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EVALUATION REPORT ON THE 10TH ROUND OF MUTUAL EVALUATIONS

on the implementation of the European Investigation Order (EIO)

REPORT ON THE GRAND DUCHY OF LUXEMBOURG

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1. EXECUTIVE SUMMARY

Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters ('Directive') was a significant step forward in the domain of judicial cooperation in criminal matters based on the principle of mutual recognition, going beyond the previous regime of mutual legal assistance ('MLA'). The European Investigation Order ('EIO') has since become a core instrument in gathering evidence within the EU. However, to ensure more consistent application and smoother functioning of this instrument across the EU, several practical and legal challenges still need to be addressed.

The evaluation visit to the Grand Duchy of Luxembourg took place in an open and cooperative atmosphere, aided by the meticulous preparation done by the Luxembourgish practitioners met, and by the support provided throughout by the Ministry of Justice, which oversaw the visit. The Luxembourgish authorities provided the evaluation team with all the information and explanations requested during the on-site evaluation. In addition, the team was given comprehensive presentations by all the representatives on their roles as regards the EIO in the Grand Duchy of Luxembourg. These presentations served as a valuable basis for in-depth discussions on the practical application of EIOs.

The evaluation team acknowledged that, because it is a small country with limited resources, Luxembourg may need to take a different approach to that taken by the other Member States. In addition, the country's position as a financial centre requires special attention, which was taken into account throughout the evaluation process.

The discussions with the practitioners revealed the Luxembourgish authorities' implementation of the EIO to be wholly satisfactory. The evaluation team was able to identify several best practices (*see Chapter 23.3*). In particular, the team was impressed by the fact that all of the practitioners showed a clear sense of pride in and commitment to their work. They demonstrated a proactive approach and a spirit of cooperation, in order to ensure that EIOs were executed as far as possible, and the necessary evidence was preserved.

The evaluation team would like to highlight the establishment of units specialising in judicial cooperation in criminal matters within the criminal investigation department, offices of the examining magistrates and the public prosecutor's office. These units organise informal internal training sessions and regular meetings to share their experience of individual cases and discuss problems encountered when dealing with EIOs.

Similarly, the evaluation team considers the fact that the Luxembourgish transposing law (Law of 1 August 2018) provides that every EIO must be treated as an urgent and priority matter (Article 18) to be a best practice.

With regard to the execution of EIOs, the evaluation team highlights the fact that the Luxembourgish practitioners write and send final execution reports as well as interim reports. This approach means the issuing State is immediately able to learn what has been done to execute its request. The experts consider that writing such reports is an excellent practice, and recommend that all Member States adopt it (*see Chapter 23.2.2*).

Despite the numerous best practices employed by the Luxembourgish authorities, certain aspects of the legislation in force could be changed (*see Chapter 23.2.1*). Currently, the transposing law (Articles 26 and 27) provides for a systematic review of the formal validity of the procedure to be automatically carried out by the council chamber of the district court in the case of the coercive measures referred to in Article 21 of that law.

Under Luxembourgish law, coercive measures are measures to be taken in the Grand Duchy of Luxembourg for the seizure of items, documents, funds or property of any kind, the provision of information or documents ordered in accordance with Articles 66(2) to (4) of the Code of Criminal Procedure (requests for information on bank accounts, for the monitoring of banking transactions and for information on banking transactions), a search or any other investigative action involving a similar degree of constraint. In the case of such measures, evidence can be transmitted to the issuing authority only after a decision confirming validity is taken by the council chamber.

In transposing the Directive, the Luxembourgish legislator opted to replicate the system established in the Law on international mutual legal assistance in criminal matters of 8 August 2000, which includes: (i) a systematic review of the formal validity of the procedure to be automatically carried out by the council chamber of the district court, (ii) a suspension of the transfer of evidence to the issuing authority pending this review, (iii) the right of the individuals in question to submit a statement setting out observations on the validity of the procedure (except for a customer of a bank, as banks are bound by an obligation not to tip off their customers) within 10 days from the date on which the order authorising the execution of investigative measures is notified to the person subject to the measures, and (iv) no possibility of legal remedy against the order of the council chamber.

In these circumstances, the evaluation team considers that the automatic review of the formal validity of the procedure by the council chamber is currently overly burdensome, time-consuming, and of little relevance. The review is not conducive to the swift transfer of evidence to the issuing authority, as provided for in Article 13(1) of the Directive. In addition, the suspension of this transfer pending the council chamber's decision remains in place, even if the individuals in question have not submitted a statement setting out observations and claims for restitution. The evaluation team considers that this suspension, based only on the automatic review, may be difficult to reconcile with the spirit and letter of Article 13(2) of the Directive, which provides that the transfer of evidence may be suspended pending a decision regarding a legal remedy (i.e. a request submitted by the party in question). In addition, a review of the legality is already carried out beforehand by the Prosecutor-General and by the investigating judge, which makes this third legal review by the council chamber all but pointless. Statements are very rarely submitted, amounting to no more than around 10 cases per year.

In the evaluators' view, national law, and especially the transposing law, should have provided for a legal remedy in the case of coercive measures, in accordance with Article 14 of the Directive. It should be an equivalent legal remedy to those available in similar national proceedings, as is the case with the application for a declaration of invalidity provided for in Article 7 of the Law of 23 December 2022 concerning the implementation of Regulation (EU) 2018/1805.

It is worth noting that, following a recent legislative amendment, an exception can be made to this procedure of an automatic review of validity if there are compelling indications that carrying out the procedure might endanger a person's physical or mental health, in which case the evidence is transferred without delay on the basis of a decision by the magistrate chairing the council chamber, i.e. the court responsible for the automatic review; this provision has been used in particular in cases of EIOs relating to terrorism offences, and any other case of an EIO where any delay in the transfer may give rise to the risks listed in the legislation.

It should also be noted that the Grand Duchy of Luxembourg has included in Article 24 of the transposing law that EIOs covered by Article 21 (coercive measures) are to be recognised and executed only if the investigative measure requested could be authorised in similar national proceedings. This provision obliges Luxembourgish magistrates to refuse to execute all coercive investigative measures requested if they would not be authorised in similar national proceedings, requiring them to apply the grounds for refusal set out in Article 11(1), points (g) and (h), of the Directive.

However, Article 11 of the Directive does not provide for any cases in which refusal is mandatory. In fact, the Directive contains only optional grounds for non-execution (Articles 9 and 11 and recitals 11 and 19 of the Directive). The experts point out that the grounds for non-recognition and non-execution constitute exceptions to mutual trust, which is essential for proper application of the EIO. Making a ground for refusal mandatory may therefore complicate, or even halt, criminal investigations under way in the other Member States.

That being the case, as regards the coercive measures referred to in Article 21 of the transposing law, the evaluation team invites the Grand Duchy of Luxembourg to:

- respect the optional nature of the grounds for non-recognition and non-execution, which constitute exceptions to the mutual trust that is essential for proper application of the EIO; accordingly remove or amend Article 24 of the transposing law, in which the optional grounds for refusal provided for in Article 11(1), points (g) and (h), of the Directive are made mandatory, which runs counter to the Directive (*see recommendation 1.1*);

- reassess the relevance of an automatic review of the procedure's formal validity by the council chamber (Articles 26 to 28 of the transposing law), in the light of the facts that: (i) a review of the legality is already carried out beforehand by the Prosecutor-General and by the investigating judge, (ii) a legal remedy may be more in line with the requirement to introduce legal remedies equivalent to those available in similar national proceedings, and therefore also more in line with Article 14 of the Directive (e.g. application for a declaration of invalidity provided for in Article 7 of the Law of 23 December 2022), and (iii) the transfer to the issuing authorities of the items, documents or information seized must be efficient and done without delay and must not be subject to a procedure likely to cause significant delays without adding any value with regard to the review already carried out by the public prosecutors and investigating judges (*see recommendation 1.2*).

The interviews with the practitioners also revealed that the Luxembourgish authorities have already dealt with requests to authorise cross-border surveillance, in particular via the placing of a GPS beacon, which have been submitted using an EIO and notified using the form in Annex C to the Directive, dealing with the interception of telecommunications. Applying their transposing law, the Luxembourgish authorities consider that this legal basis is not appropriate, and that such requests should be based on Article 40 of the Schengen Convention. It is clear that the cross-border surveillance referred to there is surveillance that begins in the issuing State and is to be continued on Luxembourg's territory of enforcement.

This theoretical viewpoint has nevertheless not prevented the Luxembourgish authorities from agreeing to execute an EIO even on this point, in the interests of pragmatism and simplification, in certain cases, especially when EIOs have included the continued surveillance of a vehicle via a GPS beacon on Luxembourgish territory as only one of a number of investigative measures.

On the other hand, it was explained during the visit that a request to begin surveillance of a vehicle in the Grand Duchy of Luxembourg (executing State), whether physically or via the placing of a beacon under the vehicle, does not constitute cross-border surveillance within the meaning set out in Article 40 of the Schengen Convention. Such a case is to be regarded as a request for execution of an investigative measure within the meaning of the Directive. Since it is covered by the Directive, the request must be made in the form of an EIO (*see Chapter 5.3*).

The evaluation team agrees with the Luxembourgish authorities that the distinction is in that respect a fine and subtle one, and very often confusing for practitioners. Although carrying out cross-border surveillance as a police cooperation measure is generally simpler than executing an EIO, excluding it from the scope of the Directive leads to practical complications.

When cross-border surveillance is ordered by an investigating judge as part of a pre-trial investigation, its exclusion from the EIO complicates the application of the rules on mutual legal assistance. In such cases, bringing cross-border surveillance within the scope of the EIO would contribute to a simpler and more consistent application of the rules on mutual legal assistance.

That being the case, the experts invite the European Commission to clarify the scope of the EIO as regards cross-border surveillance for the purpose of gathering evidence as part of criminal proceedings and in the context of mutual legal assistance (*see recommendation 19.2*).

In addition, the Commission is invited to clarify the scope of the concept of the interception of telecommunications. It is also invited to clarify whether or not the speciality rule (*see Chapter 23.2.3*) applies in the context of the EIO.

2. INTRODUCTION

The adoption of Joint Action 97/827/JHA of 5 December 1997[1] ('the Joint Action') established a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime.

In line with Article 2 of the Joint Action, the Coordinating Committee in the area of police and judicial cooperation in criminal matters ('CATS') agreed after an informal procedure following its informal meeting on 10 May 2022 that the 10th round of mutual evaluations would focus on the EIO.

The aim of the 10th round of mutual evaluations is to provide real added value by offering the opportunity, via on-the-spot visits, to consider not only the legal issues but also – and in particular – relevant practical and operational aspects linked to the implementation of Directive 2014/41/EU. This will make it possible to identify shortcomings and areas for improvement, together with best practices to be shared among Member States, thus contributing towards ensuring more effective and coherent application of the principle of mutual recognition at all stages of criminal proceedings throughout the EU.

More generally, promoting the coherent and effective implementation of this legal instrument at its full potential could significantly enhance mutual trust among the Member States' judicial authorities and ensure better functioning of cross-border judicial cooperation in criminal matters within the area of freedom, security and justice. Furthermore, the current evaluation process could provide helpful input to Member States that may not have implemented all aspects of Directive 2014/41/EU.

[1] Joint Action of 5 December 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime.

The Grand Duchy of Luxembourg was the 19th Member State to be evaluated, as provided for in the order of visits to the Member States adopted by CATS[2].

In accordance with Article 3 of the Joint Action, the Presidency has drawn up a list of experts in the evaluations that are to be carried out. Pursuant to a written request sent to delegations by the General Secretariat of the Council of European Union, Member States have nominated experts with substantial practical knowledge in the field.

The evaluation team consists of three national experts, supported by one or more members of staff of the General Secretariat of the Council and observers. For the 10th round of mutual evaluations, it was agreed that the European Commission and Eurojust should be invited as observers[3].

The experts responsible for evaluating the Grand Duchy of Luxembourg were Ms Sophie Wolf (Belgium), Mr Pierre Giraud (France) and Mr Ramiro Santos (Portugal). Two observers were also present: Ms Rita Simoes from Eurojust and Ms Filipa de Figueiroa Quelhas from the General Secretariat of the Council.

This report was prepared by the team of experts with the assistance of the General Secretariat of the Council, based on the Grand Duchy of Luxembourg's detailed replies to the evaluation questionnaire and the findings from the evaluation visit carried out between 11 and 15 December 2023, during which the evaluation team interviewed investigating judges, representatives from the public prosecutor's office and the criminal investigation department, council chamber judges and representatives from the Luxembourg/Diekirch Bar.

[2] ST 10119/22 and WK 6508/2023.
[3] ST 10119/22.

3. TRANSPOSITION OF DIRECTIVE 2014/41/EU

Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters was transposed into Luxembourgish law by the Law of 1 August 2018 ('the Law')[4], as amended by the Law of 23 December 2022 on mutual recognition of decisions on freezing and confiscation orders[5].

Although the Law arranges the topics slightly differently from the Directive, it is just as logical. The distinction between the role of the national authorities as the issuing and executing authorities is perfectly clear. Competence to issue and execute EIOs is determined by reference to internal rules on the attribution of competence.

Often, the Law follows the provisions of the French version of the Directive word for word.

The Law also added a new chapter to Title IV of Book II of the Code of Criminal Procedure, to accommodate measures concerning video conferences and audio conferences, which had not been provided for in Luxembourgish law. Articles 48-17 (sting operations), 66-2 and 66-3 (banking information) of the Code of Criminal Procedure were amended, as were Articles 7 and 13 of the Law of 8 August 2000 on international mutual legal assistance in criminal matters, in order to ensure consistency with the corresponding provisions of the EIO.

The evaluation team highlights as a best practice the fact that the transposing law provides that every EIO must be treated as an urgent and priority matter (Article 18) (*see best practice 1*).

4 Mémorial A, 2018, No 787 of 11 September 2018. https://www.legilux.public.lu/eli/etat/leg/loi/2018/08/01/a787/jo

5 Mémorial A, 2022, No 680 of 23 December 2022. This law added an Article 28-1 to the Law. https://www.legilux.public.lu/eli/etat/leg/loi/2022/12/23/a680/jo

Overall, the Luxembourgish practitioners declared themselves to be satisfied with the transposition of the Directive and proved to be familiar with the text of the Directive and its recitals, and with the transposing law. They consider the EIO to be a major step forward in judicial cooperation, especially in relation to the instruments that were previously available to them.

4. COMPETENT AUTHORITIES

The Grand Duchy of Luxembourg has a three-tier criminal justice system:

- Police courts, which operate within each magistrates' court, are responsible for judging criminal cases involving minor offences and certain mid-level offences.
- District courts, which function as courts responsible for mid-level and serious offences, have jurisdiction to try all mid-level offences, i.e. offences punishable by a correctional sentence, as well as offences classified as crimes by law, which are referred to them by the council chamber or the council chamber of the Court of Appeal. They also hear appeals against first-instance judgments handed down by magistrates' courts.
- The High Court of Justice, which comprises the Court of Cassation and the Court of Appeal, re-examines cases already decided in first instance by the district courts, and exercises its control in law and in fact.

The public prosecutor's office is organised into a prosecutor general's office and district prosecutors' offices.

The prosecutor-general's office, headed by the Prosecutor-General, represents the public prosecutor's office before the Superior Court of Justice, and in particular before the Court of Appeal. The Prosecutor-General also acts as the central authority for international mutual assistance in criminal matters.

Judges in the district prosecutors' offices represent the public prosecutor's office in the district courts and police courts of their respective districts.

4.1. Issuing authority

Under Article 5 of the Law, in the Grand Duchy of Luxembourg the public prosecutor, the investigating judge and the judges at the trial courts may, in the exercise of their powers, issue an EIO.

This means that an EIO may be issued by any competent judicial authority in criminal proceedings. In accordance with the Code of Criminal Procedure, criminal proceedings consist, in principle, of several successive stages:

- the preliminary investigation, led by the public prosecutor;
- pre-trial judicial investigation led by the investigating judge; and
- the trial procedure, which falls under the jurisdiction of the trial courts.

However, the question of competence for issuing an EIO is not so simple. The Grand Duchy of Luxembourg's Code of Criminal Procedure draws an important distinction between coercive and non-coercive investigative measures. EIOs for the execution of coercive measures are issued by investigating judges; if, on the other hand, an EIO concerns non-coercive measures, it is issued by the public prosecutor.

The distinction between coercive and non-coercive measures will be explained in the following section.

4.2. Executing authority

In the Grand Duchy of Luxembourg, '*the execution of an EIO is entrusted to the judicial authority that would be competent if the offence had been committed in the Grand Duchy of Luxembourg*' (Article 10 of the Law).

As in the case of issuance, competence for the execution of an EIO depends on the coercive or non-coercive nature of the required measures. In order to determine the competence of the executing authority, it is therefore necessary to verify the classification of the measures in accordance with the laws of the Grand Duchy of Luxembourg.

Under Article 21 of the Law, an EIO is aimed at the enforcement of a coercive measure if its object is '*to carry out in the Grand Duchy of Luxembourg the seizure of items, documents, funds or property of any kind, the provision of information or documents ordered in accordance with Articles 66(2) to (4) of the Code of Criminal Procedure, a search or any other investigative measure involving a similar degree of constraint*'.

The following are therefore considered to be coercive measures:

- the seizure of goods of any kind, whether movable or immovable, tangible or intangible, the purpose of which is to cover all scenarios[6];
- the provision of information or documents ordered in accordance with Articles 66-2 to 66-4 of the Code of Criminal Procedure, in particular requests for information on the existence of bank accounts (Article 66-2), requests for information on banking transactions (Article 66-4) and requests for monitoring of banking transactions (Article 66-34);
- searches (Articles 33, 47 and 65 of the Code of Criminal Procedure);
- *any other investigative action involving a similar degree of constraint*, such as:
    - tracing telecommunications or locating the origin or destination of telecommunications (Article 67-1); and
    - special surveillance measures (surveillance and monitoring of telecommunications and postal correspondence, audio recording and taking images of certain places or vehicles and capturing computer data).

All of these measures are, de jure if not de facto, carried out by an investigating judge, in the context of a preparatory investigation. In theory, an EIO issued in the context of what corresponds, under Luxembourg law, to an investigation of a serious offence or a mid-level offence in flagrante delicto, which is therefore carried out less than 24 hours after the discovery of the fact and is executed within the same timeframe, could, if it concerns a search or seizure, be executed in the Grand Duchy of Luxembourg by the public prosecutor, since the latter has this same power under domestic law in cases of flagrante delicto. In practice, however, in such cases, execution by an investigating judge is chosen.

[6] In criminal matters, seizure is governed by Article 31, paragraphs 3 and 5, Article 33, paragraphs 1 to 8, and Articles 47, 66 and 66-1 of the Code of Criminal Procedure.

However, non-coercive measures which may be the subject of an EIO may be ordered under domestic law by both the public prosecutor and the investigating judge. This is the case for the hearing of witnesses[7], the questioning of suspects by the police[8], observation[9] (excluding cross-border observation, which remains governed by the Convention implementing the Schengen Agreement of 19 June 1990)[10], the so-called controlled deliveries measure[11], infiltration[12], access to certain processing of personal data implemented by legal persons under public law (such as the national register of natural and legal persons or the file of road vehicles and their owners and holders)[13], rapid and immediate retention, for a period not exceeding 90 days, of computer data[14], investigation under pseudonym by electronic means[15], identification of the user of a means of telecommunication[16], the taking, under physical constraint, of human cells necessary for the establishment of a DNA profile[17], the taking of fingerprints and photographs[18], expert appraisals[19], systematic searches of vehicles[20], the use of audiovisual telecommunications and audioconferencing means for taking a statement, hearing or questioning a person, as well as for the confrontation between several persons[21].

7 Regulated by Articles 38 (hearing witnesses in flagrante delicto), 46 and 48-1 (hearing witnesses as part of a preliminary investigation), and 69 to 80 (hearing witnesses as part of a preliminary investigation by the investigating judge) of the Code of Criminal Procedure.

8 Regulated by Articles 39 and 39-1 (investigation of a flagrant serious offence or mid-level offence), Article 46, paragraphs 2 and 3 (preliminary investigation), and Articles 52-1, 52-2 and 81 (pre-trial investigation) of the Code of Criminal Procedure.

9 Regulated by Articles 48-12 to 48-16 of the Code of Criminal Procedure.

10 Recital 9 of the Directive. See also Article 1, paragraph 1, point 2° of the Law. The Schengen Convention was published in the Official Journal of the European Union L 239 of 22.09.2000, page 19.

11 Provided for by Article 73 of the Schengen Convention, constituting, in domestic law, a means of observation.

12 Regulated by Articles 48-17 to 48-23 of the Code of Criminal Procedure.

13 Regulated by Article 48-24 of the Code of Criminal Procedure.

14 Regulated by Article 48-25 of the Code of Criminal Procedure.

15 Regulated by Article 48-26 of the Code of Criminal Procedure.

16 Regulated by Article 48-27 of the Code of Criminal Procedure.

17 Regulated by Article 48-5 of the Code of Criminal Procedure.

18 Measure regulated by Article 33, paragraph 9, Article 39, paragraph 6 (as part of the flagrante delicto investigation), Article 47-2 (as part of the preliminary investigation) and Article 51-2 (as part of the pre-trial investigation).

19 Regulated by Articles 36 (as part of the flagrante delicto investigation), 87 and 88 (as part of the pre-trial investigation).

20 Regulated by Article 48-11 of the Code of Criminal Procedure.

21 Regulated by Articles 553-557 of the Code of Criminal Procedure.

According to the Luxembourg authorities, it is preferable to entrust the investigating judge with measures that fall within the concurrent jurisdiction of the public prosecutor and the investigating judge, with the exception of the hearing of witnesses and suspects and DNA sampling, which are, in principle, carried out by the public prosecutor.

