) on the Initiative for a Directive of the European Parliament and the Council regarding a European Investigation Order in criminal matters, Printed Paper 17/3234, 6 October 2010, p. 5 (http://www.ipex.eu/ipex/webdav/site/myjahiasite/groups/CentralSupport/public/COUNCIL/Protocol2/PE-CONS%203_10/German%20Bundestag%20concerning%20Council_Document_9145_10_EN.pdf).

⁷⁹ Council of the European Union, Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280/1, 26.10.2010(a).

⁸⁰ Ibid., recital 4.

⁸¹ See the Detailed Statement on the EIO in Council of the European Union, Note – Explanatory Memorandum, 9288/10, Brussels, 3 June 2010(d).

competent authorities will affect the efficiency of the fight against crime and, as a consequence, the right of the citizens to live in a society with a high standard of safety".⁸² This approach directly contradicts the interpretation given by the Commission of such assessments: "It would be wrong to understand [the right to liberty and security] as an abstract guarantee 'to be protected' by the state and as an alleged right to 'public security'."⁸³ The EIO continues to lack a thorough assessment in terms of its impact on fundamental rights and this must be addressed urgently.

Finally, it must also be noted that a genuine area of mutual trust for such mechanisms of cooperation requires understanding of the varied context in which such instruments will operate. This includes an understanding that mutual legal-assistance protections exist for a purpose and this is largely to protect sovereignty and regulate the effects of diversity among systems. Cooperation in the EU is hampered not only by sovereignty but also by differences – in laws, in languages and in organisational traditions governing law enforcement agencies and criminal processes in each jurisdiction. This point is critical and yet frequently overlooked. The reality is that criminal justice systems are not all the same. Common laws and civil law systems vary profoundly but this does not mean they cannot be equivalent in terms of fairness. Fairness can be established through the development of basic procedural protections that are effective. Thus, the EIO must not be allowed to progress in isolation, but rather its development should be stopped until it is tied explicitly to the Roadmap for Strengthening Procedural Safeguards, which should be further extended to cover the gathering and admissibility of evidence.⁸⁴ Currently, the EIO does too much too soon. It is complex, intrusive and broad, permitting inconsistency and fragmentation while simultaneously ignoring the reality it seeks to confront, namely the profound diversity of the criminal justice systems. The EIO demonstrates that a fundamental contradiction lies at the heart of policy. For while the Union has acknowledged the need to do something to shore up the protection of individual rights in order to secure mutual trust, it has simultaneously pursued a mutual recognition agenda based on the fallacy that such trust already exists.

The ways in which the EIO could be improved if it is taken forward are discussed below.

Scope of the EIO

- The term "investigative measure" should be defined by reference to what it includes as well as what it excludes.
- We need to define the line between police and judicial cooperation.
- Police cooperation should be subject to judicial oversight and serious thought should be given to prohibiting police operational measures.
- There should be a penalty threshold that needs to be crossed before an EIO can be issued in order to reduce trivial requests.

⁸² Ibid, p. 27.

⁸³ European Commission, *Operational Guidance on Taking into Account Fundamental Rights in Impact Assessments*, Commission Staff Working Paper, SEC(2011) 567 final, Brussels, 6 May 2011, p. 8.

⁸⁴ In addition to the Directive on Interpretation and Translation, a European Commission *Proposal for a Directive on the right to information in criminal proceedings* is currently being debated (COM(2010) 392, Brussels, 20 July 2010(b)). In 2011, the Commission intends to propose another two directives: i) on the right to access to a lawyer (in summer 2011) and ii) on the right of arrested persons to communicate with their families and consular authorities (at the end of 2011). Along with these proposed directives, and in line with the European Council's proposals in the Stockholm Programme, the Commission will look into the issue of detention and in particular pre-trial detention in the European Union.

- These measures should be specifically limited to investigations with a cross-border element, with this term being defined.

Judicial control

- An element of judicial validation needs to be in place on both sides – issuing and executing.
- The proportionality test should be linked to what would be issued in the issuing state and not what could be issued.