The investigating judge is therefore responsible for searches, seizures, the communication of information or bank documents ordered in accordance with Articles 66-2 to 66-4 of the Code of Criminal Procedure, tracing telecommunications or locating the origin or destination of telecommunications, as well as special surveillance measures, including the monitoring and control of telecommunications and postal correspondence, the recording of sound and images of certain places or vehicles, the capture of computer data, pseudonymous electronic investigations, the identification of the user of a means of telecommunication, DNA sampling, the taking of fingerprints or photographs, and expert appraisals.

On the other hand, the public prosecutor is empowered to hear witnesses, except where a hearing under oath by a judge is requested, in which case it is entrusted to the investigating judge; questioning of suspects by the police; access to certain personal data processing operations carried out by legal entities governed by public law; observation, including cross-border observation and controlled deliveries; infiltration, the rapid and immediate storage of computer data for a period not exceeding 90 days, the systematic searching of vehicles or the use of audiovisual telecommunications and audioconferencing to take statements, hear or question a person, or to confront several people, except when a hearing under oath by a judge is requested, and is then entrusted to the investigating judge.

The public prosecutor is also entrusted with all other non-coercive measures which are not specifically regulated by the Code of Criminal Procedure, such as the consultation of public registers or physical checks, that is to say, what Article 10(2)(d) of the Directive defines as *any non-coercive investigative measure* and Article 17(1)(4) of the Law as '*any non-coercive investigative measure which does not infringe individual rights or freedoms*'.

During the on-site visit, the assessment team was able to clarify that the Public Prosecutor's Office and the investigating judge have concurrent jurisdiction over DNA sampling and that, as in all other cases of concurrent jurisdiction, the measure will be carried out by the Public Prosecutor's Office, unless, within the same EIO, certain measures fall within the jurisdiction of the investigating judge, in which case all measures will remain the responsibility of the investigating judge.

4.3. Central authority

Article 7(3) of the Directive permits Member States to designate a central authority to assist the competent authorities and make them responsible for the administrative transmission and receipt of EIOs, as well as for other official correspondence relating to EIOs.

A central authority may therefore have the task of both transmitting, in the issuing State, EIOs from the issuing State to the executing State and receiving, in the executing State, EIOs from the issuing State.

The Luxembourg legislator has, partially, limited itself to the second option.

Central authority for receiving EIOs for coercive purposes

On this point, the Grand Duchy of Luxembourg has chosen to designate the State Public Prosecutor as the central authority, but restricting its competence to EIOs seeking coercive measures (Article 22 of the Law)[22]. The State Public Prosecutor also returns EIOs after execution[23]. If, however, the EIO has been erroneously sent directly to another judicial authority or to the Ministry of Justice, it is forwarded to the State Public Prosecutor by these latter institutions[24].

Any enforcement authority that receives an EIO for coercive measures must forward it to the State Public Prosecutor as soon as possible. Nevertheless, the Law provides for an exception to this obligation that the execution of an EIO should be preceded by an intervention from a central authority, namely *if the case on which the EIO is based appears to be serious, and if the situation is urgent, in particular if there is a risk that evidence may be lost*[25]. In such cases, the competent judicial authority can carry out the requested investigative measures[26].

[22] It should be noted that the judicial system of the Grand Duchy of Luxembourg consists of two courts of first instance, known as district courts (the district court of Luxembourg and the district court of Diekirch, a town located 30 km north of the capital and head of the second judicial district of Luxembourg, alongside that of Luxembourg(-Ville)). Each of these district courts has a public prosecutor and investigating judges. Above the two district courts stands the Superior Court of Justice, which consists of a Court of Appeal (with nationwide jurisdiction) and a Court of Cassation. Next to the Superior Court of Justice is a public prosecutor's office called the Prosecutor-General's Office, which is chaired by the Prosecutor-General (currently Mrs Martine Solovieff). The Prosecutor-General is designated by law as the central authority. The Prosecutor-General assumes the same role under the ordinary law of international mutual assistance in criminal matters, on the basis of the law of 2000. This legislative precedent justifies the legislator's choice to designate this same authority as the central authority in the context of receiving EIOs. It is important to clarify that the purpose of the 2000 law is exclusively to regulate the execution in Luxembourg of foreign requests for mutual assistance in criminal matters of a coercive nature, as there is no law regulating the execution of non-coercive requests. This legislative precedent therefore explains why the competence of the Prosecutor-General as a central authority is limited to EIOs for coercive purposes.

[23] Article 22(2) of the Law.

[24] Article 22(3) of the Law.

[25] Article 22, last subparagraph of the Law.

[26] Idem et loc.cit.

The purpose of the State Public Prosecutor's intervention is to rule on the recognition of the EIO. The State Public Prosecutor may refuse to execute it in whole or in part, if doing so would risk endangering essential national security interests, endangering a source of information or involving the use of classified information relating to intelligence activities. the execution of the EIO would endanger essential national security interests, jeopardise the source of the information or involve the use of classified information relating to specific intelligence activities[27]. The State Public Prosecutor may first consult the issuing authority. The State Public Prosecutor's decision is not subject to appeal.

Absence of a central authority for the receipt of non-coercive EIOs

The law does not establish a central authority for the receipt of EIOs aimed at enforcing non-coercive measures. Such EIOs are received directly by the judicial authority that is competent to execute them. If they are mistakenly forwarded to a non-competent judicial authority, the latter automatically forwards them to the competent authority[28].

In the case of non-coercive EIOs, execution is up to the competent judicial authority (either the public prosecutor or the investigating judge) to assess the cases for refusal provided for in Article 11(1)(b) of the Directive, arising from the risk engendered by the execution of the EIO of harming essential national security interests, of endangering a source of information or of involving the use of classified information relating to intelligence activities[29].

[27] Article 23(1) of the Law. In addition to ensuring harmonisation with the amended Law of 8 August 2000 on International Mutual Assistance in Criminal Matters (hereinafter referred to as the '2000 Law'), i.e. with the ordinary law governing the execution of mutual assistance in criminal matters, the rationale behind the creation of this central authority is to exploit the advantages of centralization, the concern to entrust the State Prosecutor with the assessment of the ground for refusal, provided for in Article 11(1)(b) of the Directive, based on the risk that the execution of an EIO may infringe essential national security interests, endangering a source of information or involving the use of classified information relating to intelligence activities.

[28] Article 12 of the Law.

[29] Article 15(4) of the Law.

The Grand Duchy of Luxembourg as issuing State: lack of central authority

The transposing law does not set up a central authority to forward EIOs issued by Luxembourg judicial authorities to the executing State. Any EIOs issued by a Luxembourg authority are therefore transmitted by that authority directly to the competent authority in the executing State. There is, therefore, no central authority for these transmissions. Each examining magistrate, each public prosecutor and, where applicable, each trial court transmits its EIOs directly to the executing state.

When asked about the possibility of designating a central authority to assist the competent authorities in every aspect of issuing the EIO, practitioners reported that the Grand Duchy of Luxembourg had set up specialised sections that cooperate within the criminal police, investigating judges and the Prosecutor-General's Office. The existence of a central authority with more powers is therefore not really an issue for them; Its only advantage would be that it would facilitate the collection of statistical data on incoming and outgoing EIOs.

The evaluation team considers that the creation of the specialised sections mentioned above would be a very good practice (*see good practice 2.6*.). Within the Economic and Financial Prosecutor's Office, there is even a legal secretary who assists the judicial authorities in drafting EIOs.

4.4. Right of the suspected or accused person or victim to apply for an EIO

Under Luxembourg law, the right of the suspected person or victim to request that an EIO be issued is covered by the procedural rights of the parties to the proceedings, governed by the Code of Criminal Procedure, in particular the right to request investigative measures during the pre-trial judicial investigation carried out by the investigating judge, as well as before the trial courts.

In the case of a serious offence, Luxembourg's criminal justice system provides for the involvement of an investigating judge. The latter is a judge at the district courts, i.e. the ordinary courts of first instance. Their mission is to collect and verify, *with equal care, the facts and circumstances incriminating or exculpating the accused person* and to carry out, to this end, *in accordance with the law, all 'acts of information' that it deems useful for establishing the truth* (Article 51 of the Code of Criminal Procedure).

The pre-trial judicial investigation conducted by the investigating judge is compulsory in the case of serious offences and optional in the case of mid-level offences.[30] In fact, the pre-trial investigation is always initiated in the case not only of serious offences ('*crimes*'), but also of serious mid-level offences ('*délits sérieux*'). The victim has the right to request the opening of a judicial pre-trial investigation into a serious offence or mid-level offence by lodging a complaint with the investigating judge and applying to join the proceedings as a civil party.

[30] Luxembourg criminal law distinguishes three categories of criminal offences, classified according to the severity of the penalties provided for by law: serious offence ('*crime*'), punishable by penalties entailing at least five years' imprisonment; mid-level offence ('*délit*'), punishable by penalties involving a prison sentence, i.e. a custodial sentence not exceeding five years in principle, or a fine of at least EUR 251; minor offence ('*contravention*'), punishable by penalties involving a fine of EUR 250 or less, without any custodial sentence.

In the context of the pre-trial judicial investigation, the suspected person, after being charged, which may take place at the end of the first interrogation carried out by the investigating judge,[31] and the victim, after joining the proceedings as a civil party (that is to say, after an application addressed to the investigating judge by which the victim seeks compensation for damage suffered as a result of the offence),[32] may ask the investigating judge to order investigative measures, including the issuing of one or more EIOs if these measures are to be carried out in the territory of another Member State of the European Union to which the Directive is addressed. The accused person and the civil party may thus request that the investigating judge issue an EIO. If the investigating judge refuses to grant such a request, the public prosecutor or the accused person may, in any case, appeal against the order of the investigating judge. The civil party is entitled to appeal against any order adversely affecting their civil interests. The appeal will be brought before the council chamber of the Court of Appeal[33].

The defendant and the civil party also have the possibility of asking the trial court to issue an EIO. However, this right is rarely exercised because, in general, the investigation focuses on the earlier stages of the procedure. In the event of refusal, the parties may challenge the decision only in the context of an appeal against the judgment at first instance.

It must be borne in mind that, under Article 1(3) of the Directive, *the issuing of an EIO may be requested by a suspected or accused person, or by a lawyer on his behalf, within the framework of applicable defence rights in conformity with national criminal procedure*. The Grand Duchy of Luxembourg goes further by also ensuring that the victim, as a civil party, can make use of the EIO within the framework of the procedural rights of the parties to the proceedings, governed by the Code of Criminal Procedure.

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31 Article 81 of the Code of Criminal Procedure.

32 This joining of a civil action can be done either in the context of a complaint filed by the victim with the investigating judge which, if admissible, has the effect of opening a pre-trial judicial investigation (Article 56 of the Code of Criminal Procedure) or, incidentally, during a pre-judicial investigation already initiated (as a result of an indictment filed by the public prosecutor's office, or an application to join a civil action submitted by another victim) (Article 58(1) of the aforementioned Code).

33 Article 133 of the aforementioned Code.

5. SCOPE OF THE EIO AND RELATION TO THE OTHER INSTRUMENTS

5.1. Investigative measures which, under national law, fall within the scope of the Directive

The internal criminal procedure law of the Grand Duchy of Luxembourg establishes a fairly broad list of investigative measures. However, in order to transpose the Directive, it was necessary to incorporate into the law specific measures imposed by the Directive within the framework of its application, namely:

- temporary transfer of a person held in custody in the executing State for the purpose of carrying out an investigative measure in the issuing State (Article 30 of the Law);
- temporary transfer of a person held in custody in the issuing State for the purpose of carrying out an investigative measure in the executing State (Article 31 of the Law);
- interception of telecommunications (Articles 32 and 33 of the Law);
- hearing by videoconference or other audiovisual transmission or by telephone conference (Articles 34 and 35 of the Law), which was, however, already provided for by domestic law;
- obtaining information on bank and other financial accounts as well as on banking and other financial transactions and the monitoring of banking and other financial operations (Articles 36 to 38 of the Law), which was also already provided for by domestic law;
- gathering evidence in real time in the context of controlled deliveries in the territory of the executing State (Article 38 of the Law);
- covert investigations (Article 39 of the Law), which was, however, already provided for by domestic law, which authorised infiltration.

This list is supplemented by all the other non-coercive measures which are not specifically regulated by the Code of Criminal Procedure, such as the consultation of public registers or physical checks, that is to say, what Article 10(2)(d) of the Directive defines as *any non-coercive investigative measure* and Article 17(1)(4) of the Law as *any non-coercive investigative measure which does not infringe individual rights or freedoms.*

The Luxembourg authorities have highlighted a difficulty relating to the need to establish a practical correspondence between the provisions of the EIO Directive and Regulation (EU) 2018/1805 on the mutual recognition of freezing orders and confiscation orders.

In this regard, the Directive provides for provisional measures only with a view to gathering evidence, whereas the Regulation refers to the confiscation or restitution of property (recital 34 of the Directive). This distinction between the two instruments, which have complementary objectives, is, according to the Luxembourg authorities, a complicating factor which could have been avoided by establishing a single instrument covering these two aspects, which are often inseparable in practice. Thus, the seizure of objects frequently serves both purposes, namely to provide evidence of an offence and to prepare for subsequent confiscation or restitution.

In order to cover these two purposes, the investigating judge would have to issue both an EIO and a freezing certificate on the basis of Regulation 2018/1805, which is a surprising practical difficulty for instruments intended to facilitate mutual legal assistance between Member States. The authors of the Directive were aware of this difficulty, noting that the distinction between the two objectives of the provisional measures is not always clear and may change in the course of the proceedings.

The evaluation team notes that this issue arises in all Member States bound by the EIO and Regulation 2018/1805, but does not necessarily constitute a problem. Since the Regulation specifically concerns confiscation or restitution, this separation into two distinct instruments is understandable, even if their scopes sometimes overlap. Aware of this overlap, the EU legislator recommends in recital 34 that the choice of the most appropriate instrument for each situation be left to the discretion of the issuing authority.

The Luxembourg authorities drew attention to another difficulty resulting from the coexistence of these two instruments: in practice, the issuing of a freezing certificate on the basis of Regulation 2018/1805 is carried out only after the assets to be seized by means of an EIO have been located, in particular by means of measures to obtain information on bank or financial accounts and operations, as referred to in Articles 26 and 27 of the Directive.

This information can only be transmitted at the end of the procedure to enforce the EIO, and entails, under Luxembourg law, an ex officio review by the council chamber of the district court of the validity of the procedure to be carried out, on the basis of Article 27 of the Law, within 20 days of its referral. A certain amount of time therefore necessarily elapses, albeit in compliance with the Directive, between obtaining the information and transmitting it to the issuing authority, with transmission presupposing this ex officio review. It is only after transmission that the issuing authority considers itself in a position to issue a freezing certificate. This delay entails, in theory, a risk that the assets to be seized will be diminished.

However, the Luxembourg authorities also informed us that, in practice, this difficulty can be avoided if the issuing authority requires, in the EIO, not only that the funds be located, but that they be be seized for evidential purposes, or if an EIO and a freezing certificate are issued simultaneously. In this regard, the evaluation team notes that nothing prevents the Luxembourg authorities from contacting the issuing authorities and drawing their attention to this issue, informing them of the possibility of requesting the seizure of the property. As regards the risk of the assets being run down, this also comes within the scope of the procedure for checking formal legality introduced by Luxembourg in Articles 26 to 28 of the Law, analysed in Chapter 15 of this report.

Nevertheless, the evaluators recognise the relevance of suggesting, as proposed by the Luxembourg practitioners, that the freezing certificate be included in the EIO in all situations where the issuing authority requires not only the location of the funds, but also their seizure for evidential purposes (see *recommendation 20.1 for the attention of the European Commission*). In all cases, the issuing authorities are required to respect the limits of the EIO and not to use it for any purpose other than gathering evidence (*see recommendation 7*).

Another difficulty reported stems from the fact that, as the Directive cannot apply to provisional measures with a view to confiscation, an investigative measure recently introduced into Luxembourg law, namely the investigation of post-sentencing assets (Articles 704 to 710 of the Code of Criminal Procedure, introduced by the Law of 22 June 2022 on the management and recovery of seized or confiscated assets), the purpose of which is to detect and trace assets on which the decision on special confiscation can be enforced, cannot be implemented in the context of an EIO.

The evaluation team considers that the EIO should not be used for the purposes of the post-sentencing investigation of assets, the objectives of which can be achieved within the framework of cooperation between national asset recovery offices, provided for in Council Decision 2007/845/JHA, and which has already been transposed into Luxembourg law (see, in particular, the Law of 22 June 2022, known as the BGA Law). This cooperation mechanism can also be used in the pre-proceeding phases, in order to identify assets that could be seized with a view to confiscation or restitution.

5.2. Possible purposes of an EIO under Luxembourg law

The transposing law establishes that the EIO is an instrument which makes it possible to request a Member State to conduct *investigations aimed at gathering evidence relating to an offence or transmitting evidence already in the possession of the executing authority,* as well as *with a view to provisionally preventing the destruction, transformation, removal, transfer or disposal of items that may be used as evidence* (Article 2 of the Law).

On that solid basis, the Luxembourg authorities have concluded that the EIO cannot therefore, either on the basis of the Directive or of the Law, have as its purpose the performance of a procedural act other than one intended to gather evidence. For example, they have no problem providing copies of judicial decisions to the authorities of other Member States bound by the Directive, if the request made is for the disclosure of evidence; if that purpose is not complied with, the measure needs to be requested, if appropriate, on the basis of Articles 5 (sending and service of procedural documents) and 7 (spontaneous exchange of information) of the 2000 Convention on Mutual Assistance in Criminal Matters, which, in the light of Article 34(1)(c) of the Directive, remains applicable in respect of all its provisions not corresponding to those of the Directive.

Despite this reply, the Luxembourg authorities also informed us that they have executed EIOs for the purpose of obtaining copies of judicial decisions, having categorised the decisions in such cases as evidence, and thus eligible to be the subject of an EIO.

The Grand Duchy of Luxembourg also reported cases in which it received EIOs whose purpose was the seizure of funds with a view to confiscation. In such cases, the issuing authority was asked to draw up a certificate and, in order to prevent the funds from being lost, attempts were made to reclassify the request as far as possible as having, at least in part, an evidential purpose, so that it could be accepted as an EIO. The Grand Duchy of Luxembourg has also received EIOs for the purpose of issuing extracts from criminal records, which were executed on the same premiss, though it was specified, however, that the exchange of criminal records is carried out, in principle, on the basis of the European Criminal Records Information System (ECRIS).

The Luxembourg authorities are thus showing great pragmatism and flexibility; they endeavour to interpret EIOs as far as possible in such a way as to enable mutual assistance to be granted (see *good practice 2.1*).

5.3. Stages of the procedure during which it is possible under national law to have recourse to an EIO

The Luxembourg authorities interpret the Law as preventing them from having recourse to issuing an EIO after the judgment. Indeed, Article 5 of the Law provides that *the public prosecutor, the investigating judge or a trial court may, in the exercise of their powers, issue an EIO* [...]. This means that it is possible to have recourse to the EIO at any time during the criminal proceedings, up to the time of the judgment on the substance of the case at the latest.

In the Grand Duchy of Luxembourg, there is no police phase before the judicial phase of criminal proceedings; from the first acts of investigation and detection of offences, even if carried out by the police services alone, the public prosecutor is competent to issue an EIO. However, the EIO cannot be used during enforcement of the criminal law decision on the substance of the case handed down by the trial courts, i.e. during the phase subsequent to the judgment on the substance of the case. The enforcement of criminal law judgments is the responsibility of the Prosecutor-General, under the supervision of the Chamber for the Enforcement of Sentences, which comes under the jurisdiction of the Court of Appeal.

5.4. The EIO and the European arrest warrant (EAW)

The Luxembourg authorities accept that an EIO may have the purpose of locating suspected persons in order to prepare the subsequent transmission of an EIO for search and seizure purposes at the place where the suspected person was located. Such preparatory acts indisputably fall within the scope of the EIO, their purpose being to carry out investigative measures for the purpose of obtaining evidence of infringements.

The authorities report that it is common practice for Luxembourg investigating judges to issue an EIO at the same time as an EAW: EIOs are issued in order to locate, in particular by means of observation or telephone tapping, the person sought under the European arrest warrant issued at the same time. This practice is accepted by the executing authorities. The opposite is also true: the Luxembourg executing authorities accept EIOs issued together with an EAW in order to locate the person whose surrender is requested.

However, they consider that, strictly speaking, an investigative measure aimed at locating a person with a view to transmitting to that person an EAW or a certificate on the basis of Council 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 sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union does not have as its purpose the subsequent execution of an investigative measure for the purpose of obtaining evidence of an offence by means of that preparatory act. In order to respect the text and the purpose of the Directive, it cannot therefore be the subject of an EIO. The same applies to EIOs issued in order to prepare the issuing of a freezing or confiscation certificate[34] on the basis of Regulation 1805/2018.

This position of the Luxembourg authorities seems correct. In principle, the location of accused persons is a matter for police cooperation, to be handled within the framework of the Schengen Information System. Despite this, it is sometimes necessary to resort to more intrusive investigative measures such as those provided for under the EIO. But there is no legal basis for using these measures for purposes other than the investigation.

[34] The EIO can, however, be used to identify accounts.

5.5. Request for personal data for the implementation of administrative decisions

Luxembourg law does not provide for a system akin to the German system of *Ordnungswidrigkeiten* (administrative offences). Consequently, there is no administrative penalty procedure in the Grand Duchy of Luxembourg for infringements of rules of law which are not classified as criminal offences and are not prosecuted by the judicial authorities. As a result, Luxembourg has never issued an EIO for these purposes. As executing State, the Luxembourg authorities have not reported any cases where EIOs were addressed to them in the context of such procedures.

5.6. Cross-border surveillance and the EIO

The Luxembourg authorities are fully aware that, in theory, the EIO is not concerned with cross-border surveillance. Accordingly, the Law takes note of this by providing, in the second subparagraph of Article 1(2), that an EIO should not be issued *in cases where cross-border surveillance is requested pursuant to Article 40 of the […] Schengen Convention […]*.

In the Grand Duchy of Luxembourg, the Prosecutor-General is responsible for the implementation of cross-border surveillance under Article 40 of the Schengen Convention. However, it is in fact implemented by the public prosecutors attached to the district courts, under the authority of the Prosecutor-General. The Luxembourg authorities agree that cross-border surveillance may be carried out in the form of physical surveillance or by tracking location data emitted by a GPS beacon which is under the vehicle to be placed under surveillance.

The Grand Duchy of Luxembourg as issuing authority

If the Luxembourg authorities carry out surveillance on a vehicle, either physically or by placing a GPS beacon, a measure governed under national law by subparagraphs 2 and 3 of Article 48(12) of the Code of Criminal Procedure, they are required to ensure that, in the case of surveillance beginning in the Grand Duchy of Luxembourg and continuing beyond the border, they comply with the formalities of Article 40 of the Schengen Convention and refrain from issuing an EIO.

The Grand Duchy of Luxembourg as executing authority

The Luxembourg authorities have already dealt with requests to authorise cross-border surveillance, in particular via the placing of a GPS beacon, which have been submitted using an EIO and notified using the form in Annex C to the Directive, dealing with the interception of telecommunications. Applying their transposing law, the Luxembourg authorities consider that this legal basis is not appropriate, and that such requests should be based on Article 40 of the Schengen Convention.

This theoretical viewpoint has nevertheless not prevented the Luxembourg authorities from agreeing, in the interests of pragmatism and simplification to execute an EIO even on this point, in certain cases, especially when EIOs have included the continued surveillance of a vehicle via a GPS beacon on Luxembourg territory as only one of a number of investigative measures (*see best practice 2.1*).

On the other hand, it was explained during the visit that a request to begin surveillance of a vehicle in the Grand Duchy of Luxembourg (executing State), whether physically or via the placing of a beacon under the vehicle, does not constitute cross-border surveillance within the meaning set out in Article 40 of the Schengen Convention. Such a case is to be regarded as a request for execution of an investigative measure within the meaning of the Directive. It falls within the scope of the Directive and must therefore be the subject of an EIO.

This legal framework is complex and the evaluation team therefore recommends that the Grand Duchy of Luxembourg include all relevant information in the Fiches Belges (*see recommendation 2),* in particular concerning surveillance carried out via a GPS beacon on a vehicle.

In fact, the authorities of the Grand Duchy of Luxembourg distinguish between:

- surveillance begun in the issuing State and continued in the Grand Duchy of Luxembourg, which constitutes cross-border surveillance within the meaning of the Schengen Convention; and
- surveillance begun following a request made by an foreign issuing State to the Grand Duchy of Luxembourg as executing State, which constitutes an investigative measure within the meaning of the Directive and must be submitted as an EIO, regardless of whether the surveillance begun in the Grand Duchy of Luxembourg continues in the territory of other states.

The evaluation team agrees with the Luxembourg authorities that the distinction is in that respect a fine and subtle one, and very often confusing for practitioners.

While cross-border surveillance, which constitutes a police cooperation measure, is in principle easier to execute out than an EIO, which probably explains why it has been excluded from the scope of the Directive, this exclusion gives rise, however, to practical complications. In most cases examining magistrates order a number of simultaneous measures. Investigative measures other than cross-border surveillance come under the EIO, while cross-border surveillance has to follow the Schengen Convention regime, and in addition, a freezing certificate may need to be issued, where appropriate, on the basis of Regulation 2018/1805, as well as an EAW, both falling under different legal bases.

Indeed, when cross-border surveillance is ordered by an examining magistrate as part of a pre-trial investigation (and not carried out ex officio by the police as part of their wider powers to investigate a flagrant crime or offence), its exclusion from the EIO complicates the application of the rules on mutual legal assistance. In such cases, bringing cross-border surveillance within the scope of the EIO would contribute to a simpler and more consistent application of the rules on mutual legal assistance.

That being the case, the experts invite the European Commission to clarify the scope of the EIO as regards cross-border surveillance for the purpose of gathering evidence as part of criminal proceedings and in the context of mutual legal assistance (*see recommendation 19.2*).

5.7. Temporary transfer based on the EIO and the EAW

The Luxembourg authorities draw our attention to what they see as a flaw in the temporary transfer system provided for in the EIO.

Articles 22 and 23 of the Directive provide, as the first specific provision relating to certain investigative measures, for the temporary transfer of persons detained in one state for the purpose of carrying out an investigative measure in another state. In this regard, Article 22 deals with the case of a request by the issuing State to have a person detained in the executing State transferred for that purpose, while Article 23 deals with the case of a transfer from the issuing State to the executing State for the purpose of executing an investigative measure for which the presence of the person detained in the territory of the executing State is required. Luxembourg's transposing law deals with these two situations in Articles 30 and 31.

Articles 22(6) and 23(2) of the Directive oblige Member States to ensure that *the transferred person remains in detention in the territory of the issuing State* [or, in the context of Article 23, in the territory of the executing State] *and, where appropriate, in the territory of the Member State of transit, for the acts or convictions for which he has been kept in detention in the executing State* [or, in the context of Article 23, in the territory of the issuing State] *unless the executing State requests his release* (Article 22(6)). The Grand Duchy of Luxembourg transposed this obligation in Article 30(4) (regarding the transit through Luxembourg of transferred detainees), Article 30(6) (regarding the continued detention in the territory of the issuing State of the person detained in the executing State), and Article 31(2) (regarding the continued detention in the territory of the executing State of the person detained in the issuing State).

Whether it is the issuing State, the executing State or the State of transit, the Grand Duchy of Luxembourg thus has a legal basis for the continued detention of persons who are the subject of a transfer or are detained in another state bound by the Directive, regardless of whether that state is the issuing or executing State. However, this legal basis has a flaw: the detention of the transferred person can only be continued as long as the state of the territory from which the person was transferred and which detained them does not put an end to such detention, for example following a request to release the person that is upheld by the courts of the state which granted the transfer. In this case, the state to whose territory the person has been transferred is obliged to release them immediately. That state therefore has no certainty and no guarantee that the transferred person will remain at its disposal for the execution of the investigative measures requested. It faces the risk of immediate release by the authorities of the state which granted the transfer, over which it has no influence.

Where necessary, in order to avoid this risk, the issuing State prefers, when it intends to prosecute the detained person and carry out the investigative measures with this in mind, to an issue an EAW in addition to requesting a transfer under an EIO. Under Article 24(2) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (hereafter the 'Framework Decision on the European arrest warrant'), the executing judicial authority may temporarily surrender the requested person to the issuing Member State under conditions to be determined by mutual agreement between the executing and the issuing judicial authorities. The issue of an EAW for the purpose of prosecution presupposes that that warrant is based on an international arrest warrant issued by the issuing State in accordance with its domestic law, in other words on the basis of a detention order issued under domestic law. This possibility of issuing an EAW offers the issuing State the advantage of better control over the detention of the transferred person by means of the detention order that is issued under domestic law and forms the basis of the EAW. While the transferred person will certainly be able to apply for provisional release, the judicial authorities of the state to whose territory they have been transferred will at least have the option of intervening in those proceedings, which will take place before the courts of that state, and to put forward their arguments.

As issuing authority, the Luxembourg authorities, in this case the examining magistrates, ensure, where necessary, that the issue of the EIO is 'duplicated' by the issue of an EAW based on an international arrest warrant.

The issue of such a warrant presupposes, under domestic law, that the person concerned is suspected of having committed a crime or offence punishable by deprivation of liberty and that they are a fugitive or reside outside the territory (which is assumed to be the case when the requested person is detained abroad). This warrant is in fact only issued if the examining magistrate intends to issue a committal order in respect of the suspect, following the execution of the international arrest warrant. This committal order presupposes the existence of serious indications of guilt, a risk of absconding, a risk of obscuring the evidence or a risk of recidivism justifying deprivation of liberty in the circumstances of the case. Only if these conditions are met can the issue of an international arrest warrant, on which a European arrest warrant will be based, be considered. Such issue is therefore by no means automatic; it is reserved for the most serious cases.

When the Grand Duchy of Luxembourg acts as executing State of an EIO for the purposes of a transfer, it cannot guarantee the issuing State that the transferred person will be kept in detention throughout the transfer. This measure does not prevent the detained person from asserting their rights in the country which requested their detention. If the detained person is in pre-trial detention, they may at any time apply for provisional release, which will be granted if the conditions for detention are no longer met in their case, as assessed by the court ruling on the application. If that person is the subject of the execution of a sentence, they have the right to apply to the State Public Prosecutor, who under Luxembourg law is responsible for executing sentences, adjusting sentences or, depending on the circumstances, conditional release. They also have the right to seek effective legal remedy against the refusal to grant such favours before the Chamber for the Enforcement of Sentences of the Court of Appeal.

In such instances, the issuing State is advised to consider issuing an EAW if possible, in order to ensure the presence of the transferred person and so as to avoid exposure to the risks of a decision on release being taken by the Luxembourg authorities in the course of execution.

Despite these considerations, practitioners tell us that so far they have not had to deal with any cases where the foreign authorities decided to release the transferred person.

5.8. The EIO and Joint Investigation Teams (JITs)

The transposing law provides that *where a competent authority participating in a joint investigation team requires the assistance of a Member State other than those participating in it, an EIO may be issued for that purpose* (Article 1(2)).

The Luxembourg authorities report that they have come across cases of this kind, albeit rarely, both as issuing and executing authority, and have not encountered any major difficulties.

As for sharing the information obtained, the Luxembourg authorities point out that there are two possible scenarios:

- the Luxembourg authorities participate in a team which issues an EIO to the executing authority of a state which is bound by the Directive but does not part participate in the team; or
- the Luxembourg authorities are the addressees of an EIO issued by an issuing authority that is part of a team in which the Luxembourg authorities are not participating.

In the first case, the power to issue an EIO, granted by law, implies the power to share with the other states participating in the team the evidence obtained from the executing authority of the state that is bound by the Directive but not participating in the team. However, such sharing must also be authorised by the law of the state executing the EIO (but not participating in the team); this legislation and any reservations concerning the speciality rule arising from it must be complied with.

Furthermore, the use of the outcome of an EIO issued by a Luxembourg authority in the context of a joint investigation team presupposes the Luxembourg authority specifying that the EIO is issued in the context of such a team and systematically seeking the agreement of the executing authority before sharing the outcome of the EIO with the other authorities participating in the joint investigation team.

In the second case, the Luxembourg executing authority's obligation to accept an EIO issued by an authority participating in a team in which the Luxembourg authority is not participating, and to look at the evidence transmitted to the other authorities participating in the team derives from the Law. However, in accordance with the speciality rule laid down in Article 29 of the Law,[35]the evidence obtained must not be used in proceedings other than those for which the EIO was issued, in other words, outside of the criminal proceedings which gave rise to the creation of the joint investigation team.

However, the evaluation team notes that while Article 29 of the Law is concerned with the speciality rule, it is only concerned with that rule as far as the objects, documents or information obtained by means of an EIO are concerned. Furthermore, this provision is in a section entitled 'European Investigation Orders aimed at implementing coercive measures'. It therefore follows from an *a contrario* interpretation that evidence which has not been obtained by a coercive measure is not covered by that constraint of the speciality rule.

5.9. EIO issued by administrative authorities

Since there is no equivalent of the *Ordnungswidrigkeiten* system under Luxembourg law, Article 5 of the Law confers the power to issue an EIO on the judicial authorities alone. Luxembourg does not therefore make use, as issuing State, of the option provided for in Article 4(b) of the Directive. On the other hand, it receives EIOs issued by the administrative authorities of other countries and executes them once they have been validated by the judicial authorities. In the absence of such validation, these EIOs are returned to the issuing State.

[35] Article 29 of the Law provides that: ' *With the exception of cases where the person concerned gives their consent or in cases of immediate and serious danger to public security, the issuing State may only use objects, documents or information obtained by means of an EIO for the purpose of investigations or for the purpose of producing them as evidence in the proceedings referred to in Article 3 other than the proceedings for which the EIO was executed, with the agreement of the State Prosecutor General if the objects, documents or information were obtained in the execution of an EIO referred to in Article 21, otherwise with the agreement of the judicial authority referred to in Article 10'. Such request may be refused on only one of the grounds referred to, as applicable, in Articles 15, 23 or 24. Before refusing a request in whole or in the part, the Luxembourg judicial authority shall consult the issuing authority by any appropriate means'.*

That validation is all the more essential since the Court of Justice of the European Union stated, in its recent judgment in case C-16/22 of 2 March 2023, *Staatsanwaltschaft Graz* [36] that '*a tax authority of a Member State which, while being part of the executive of that Member State, conducts, in accordance with national law, criminal tax investigations autonomously, instead of the public prosecutor's office and assuming the rights and the obligations vested in the latter, cannot be classified as a "judicial authority" and an "issuing authority", within the meaning, respectively, of* [the first subparagraph of Article 1(1) and Article 2(c)(i) of the Directive] [but that] *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* [including the condition of validation of the EIO by a judicial authority of the issuing State] *are met*'[37]**.**

[36] Court of Justice of the European Union, 2 March 2023, C-16/22, *Staatsanwaltschaft Graz*, ECLI:EU:C2023:148.
[37] Provision of the judgment.

6. CONTENT AND FORM OF THE EIO

6.1. Challenges relating to the form

The authorities of the Grand Duchy of Luxembourg do not report any particular challenges in using the form, with the exception of two specific issues.

The first issue is that, in their view, the form is difficult to read due to the separation of Sections C and H: in Section C, the issuing authority is invited to describe the investigative measures required, while Section H has exactly the same purpose, but requests more detailed information about certain investigative measures. This is the case, for example, for information regarding bank accounts, which is the subject of Sections C and H4, using the same wording. There is therefore a redundancy here.

The Luxembourgish practitioners also point out that Sections C and H have the same purpose, but have not been merged. Worse, sections that have a completely different purpose (D – relation to an earlier EIO, E – identity of the person concerned, F – type of proceedings for which the EIO is issued, and G – grounds for issuing the EIO) are sandwiched between them, which makes the form more difficult to read.

That being the case, the evaluators invite the European Commission to make the form more user-friendly and to develop 'smart forms' to save repetition, as well as to include a section on the technical information necessary for the receipt of electronic banking data (*see recommendation 20.2*).

The second issue concerns the ability to assess the issuing authority's compliance with the principle of proportionality on the basis of the form. The basic criterion that enables the executing authority to evaluate compliance with the conditions is establishing a link between the facts subject to the proceedings and the investigative measures requested. The form does not specifically ask the issuing authority to describe this link. Section G.1 of Form A merely invites the issuing authorities to '*set out the reasons why the EIO is issued*'. These 'reasons' should include the link between the facts and the requested measures, i.e. the relevance of the measures. The requirement to describe these '*reasons*' implies that this link should be specified.

Unfortunately, the form is insufficiently explicit on this point. Adding a clarification and, even better, a separate section for this question would help the executing authority to better evaluate the necessity and proportionality of the measures. A measure will be problematic in terms of its necessity and proportionality if it has no apparent link with the facts or is intended to gather evidence of hypothetical offences, such that it actually amounts to a 'fishing expedition', i.e. randomly searching for evidence of offences that have not yet been established. The form should ideally be supplemented in such a way as to oblige the issuing authorities to describe the link between the offence and the requested measures. Article 6 of the Directive would appear to be a sufficient legal basis for this requirement.

The evaluation team considers that these complaints from the Luxembourgish practitioners stem more from an issue with filling in the form than with its design. The description of the offence under investigation and of the investigative measures required must be such that, when both are read, the necessity of the investigative measures must appear to be the logical corollary of the offence. For example, it will not be clear why the issuing State is requesting the identity of a telephone number subscriber if that number is not mentioned in the description of the offence. By contrast, if the number is mentioned in the description of the offence (for example, it was used by the fraudster to contact the victim), the reason for the request, i.e. the link, is immediately apparent. Any gaps in the information provided in one or several of the sections can always be filled in by means of consultations between the two authorities.

In all cases, the team considers it necessary to recommend to all Member States that the issuing authorities fill in the statement of facts consistently and sufficiently comprehensively for the measures requested (*see recommendation 6*).

The authorities of the Grand Duchy of Luxembourg complain that, when they are the executing authorities, the summary of the facts in many EIOs sent to them (Section G) is too short and too vague, which they consider to be a recurrent challenge. In the case of EIOs issued for tax offences, such as simple tax fraud, which does not constitute a criminal offence under Luxembourgish law, unlike aggravated tax fraud and tax swindling, the question arises of applying Article 11(1), point (g), of the Directive, which provides that the execution of an EIO may be refused if the conduct for which the EIO has been issued does not constitute an offence under the law of the executing State, unless,

- on the one hand, the conduct concerns an offence listed within the categories of offences set out in Annex D to the Directive, and the issuing authority has ticked one of the relevant boxes in Section G3 of Form A, if it is punishable in the issuing State by a custodial sentence or a detention order for a maximum period of at least three years, or,

– on the other hand, as provided for in Article 11(2) of the Directive, the investigative measures requested are those referred to in Article 10(2), i.e. the obtaining of information or evidence which is already in the possession of the executing authority, the obtaining of information contained in databases held by police or judicial authorities, the hearing of a witness, expert, victim, suspected or accused person or third party, any non-coercive investigative measure, or the identification of persons holding a subscription of a specified phone number or IP address.

Given that simple tax fraud is not a criminal offence under Luxembourgish law, the question also arises of applying the ground for non-execution provided for in Article 11(1), point (h), of the Directive, which allows for the non-execution of EIOs if the use of the investigative measure indicated in the EIO is restricted under the law of the executing State to a list or category of offences or to offences punishable by a certain threshold, which does not include the offence covered by the EIO. In accordance with Article 11(2) of the Directive, this ground for refusal does not apply to the presumably non-coercive investigative measures listed above and referred to in Article 10(2). Under Luxembourgish law, the use of coercive investigative measures, such as a search or seizure, presupposes as a minimum that the offence can be classified under Luxembourgish law as a serious offence or a mid-level offence; this condition is not met by simple tax fraud, which is not a criminal offence in Luxembourg.

Article 24 of the Luxembourgish transposing law states that EIOs for the execution of a coercive measure in the Grand Duchy of Luxembourg '*shall be recognised and executed only where the investigative measure requested would have been authorised as part of similar domestic proceedings*'. Thereby transposing Article 11(1), point (h), of the Directive, the Law therefore obliges the Luxembourgish executing authorities to refuse an EIO if it requests the execution of a coercive measure relating to an offence for which the measure could not be executed under Luxembourgish law. This occurs in particular when such a measure is sought in relation to an offence which would be classified under Luxembourgish law as simple tax fraud, which is not a criminal offence under Luxembourgish law and therefore would not justify the use of a coercive measure in domestic proceedings.

The Luxembourgish authority executing an EIO for tax offences must therefore determine whether the offences being prosecuted by the issuing authority should be classified under Luxembourgish law as tax swindling or aggravated tax fraud, in which cases the principle of double criminality applies (where necessary, i.e. provided that none of the boxes in Section G3 of Form A have been ticked by the issuing authority or that the measure is not among those listed in Article 10(2) of the Directive, which must always be executed) and the execution of a coercive measure does not conflict with the ground for refusal provided for in Article 11(1), point (h) (measure that could be authorised as part of similar domestic proceedings), or whether they should be classified as simple tax fraud, in which case the principle of double criminality, insofar as it applies, is not observed and the execution of a coercive measure conflicts with the ground for refusal provided for in Article 11(1), point (g), of the Directive, as transposed by Article 24 of the Law.

Under Luxembourgish law:

- tax swindling involves, firstly, the systematic use of fraudulent tactics with the intent to conceal relevant information or to misrepresent information and, secondly, a significant amount either in absolute terms or in relation to the annual tax due; and
- aggravated tax fraud is fraud involving an amount exceeding a quarter of the annual taxes or duties due, provided it is not less than EUR 10 000, or in any case an amount exceeding EUR 200 000.

In order for the Luxembourgish executing authorities to be able to assess these criteria, it is therefore important that the summary of the facts refer, in the case of tax swindling, to systematic tactics and a significant amount and, in the case of aggravated tax fraud, that it mention that the fraud involves an amount exceeding a quarter of the taxes or duties due and exceeding EUR 10 000 or, regardless of the proportion of the duties evaded, exceeding EUR 200 000.

Unfortunately, though obviously understandably given the relative complexity of the matter, foreign issuing authorities are unaware of these particularities unless they regularly issue such EIOs to the Grand Duchy of Luxembourg, and so their summary of the facts in Section G1 of Form A rarely makes it possible to classify the case as required, which obliges the Luxembourgish executing authority to request additional information on the basis of Article 16(2), point (a), of the Directive, and to inform the issuing authority that '*it is impossible for the executing authority to take a decision on the recognition or execution due to the fact that the form provided for in Annex A is incomplete*'.

The evaluation team notes that these challenges stem mainly from Article 24 of the Law transposing the Directive, as explained above. In addition, the issuing authority is not required to have detailed knowledge of Luxembourg's tax rules. An update to the Fiches Belges could be useful to other Member States' judicial authorities that may be considering issuing an EIO to Luxembourg.