Human rights

- The right to a fair trial can include pre-trial measures, so Art. 6 protections should be factored into the EIO. These include being notified of criminal charges⁸⁵ and having access to an interpreter free of charge in certain circumstances,⁸⁶ and explicit reference should be made to the Directive on Interpretation and Translation.⁸⁷ The FRA has commented on the relevance and importance of such protections to the right to a fair trial and has also noted the need to ensure access to a lawyer, and if necessary, legal aid during an investigation.⁸⁸
- The progress of the EIO should be tied to the development of the Roadmap.
- There should be specific protections in relation video and telephone conferencing, including access to a lawyer, the recording of proceedings and the right to challenge the evidence and equivalent protections for the presumption of innocence.
- A ‘substantial risk’ that the execution of an EIO would breach the human rights of any person involved should justify the mandatory refusal to execute the order. Executing authorities should be obliged to consider this judicially before executing the EIO.
- The Commission should resume its work in relation to the admissibility of evidence and develop a directive detailing both the fair minimum standards in the gathering and handling of evidence and its admissibility. The standards must reflect the diversity and practices of criminal justice systems.⁸⁹
- If witnesses or suspects are interviewed they should be tape-recorded, have access to legal advice and there should be provisions on the retention of this evidence.
- Evidence gathered should be used for a defined purpose and should be subject to clear data protection and confidentiality protections.
- In surveillance and covert operations, there should be a clear articulation of the privacy rights confirmed by Art. 8 of the ECHR and the permissible qualification of such rights.

⁸⁵ See *Pélissier and Sassi v. France* [1999] 30 EHRR 715.

⁸⁶ See *Luedicke, Belkacem and Koc v. Germany* [1978] 2 EHRR 149.

⁸⁷ More specifically, reference should be made to Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings.

⁸⁸ See *Murray v. the United Kingdom* [1996] 22 EHRR 29; see also *Salduz v. Turkey* [2008] 49 EHRR 421.

⁸⁹ European Commission (2009b), Green Paper, op. cit., p. 5. The Commission has noted the “risk that the existing rules on obtaining evidence in criminal matters will only function effectively between Member States with similar national standards for gathering evidence”.

- The rights of those not suspected of involvement in a criminal offence should be explicitly protected.
- The issue and execution of the EIO should contain confirmation that all actions in pursuit of the EIO are compliant with the EU Charter of Fundamental Rights and the ECHR.

Data protection

- A comprehensive data protection directive is required, covering all aspects of criminal and police investigations.
- The recommendations of the EDPS should be adopted. These include guaranteeing the accuracy of evidence (e.g. in relation to translations), the security of data and investigative security with electronic systems. The EDPS also recommends the creation of consistent professional standards and internal procedures to ensure the protection of individuals with regard to the processing of personal data and accountability systems. These recommendations require the application of adequate resources.
- The FRA confirms that data protection with unlimited discretion leads to legal uncertainty. Thus, it is essential that the term “investigative measure” be defined, because the purpose for using the data needs to be clearly stipulated to ensure it is being used appropriately.
- The Stockholm Programme referred to the protection of personal data as a “political priority”.⁹⁰ There is a need for specific work to set standards to be implemented coterminously.

Privacy

- A clear commitment to protecting privacy rights should be articulated based on the requirements of the ECHR’s case law.⁹¹
- Specific safeguards are required to protect professional or investigative secrecy.⁹²

Grounds for refusal to execute

- The grounds should be more clearly and consistently set out. For example, Art. 10(1) should apply to all proceedings.
- There should be a mandatory prohibition on execution if an EIO could not be authorised in a similar domestic case.
- There should be a discretionary prohibition on execution if an EIO is not likely to be authorised in a similar domestic case.
- The distinction between measures that do not exist in national law and those that could not be authorised needs to be made clear.
- If there is to be a division between coercive and non-coercive measures, the distinction should be plainly defined from the individual’s perspective.

⁹⁰ See European Council (2010), op. cit., para. 1.

⁹¹ Refer to *Funke v. France* [1993] 16 EHRR 297.