6.2. Language regime and problems related to translation

When acting as the issuing State and a translation is required, the Luxembourgish authorities use professional translators rather than online electronic translation systems, which in their view raise more issues, at least in theory, when it comes to data confidentiality (*see best practice 3*).

In the Grand Duchy of Luxembourg, the official languages in administrative and judicial matters are French, German and Luxembourgish. The language of legislation is French. Luxembourgish is rarely used as a written language, especially in judicial matters. The written languages used in administrative and judicial matters are therefore French and German, with Luxembourgish limited to spoken use in these matters.

The Luxembourgish legislator is considered to have been generous, since the transposing law allows EIOs sent to the Luxembourgish authorities to be drafted in, or accompanied by a translation into, French, German or English. Thus the choice has been made to accept another language commonly used in the EU (English) in addition to the official written languages. This choice has also been made in the context of ordinary law on mutual legal assistance in criminal matters (*see best practice 4*).

The Luxembourgish authorities complain that they have on several occasions, though not systematically, received translations of such low quality that they are unable to satisfactorily understand the document. This situation is often the result of the use of online electronic translation systems by the issuing authority.

On site, the practitioners specified that an EIO received in English does not have to be translated because magistrates and the criminal investigation department have a good command of English. Such cases will be executed in one of the procedural languages of the Grand Duchy of Luxembourg and the execution documents will be provided to the issuing authority in French or German without translation.

The team welcomed the fact that the Grand Duchy of Luxembourg uses professional translators as a matter of principle (*see best practice 3*), and notes that other Member States should be invited to follow the same practice (*see recommendation 9*). The team also highlights the use of a language commonly used in the EU as an additional language, in line with the recommendation in recital 14 of the Directive (*see best practice 4 and recommendation 18*).

It is also the team's view that EIOs must be accurate and comprehensible. To this end, issuing authorities should use short sentences and precise language, which would also make translation easier (*see recommendation 8*).

6.3. EIOs containing multiple requests

In the Grand Duchy of Luxembourg, EIOs containing multiple requests are executed by the authority competent to execute the most demanding measure: usually coercive measures, which fall within the competence of investigating judges. Where the measures fall within the competence of several courts (the courts, including the public prosecutor's offices, of the judicial districts of Luxembourg and Diekirch), they are executed by the public prosecutor's office that first received the EIO, irrespective of any other considerations. The fact that the criminal investigation department has competence throughout the country also makes it easier to execute the EIO and coordinate with the judicial authority responsible for executing the EIO.

6.4. Additional EIOs, splitting of EIOs, conditional EIOs

The Luxembourgish authorities do not report any particular difficulties in relation to additional EIOs issued by them or with split EIOs. They have not had occasion to issue a conditional EIO. However, they noted that, in certain isolated cases, foreign executing authorities to which Luxembourg had referred an EIO executed it only in part and, after that merely partial execution, transferred the evidence gathered, deeming the EIO to have thus been fully executed. The issuing authority was then obliged to pursue the matter anew, in which case the executing authority required an additional EIO to be issued, covering only those measures already requested in the original EIO but not yet executed.

When acting as the executing authority, the Grand Duchy of Luxembourg reports that no conditional EIOs have been referred to its authorities. By contrast, additional EIOs are quite often referred to them. They again make reference to the system of automatically reviewing the validity of the procedure in the case of coercive measures. This system is also applicable to requests for international legal assistance in criminal matters. In that context, an automatic review was carried out on a case-by-case basis. Thus, in the event of several successive requests for assistance relating to the same case, prior to the entry into force of the transposing law the execution of the measures was subject to a single review; as a consequence, the results of the individual successive requests were not transferred immediately, as and when the requests were executed, but were held back pending execution of the final additional request. This approach necessitated an extension of the time limits in which the requesting authority could be made aware of the execution of measures.

Following the entry into force of the Directive, the Luxembourgish authorities changed this approach in order to better comply with the time limits for execution provided for in Article 12 of the Directive. Since then, they have no longer been combining the results of successive EIOs into one transfer for the purpose of carrying out a single review of the legality. The review is carried out individually for each successive EIO as and when it is executed, even when the EIOs relate to the same case.

6.5. Orally issued EIOs

The authorities of the Grand Duchy of Luxembourg have never encountered an orally issued EIO. However, they consider that Article 7(1) of the Directive leaves some scope for accepting EIOs that have not been transmitted as an authentic version with an official signature. In particular, it makes it possible to accept EIOs sent by fax or scanned versions sent by email. In this respect, the Luxembourgish authorities are fairly liberal (*see best practices 2.1 and 2.3*). In the light of the Directive's philosophy of simplifying mutual legal assistance, and of the aim of Article 7(1), which is to establish the EIO's authenticity regardless of the format used, they agree that it would be possible to accept conditional execution in an extremely urgent case, provided that the oral EIO is promptly confirmed in writing. The only issue in such a case would be confirming the identity of the contact person, by whatever means, in order to prevent fraud.

No doubt these concerns are justified. However, the evaluation team's opinion is that these cases, which are quite rare, are most likely to occur in the context of the coordinated and simultaneous execution of several EIOs by multiple judicial authorities in multiple countries on a single action day, in which case the identity of the contact person is confirmed by default. These cases can also occur in situations in which police cooperation measures have already been carried out on the ground, which can also help ensure the contact person can be trusted.

7. NECESSITY, PROPORTIONALITY AND RECOURSE TO A DIFFERENT TYPE OF INVESTIGATIVE MEASURE

Article 6(1)(a) of the Directive makes the issuing of an EIO subject to the condition that it is '*necessary and proportionate for the purposes of the proceedings referred to in Article 4* [i.e. criminal proceedings or assimilated to criminal proceedings in which the EIO has been issued], *taking into account the rights of the suspect or accused person*'. '*The conditions referred to* [...] are to be *assessed by the issuing authority in each case*'[38]. '*Where the executing authority has reason to believe that the conditions referred to in paragraph 1 have not been met, it may consult the issuing authority on the importance of executing the EIO* [and] *the issuing authority may decide to withdraw the EIO*'[39]. Moreover, Article 10(3) of the Directive authorises the executing authority to '*have recourse to an investigative measure other than that indicated in the EIO where the investigative measure selected by the executing authority would achieve the same result by less intrusive means than the investigative measure indicated in the EIO*', i.e. more proportionate measures. Recital 11 of the Directive defines the criteria of necessity and proportionality as the requirement to ascertain '*whether the evidence sought is necessary and proportionate for the purpose of the proceedings, whether the investigative measure chosen is necessary and proportionate for the gathering of the evidence concerned, and whether, by means of issuing the EIO, another Member State should be involved in the gathering of that evidence*'.

As the issuing authorities, the Luxembourgish authorities verify compliance with the principles of necessity and proportionality by means of checks which take place on three levels: the first two relate to the investigative measure which is the subject of the EIO, while the third concerns the issuing of the EIO itself.

[38] Article 6(2) of the Directive.
[39] Article 6(3) of the Directive.

The first level results from the application of the criteria defined by law to permit the use of the various investigative measures. The legislator has taken care to make those criteria more or less binding in proportion to the level of intrusiveness of the measure concerned in terms of the exercise of the right to privacy. Each intrusive measure is subject to conditions of admissibility by which the legislator has given concrete expression to the application of the principles of necessity and proportionality. Some of those measures can be ordered only at certain stages of the proceedings, while others must correspond to offences punishable by a certain threshold, and all of them must be useful in terms of establishing the truth.

The second level of checks concerns the absence of any disproportion in terms of the investigative measure ordered, having regard to the needs of the main or pre-trial investigation. Such disproportion is assessed in the light of the link between the offences being prosecuted and the measures ordered. The essential criterion here is therefore the existence of a plausible link between the offences and the measure ordered.

The third level of checks relates to the question of whether it was necessary and proportionate to execute the investigative measure by means of an EIO. That question could arise in particular in cases where such a measure, which is hypothetically both necessary and proportionate, is executed abroad by means of an EIO in the absence of sufficient indications of the existence of evidence within the country in which execution is sought. In that regard, the Luxembourgish authorities point out that although such checks are perfectly conceivable in theory, there is at this stage no example of a judicial remedy in such a case.

The evaluation team concludes that the assessment of necessity and proportionality undertaken by the Luxembourgish authorities is the same as that undertaken in the context of internal investigations, and that the Directive has not in fact introduced anything new in that regard.

As the issuing State, Luxembourg has only rarely been confronted with cases of refusal to execute EIOs issued by its authorities on the grounds of non-compliance with the principle of proportionality. Such a situation has occurred in the context of EIOs addressed to the authorities of the United Kingdom, which, prior to its withdrawal from the European Union, was bound by the Directive. Those authorities refused to execute certain EIOs on the ground that they related to offences which had caused too little damage to justify such execution.

As the executing State, Luxembourg's attitude with regard to compliance with the criteria of necessity and proportionality of the EIOs transmitted to it for the purposes of execution is summarised in two proposals. As regards the criterion of proportionality, the Luxembourgish authorities refrain from raising objections based on the small scale of the case which gave rise to the EIO or the small amount of damage caused by the offence in question. The authorities of countries in Central and Eastern Europe, in particular, regularly refer EIOs concerning small-scale offences to them. Luxembourg understands that the authorities of those countries are obliged by their national law to prosecute any offence, regardless of its scale. The Luxembourgish authorities execute those EIOs without objecting to the possible disproportional nature of the measures requested in view of the small scale of the infringements justifying them (*see best practice 2.1.*).

However, where the EIO seeks the enforcement of coercive measures, the Luxembourgish authorities must verify whether recourse to the requested investigative measure would be legally permitted under Luxembourgish law if the offence had been committed there. Thus, under Luxembourgish law, the use of audio recordings and the taking of images of private locations or computer data capture is permitted only in respect of major and intermediate offences against national security or acts of terrorism or the financing of terrorism. Similarly, the execution of coercive measures for tax offences presupposes, under Luxembourgish law, that the offences in question may be classified as tax swindling or aggravated tax fraud, and not as simple tax evasion, which does not constitute a criminal offence and therefore does not permit the execution of coercive measures. In such cases, the Luxembourgish executing authorities, under Article 11(1)(h) of the Directive, are obliged to refuse execution of the measure (the formal legal basis for such refusal being Article 11(1)(h) of the Directive rather than compliance with the principle of proportionality, which is, however, what is in fact sanctioned by that Article). To some degree, in fact, the application of those legal criteria has the effect of applying a proportionality criterion.

With regard to Article 11(1)(h), the team reiterates the comments made regarding Article 24 of the transposing law, adding that the problem lies not in the disproportionate nature of the measures required, but in the fact that Luxembourg has transformed an optional ground for non-recognition into a mandatory ground for refusal, without really leaving its authorities free to decide, in the context of the recognition decision, whether the measures are necessary and proportionate (*see recommendation 1.1.*).

On the other hand, as regards the criterion of necessity, the Luxembourgish executing authorities take care to assess, with reference to the summary of facts provided for in Section G.1 of Form A, whether there is a link between the offences being prosecuted and the measures requested. This question arises, for example, when the issuing authority, in order to investigate acts of fraud committed in 2020, requests, without further explanation or justification, banking data relating to account transactions that took place in 2014. In such cases where there is an apparent lack of a plausible link between the offences and the measures sought, the Luxembourgish executing authority will implement the consultation procedure provided for in Article 6(3) of the Directive (*see best practices 7 and 8 and recommendation 12*).

In addition, the Luxembourgish authorities point out that, as executing authorities, they often suggest that the issuing authorities replace a measure that has been requested with a different one. That is the case as regards hearings of bank employees, which are replaced by the requisitioning of bank documents, such hearings remaining reserved for more complex cases, such as – for example – to address concerns raised by requisitioned bank documents (*see best practice 14*).

8. TRANSMISSION OF THE EIO FORM AND DIRECT CONTACT

The Luxembourgish authorities do not report any particular difficulty in identifying the executing authority when issuing an EIO. First, they turn to the Judicial Atlas in criminal matters of the European Judicial Network (EJN) (*see best practice 6*). If, as sometimes happens, they are unable to identify the executing authority, they contact the EJN Contact Points. If they fail to receive a reply, or if they have any doubts about the reply received, they turn to the Luxembourg National Member at Eurojust, who contacts the national office of the executing State. Luxembourg's small size, combined with the limited number of judges working in this field, facilitates direct, informal contacts between the issuing authority and the National Member at Eurojust (*see best practices 7 and 8 and recommendation 12*).

The Luxembourgish authorities point out that, in general, the executing authorities ensure, in accordance with the Directive, that the execution of the EIO is properly coordinated if it cannot be executed by a single authority. However, coordinating the execution of an EIO for which several competent authorities in the executing State are responsible had in some cases been a source of sporadic difficulties for the issuing authorities. The difficulties encountered had been of two kinds:

- on the one hand, because the measures requested were to be executed in more than one place, execution of the EIO had been the subject of a split between different authorities that had failed to coordinate either with each other or with the help of a central authority, leaving the Luxembourgish issuing authority faced with an increasing number of interlocutors and in possession of only fragmented and partial responses,

– on the other hand, while the EIO had indeed been entrusted by the Luxembourgish issuing authority to the executing authority which had territorial jurisdiction in the light of the information available, it had turned out in the course of executing the EIO that – since the person subject to the measure had in the meantime changed his or her domicile within the executing country – the requested authority no longer had territorial jurisdiction, and had failed to inform the issuing authority or to transmit the EIO *ex officio* to the competent authority, thus obliging the issuing authority to issue a new EIO.

The Luxembourgish authorities report a recent change of position regarding the means of transmission of the EIO. Until relatively recently, they had systematically required the transmission of an original document. Despite this, in many cases EIOs had been sent by email, with an electronic copy of the EIO (in PDF format) in attachment, without an electronic signature. The Luxembourgish executing authorities would then systematically ask the issuing authority to send an original document in paper form. Those requests were not always complied with. In such (admittedly exceptional) cases, the Luxembourgish authorities faced a dilemma: they could either execute the EIO without waiting to receive the original document (something which they always did in the case of an urgent EIO), then being obliged, however, to transmit the result without having received the original document 'regularising' the sending of the email; or they could suspend execution pending receipt of the original document, thereby causing delays and exposing themselves to the risk of evidence being lost, the time limits laid down by Article 12 of the Directive being exceeded or even an outright refusal in cases not presenting any real difficulty in terms of their authenticity.

To overcome those difficulties, it has recently been decided to accept, from now on, on the basis of Article 7(1) of the Directive, EIOs sent by email with an electronic copy of the original EIO in attachment (*see best practice 5 and recommendation 17*).

Luxembourgish practitioners advocate the establishment of a secure IT system for the exchange of EIOs. Article 7(4) of the Directive refers to the '*telecommunicationssystem of the European Judicial Network',*which, however, is not used for that purpose by Luxembourgish practitioners to the extent that it exists. Secure exchanges of IT data in this area will be enhanced by the entry into force of Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters and amending certain acts in the field of judicial cooperation.

While the 'e-Evidence Digital Exchange System (eEDES)' is currently in operation at the public prosecutor's office in Diekirch, there are no plans at present for it to be deployed by the other judicial authorities in Luxembourg. The evaluators recommend that all national authorities competent for the EIO should connect to the eEDES system as soon as possible, irrespective of whether the measures are coercive (*see best practice 3*). The other Member States should connect all competent national authorities to eEDES as soon as possible (*see recommendation 10*).

In principle, and in the vast majority of cases, any communication subsequent to the transmission of the EIO by the Luxembourgish authorities – whether issuing or executing – takes place directly (*see best practice 7*). It is only in very exceptional circumstances, when confronted with difficulties, that such communication takes place through Eurojust, as the EJN is, in fact, hardly used for that purpose (*see best practice 8*).

9. RECOGNITION AND EXECUTION OF AN EIO AND FORMALITIES

9.1. Compliance with formalities

Section I of the A form deals with the formalities and procedures requested by the issuing authority for the execution of an EIO, in terms of both compliance with certain formalities and procedures, and assistance in executing the EIO provided by officials of the issuing State. It transposes Article 9 of the Directive, which provides, first, in paragraph 1, that the executing authority '*shall ... ensure its execution in the same way and under the same modalities as if the investigative measure concerned had been ordered by an authority of the executing State*' and, second, in paragraph 2, that '*[t]he executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority unless otherwise provided in this Directive and provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State*'.

In practice, the indication of specific procedures to be followed at the request of the foreign issuing authority by the Luxembourg executing authority arises in certain cases, particularly with requests for the hearing/questioning of witnesses and suspected persons. The issuing authorities sometimes require such hearings to be conducted by a judge. Compliance with this formality does not pose any particular difficulties. The formalities required are generally not contrary to the fundamental rights guaranteed in the Grand Duchy of Luxembourg; however, certain requests are not compatible with the requirements of the Luxembourg Code of Criminal Procedure, in particular as regards the status of the person to be heard (witness or suspect). In such cases, the Luxembourg authorities consult with the issuing authority on the procedure to be followed.

If the issuing authority fails to complete Section I, in accordance with Article 9(1) of the Directive the Luxembourg executing authority executes the EIO in accordance with Luxembourg law. Again, the Luxembourg authorities did not encounter any problems arising from an issuing authority failing to complete Section I.

As issuing authority, the Luxembourg authorities did not have to ask executing authorities to comply with any specific formalities, and so they did not encounter any difficulties.

9.2. Admissibility of evidence

No particular difficulties were reported to the Luxembourg authorities as issuing authority of an EIO. It should be borne in mind, however, that the admissibility of evidence submitted to the issuing State and not subject, in the executing State, to compliance with formalities specifically required by the issuing State, can be usefully assessed only by the latter.

When issuing an EIO, the Luxembourg authorities do not, in principle, require compliance with specific formalities. They did not encounter any difficulties in terms of the admissibility of evidence obtained abroad in the execution of their EIOs.

10. SPECIALITY RULE

According to the Luxembourg authorities, the Directive does not allow the use by the issuing State of evidence gathered in the executing State for the execution of an EIO in proceedings other than those for which the EIO was issued, as it provides in Article 19(3) that *'unless otherwise specified by the executing authority, [the issuing authority] shall not disclose any evidence or information provided by the executing authority, except to the extent that such disclosure is necessary for the purposes of the investigations or proceedings described in the EIO.'*

According to the Luxembourg authorities, the criteria on the basis of which such confidentiality may, where appropriate, be waived, should be defined in the executing State's legislation. Consequently, the Luxembourg legislature defined those conditions in Article 29 of the transposing law, which provides as follows:

'***Article 29***. *With the exception of cases where the person concerned has given their consent or in cases of immediate and serious danger to public security, the issuing State may only use objects, documents or information obtained by means of an EIO for the purposes of investigations or for the purpose of producing them as evidence in the proceedings referred to in Article 3* [which transposes Article 4 of the Directive and defines the proceedings for which an EIO can be issued] *other than the proceedings for which the EIO was executed, with the agreement of the public prosecutor-general if the objects, documents or information were obtained in the execution of an EIO referred to in Article 21* [that is, an EIO for the purpose of implementing coercive measures]*, otherwise with the agreement the judicial authority referred to in Article 10* [i.e. public prosecutors, as the EIOs referred to here concern the execution of non-coercive measures]. *Such a request may be refused on only one of the grounds referred to, as applicable, in Articles 15* [which corresponds to the grounds for non-recognition or non-execution provided for in Article 11 of the Directive], *Article 23* [which reflects, as regards EIOs for the purposes the execution of non-coercive measures, the case of non-recognition and non-execution set out in Article 11(1), point (b) (the execution of the EIO would harm essential national security interests, jeopardise the source of the information or involve the use of classified information relating to specific intelligence activities)] *or Article 24* [which reflects, as regards EIOs for the purposes of coercive measures, the case of non-recognition and non-execution of Article 11(1), point (h) (refusal on the ground that the use of the investigative measure indicated in the EIO is restricted under the law of the executing State to a list or category of offences or to offences punishable by a certain threshold, which does not include the offence covered by the EIO), with Article 24 of the Law making this ground for refusal mandatory for Luxembourg execution authorities]. *Before refusing, in whole or in part, a request, the Luxembourgish judicial authority shall consult the issuing authority by any appropriate means.'*

The Luxembourg authorities explain that this provision therefore makes the waiving of the speciality rule subject to the condition that a new EIO issued by the issuing authority for the purposes of seeking evidence in the new proceedings in which it is intended to use the evidence obtained, would not have been contrary to the grounds for refusal in Article 11 of the Directive.

However, there is an exception to this principle – the speciality rule is waived without the need to require the agreement of the Luxembourg authorities in two situations:

- where the person concerned gives consent (e.g. the suspected person who is holder of the account the documents of which were seized agrees to the evidence being used in the new proceedings), and
- where there is an immediate and serious danger to public security (e.g. where the evidence would allow an attack to be foiled or to locate the victim of an ongoing kidnapping).

The waiving of the speciality rule presupposes that the evidence is used in one of the proceedings for which an EIO can be issued, as defined in Article 4 of the Directive, transposed by Article 3 of the Law. What these proceedings have in common is that, if not criminal proceedings, they are at least proceedings that penalise infringements of the rules of law. They cannot therefore be mere administrative proceedings unrelated to any penalty for infringement, such as tax proceedings which tax authorities would like to carry out on the basis of documents in the context of an EIO issued for a tax offence[40].

The speciality rule, provided for in Article 29 of the Law, is, as regards EIOs for the enforcement of coercive measures, systematically brought to the attention of issuing authorities in the transmission letter accompanying the dispatch of evidence after execution of the EIO, signed by the Prosecutor-General's Office, which is the central authority in this matter[41].

[40] Reference is made to the case in which a foreign judicial authority issued an EIO to obtain evidence of a tax offence and, after conviction of the perpetrator, requested permission to transfer the evidence to the tax authorities in order to allow those authorities to levy tax on the convicted person on the basis of that evidence. Since administrative tax proceedings are not included in proceedings referred to in Article 3 of the Directive, the requests were refused.

[41] See Article 22 of the transposing law.

As issuing authority, the Luxembourg authorities ensure that they obtain the consent of the executing authority if they intend to use the evidence obtained as a result of the execution of their EIO in proceedings other than those in which the EIO was issued. Without that consent, the use of such evidence would run counter to the confidentiality rule of Article 19(3) of the Directive, which requires the issuing authority, *'unless otherwise indicated by the executing authority'*, to not disclose any evidence or information *'except to the extent that its disclosure is necessary for the investigations or proceedings described in the EIO'*. Such usage would be unlawful, thereby calling into question the legality of the new proceedings in which it was intended to use the evidence.

Since the root of this issue is in Article 19(3) of the Directive, Luxembourg issuing authorities refer to that provision in their letters to the executing authority.

The evidence may be used, in accordance with the aforementioned Article, *'for the investigations or proceedings described in the EIO'*. However, such investigations or proceedings are not considered to be new or different if they pertain to related facts, facts covered by the original investigation, or persons not identified at the time of the issuance of the EIO. Such a development of investigations or proceedings is not considered to constitute new investigations or proceedings, different to those for which the EIO had been issued, which would prevent the issuing authority from using the evidence. On the basis of this understanding, the executing authority is not informed of such developments in a case.

The execution of an EIO may make it possible to identify offences in the executing State.

In this regard, a distinction should be made between the following three situations:

- The execution of an EIO makes it possible to discover an offence which is not deduced from the evidence gathered, but from officers' own findings made at the time of the execution and independently of the evidence. For example, in the course of a search aimed at seizure with a different purpose, the chance discovery of drugs, weapons or the unauthorized exercise of a service provision activity (for example, acting as a provider of a legal address). In such cases, as the evidence of the offence discovered by chance does not arise from the evidence gathered in the execution of the EIO, the issuing authority is not, in principle, informed.

- An offence other than the one that is the subject of the criminal prosecution for which the EIO was issued is discovered on the basis of evidence gathered for the execution of the EIO. For example, the discovery, on the basis of the evidence, of a money-laundering offence committed in the Grand Duchy of Luxembourg, which is ancillary to, but separate from, the primary offence being prosecuted in the issuing State. In this case, the Luxembourg authorities request authorisation from the issuing authority to use the evidence in the context of the new, separate criminal proceedings opened in the Grand Duchy of Luxembourg following the discovery. Once authorisation has been received, the evidence is seized a second time in the context of the Luxembourg prosecution, which allows the Luxembourg authorities to make legal use of it in their proceedings.

- It becomes apparent, after the execution of the EIO and the transmission of the evidence to the issuing State, that the evidence is relevant for a criminal prosecution in the Grand Duchy of Luxembourg, the executing State. The issuing authority is then requested to authorise the use of the evidence in that criminal prosecution and the transmission, in the form of an EIO, of copies or the original of that evidence.

In accordance with the speciality rule laid down in Article 29 of the Law, the evidence obtained must not be used in proceedings other than those for which the EIO was issued. However, the evaluation team notes that Article 29 regarding the speciality rule applies only to objects, documents or information obtained by means of an EIO. In addition, this provision forms part of a section entitled 'European Investigation Orders aimed at implementing coercive measures'. It therefore follows from an a contrario interpretation that evidence not obtained by coercive measures is not covered by that constraint of the speciality rule.

As the existence and content of the speciality rule seem open to discussion or interpretation, and in the interest of uniformity of practice in all Member States, the evaluation team invites the Commission to provide clarifications on the speciality rule in the context of the EIO (*see recommendation 19.3*).

11. CONFIDENTIALITY

The Grand Duchy of Luxembourg as issuing State

The Luxembourgish issuing authorities have not received any notifications under Article 19(2) of the Directive.

The Grand Duchy of Luxembourg as executing State

The execution of an EIO in the Grand Duchy of Luxembourg falls under the principle of investigative secrecy, which is guaranteed by Article 8 of the Code of Criminal Procedure and the contravention of which is penalised in accordance with Article 458 of the Criminal Code[42]. Undue disclosure of an EIO would therefore constitute a breach of professional secrecy, which is criminally reprehensible. From this point of view, the execution of EIOs falls under the same regime as investigations and pre-trial judicial investigations in national law.

With a view to reinforcing this principle of confidentiality, Article 19(4) of the Directive requires Member States to take '*the necessary measures to ensure that banks do not disclose to the bank customer concerned or to other third persons that information has been transmitted to the issuing State in accordance with Articles 26 and 27 or that an investigation is being carried out*.'[43] That obligation was transposed by Article 25 of the Law, which provides that:

[42] '*Article 8. (1) Unless otherwise provided for by law and without prejudice to the rights of the defence, proceedings during an investigation shall be secret. (2) Subject to exemptions stemming, in national law, from international undertakings in the area of international cooperation in particular, anyone who participates in these proceedings is bound to professional secrecy under the conditions and subject to the penalties set out in Article 458 of the Criminal Code.* […]'. Article 458 of the Criminal Code to which it refers provides that: '*Article 458. Medical practitioners, surgeons, health officers, pharmacists, midwives and all other persons who, by virtue of their position or profession, are in receipt of confidential information shall, except where called to give evidence in a court of law or where required by law to disclose such information, be punished, in the event of such disclosure, by a term of imprisonment of eight days to six months and a fine of EUR 500 to EUR 5 000.*'

[43] Article 26 of the Directive relates to information on bank and other financial accounts and Article 27 relates to information on banking and other financial operations.

'*Article 25.*

Credit institutions and their directors and employees may not disclose to the customer concerned or to third persons, without the prior express consent of the authority which ordered the measure, that the seizure of documents or disclosure of documents or information has been ordered by the investigating judge in relation to the execution of a European Investigation Order.

Knowing violation of this obligation will result in a fine ranging from EUR 1 250 to EUR 1 250 000.'

The Directive places a limitation on the duty of confidentiality. It specifies that this confidentiality shall apply, '*except to the extent necessary to execute the investigative measure*.' However, execution of the EIO may result in the disclosure of the existence of the EIO to the person who is the subject of the investigation, either directly or by means of third parties not bound by a duty of confidentiality. This is particularly the case when the EIO is to be executed with the person who is the subject of the investigation or with third persons who have a relationship with that person who, contrary to banks, are not bound by a duty of confidentiality (for example, in the event of a search of the premises of the person who is the subject of the investigation or of an authorised representative of that person other than a bank, such as a lawyer, provider of a legal address ('*domiciliataire*'), accountant, asset manager, etc.). In such cases, the execution of the EIO necessarily implies disclosure of the fact that there is an ongoing investigation against the person concerned (even though the EIO itself is, of course, not disclosed).

Disclosure of the EIO to third persons is not provided for in Luxembourgish transposing law when the Grand Duchy of Luxembourg is the executing State, nor is it provided for in practice in this case. Disclosure of this kind must not be made when executing an EIO, in which case only notification of the order for investigative measures may be made to the person subject to those measures, nor when a person concerned submits a statement contesting the validity of the proceedings, it being noted that the council chamber adjudicates on that statement after examination of the file and therefore without a hearing.

It is understood that if the Grand Duchy of Luxembourg is the issuing State, an EIO which is to be executed in a foreign executing State could, at the appropriate time, be consulted in the Grand Duchy of Luxembourg by the person under investigation or the civil party in compliance with the rules regarding communication of the file as set out in the national law on criminal procedure.

12. GROUNDS FOR NON-EXECUTION

12.1. General

Distinction must be made between the Grand Duchy of Luxembourg as issuing State and executing State.

The Grand Duchy of Luxembourg as issuing State

Luxembourgish authorities have met with few instances of the execution of an EIO being refused. Some examples of non-execution have however been noted.

On one occasion, a Luxembourgish authority was refused access to a medical file on the ground that the measure, under the law of the executing State, would require the consent of the patient, who was the suspected person; in the absence of such consent, execution of the EIO was refused by the foreign executing authority.

In another case, execution of an EIO was refused because the executing authority considered that the acts were statute-barred under its national law and refused to take into account that the limitation period had been interrupted under Luxembourgish law.

These two refusals do not appear to be in compliance with the Directive. Article 11(1), point (h) of the Directive does in fact authorise refusal of execution if the use of the measure is restricted under the law of the executing State to a list or category of offences or to offences punishable by a certain threshold, which does not include the offence covered by the EIO. It does not, however, authorise the refusal of execution of a measure provided for by the executing State on grounds unrelated to the admissibility of this measure in view of the offence, the prosecution of which is the reason the order was requested, such as not receiving consent from a patient whose medical file is to be seized or respect of the time-bar for proceedings under the law of the executing State (*see recommendation 1.1.*).

The Grand Duchy of Luxembourg as executing State

In certain cases, Luxembourgish authorities have been forced to refuse the execution of an EIO.

The most common grounds for refusal fall into one of three categories.

Firstly, refusals had to be made when the issuing authority requested the execution of coercive measures, most commonly a search of premises or seizure, for acts which, under Luxembourgish law, are classified as simple tax evasion, which does not constitute a criminal offence.

There are two potential difficulties which may arise in this case.

- If the issuing State did not indicate, by ticking one of the boxes in Section G.3 of Form A, that, under its law, the acts constituted an offence listed within the categories of offences set out in Annex D, the ground for optional non-execution provided for in Article 11(1), point (g) (an act which does not constitute an offence under the law of the executing State) is established (the requested measure being, presumably, a coercive measure not covered by Article 10(2), which lists the measures which, on the basis of Article 11(2), are an exception to the ground for non-execution provided for in Article 11(1), point (g)). The Luxembourgish executing authorities are therefore obliged, in accordance with Article 24 of the transposing law, to refuse execution, as '*the requested investigative measure would [not] be authorised in a similar domestic case*'[44], as an act which does not constitute a criminal offence may not justify the use of a coercive measure, such as a search of premises or seizure.

- If the issuing State indicated that, under its law, the acts constituted an offence listed within the categories of offences set out in Annex D (by ticking one of the boxes in Section G.3 of Form A), the use of the investigative measure, which is presumably coercive (and as such not covered by the exception provided for in Article 11(1), point (h) and Article 11(2) in conjunction with Article 10(2) of the Directive) is not provided for under Luxembourgish law, where the use of coercive investigative measures is limited to serious and mid-level offences and as such is excluded for acts which do not constitute a criminal offence. Therefore, the ground for optional non-execution provided for in Article 11(1), point (h) is established and the Luxembourgish executing authorities are obliged, in accordance with Article 24 of the transposing law, to refuse execution as '*the requested investigative measure would [not] be authorised in a similar domestic case*'[45].

[44] Article 24 of the Law.
[45] Article 24 of the Law.

In cases where the requested coercive measure cannot be taken, the Luxembourgish authorities suggest to the issuing authority that they consider using a non-coercive measure, in accordance with Article 10(3) of the Directive. However, this option is not relevant in many cases, as the desired evidence can only be obtained by means of a coercive measure (which is excluded for the aforementioned reasons).

This finding led the evaluation team to make a recommendation to amend or remove Article 24 of the transposing law of 1 August 2018 as, in the two cases mentioned above, it makes the refusal of execution of the EIO mandatory, although the Directive does not provide for that in such cases. It should be noted that the grounds for refusal of execution already constitute exceptions to the principles of mutual trust and mutual recognition and that as such the optional grounds for refusal of execution provided for in the Directive cannot be established as mandatory grounds by the application of domestic rules in the executing State (see recommendation 1.1.).

Secondly, refusals had to be made when the issuing authority requested the execution of coercive investigative measures which, under Luxembourgish law, may only be used for certain categories of offences or for offences punishable by a certain threshold, which does not include the offence covered by the EIO.

The most common examples are the particularly intrusive measures of audio recording and taking images of certain locations or vehicles and computer data capture, which, under Luxembourgish law, are limited to serious and mid-level offences against national security and acts of terrorism or the financing of terrorism[46]. These measures therefore cannot be executed, by way of example, for offences relating to drug trafficking or those committed within a criminal organisation or criminal association. The result is that EIOs for the purpose of carrying out those measures on account of such offences cannot be executed. This refusal of execution is based on the optional ground for refusal provided for in Article 11(1), point (h) of the Directive, however it is binding on the Luxembourgish authorities, which are obliged to apply it; they are therefore obliged, under Article 24 of the transposing law to make use of the option provided for in the Directive where '*the investigative measure requested would [not] be authorised in a similar domestic case*'[47] (*see recommendation 1.1.*).

The Luxembourgish judicial authorities consider that it would be desirable to extend the admissibility of the measures of audio recording and computer data capture to serious crimes, such as offences committed within a criminal organisation or criminal association[48].

Where these measures must be refused, the executing authorities suggest that the requesting authority, on the basis of Article 10(3) of the Directive, use an alternative measure, such as surveillance or the surveillance and monitoring of telecommunications, which are admissible measures in broader conditions (*see best practices 2.1.*).

[46] Article 88-2(1), point (1) of the Code of Criminal Procedure.
[47] Article 24 of the Law.
[48] It should be noted that a bill is currently being drafted with the aim of extending the list of offences for which these types of measures may be ordered.

Thirdly, refusals of execution have been made because the issuing authority failed, despite reminders being sent, to respond to a request for additional clarification regarding the summary of the facts (Section G.1 of Form A) or the description of the nature and legal classification of the offences for which the EIO was issued, sent on the basis of Article 11(4). In the absence of clarification, which in certain cases was not provided even after several reminders, the executing authority was not in a position to assess the admissibility of the EIO. It was therefore obliged to refuse execution.

Such cases of refusal are however rare.

The Luxembourgish issuing authorities are consulted by foreign executing authorities when there is a problem linked to a potential refusal of an EIO, just as the Luxembourgish executing authorities, in such instances, carry out consultations as provided for in Article 11(4) of the Directive (*see best practice 7*).

These consultations therefore take place systematically and do not lead to difficulties worthy of reporting, with the exception, as described above, of a lack of response from the issuing authority, even after several reminders.

12.2. Dual criminality

The Luxembourg issuing authorities have never seen the dual criminality criterion invoked when they indicated, by ticking one of the boxes in Section G.3 of Form A, that the EIO related to an offence included in the categories of offences in Annex D.

And when seized as executing authorities, they have seen EIOs issued with a view to executing coercive measures for matters that are classified under Luxembourg law as simple tax evasion, which does not constitute a criminal offence under Luxembourg law. When, in those cases, the issuing authority had ticked one of the boxes in Section G.3 of Form A, i.e. had specified that the offences being prosecuted by the issuing State constituted offences in line with Annex D, the grounds for non-execution under Article 11(1)(g) were, of course, not established and execution of the EIOs was not refused on that basis. However, as Luxembourg law limits the use of coercive measures to the prosecution of serious offences and mid-level offences [*crimes* and *délits*] and the matter did not constitute a criminal offence under Luxembourg law, these EIOs had to be refused on the basis of Article 11(1)(h), the application of which is binding on the Luxembourg authorities in accordance with Article 24 of the transposition law. It should be clarified that the grounds for non-execution in Article 11(1)(h) also apply, unlike those in Article 11(1)(g), to offences classified by the issuing authority as falling under Annex D.

Refusals such as these, based on Article 11(1)(h), relate only to measures which, under the law of the executing State, may be used only for a list or category of offences or for offences punishable by a certain threshold which do not include the offence to which the EIO relates. Under Luxembourg law, this concerns coercive measures, in particular searches and seizures, the application of which is limited to serious crimes and mid-level crimes [*crimes* and *délits*], and is not therefore for matters such as simple tax evasion, which do not constitute a criminal offence. However, it does not concern non-coercive measures. The distinction should be made between two different situations in this respect. On the one hand, the measures referred to in Article 10(2) of the Directive, which are by their nature non-coercive, are not, as stated in Article 11(2), relevant to the non-implementation of Article 11(1)(h). On the other hand, the non-execution in Article 11(1)(h) is optional, and therefore does not oblige the executing State to refuse execution. Article 24 of the transposing law obliges the Luxembourg executing authorities to apply this non-execution where the measures requested are of a coercive nature. However, it does not oblige them to use these grounds when the measure requested is not coercive.

Following this logic, the Luxembourg executing authorities have taken care as far as possible to propose to the issuing authority, in the event of non-execution of coercive measures for matters which can be classified under Luxembourg law as simple tax evasion, on the basis of Article 10(3), that they execute an alternative measure of a non-coercive nature instead of the coercive measure refused. However, the use of alternative measures has often proven to be deceptive because it is often only possible to gather the evidence requested using a coercive investigative measure. Specifically, the evidence is most often bank documents. Under Luxembourg law, these documents are covered by the principle of professional secrecy, to which bankers and professionals in the financial sector who hold these documents are also subject. In practice they are seized coercively by search and seizure or transmitted by the banker under threat of criminal sanctions if assistance is refused in the execution of a demand for banking information on the basis of Articles 66-2 to 66-5 of the Code of Criminal Procedure.

The exercise of these coercive measures allows the judicial authorities to take possession of documents and information without professionals in the financial sector incurring penalties for breach of professional secrecy. A coercive seizure is executed without practical assistance or, in any case, the will of the holder of the secret, and the delivery of documents or information pursuant to a requisition from the investigating judge issued on the basis of Articles 66-2 to 66-5 of the Code of Criminal Procedure is justified by the criminal law penalising the breach of professional secrecy, namely Article 458 of the Criminal Code and Article 41 of the amended act of 5 April 1993 on the financial sector (for professionals in that sector), if the law requires the holder of the secret to make it known. In theory, the holder of a professional secret may lawfully disclose it when called upon to give evidence[49]. It would then theoretically be possible to proceed straight to a hearing of the professional by the investigating judge instead of carrying out a search and seizure. However, this alternative is of no interest in practice. The case-law confers on the holder of the secret called to testify in court the choice of revealing the secret, in which case they are not liable to a penalty, or of refusing to reveal it, as is their right[50]. In practice, the holders of secrets and in particular professionals in the financial sector, systematically opt to remain silent. The option of a hearing as a witness is therefore not worth considering.

Article 10(2) of the Directive lists five investigative measures which, in the light of Articles 11(1)(g) and 11(2), cannot be refused on the grounds of non-compliance with the principle of dual criminality. These same measures cannot be refused, in the light of Articles 11(1)(h) and 11(2), on the grounds that the use of the measure is limited under the law of the executing State to a list or category of offences or for offences punishable by a certain threshold which do not include the offence to which the EIO relates.

The Luxembourg authorities, as issuing authorities, have not met with cases where these measures were refused on these grounds.

[49] Article 458 of the Criminal Code.
[50] See, by way of illustration: Court of Appeal, 6 June 1961, *Pasicrisie luxembourgeoise*, 18, page 351.

Nor have they refused as executing authorities to execute these measures on these grounds. On the contrary, although they were, in particular in connection with matters classified under Luxembourg law as simple tax evasion, which does not constitute a criminal offence under Luxembourg law, compelled to not carry out coercive measures on the basis of Article 11(1)(g) and (h) of the Directive and Article 24 of the transposing law, they proposed that the issuing authority use non-coercive measures, including those referred to in Article 10(2), adding, however, that the use of those measures proved in most cases to be irrelevant since it was likely that the evidence requested could be obtained only through coercive investigative measures (in particular searches and seizures).

12.3. Ne bis in idem

No difficulties were encountered whether the Grand Duchy of Luxembourg was the executing State or the issuing State.

12.4. Immunities or privileges

The Luxembourg authorities stated that they had never had any difficulties related to privileges and immunities, either as issuing authorities or as executing authorities.

12.5. Fundamental rights

The Luxembourg authorities, as issuing authorities, have not been faced with measures being refused on the grounds that they breached the fundamental principles of the law of the executing State.

And they have not refused to execute an EIO for that reason either. Luxembourg law includes a broad range of intrusive investigative measures including observation, covert investigation (called 'infiltration' in Luxembourg law), screening of telecommunications and locating the origin or the destination of telecommunications, surveillance and monitoring of telecommunications and postal correspondence, audio recording and taking images of certain places or vehicles or capturing computer data. Since these measures are set out in national law, executing them in connection with an EIO cannot, in principle, raise questions of compatibility with the fundamental principles of Luxembourg law. The Grand Duchy of Luxembourg has not met with requests for the implementation of even more intrusive measures not provided by national law, which would have raised questions of compatibility.

13. TIME LIMITS

Article 12 of the Directive imposes time limits for execution which are in principle very strict:

- the decision on the recognition and execution of an EIO must be taken *as soon as possible* and, unless a shorter period is requested, within 30 days of receipt of the EIO[51]; this period may be extended in specific cases, after informing the issuing authority, by a maximum period of 30 days,

- the investigative measure must be carried out *without delay* and, unless a shorter period is requested, within 90 days of the date on which the recognition decision was taken[52].

While at least one third of EIOs meet the deadlines[53], the deadlines are not always met in all cases, given the resources available, even with the best of intentions. The evaluation team therefore recommends that the Grand Duchy of Luxembourg ensure that the authorities responsible for execution have the necessary means and human resources to comply with the time limits set out in the Directive (*see recommendation 5*).

The Grand Duchy of Luxembourg as issuing State

The Luxembourg authorities noted that it was very common for the foreign execution authorities not to comply with these deadlines. Furthermore, they very rarely inform the issuing authority of these delays or explain why there is a delay.

[51] Article 12(3) and (5) of the Directive and the second paragraph of Article 18 of the Law.
[52] Article 12(4) and (6) of the Directive and the third and fourth paragraphs of Article 18 of the Law.
[53] This can also be seen from the conclusions in Chapter 21 Statistics.