⁹² For example, see *Mancevschi v. Moldova*, No. 33066/04, 7 October 2008.

- In relation to all EIOs in all proceedings, there should be discretion to refuse if the offence does not appear on the double criminality list.⁹³
- There should be an explicit, discretionary ground to refuse if there is evidence of a trivial or disproportionate request.
- The grounds to refuse should include a mandatory human rights exception.
- The grounds to refuse should include a discretionary territoriality exception.⁹⁴
- There grounds for refusal should be articulated in one article.⁹⁵
- There should be judicial involvement in refusal decisions by the executing state.

Costs and resources

- At present, the executing state will bear the cost of execution, save for explicit provisions that enable costs to be shared. This may invite overuse and abuse, as states may be less careful about applying for measures if there are no cost implications.⁹⁶ A proportionality test applied by the executing state may prevent ‘fishing expeditions’.
- It should be noted that there will be resource issues related to training law enforcement officers and ensuring access to justice.
- Art. 11 demands the “same celerity and priority” for the EIO as for a similar national case subject to a deadline of 30 days (with extensions to 90 days possible). Yet what if national cases are never dealt with within this 30-day period because of a lack of resources or an absence of technical capabilities? The EIO will mean that foreign investigative measures may be given precedence and attributed resources over national measures. Officers may be compelled to pursue a measure that they would not consider appropriate or relevant in a domestic matter all at their own cost. This may also lead to an unfair two-tier system for citizens within the same jurisdiction. This will undoubtedly affect attitudes towards the EIO itself and practice on the ground.
- A key concern with the EAW is the number of warrants issued for low-level offending. This lesson has not been learnt, as apart from a proposed proportionality test in the issuing state, there is nothing to stop speculative requests being issued. This self-verification procedure is not even subject to a penalty threshold, nor is it replicated in the

⁹³ Consideration should be given to harmonising the definitions of substantive offences.

⁹⁴ Note that the executing authority may postpone the execution of the EIO until such time as the executing state thinks it is reasonable on the grounds that it would prejudice an ongoing criminal investigation or prosecution, or if the evidence required (such as objects, documents or data) is already being used in other criminal proceedings. Could this be used as a temporary, *de facto* territorial exception?

⁹⁵ Several articles contain limited refusal grounds because they have been replicated from previous agreements, e.g. there is a custody threshold in Art. 23, there are consent provisions in Arts. 19 and 20 and frequent references to the fundamental principles of national law as a ground for non-execution.

⁹⁶ The Council of the European Union (2011(b), Note on the text submitted for partial general approach, op. cit.) confirms that “[d]isproportionate costs or lack of resources in the executing State should not be a ground for refusal for the executing authority; instead other possible alternative solutions could be applied (direct communication between the competent authorities, extension of deadlines, sharing of costs, etc.)”. In exceptional circumstances, there should be a possibility to make the execution of the investigative measure subject to the condition that the costs will be borne by (or shared with) the issuing state. In this case, the issuing authority should have the possibility to withdraw the EIO.

executing state.⁹⁷ Penalty thresholds should be set detailing the types of offences to which the EIO relates and a proportionality test should be inserted for the executing state to apply.

- Some member states are wealthier and better resourced. There are also stark differences in criminal justice systems that permit different types of investigative measures. There must be an absolute bar on countries issuing EIOs for investigative measures that could be conducted in their own country.

Remedies

- Under Art. 13 of the EIO, remedies are available in accordance with national law, which will lead to different levels of protection. The FRA has recorded the need for clear legal remedies and time limits.
- The individual is only able to pursue a challenge to the substance of the EIO in the issuing state. This should be changed and any challenge should postpone the execution of the EIO.⁹⁸
- In many cases, the individual will never know s/he is being investigated. There should be a clearly articulated right to know about EIO measures and information should be withheld only on the grounds of clear and justifiable prejudice to the investigation. Any limitation should be documented, temporal and retrospectively reviewable.
- Legal assistance, with legal aid where necessary in the interests of justice, should be available for challenges.