In this respect the foreign authorities are probably in the same situation as the Luxembourg executing authorities with the workload of the judicial authorities and police services making it physically impossible to comply with these requirements.

Since the first challenge is to be able to ensure the execution of EIOs, respecting the deadlines is an additional challenge to be met in principle and subject to emergencies, and is difficult to manage in view of the resources available.

Nonetheless, the evaluators recommend that the executing authorities respect the deadlines and swiftly inform the issuing authorities of any potential delays (*see Chapter 11*).

The Grand Duchy of Luxembourg as executing State

The Luxembourg authorities also indicated that they tried to comply with the time limits set out in the Directive but were facing difficulties in practice, especially in the execution of coercive EIOs, owing to the workload of the services. In any event, where requests are indicated as urgent, they are executed promptly, within the day even, and always within the time limits indicated by the issuing State.

It should be noted that another source of delay is the procedural and practical handling of EIOs for the purpose of executing coercive measures after they have been executed: Luxembourg law makes the transmission of evidence to the issuing authority subject to an ex officio review of the formal validity, with the persons concerned having the right to file a statement challenging that validity. This procedure presupposes that the public prosecutor's office will issue an indictment to the court responsible for the review[54] and that the court will issue an order[55]; the law gives the court 20 days to adjudicate[56]. Once the ex officio review has been completed, the documents and case papers are transmitted to the issuing authority by the central authority, which is the State Public Prosecutor. All these steps are potential sources of delay. However, it should be noted that in the vast majority of cases the court responsible for the ex officio review of the validity adopts its decision much sooner than the maximum 20 days prescribed.

54 Article 26(3) of the Law.
55 Article 27(1) of the Law.
56 Idem et loc. cit.

It is worth noting that, following a recent legislative amendment, an exception can be made to the ex officio review of validity if there are compelling indications that carrying out the review might endanger a person's physical or mental health, in which case the evidence is transferred without delay on the basis of a decision by the magistrate chairing the council chamber, i.e. the court responsible for the ex officio review[57]. This provision has been used systematically in particular for EIOs relating to terrorism offences, and for any other EIOs where any delay in transmission may give rise to the risks listed in the legislation.

The Luxembourg authorities endeavour to do everything possible to ensure that urgent requests are executed rapidly, preferably immediately, and to ensure that all other requests are executed as quickly as possible in view of the resources available, however they are not in a position, save in exceptional circumstances, to communicate the information in Article 12(5) of the Directive. The purpose of this provision is to justify a maximum extension of the time limit for the decision on recognition and execution of up to 30 days, in addition to the initial 30-day period. However, with the exception of urgent requests, owing to the resources available it is not generally possible to comply with these very short deadlines, which are particularly unrealistic, especially where the EIO involves, as is often the case in the Grand Duchy of Luxembourg, the simultaneous execution of a number of investigative measures involving a number of persons or establishments. From this point of view, there is a regrettable lacuna in the Directive, which fails to make the slightest distinction depending on the number of investigative measures requested and the degree of complexity.

[57] Article 28-1, new, of the Law, added by a law of 23 December 2022 (Mémorial, A, 2022 no 680 of 23 December 2022.

Since the time limits imposed are manifestly unrealistic, especially for requests involving the execution of numerous and complex investigative measures making it impossible to comply with the time limits, the communication of information relating to a single extension of a maximum of 30 days seems devoid of purpose. Furthermore, the timely preparation and dispatch of the information referred to in Article 12(5) is a time-consuming and human resource-consuming process which can be better used to advance the execution of requests. To this end, it should be noted that the Luxembourg authorities, and more particularly those of the District Court of the Grand Duchy of Luxembourg and the criminal police service, in principle, in charge of the execution of complex EIOs, are, given the existence of a significant financial sector in the Grand Duchy of Luxembourg, seized of EIOs of a number and complexity that are not commensurate with the size and population of the country, which is a challenge for them. The legislator has reacted by significantly increasing the human resources available. There are also sections in the office of the examining magistrate at the District Court of the Grand Duchy of Luxembourg and in the criminal police service that are dedicated to the execution of requests for international legal assistance in criminal matters, including EIOs. However, these resources are not comparable to those available to financial centres of similar importance, often located in cities and countries that are incomparably larger. But the Luxembourg executing authorities are at the disposal of their counterparts to reply to their requests for information on the follow-up of the execution.

Article 12(2) of the Directive states that the issuing authority may apply a shorter deadline for recognition and execution than in ordinary law *due to procedural deadlines, the seriousness of the offence or other particularly urgent circumstances*. The Directive calls on the issuing authorities to state this request in Section B of form A, which has three boxes for this purpose covering urgency owing to evidence being concealed or destroyed, an imminent trial date, or any other reason.

The Grand Duchy of Luxembourg as issuing State

The Luxembourg issuing authorities mainly use the urgency procedure in four situations:

- if there is urgency owing to the nature of the offence, involving a risk to human life and health, whether in preparation for terrorist attacks, kidnapping or similar situations;

- in urgent cases arising from the pre-trial detention of the suspect;

- if there is urgency owing to the existence of a risk of deterioration of evidence; and

- if there is urgency arising from the desire to carry out coordinated and simultaneous investigative measures in different countries.

These grounds for urgency were accepted by the foreign executing authorities. From this point of view, there are no problems to report.

The Grand Duchy of Luxembourg as executing State

The Luxembourg executing authorities have met with requests for urgent handling on the basis of Article 12(2) of the Directive, which were justified by urgency corresponding in substance to the four cases listed above.

14. GROUNDS FOR POSTPONEMENT OF RECOGNITION OR EXECUTION

In fact, no proceedings involving postponements have been recorded.

15. LEGAL REMEDIES

Article 14 of the Directive requires the Member States, as executing States, to ensure that legal remedies equivalent to those available in a similar domestic case are applicable to investigative measures carried out on the basis of an EIO[58], that such remedies cannot relate to the substantive reasons for issuing the EIO[59] and that they cannot suspend the execution of the investigative measure, unless so provided in similar domestic cases.[60]

The Directive thus endeavours to apply the legal remedies available in ordinary criminal procedure.

[58] Article 14(1) of the Directive.
[59] Article 14(2) of the Directive.
[60] Article 14(6) of the Directive.

Under Luxembourgish criminal procedure, measures of the kind likely to be carried out on the basis of an EIO may be subject to an application for a declaration of invalidity[61]. A legal remedy of this kind may be sought by any person concerned who can demonstrate a legitimate personal interest. It must be brought within five days of the date on which the act came to their knowledge[62]. If the measure has been carried out in the context of a preliminary enquiry, which is directed by a public prosecutor, the remedy (which must always be lodged within five working days of the date on which the act came to the knowledge of the person concerned) must, moreover, be lodged at the latest within two months of the act, unless the preliminary enquiry is followed by a pre-trial judicial investigation, which is a procedure directed by an investigating judge, in which case the remedy must be lodged at the latest within five working days of the charge being brought, or, if the preliminary enquiry is followed by a summons to a hearing without a pre-trial judicial investigation, at the latest at the first hearing by the trial court[63]. If the measure has been carried out in the context of a pre-trial judicial investigation, the remedy (which must always be lodged within five working days of the date on which the act came to the knowledge of the person concerned) must, moreover, be lodged during the pre-trial judicial investigation, and may not be lodged afterwards[64]. Remedies are therefore governed by a twofold deadline: on the one hand, a deadline for action of five working days from the date on which the act came to the knowledge of the person concerned and, on the other hand, a maximum deadline during which the act must be brought to the knowledge of the person concerned to enable a remedy to be sought (two months from the act, five working days from the date on which the charge was brought by the investigating judge, at the first hearing of the trial court or before the end of the preparatory investigation). If the act does not come to the knowledge of the person concerned until after expiry of these deadlines, they may not make an application for a declaration of invalidity.

Exercising the right to seek a legal remedy does not suspend, in domestic law, the preliminary enquiry or pre-trial judicial investigation. The fact that the remedy does not have suspensive effect is compensated for by the rule according to which, if the legal remedy is successful, not only the challenged act, but also all subsequent acts arising from it will consequently be declared invalid[65]. The preliminary enquiry or pre-trial judicial investigation is therefore continued subject to the risk that it may subsequently be declared invalid.

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61 This remedy is governed by Article 48-2 of the CCP in the case of investigative measures ordered by a prosecutor or carried out in the context of proceedings directed by a prosecutor, and by Article 126 of the CCP in the case of investigative measures ordered by an investigating judge (who is the one who has the power – apart from in cases of *in flagrante* serious and mid-level offences, an exception which does not apply to the most intrusive measures – to order intrusive measures such as searches and seizures and who is, in any case, the only one who has the power to order the most intrusive measures such as telecommunication surveillance measures).

62 Article 48-2(2), second subparagraph, and Article 126(3) of the Code of Criminal Procedure.

63 Article 48-2(3) of the Code of Criminal Procedure.

64 Article 126(3) of the Code of Criminal Procedure.

65 Article 48-2(7) and Article 126-1(1) of the Code of Criminal Procedure.

A declaration of invalidity in domestic law is only on application, not automatic. The only exception to that rule is the power granted to the investigating court of appeal, namely the council chamber of the Court of Appeal, to examine automatically whether the proceedings are formally valid, if it is seized of an appeal against the outcome of the procedure of the preparatory investigation, that is, of the decision of the investigating court of first instance (the council chamber of the district court) to bring the accused before the trial court or to dismiss the case[66]. This exception only applies if these conditions are met.

The decision of the council chamber of the district court on the application for a declaration of invalidity is subject to appeal before the council chamber of the Court of Appeal[67].

For mutual legal assistance in criminal matters, the legislature opted for a slightly different system in its 2000 Law:

- unlike in ordinary law, the formal validity of the proceedings is reviewed automatically by the investigating court of first instance, i.e. the council chamber of the district court, without it being necessary to make an application for a declaration of invalidity[68];

- also unlike in ordinary law, proceedings are suspended pending the performance of that automatic review, so the execution documents for the request for mutual legal assistance are not forwarded to the requesting state until that review has been carried out[69];

[66] Article 126-2 of the Code of Criminal Procedure.
[67] Article 133(1) of the Code of Criminal Procedure.
[68] Article 9(1) of the 2000 Law (*op. cit.* note 27).
[69] Article 10(1) of the 2000 Law.

- the persons concerned are entitled to intervene before the council chamber of the district court carrying out the abovementioned automatic review by lodging a statement containing observations on the validity of the proceedings[70]. That statement must be submitted ten days from the date on which the person subject to the investigative measure was notified of the investigating judge's order for the measure to be carried out[71]. Such a statement cannot, however, be submitted by bank customers, as banks are bound by an obligation not to tip off their their customers, whom they are not allowed to inform of the execution of a request for mutual legal assistance (unless the purpose of the request is a seizure of funds, which cannot in any event be kept secret from the customer). Consequently, if the bank breaches that obligation, the customer has no legal standing to lodge a statement[72]. In that case, interested parties have, as in ordinary law, the right to bring some kind of application for a declaration of invalidity; nevertheless, the deadline for that type of remedy differs from that under ordinary law: it allows ten days from notification of the order to the person subject to the investigative measure, who might be someone other than the interested party submitting a statement (who might be, for example, the customer targeted by the foreign investigation of a provider of a legal address ('*domiciliataire*') against whom the measure has been carried out), as opposed to the five days from knowledge of the order allowed under ordinary law; and

- the decision of the council chamber on the formal validity of the procedure and the merits of the statements is not subject to appal[73].

[70] Article 9(4), first subparagraph, of the 2000 Law.
[71] Article 9(4), third subparagraph, of the 2000 Law.
[72] Articles 7 and 9(4), first subparagraph, of the 2000 Law.
[73] Article 10(4) of the 2000 Law.

This specific system of legal remedies is designed to reconcile two contradictory requirements peculiar to mutual legal assistance:

- to allow, in the interests of an effective legal remedy, a review of the legality of execution of the request for mutual legal assistance, which is carried out automatically and during which the interested parties may submit a statement, **before** the requesting authority is sent the acts of execution, the fear being that a review after they have been sent would no longer serve any purpose, as the requesting authority would have become aware of the evidence and might not take into account an annulment by the Luxembourgish courts; and

- to ensure, in the interests of effective mutual legal assistance, that the review, which suspends transmission of the result of the assistance, does not take too long, by not allowing an appeal against the order of the council chamber.

When transposing the Directive, the Luxembourgish legislator opted to replicate the system described above from the 2000 Law, which includes:

- a systematic, automatic review of the formal validity of the proceedings by the council chamber of the district court[74];

- suspension of the transfer of evidence to the issuing authority pending that review[75];

- the right of the interested parties to submit a statement setting out observations on the formal validity of the proceedings (except for a customer of a bank, as banks are bound by an obligation not to tip off their customers) within ten days from the date on which the order authorising the execution of investigative measures is notified to the person subject to the measures[76]; and

- not allowing legal remedies against the order of the council chamber[77].

[74] Article 26(1) of the transposing Law.
[75] Article 27(1) of the transposing Law.
[76] Article 26(4), first and third subparagraphs, of the transposing Law.
[77] Article 27(4) of the transposing Law.

This system is thus intended, like that applied in ordinary law on mutual legal assistance, to reconcile the contradictory requirements of, on the one hand, the efficacy of an automatic review and of the right to challenge the formal validity of execution of an EIO, ensured by suspending transfer of evidence pending a decision on that automatic review and on that challenge, and, on the other hand, the efficacy of execution of an EIO, ensured by not making a legal remedy available.

According to the Luxembourgish authorities, the decision to adopt this system is especially due to the belief, which was already behind the legislator's thinking when adopting the 2000 Law, that a review of validity and a decision on related challenges would be deprived of any effect if they did not take place until after the evidence had been transferred to the issuing authority. Based on that premiss, a system of domestic law that does not include any suspension of proceedings – which, in the context we are dealing with, would mean the immediate transfer of evidence to the issuing authority – is, rightly or wrongly, considered ineffective. It was ultimately for the sake of ensuring the efficacy of the legal remedy that the chosen system was adopted.

The Law draws a distinction between non-coercive and coercive measures (seizure of objects, documents, funds or property of any kind, the provision of information or documents ordered in accordance with Articles 66-2 to 66-4 of Luxembourg's Code of Criminal Procedure, a search or any other investigative act involving a similar degree of constraint). For such measures, the Law has established a procedure for an automatic verification of the formal validity of the procedure (Articles 26 to 29). The evidence may only be transferred to the issuing authority once the council chamber has ruled that the procedure was valid.

The evaluation team finds that this system of review is not in the spirit of the Directive as it is not conducive to a swift transfer of evidence to the issuing authority as provided for in Article 13(1) of the Directive. Such a review does not encourage a swift transfer of evidence to the issuing authority as provided for in Article 13(1) of the Directive. In addition, the suspension of this transfer pending the council chamber's decision remains in place, even if the individuals in question have not submitted a statement setting out observations and claims for restitution. The evaluation team considers that this suspension, based only on the automatic review, may be difficult to reconcile with the spirit and letter of Article 13(2) of the Directive, which provides that the transfer of evidence may be suspended pending a decision regarding a legal remedy (i.e. a request submitted by the party in question).

In addition, a review of the legality is already carried out beforehand by the Prosecutor-General and by the investigating judge, which makes this third legal review by the council chamber all but pointless. This impression is confirmed by the statistics collected from the judge of the council chamber during the evaluation visit: an average of 600 cases a year, which makes approximately 3 000 cases in five years, of which only one resulted in a declaration of invalidity. According to the same judge, the review procedure is carried out even when nothing has been seized. Statements are very rarely submitted, amounting to no more than around 10 cases per year.

The representatives of the bar expressed the same impression of futility, explaining that all statements submitted to date had resulted in a decision rejecting the application for a declaration of invalidity of the acts of execution of the EIO.

Then again, domestic law, in particular the transposing law, should have provided for a legal remedy, including in relation to coercive measures, in accordance with Article 14 of the Directive, that is, a legal remedy equivalent to those available in similar domestic cases, as is the case for the application for a declaration of invalidity provided for in Article 7 of the Law of 23 December 2022 on implementation of Regulation (EU) 2018/1805.

At the end of its on-site visit and interviews, the evaluation team therefore recommends to the Luxembourgish legislator that it reassess the usefulness of an automatic review of the procedure's formal validity by the council chamber (Articles 26 and 28 of the transposing law) given that: (i) a review of the legality is already carried out beforehand by the Prosecutor-General and by the investigating judge, (ii) a legal remedy could be more in line with the requirement to ensure the availability of legal remedies equivalent to those available in similar domestic cases, and therefore also more in line with Article 14 of the Directive (e.g. application for a declaration of invalidity provided for in Article 7 of the Law of 23 December 2022), and (iii) the transfer to the issuing authorities of the items, documents or information seized must be efficient and done without delay and must not be subject to a procedure likely to cause significant delays without adding any value with regard to the review already carried out by the public prosecutors and investigating judges (*see recommendation 1.2*).

16. TRANSFER OF EVIDENCE

No difficulties have been reported when Luxembourg acts as either the issuing or the executing State.

17. OBLIGATION TO INFORM - ANNEX B

The form in Annex B to the Directive constitutes an acknowledgement of receipt which must be drawn up by the executing authority, in accordance with Article 16(1), first subparagraph, of the Directive.

On several occasions, the Luxembourgish authorities, acting as issuing authorities, have not been sent this form by the executing authority. This meant it was difficult for the issuing authority to contact the executing authority, as it did not know which authority it was (*see recommendation 16*).

However, none of these cases resulted in the EIO not being executed, so the failure to return the form to the issuing authority did not ultimately jeopardise execution of the EIO.

The B form is systematically completed and sent by the Luxembourgish authorities when acting as executing authorities. They are obliged to do so under Article 12, first paragraph of the Law, which transposes Article 16(1), first subparagraph, of the Directive verbatim (*see best practice 2.2*).

In accordance with Article 16(1), third subparagraph, of the Directive, it is understood that the form is completed and returned by the Luxembourgish authority which first received the EIO, even if it is not competent and has automatically forwarded the EIO to the competent authority, as provided for in Article 7(6) of the Directive, transposed by Article 12, second paragraph, of the Law.

The Luxembourgish authorities have not reported any difficulties or shortcomings relating to the B form that would warrant amending it.

18. COSTS

Article 21(1) of the Directive provides that, in principle, the executing State is to bear all costs undertaken on its territory which are related to the execution of an EIO. Article 21(2) adds that where the executing authority considers that the costs of execution are exceptionally high, it may consult with the issuing authority on whether the costs could be shared or whether the EIO could be modified to reduce the costs. According to paragraph 3 of that Article, where no agreement can be reached, the issuing authority may choose either to withdraw the EIO, or to keep it and bear the part of the costs deemed exceptionally high by the executing State. Based on these provisions, the executing State thus has, in essence, the right to oppose the execution of measures giving rise to costs which it deems exceptional, or to oblige the issuing authority, if it insists on the measures being executed, to bear the exceptional part of the costs.

The Luxembourgish issuing authorities have in some cases been faced with partial refusals to execute due to the exceptionally high costs of executing the EIO in the executing State. Apart from a more anecdotal case of costs resulting from the seizure of a dog, these cases involve EIOs to execute telecommunications surveillance or tracking measures. In some countries, the costs of these measures are charged to the judicial authorities by the telecommunications operators and can be quite high. In these cases, the foreign executing authorities limited the duration of the execution of the measures, in order to reduce the costs. In these specific cases, the Luxembourgish issuing authorities declined to oblige them to continue the execution by bearing in exchange the costs they had deemed exceptionally high.

As executing authorities, the authorities of the Grand Duchy of Luxembourg have had to raise the issue of exceptionally high costs in relation to telecommunications surveillance measures carried out in the Grand Duchy of Luxembourg, combined with a translation, in the Grand Duchy of Luxembourg, of the recorded interviews by sworn translators, over an extended period of time. In the Grand Duchy of Luxembourg, telecommunications surveillance, which is carried out by the police, does not give rise to any particular costs. By contrast, the translation by sworn translators of the interviews thus recorded is a source of costs, which can become significant if the surveillance measure continues for an extended period of time. The Luxembourgish authorities were thus faced with measures costing tens of thousands of euros. To avoid an undue increase in these costs, the Luxembourgish authorities, consulted with the issuing authorities in these cases to request that they limit the duration of the execution of the measure. The issuing authorities agreed to these proposals and therefore decided not to insist on the continued execution of the measure or bear in exchange the costs resulting from the continued execution. Current practice, which has evolved in this respect, favours sending the results of the telecommunications surveillance immediately to the issuing State. Responsibility for the translation of recorded interviews then falls to the issuing State, which means that the issue of costs, in such cases, is no longer relevant.

As regards the criteria for assessing what may constitute an exceptionally high cost, this issue has only arisen for the Luxembourgish authorities, as set out above, in connection with certain translation costs. Having not encountered any other cases, the Luxembourgish executing authorities have not had the opportunity to consider drawing up abstract criteria for classifying costs as exceptionally high.

As regards the costs of appointing a duty solicitor – a scenario more likely to arise in the context of executing European arrest warrants – these are not considered to be exceptionally high. There have been no instances of the Luxembourgish executing authorities challenging these costs.

The authorities of the Grand Duchy of Luxembourg have therefore not encountered any situations in which execution has been refused due to exceptionally high costs, nor have they themselves refused execution of an EIO for this reason.

The evaluation team considers that the Luxembourgish authorities have done a good job of managing the situations involving high costs that they have encountered (*see best practice 2.5*). However, there is no definition of what is to be considered an exceptionally high cost, to reduce each state's margin of subjectivity when classifying costs.

Member States' practitioners would welcome guidelines on this topic. In fact, the evaluators invite the Commission to develop guidelines on the classification of costs as exceptionally high, to give guidance to national authorities when they consult each other on that issue (*see recommendation 22*). The guidelines could mention asking Eurojust to facilitate such consultations if necessary (see Article 31 of the Regulation on freezing and confiscation orders, which already contains a provision to that effect). Furthermore, Eurojust is invited to draw up guidelines, based on its experience, concerning 'excessive costs' so as to give guidance to the judicial authorities (*see recommendation 24*).

19. COORDINATION OF THE EXECUTION OF DIFFERENT EIOS IN DIFFERENT MEMBER STATES AND/OR IN COMBINATION WITH OTHER INSTRUMENTS

The simultaneous execution, by the authorities of several countries, of investigative measures in several countries requires significant coordination, which is usually carried out by Eurojust. The authorities of the Grand Duchy of Luxembourg report that, as a general rule, simultaneous execution has not given rise to any particular difficulties, but that it does, of course, require compliance with a tight schedule and, consequently, expedited recognition and execution of EIOs issued for that purpose.

The urgency which accompanies the simultaneous execution of these measures can cause difficulties. Such measures often give rise to the execution not only of EIOs, but also of EAWs. In this context, the Luxembourgish authorities have on several occasions been faced with requests for urgent arrest in the framework of measures based on EAWs which had not been translated into one of the languages accepted in the Grand Duchy of Luxembourg (French, German or English). The Luxembourgish authorities, which of course did not wish to hamper the success of the measures, were thus obliged, in one of these cases, to translate the arrest warrant themselves into one of the languages of the proceedings and, in another case, to disregard the European arrest warrant, which was incomprehensible and inadmissible in terms of its form, and temporarily detain the requested person on the basis of the alert issued in accordance with Article 95 of the Schengen Convention, which is regarded as equivalent to an EAW and which was translated into the languages of the proceedings.

During the visit, the Luxembourgish judicial authorities stressed the importance of the role of their criminal investigation department in these simultaneous and coordinated measures (‘action days’). They also reported that they proactively cooperate on the expedited and simultaneous execution of EIOs issued by different Member States when participating in action days (*see best practice 2.4*). The representative of the criminal investigation department mentioned the challenge of mobilising, sometimes in just a few days, sufficient human resources to meet operational needs (see *recommendation 5*).

20. SPECIFIC INVESTIGATIVE MEASURES

In Articles 22 to 31, the European Directive lays down specific provisions for certain investigative measures. These have been transposed in Articles 30 to 39 of the Luxembourgish law.

20.1. Temporary transfer (Articles 22 and 23)

Articles 22 and 23 of the Directive deal with temporary transfer. This obligation has been transposed in Articles 30 and 31 of the Luxembourgish law.

All the paragraphs have been reproduced word for word, with the addition of the following in Article 30(1): the investigative measure must be considered appropriate for the establishment, prosecution or trying of the offence under investigation.

In practice, the Luxembourgish judicial authorities pay close attention to the matter of the grounds to detain a person transferred to the Grand Duchy of Luxembourg.

Indeed, the Directive obliges the States parties to ensure that 'the transferred person shall remain in custody in the territory of the issuing State [or, in the context of Article 23, in the territory of the executing State] and, where applicable, in the territory of the Member State of transit, for the acts or convictions for which he has been kept in custody in the executing State [or, in the context of Article 23, in the territory of the issuing State] unless the executing State applies for his release'.

There is a legal basis for the continued detention in the Grand Duchy of Luxembourg, whether the Grand Duchy of Luxembourg is the issuing State, the executing State or the State of transit, of persons who are the subject of a transfer and in custody in another State party to the Directive, whether that state is the issuing State or the executing State.

However, the Luxembourgish practitioners have explained that, in their view, this legal basis has a flaw: the transferred person can only continue to be held in custody as long as the state of the territory from which the person was transferred and which placed them in custody them does not put an end to their detention, for example following a request to release the person that has been upheld by the courts of the state which granted the transfer. In this event, the state to whose territory the person was transferred is obliged to release them immediately. That state therefore has no certainty and no guarantee that the transferred person will remain, by virtue of their detention, at its disposal for the execution of the investigative measures requested.

In order to avoid this risk, the Luxembourgish practitioners report that they prefer, when they intend to prosecute the person in custody and carry out the investigative measures with this in mind, to not only request a transfer by means of an EIO, but also to issue a European arrest warrant on the basis of Article 24(2) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant.

The Luxembourgish authorities prefer to proceed in this way, at least as long as they are prosecuting the transferred person and are able to issue an international arrest warrant on which to base the European arrest warrant.

Article 24(2) of the Framework Decision on the European arrest warrant also offers the option of temporarily surrendering the requested person under conditions to be determined by mutual agreement between the executing and the issuing judicial authorities.

In practice, the investigating judges of the Grand Duchy of Luxembourg, acting as a body of the state requesting the EIO, wait until the detention abroad comes to an end and then issue an EAW, in order to avoid constraints on (pre-trial) detention in two different countries. They request that the interrogation be carried out in the country where the person is already being held in custody and sometimes travel to neighbouring countries to participate in the interrogation. They then bring charges, but they do not systematically place the person under a committal order, even in cases of temporary surrender. The issuing of a committal order presupposes, under domestic law, that the person concerned is suspected of having committed a serious or mid-level offence punishable by a custodial sentence, that there are serious indications of guilt, that there is a danger of evidence being obscured, that there is a risk of recidivism or of absconding, or the person resides outside the territory, which is assumed to be the case when the requested person is being held in custody abroad. The EAW is only issued if the investigating judge intends to issue a committal order in respect of the suspect following the execution of the international arrest warrant. Its issuing is therefore by no means systematic; it is reserved for the most serious cases.

During the visit, it was also explained to the expert evaluators that Article 186 of Luxembourg's Code of Criminal Procedure also offers the public prosecutor's office the option of obtaining an arrest warrant when the person appears at the hearing, in the event of detention abroad.

Luxembourg's Code of Criminal Procedure also provides, in Article 130, that when the proceedings are brought to a close, the council chamber may order a provisional arrest (which is equivalent to a committal order), which may serve as a basis for issuing a European arrest warrant.

In cases where Luxembourg is the executing State, the practitioners interviewed advise their foreign colleagues to consider, where possible, issuing a European arrest warrant, to ensure the presence of the transferred person and to avoid exposure to the risks of a decision on release being taken by the Luxembourgish authorities in the course of execution.

In conclusion, the evaluators are of the opinion that the Grand Duchy of Luxembourg has taken the necessary steps to honour its commitments vis-à-vis requesting states.

20.2. Hearing by videoconference

Article 24 of the Directive provides, as an investigative measure, for hearings by videoconference or other audiovisual transmission by people in their capacity as witnesses, experts, or suspected or accused persons.

The Directive was transposed into Article 34 of the Luxembourgish law.

The evaluators note that the transposition complies with the Directive in all respects.

The Luxembourg Code of Criminal Procedure provides for the use of audiovisual telecommunications and audioconferencing for the purposes of deposition, of hearing or questioning of a person and of discussions involving several persons. These provisions were introduced into national law by the Law transposing the Directive.

Furthermore, Luxembourg law provides for the possibility to interview suspected persons by videoconference on the basis, and as a result of the transposition of the Directive. These legislative provisions are set out in Articles 553 and 557 of the Code of Criminal Procedure.

During the visit the interviewed magistrates explained that this legislation is very flexible.

In practice, remote hearing of the person is carried out before a criminal police officer, who verifies the identity of the person to be heard and draws up the minutes of the hearing. If the person is in custody, that task is performed by a member of the prison staff. If the person to be heard is assisted by a lawyer the latter may accompany them or contribute to the proceedings of the court or with the competent magistrate. In the latter case, the lawyer may hold a prior, confidential discussion with the person they are assisting, by using audiovisual telecommunications, i.e. an audioconference.

The practitioners explain that the hearing is recorded in an audiovisual recording and, in the case of an audioconference, in an audio recording, which is attached to the file and serves as evidence.

The evaluators note that the presence of the magistrate is not required in all cases. Where the magistrate is present, the purpose is to avoid any procedural difficulties and to ensure that the hearing takes place in compliance with the fundamental rules of Luxembourg law. However, a member of the public prosecutor's office will always be present throughout the hearing except where the added value of such presence is limited, in which case there will be no magistrate at the hearing.

When acting as executing authorities, the Luxembourg authorities have not encountered any particular difficulties with regard to the venue of the hearing.

As stated above, the presence of a judicial authority with the person to be heard is not provided for in domestic law, which provides solely for that of a police officer. In such cases, the EIO is properly executed, in accordance with Article 9(2) of the Directive and in compliance with the formalities and procedures desired by the issuing authority.

Where EIOs were referred to the Luxembourg authorities for a hearing, the hearing mostly concerned suspected persons or witnesses and was held remotely by the issuing authority, which sometimes requested the presence of a Luxembourg investigating judge.

It appears that the Luxembourg authorities have rarely issued EIOs intended for hearings by videoconference, so they cannot report any difficulties in that respect.

During the visit, the Luxembourg magistrates did mention several practical difficulties and questions that had arisen when Luxembourg was the issuing State. Those difficulties and questions specifically concerned sending of the file and consultation of the file by the person to be heard, translation of all the documents, knowing whether a charge could be brought and whether it could be administered by the foreign magistrate.

If a Luxembourg investigating judge intends to issue an EIO for the purposes of a videoconference hearing, they systematically send a list of questions in advance to the foreign counterpart, as with traditional EIOs intended for a detailed hearing.

When executing such requests in Luxembourg, the national magistrates comply with the requirements of the foreign requesting magistrates.

The Luxembourg authorities state that they did not face any particular difficulties as regards the status of the people to be heard and compliance with the applicable procedural guarantees. So far they have not received requests from the authorities of other States party to the EIO Directive that could give rise to refusals on the grounds that they contravened the fundamental principles of the law of the executing State, as provided for in Article 24(2)(b) of the Directive.

They have not been faced, either, by cases under Article 24(2)(a) of the Directive, which allows the executing State to refuse an EIO for the purpose of hearing a suspected person or accused person by means of a videoconference where the latter does not consent to that hearing. Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, the suspected person has the right to remain silent. The suspected person cannot therefore be compelled to make statements. The Luxembourg authorities state that the Directive does not provide any legal basis for forcing a suspected person to attend an interrogation to be carried out, at the request of a foreign issuing authority, by videoconference. There is therefore no alternative to refusing the EIO where a suspected person does not give their consent to be questioned. Accordingly, they suggest in those circumstances that the issuing authority consider issuing a European arrest warrant.

The Grand Duchy of Luxembourg as issuing authority:

Domestic legislation on hearings and interrogations authorises hearings and interrogations by videoconference, both for hearings of witnesses or experts or interrogation of suspected persons, at any stage of the proceedings, i.e. in the investigation, the pre-trial investigation (directed by the investigating judge) or the proceedings on the merits leading up to the final judgment on the merits.

In theory, all the authorities and courts in charge of these proceedings are competent to issue EIOs for hearings or interrogations by videoconference if the person to be heard is in another State party to the Directive.

The Grand Duchy of Luxembourg as executing authority:

The Luxembourg authorities are competent to execute an EIO for the purpose of hearing or questioning a person located in Luxembourg by videoconference, irrespective of the stage of the proceedings in which that measure is requested by the issuing State (as long as that stage precedes that of the enforcement of a sentence, which is outside the scope of the Directive). No provision in domestic law precludes this; indeed, national law allows this measure to be taken.

During the on-site visit, the authorities expressed their wish to have a secure, two-way system for cross-border videoconferences. The European Commission is invited to explore this possibility (*see recommendation 21*).

20.3. Hearing by telephone conference

A telephone conference, which signifies what Luxembourg national law describes as an audioconference, is a type of remote hearing that meets the same conditions as a videoconference, as provided for in Article 25(2) of the Directive.

This matter is theoretical since the Luxembourg authorities have not been asked to execute an EIO using this alternative to videoconferencing, nor have they have issued a request that such a conference be used to execute an EIO they have issued. They have therefore not faced any difficulties in that respect.

Domestic legislation, which provides for the use of both the video- and audioconferencest that are referred to in the Directive as telephone conferences, is particularly flexible and authorises the use of either at any stage of criminal proceedings, prior to the execution of the sentence.

Moreover, in the event of a procedural discrepancy with Luxembourg law where a foreign state has issued an EIO to the Luxembourg authorities, there is the option for Luxembourg to accept additional formalities and procedures that may be required by the issuing authority. Accordingly, in hearings by videoconference the Luxembourg authorities have had no difficulty in accepting the requirement from the issuing authorities that a hearing in Luxembourg of a person who is to be heard remotely by the issuing authority and from the issuing country be carried out in the presence of an investigating judge, even though that requirement is not provided for in the national law, which stipulates that the person is to be heard remotely in the presence of a police officer.

20.4. Information on bank and other financial accounts and banking and other financial operations

Articles 26 and 27 of the Directive have been correctly transposed in Articles 36 and 37 of the Luxembourgish law.

Indeed, it is possible to obtain information relating to bank accounts held as well as financial accounts opened in non-banking institutions.

Requests may relate to the existence of accounts (including the identification of the person who holds them, controls them or has power of attorney over them and who is the beneficial owner) but may also seek information on those accounts and the operations/transactions that have taken place during a given period, including issuer and receiver accounts.

The information requested by the EIO does not necessarily need to relate to suspected or accused persons but may also concern other individuals involved in criminal proceedings, if the accounts have been identified in advance.

The Law of 25 March 2020 establishes a central electronic data retrieval system relating to payment accounts and bank accounts identified by an IBAN number and safe-deposit boxes held by credit institutions in the Grand Duchy of Luxembourg ('Central System' or 'CRBA').

The CSSF (*Commission de surveillance du secteur financier* - Financial Sector Supervisory Commission) is a supervisory body responsible, in particular, for ensuring compliance with professional obligations as regards the fight against money laundering and financing of terrorism by all persons supervised, approved or registered by it (Organic Law of 23 December 1998).

During the visit, it was explained to the evaluation team that a request by means of an EIO for bank information or documents is ordered upon Luxembourg in accordance with Articles 66-2 to 66-4 of the Code of Criminal Procedure.

It should be noted that:

- Article 66-2 of the Luxembourg Code of Criminal Procedure concerns requests for information relating to bank accounts (identification of account holders or accounts - indictments sent to all banks),
- Article 66-3, also of the Code of Criminal Procedure, concerns requests for the monitoring of banking transactions,
- Article 66-4, also of the Code of Criminal Procedure, concerns requests for information relating to banking transactions (the holder/bank being identified).

The request is considered to be an application for a coercive measure under Luxembourg law.

Indeed, under Luxembourg law, an EIO tends to ensure the execution of a coercive measure, if, as Article 21 of the transposition of the Directive states, its purpose is to 'to carry out in the Grand Duchy of Luxembourg the seizure of items, documents, funds or property of any kind, the provision of information or documents ordered in accordance with Articles 66(2) to (4) of the Code of Criminal Procedure, a search or any other investigative measure involving a similar degree of constraint'.

Under Luxembourg law, these coercive measures may only be carried out by the investigating judge, in the context of a preparatory investigation, and under no circumstances by the public prosecutor.

As a reminder, as regards the form (Annex A), practitioners mention that it is difficult to read because Sections C and H have been 'separated out': Section H 4.1 covers exactly the same subject-matter as Section C.1, apart from the fact that the information requested regarding certain investigative measures is more detailed, even if it is concerns solely banking information. There is a redundancy here, therefore.

Practitioners also mention the ability to assess the issuing authority's compliance with the principle of proportionality on the basis of the form. The basic criterion for measuring compliance with this condition is to establish a link between the facts forming the subject of the proceedings that gave rise to the EIO and the investigative measures requested. The form does not specifically ask the issuing authority to describe this link. In Section G.1, the issuing authority is asked to summarise the facts and simply to state the reasons why the EIO has been issued, and therefore the relevance of those reasons.

Practitioners then explain that a measure will be problematic in terms of its necessity and proportionality if it has no apparent link with the facts or is intended to gather evidence of hypothetical offences, such that it actually amounts to a 'fishing expedition', whereas the Luxembourg judicial authorities wish to avoid 'fishing expeditions' for offences that have not yet been established.

Evaluators confirm that the purpose of an investigative measure must be to seek out and discover things that are necessary or useful for the purpose of establishing the truth, and can therefore only be ordered to corroborate evidence or clues that already exist in relation to a specific offence that is already known and presumed to have been committed.

However, the procedure for obtaining banking information may seem cumbersome to evaluators and this cumbersome procedure may lead to refusals to execute requests made by an EIO.

However, the magistrates interviewed explained that, if enforcement is refused, there are other ways of obtaining banking information, in particular via the ARO network, which has direct access to the CRBA for money-laundering matters, or through cooperation between financial intelligence services.

The Luxembourg executing authorities have stated that they will ensure, as far as possible, that if it is impossible to execute coercive measures for reasons or restrictions under national law, they will propose to the issuing authority that it execute a non-coercive alternative measure instead of the coercive measure which has been refused. Direct contacts are prioritised in these circumstances.

They have explained that the evidence obtained by EIOs for the purposes of information relating to bank accounts and other financial accounts, most usually bank documents, is, under Luxembourg law, covered by professional secrecy, to which the bankers and financial sector professionals who hold these documents are also bound. They are in practice seized/received coercively by means of an order, or transmitted by the banker, under threat of criminal sanctions if assistance is refused in the execution of a demand for banking information on the basis of Articles 66-2 to 66-5 of the Code of Criminal Procedure. They add that the execution of an EIO is a matter of investigative secrecy and improper disclosure of the EIO would therefore constitute a breach of professional secrecy, punishable under criminal law.

The Directive requires Member States to '*take the necessary measures to ensure that banks do not disclose to the bank customer concerned or to other third persons that information has been transmitted to the issuing State in accordance with Articles 26 and 27 or that an investigation is being carried out*'. That obligation was transposed by Article 25 of the Luxembourgish Law, which provides that: '*Credit institutions and their directors and employees may not disclose to the customer concerned or to third persons, without the prior express consent of the authority which ordered the measure, that the seizure of documents or disclosure of documents or information has been ordered by the investigating judge in relation to the execution of a European Investigation Order*.

Anyone who knowingly contravenes this obligation will be liable to a fine of between EUR 1 250 and EUR 1 250 000'.

However, execution of the EIO may result in the disclosure of its existence to the person who is the subject of the investigation, either directly or by means of third parties not bound by a duty of confidentiality. This is particularly the case when the EIO is to be executed with the person who is the subject of the investigation or third persons who have a relationship with that person who, contrary to banks, are not bound by a duty of confidentiality (for example, in the event of a search of the premises of the person who is the subject of the investigation or of an authorised representative of that person other than a bank, such as a lawyer, provider of a legal address ('*domiciliataire*'), accountant, asset manager, etc.). In such cases, the execution of the EIO necessarily implies disclosure of the fact that there is an ongoing investigation against the person concerned (even though the EIO itself is, of course, not disclosed).

The prosecutors explain that they re-read the EIOs after they have been executed, draw up an implementation report (see *good practice 13*) and open an internal investigation if the execution of the EIO reveals that an offence has taken place on the territory of the Grand Duchy of Luxembourg.

The evaluation team was impressed by the fact that the Luxembourg executing authorities also draft and send interim reports (see *good practice 13*) and transmit the result of the partial execution of EIOs without waiting for their conclusion, whenever this is in the interest of the case or its urgency, and consult the issuing authority in this respect (see *good practice 11*). They also keep (electronic) copies of documents relating to the execution of EIOs and send scans before sending them by physical post (see *good practice 12*).

The evaluators recommend that other Member States adopt these very good practices (see *recommendations 13 to 15*).

20.5. Covert investigations

Article 29 of the Directive is transposed into Article 39 of the Luxembourgish law. Once again, the wording is fully in line with the Directive.

The covert investigations referred to in the Directive correspond in Luxembourg's national law to 'infiltration operations', which are governed by Articles 48-17 to 48-23 of the Code of Criminal Procedure.

As explained in Article 48-17(3) of the Code of Criminal Procedure, infiltration involves the 'surveillance on those persons in respect of which there is serious evidence that they are committing one or *more offences* [carrying a criminal (custodial) penalty or a correctional (custodial) penalty with a maximum penalty of two years' imprisonment or more], *by passing themselves off to these persons as one of their co-perpetrators, accomplices or receivers*'.

The Luxembourg magistrates state that, in accordance with Article 48-17(4) of the Luxembourg Code of Criminal Procedure, infiltration may only be conducted '*by an officer of the criminal investigation department or a foreign agent authorised by the national law of their country to carry out this type of measure and acting under the responsibility of a judicial police officer in charge of coordinating the operation'.* To that end, the officer of the criminal investigation department or foreign agent '*is* [...] *authorised to use an assumed identity and to commit, where necessary,* [various criminal offences]'.

He or she may, in accordance with Article 48-19(1) of the Code of Criminal Procedure, '*Without incurring* [...] *liability for their actions:*

- *acquire, possess, transport, dispense or deliver any substances, goods, products, documents or information resulting from the commission of any offences* [which are the subject of the infiltration] *or used for the commission of these offences*;

- *use or make available to those persons carrying out these offences legal or financial help, and also means of transport, storage, lodging, safe-keeping and telecommunications'.*

'[This] *exemption from liability also applies, in respect of acts committed with the sole aim of infiltration, to those persons recruited by officers of the criminal investigation department officers or foreign agents in order to enable this operation to be carried out*'.

'*Under penalty of nullity, the acts* [carried out by the infiltrated agent] *may not* [in accordance with Article 48-17(4) of the aforementioned Code] *constitute incitement to commit offences*' and '*no conviction may be handed down solely on the basis of statements made by officers of the criminal investigation department or foreign agents who have conducted an infiltration operation*'.