Transfer of persons in custody

- The term “custody” should be defined. Prisoners in provisional detention generally have greater rights. There is a need to guarantee consistency of treatment from one country to another.
- An absence of consent would not necessarily block a transfer, so explicit protections should be created and factored into refusal grounds, e.g. owing to proportionality, triviality or humanitarian/human rights grounds, or the protection of vulnerable suspects.

Obtaining information from banks

- Arts. 23-25 should apply to those ‘subject to an investigation’.
- The offence/penalty threshold set out in Art. 23 should apply to Arts. 24 and 25.
- An EIO should only be issued under Arts. 23-25 if it is for evidence of ‘substantial value’ to an investigation.
- An EIO under Arts. 23-25 should be treated as a coercive measure and thus be subject to a greater level of protection in terms of refusal grounds.

⁹⁷ We have seen from experience with the EAW that even a penalty threshold is not an effective deterrent to the growing number of requests that are perceived to be disproportionate from the point of view of the executing state.

⁹⁸ Council of the European Union (2011b), Note on the text submitted for partial general approach, op. cit.

Video and teleconferencing

- The position of the accused should be protected. Safeguards should be adopted, including a clear commitment to existing defence rights such as the right to cross-examination and the presumption of innocence.
- The hearings are governed by the law of the issuing state under the judicial authority of the executing state. To prevent inconsistency and confusion, we need agreed and comprehensive standards on protecting the interests of individuals.⁹⁹

4. Conclusion

Experience with the EAW has demonstrated that there is already a legitimate and widely held perception that the “principle of mutual recognition does not benefit the defence and that there is no real balancing of interests between prosecution and defence”.¹⁰⁰ The EIO exacerbates this feeling of imbalance and encroachment on individual rights. Indeed, the FRA’s Opinion on the EIO indicates that many of the rights put at risk by this measure are subject to a balancing test of lawfulness, proportionality and necessity, which is simply not recognised by the EIO mechanism.¹⁰¹ Member states must remain vigilant with respect to their own obligations for the protection of human rights. In addition to member states’ responsibilities under the ECHR, there is an overriding legal obligation to respect rights in Art. 67(1) TFEU and Art. 6 TEU, and secondary law may be reviewed against fundamental rights standards.¹⁰² This means that all member states must take steps to ensure the mutual recognition agenda is a composite one, balancing prosecution and human rights legislation. The cornerstone of such cooperation must be the human rights articulated in the EU Charter of Fundamental Rights and the ECHR.¹⁰³ Thus, the primary question must be that of ensuring that legislation complies with such standards in theory and in practice. This is an obligation shared by both the member states and the Union.

In conclusion, we must also note that democratic accountability is essential for the future legitimacy of such proposals. Indeed, one of the explicit aims set out in the Preamble of the Lisbon Treaty is to enhance the “democratic legitimacy of the Union”. Parliaments have a crucial role to play in changing the language of this debate and ensuring the individual is made the focus of such measures. One possible way of increasing the sense that these initiatives are legitimate is to explicitly ensure that this democratic input is respected. This expectation has

⁹⁹ Examples here include consent, access to an interpreter and access to a legal adviser.

¹⁰⁰ Vernimmen-Van Tiggelen and Surano (2008), op. cit., p. 20.

¹⁰¹ See for example the right to privacy under Art. 8 of the European Convention of Human Rights. See also the FRA’s (2011) Opinion on the draft Directive regarding the European Investigation Order, op. cit. The European Parliament asked the following questions: 1) Does the Charter of Fundamental Rights of the European Union include certain standards for an instrument involving mutual recognition of investigation orders? 2) Should the EIO Directive provide for review by the executing state of an issued measure, due to the current lack of comparability of existing standards in criminal procedural law between EU member states?

¹⁰² In general, EU secondary law must comply with fundamental rights standards. See the joined Cases C-92 and 93/09, *Volker und Markus Schecke GbR* [2010] ECR I 0000.

¹⁰³ In relation to the EIO, investigative measures can have a clear impact on the right to a fair trial, as when assessing whether the right to fair trial has been violated, the European Court of Human Rights “must...satisfy itself that the proceedings as a whole were fair” – see *Mialhe v. France* [1997] 23 EHRR 491.

been set by the Lisbon Treaty but it needs to be turned into reality. The European Parliament's work in relation to matters on the Area of Freedom, Security and Justice (e.g. on terrorism or the Roadmap for Strengthening Procedural Safeguards) has demonstrated how democratic oversight can seek to ensure that the rights of the individual are protected.¹⁰⁴ But this democratic accountability also extends to national parliaments, and cooperation among all democratic bodies can aid their work by fostering informed debate.¹⁰⁵ Direct democratic input is crucial, because to date, although parliaments have exerted little control over the implementation of framework decisions on mutual recognition, they have used their limited discretion to change or add to them in transposition.¹⁰⁶ This has been done despite so little room for manoeuvre in legislative acts that have been agreed at the executive level and when mutual trust is not shared. This lack of trust will ultimately undermine the mutual recognition agenda. The challenge for a more democratic and transparent Europe has to be taken up swiftly and together by national parliaments and the European Parliament. Some national parliaments of the EU member states have already offered opinions on the EIO.¹⁰⁷ For example, the German Bundestag considered the EIO a step too far too soon in the absence of minimum standards on criminal procedures. Additionally, it noted that "only if the EEW proves to be a serviceable tool and the instrument of mutual recognition proves to be practical for the communication of evidence, despite the lack of harmonisation in the law of criminal procedure and substantive criminal law, should new and further-reaching legislation be put in place".¹⁰⁸ For those who have yet to consider this issue, this approach should be followed and a key question must now be the following one: If mutual recognition is supposed to take place within clearly defined parameters, where and what are they?

¹⁰⁴ See for example, the European Parliament's Committee on Civil Liberties, Justice and Home Affairs *Draft report on the EU counter-terrorism policy: Main achievements and future challenges* (2010/2311 (INI)), Rapporteur: Sophia in 't Veld, 23 March 2011; see also by the same committee the *Draft report on the proposal for a directive of the European Parliament and of the Council on the right to information in criminal proceedings* (COM(2010)0392 – C7-0189/2010 – 2010/0215(COD)), Rapporteur: Birgit Sippel, 20 December 2010.

¹⁰⁵ Note that the role of national parliaments has expanded under the Lisbon Treaty, which introduces new but limited powers. The 'yellow and orange cards' system permits national parliaments to express concerns on subsidiarity directly to the institution that initiated the proposed legislation, although this is clearly hard to do. See Art. 12 TEU and Protocols (Nos. 1 and 2) to the Lisbon Treaty on the role of national parliaments and the application of the principles of subsidiarity and proportionality. If a legislative act is adopted, a national parliament can still bring an action before the European Court of Justice, if it considers that the act is not compliant with the principle of subsidiarity (in accordance with the rules laid down in Art. 263 TFEU).

¹⁰⁶ Sievers (2008), op. cit., p. 112.

¹⁰⁷ For instance, the Austrian Federal Council has expressed concerns about the broad generality of refusal grounds, the need to protect accused persons from disproportionate interference in their private lives and the need for rules on the transfer and use of evidence, including what to do if such evidence has not been legally acquired. See Federal Council of Austria, EU Committee, "Statement to the European Commission in accordance with Article Art 23f Abs 4 of the Federal Constitutional Law", 4 November 2010 (http://www.ipex.eu/ipex/webdav/site/myjahiasite/groups/CentralSupport/public/COUNCIL/Protocol2/PE-CONS%203_10/Austrian%20Bundesrat_9288_10_en.pdf), endorsing recommendations from the Standing Subcommittee on European Union Affairs on 12 October 2010 (http://www.ipex.eu/ipex/webdav/site/myjahiasite/groups/CentralSupport/public/COUNCIL/Protocol2/PE-CONS%203_10/Austrian%20Nationalrat_9288_10_en.pdf).

¹⁰⁸ German Bundestag (2010), op. cit., p. 3.

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