The infiltration operation can only be performed for a maximum period of '*four months from the date of the decision*' although it may be '*renewed under the same conditions* [...] *of duration*'.

The law does not list or specify the investigative measures to be carried out by the infiltrated officer. The latter's role is to conduct '*surveillance*' on suspects, therefore personally recording evidence that will be included in a police report and, if necessary, testified to in court. However, in order to ensure that the agent's true identity remains secret, the law states that only the officer of the criminal investigation department '*under whose responsibility the infiltration operation takes place'* may be heard as a witness. However, if the suspect '*is directly implicated by findings made by* [the infiltrated agent] *who personally carried out the infiltration operations, that person may ask to be confronted with* [the infiltrated agent] *by means of a technical device enabling the witness to be heard remotely or to have the witness questioned by his or her lawyer by the same means* [it being added that] *the witness's voice is then rendered non-identifiable by appropriate technical procedures*'.

Given the small size of Luxembourg's territory, in the rare cases where the infiltration procedure was used, foreign agents were used. In this case, the infiltrated agent must, in most cases, as mentioned above, be '*a foreign agent authorised by the national law of their country to carry out this type of measure and acting under the responsibility of a officer of the criminal investigation department in charge of coordinating the operation*'.

In order to recruit a foreign agent, the Luxembourg authorities do not make use of mutual legal assistance, therefore in this context, i.e. in this context relating to the EIO, but they do make use of mutual administrative assistance between specialist police services. Given the highly confidential nature of these operations, the channel of mutual legal assistance should indeed be avoided, as it is viewed as failing to ensure the necessary confidentiality since too many parties are involved.

It is understood that covert investigations are highly invasive. Article 29(3)(a) of the Directive therefore states in that the execution of a covert investigation may be refused if its execution would not be authorised in a similar national case. Article 29(4) of the Directive also states that such investigations are performed in accordance with national law and in line with the procedures in force in the executing State and the issuing and executing authorities should reach an agreement as regards the arrangements for conducting the investigations. Article 29(3)(b) allows the executing State to refuse the EIO if authorities have been unable to reach such an agreement. It follows that if the Luxembourg authorities were seized of an EIO for this purpose, they would pay particular attention to compliance with the provisions of national law.

The Luxembourg authorities report that they have not yet received any EIOs in this area, nor have they seized other EIO states for this purpose. There has therefore not been any opportunity to observe the difficulties raised by the question.

The question is a theoretical one since, in the experience of the Luxembourg authorities, covert investigations are not currently, in practice, coordinated via the EIO, which is not considered to be sufficiently confidential.

20.6. Interception of telecommunications

Interception of communications is provided for in Articles 30 and 31 of the European Directive, the provisions of which have been transposed in Articles 32 and 33 of the Luxembourgish law. The Luxembourgish law does not make as precise a distinction between the two scenarios provided for in Articles 30 and 31 of the Directive, namely interception of telecommunications with the assistance of another Member State and interception without such assistance, but the explanations provided during the visit were clearer. The evaluation team nevertheless takes the view that it would be highly useful to complete and clarify the 'Fiches Belges' in this respect, as the explanations currently available are somewhat unclear (see recommendation 2).

Article 11(1), point (h) of the Directive provides that recognition and execution of an EIO may be refused if the use of the investigative measure indicated is restricted under the law of the executing State to a list or category of offences or to offences punishable by a certain threshold, which does not include the offence covered by the EIO. The legislature transposed that provision by stipulating in Article 24 of the Luxembourgish law that EIOs for the execution of coercive measures are recognised and executed in the Grand Duchy of Luxembourg '*only where the investigative measure requested would have been authorised as part of similar domestic proceedings*'.

In the specific context[78] of interception of telecommunications, the Directive provides that the measure may be refused where it '*would not have been authorised in a similar domestic case*'[79].

[78] A similar ground for refusal is provided for in relation to the measures concerning information on bank and other financial accounts (Article 26(6) of the Directive), information on banking and other financial operations (Article 27(5)), monitoring of banking or other financial operations and controlled deliveries (Article 28(1)) and covert investigations (Article 29(3) point (a)).

[79] Article 30(5) and Article 31(3).

The interception of telecommunications measure is provided for in domestic law in various forms, namely:

- as screening of telecommunications or locating the origin or destination of telecommunications[80] and

- as surveillance and monitoring of telecommunications and postal correspondence[81].

These measures are subject to different admissibility conditions:

- for screening and localisation in respect of telecommunications, the acts in question must carry a penalty for a serious or mid-level offence, and hence a custodial sentence, of a maximum duration of one year[82] or more and

- for surveillance and monitoring of telecommunications, the acts in question must be particularly serious, punishable by a penalty for a serious or mid-level offence, and hence a custodial sentence, of a maximum duration of two years[83] or more.

These sentencing thresholds are applied as criteria for the admissibility of the requested measures. They do not create difficulties in practice, as the offences in respect of which such measures are usually requested, namely drug trafficking, organised crime and terrorism, meet the thresholds. Given the seriousness of the offences for which these measures are sought, the additional criterion of domestic law requiring the offence to be particularly serious for measures involving the surveillance and monitoring of telecommunications to be admissible has not yet come up as a basis for refusal. This issue could arise if a measure of this sort were requested for less serious acts, such as a single, small-scale theft, which would meet the threshold and yet would not be particularly serious.

[80] This measure is governed in national law by Article 67-1 of the Code of Criminal Procedure.
[81] This measure is governed in national law by Articles 88-1 to 88-4 of the Code of Criminal Procedure.
[82] Article 67-1(1) of the Code of Criminal Procedure.
[83] Article 88-2 point (1) of the Code of Criminal Procedure.

20.6.1. Scope of the concept of 'interception of telecommunications' and use of Annex A or C

The measure described as 'interception of telecommunications' in Articles 30 and 31 of the Directive corresponds to the following measures in domestic law:

- screening of telecommunications or locating the origin or destination of telecommunications and
- surveillance and monitoring of telecommunications and postal correspondence, which amounts in practice to what is commonly known as 'wire tapping'.

By contrast, installing a direct listening device (bugging) or malware (Trojan) and GPS tracking are not classified as telecommunications interception measures under domestic law:

- domestic law treats the installation of a direct listening device as audio recording and taking of images of certain locations or vehicles, and restricts the use of this measure to serious and mid-level offences against national security and acts of terrorism or terrorist financing[84];
- domestic law treats the installation of malware as computer data capture and limits its use to serious and mid-level offences against national security and acts of terrorism or terrorist financing[85];

[84] As noted above, a bill is currently being drafted to extend the list of offences for which such measures may be ordered.
[85] Idem.

- under domestic law, GPS tracking is deemed to be a surveillance measure involving the use of technical means, which are defined as a configuration of components that detects signals, transmits them, activates the recording of signals and records them, excluding technical means used in screening of telecommunications or locating the origin or destination of telecommunications, surveillance and monitoring of telecommunications, audio recording and taking of images of certain locations or vehicles or computer data capture; in the context of mutual legal assistance, if GPS tracking has been started by foreign authorities on their own territory and continued on Luxembourg's territory, it is considered to be cross-border surveillance, governed by Article 40 of the CISA – this is in line with the Directive, recital 9 of which states that '*[t]his Directive should not apply to cross-border surveillance as referred to in the Convention implementing the Schengen Agreement*.'

The Luxembourg authorities have explained that limiting the scope of interception of telecommunications in this way appears to be compatible with the Directive; thus the interception of telecommunications according to the Directive includes measures described in domestic law as surveillance and monitoring of telecommunications or as screening of telecommunications or locating their origin or destination. That concept is not, however, compatible with the installation of a direct listening device or malware, or GPS tracking. Besides, those measures are unrelated to telecommunications, even in a broader sense.

The Luxembourg authorities consider that the wording of Annex C to the Directive confirms this interpretation.

The question arises as to whether direct listening in to a vehicle or GPS tracking which has been started on the territory of a State party to the Directive and continues on Luxembourg's territory may be authorised *ex post* using the form in Annex C to the Directive, on the interception of telecommunications.

The judges have clarified that direct listening and GPS tracking should not be considered as telecommunications interception measures within the meaning of the Directive or of Luxembourg's domestic law. The form in Annex C is therefore not suitable for the *ex post* authorisation of such measures carried out on Luxembourg's territory.

Where GPS tracking continues on Luxembourg's territory, Article 40 of the Schengen Convention should be applied, including paragraph 2 thereof, which provides for possible *ex post* regularisation.

The particularly intrusive measure of listening directly to conversations of occupants of a moving vehicle, which is classified in Luxembourg's domestic law under audio recording of certain locations or vehicles, may be used only for serious and mid-level offences against national security and acts of terrorism or terrorist financing.

The measure cannot be deemed equivalent to the interception of telecommunications within the meaning of Articles 30 and 31 of the Directive, nor to cross-border surveillance within the meaning of Article 40 of the Schengen Convention, and cannot be regularised *ex post*; rather, it must be requested formally by way of an EIO, which will only be admissible for the two categories of offences referred to above (and not, for example, for drug-trafficking offences, which it is often used for in other countries).

In the past, some investigating judges have accepted an *ex post* regularisation of GPS tracking (as opposed to direct listening) on the basis of the form in Annex C in some cases, even though the practice, which was done for reasons or pragmatism, was legally questionable (see good practice 2.3).

The most common examples are the particularly intrusive measures of audio recording and taking images of certain locations or vehicles and computer data capture, which, under Luxembourgish law, are limited to serious and mid-level offences against national security and acts of terrorism or the financing of terrorism. These measures therefore cannot be executed, by way of example, for offences relating to drug trafficking or those committed within a criminal organisation or criminal association.

The Luxembourgish judicial authorities consider that it would be desirable to extend the admissibility of the measures of audio recording and computer data capture to serious crimes, such as offences committed within a criminal organisation or criminal association[86].

The executing authorities have explained that where they have to refuse these measures, they suggest that the requesting authority, on the basis of Article 10(3) of the Directive, use an alternative measure, such as surveillance or the surveillance and monitoring of telecommunications, which are admissible measures in broader conditions.

The result is that EIOs issued for execution purposes on account of such offences cannot be executed.

This refusal to execute is based on the optional ground set out in Article 11(1) point (h) of the Directive, which the Luxembourg authorities are obliged to apply by Article 24 of the Luxembourgish transposing law, under which it is **mandatory** for them to exercise the option to refuse made available by the Directive because '*the requested investigative measure*' could not have been '*authorised in a similar domestic case*'.

[86] As noted above, a bill is currently being drafted to extend the list of offences for which such measures may be ordered.

For these reasons, the Luxembourg authorities are invited to have due regard to the optional nature of the grounds for non-recognition or non-enforcement and to review Article 24 of their transposing law (which makes the ground for refusal mandatory). It is worth recalling the fundamental principles of mutual trust and mutual recognition here, which are indispensable for the proper application of the EIO.

In these circumstances, the Luxembourg authorities are invited to complete the 'Fiches Belges' for the sake of greater clarity on these concepts in the field of telecommunications (*see recommendation 2*). Equally, the European Union is invited to clarify the scope of the concept of interception of telecommunications in the context of the EIO (*see recommendation 19.1*.).

Secondly, refusals had to be made when the issuing authority had requested the execution of coercive investigative measures which, under Luxembourgish law, may only be used for certain categories of offences or for offences whose penalties exceed a certain threshold, and the offence covered by the EIO was not among those offences.

Article 31 of the Directive provides for notification of the Member State where the subject of the interception is located and from which no technical assistance is needed. The form in Annex C to the Directive is used for this notification. The purpose of the notification is to give the competent authority of the notified state the opportunity to assess whether the interception could have been authorised in a similar domestic case and to inform the competent authority of the intercepting state, if the interception is due to take place or is being carried out, that it may not be carried out or must be terminated or, if the interception has already taken place, that any material already intercepted may not be used, or may only be used under conditions specified by the notified state.

The Luxembourg authorities report that they have not had the opportunity to implement this provision as the intercepting authority. On the other hand, they have been contacted in very rare cases as authorities of the state where the subject of the interception was located in order to assess *ex post* whether the material intercepted, hypothetically without the intervention of the Luxembourg authorities, could be used in the intercepting state. They explain that that assessment was carried out on the basis of the criterion, set out in Article 31(3) of the Directive, transposed by Article 33(3) of the transposing law, which is similar to the criterion in Article 11(1) point (h) of the Directive, transposed by Article 24 of the transposing law.

That criterion is whether the interception could have been authorised in a similar domestic case. Its application, which was rare, has not given rise to any particular difficulties. It should be borne in mind that the interception of telecommunications, understood as corresponding to the domestic-law measures of surveillance and monitoring of telecommunications and screening of telecommunications or locating the origin or destination, is permitted under relatively broad conditions, so that conflicting categorisations are relatively rare.

Article 11(1), point (h) of the Directive provides that recognition and execution of an EIO **may** be refused if the use of the investigative measure indicated is restricted under the law of the executing State to a list or category of offences or to offences punishable by a certain threshold, which does not include the offence covered by the EIO.

The legislature transposed that provision by stipulating in Article 24 of the Luxembourgish law that EIOs for the execution of coercive measures are recognised and executed in the Grand Duchy of Luxembourg '*only where the investigative measure requested would have been authorised as part of similar domestic proceedings*', which would appear to make that refusal mandatory.

In the specific context of interception of telecommunications, the Directive provides that the measure may be refused where it '*would not have been authorised in a similar domestic case*'.

Screening of telecommunications or locating the origin or destination of telecommunications and 'special surveillance' measures (surveillance and monitoring of telecommunications and postal correspondence, audio recording and taking images of certain locations or vehicles and capturing computer data) are therefore entrusted to the investigating judge.

20.6.2. Transmission of intercepts

Article 30(6), point (b) of the Directive provides for the possibility of immediate transmission of telecommunications to the issuing State.

Accordingly, the Luxembourg executing authorities accept such immediate transmission in practice; it is simple, efficient and less costly than the executing authorities themselves going through the recordings before transmitting them to the issuing authority, accompanied, where appropriate, by a translation. This way of working is formally provided for, and hence authorised, by Article 32(4), point (1) of the transposing law.

In these circumstances, the *ex officio* review of the formal validity of the procedure by the council chamber (Articles 26 to 28 of the transposing law) appears cumbersome, time-consuming and lacking in relevance in its current form (*see Chapter 15*).

Of course, this *ex officio* review applies only to measures relating to the interception of telecommunications, and therefore does not concern the output of direct listening or of the installation of malware. GPS tracking, too, is unrelated to the concept of interception of telecommunications; rather, if it is started at the request of an issuing State in the Grand Duchy of Luxembourg, it falls under an EIO for the purpose of surveillance, and if it is carried out as part of cross-border surveillance started abroad and continuing on Luxembourg's territory, it falls under Article 40 of the Schengen Convention.

20.7. Other investigative measures (e.g., house search)

No difficulties were mentioned for either incoming or outgoing EIOs in respect of other investigative measures, except the mandatory requirement to go through the council chamber if the measure entails seizure.

20.8. Monitoring of operations and controlled deliveries

Article 38 of the Luxembourgish Law addresses the investigative measure of gathering evidence in real time (Article 28 of the Directive) and mentions examples such as the monitoring of banking or financial operations on specific accounts or controlled deliveries.

As a reminder, the question of the appropriate legal instrument arises, in particular with regard to cross-border surveillance, including that carried out using a GPS beacon fitted under the vehicle to be placed under surveillance (*see Chapter 5.6.*).

21. STATISTICS

21.1. Statistics extracted from the Eurojust Case Management System

During the evaluation visit, Eurojust provided statistics extracted from its Case Management System on cases handled by Eurojust. This included information on (i) the total number of EIO-related cases at Eurojust; (ii) the number of bilateral and multilateral cases involving the Luxembourg National Desk at Eurojust; and (iii) the number of EIO-related cases in which the Luxembourg National Desk was either 'requester' or 'requested'[87].

All EIO-related cases handled by Eurojust in the period from 2018 to 31 December 2022. Source: Eurojust Case Management System.	2018	2019	2020	2021	2022	Total
Bilateral cases	561	987	1 295	1 898	2 289	**7 030**
Multilateral cases	231	340	462	418	424	**1 875**
Total number of cases	**792**	**1 327**	**1 757**	**2 316**	**2 713**	**8 905**

All cases involving the Luxembourg National Desk handled by Eurojust in the period from 2018 to 31 December 2022. Source: Eurojust Case Management System.	2018	2019	2020	2021	2022	Total
Bilateral cases	6	20	25	41	28	**120**
Multilateral cases	15	30	29	31	22	**127**
Total number of cases	**21**	**50**	**54**	**72**	**50**	**247**

[87] 'Requester' means that a Luxembourgish national authority asked the Luxembourg National Desk to open a file at Eurojust vis-à-vis one or more other Member States; 'requested' means that another National Desk at Eurojust, at the request of its national authority, opened a file vis-à-vis the Luxembourg National Desk.

All EIO-related cases involving the Luxembourg National Desk handled by Eurojust in the period from 2018 to 31 December 2022. Source: Eurojust Case Management System.	2018	2019	2020	2021	2022	Total
Requester	0	3	8	18	5	**34**
Requested	21	47	46	54	45	**213**
Total cases	**21**	**50**	**54**	**72**	**50**	**247**

21.2. Statistics provided by Luxembourg

The Luxembourgish authorities point out that statistics are compiled systematically with regard to EIOs for the purpose of enforcing coercive measures. Those EIOs are received and the evidence collected is transmitted after execution by a central authority, namely the Prosecutor-General's Office[88], which, to that end, has an international mutual legal assistance service in criminal matters; the latter – in addition to receiving EIOs for the purpose of executing coercive measures and transmitting the acts implementing them – also deals with international letters rogatory for the purpose of executing coercive measures and executing extradition requests. On the other hand, EIOs for the execution of non-coercive measures are received not by a central authority, but by the two district court prosecutors' offices.

With regard to EIOs issued, each competent judicial authority issues EIOs without centralisation by a central authority. EIOs are therefore issued in a decentralised manner. Specifically, EIOs are transmitted by each of the two district court prosecutors' offices (in Luxembourg City and in Diekirch) and by each of the country's 18 investigating judges established at the two district courts.[89] This multiplicity of issuing authorities, in the absence of a central issuing authority, explains the difficulty of compiling statistical data.

[88] Article 22 of the transposing Law.

[89] On 1 July 2023, there were 16 investigating judges at the district court in Luxembourg City and two at the district court in Diekirch (see Article 19 of the amended Law of 7 March 1980 on the organisation of the judiciary) Official Journal of the Grand Duchy of Luxembourg (public.lu) (consulted on 11 July 2023).

Some of those EIOs are published in the courts' annual activity reports.[90] The other figures have had to be established on the basis of data compiled on request by the authorities concerned.

[90] The document consulted for that purpose was the 2022 activity report (see in particular pages 195 and 243 thereof). The report also contains, in pages 294 et seq., statistics on requests for coercive purposes received by Luxembourg through the central authority of the Prosecutor-General's Office. However, those figures do not distinguish between EIOs and international letters rogatory, and therefore internal figures were used.

	2018	2019	2020	2021	2022
Coercive EIOs received	535	634	663	799	713
Non-coercive EIOs received[91]	809[92]	704[93]	818[94]	980[95]	723[96]
Total number of EIOs received	1 344	1 338	1 481	1 779	1 436
Refusals among EIOs received[97]	8	6	13	18	16
EIOs issued[98]	692[99]	763[100]	709[101]	932[102]	765[103]
Refusals among EIOs received	Not specified	Idem	Idem	Idem	Idem
Execution postponed	Idem	Idem	Idem	Idem	Idem

[91] The statistics available do not differentiate between EIOs and international letters rogatory as regards requests for enforcement of non-coercive measures received by the two district court prosecutors' offices (in Luxembourg City and in Diekirch). However, this lack of differentiation is of little significance since the vast majority of those requests originate from countries neighbouring Luxembourg and have therefore been submitted in the form of EIOs. The ratio of EIOs to international letters rogatory may be estimated at 99.9:0.1.

[92] 808 requests received by the district court prosecutor's office in Luxembourg City and one request received by the district court prosecutor's office in Diekirch.

[93] 698 requests received by the district court prosecutor's office in Luxembourg City and six requests received by the district court prosecutor's office in Diekirch.

[94] 816 requests received by the district court prosecutor's office in Luxembourg City and two requests received by the district court prosecutor's office in Diekirch.

[95] 830 requests received by the district court prosecutor's office in Luxembourg City and 150 requests received by the district court prosecutor's office in Diekirch.

[96] 570 requests received by the district court prosecutor's office in Luxembourg City and 153 requests received by the district court prosecutor's office in Diekirch.

[97] The number of cases of refusal relates to coercive EIOs received in respect of which such refusal has been recorded; there are no statistics on the number of possible refusals of non-coercive EIOs received. Since those EIOs relate to measures which pose little problem from the point of view of their admissibility, cases of refusal are extremely rare, and therefore the fact that they have not been taken into account is irrelevant.

[98] The statistics available do not differentiate between EIOs and international letters rogatory with regard to requests issued by judicial authorities. As the vast majority of requests are addressed to the States Parties to the Directive, the proportion of requests issued outside that framework is marginal. It may, without prejudice, be assessed at less than 10% of requests; consequently, the figures – even if they are not absolutely precise – remain relevant.

[99] The figure of 692 may be broken down into 410 requests (of a non-coercive nature) issued by the district court prosecutor's office in Luxembourg City (the district court prosecutor's office in Diekirch did not publish any figures for 2018) and 282 requests (in principle of a coercive nature) issued by the offices of the examining magistrates, i.e. the investigating judges, of the district courts of Luxembourg City and Diekirch.

[100] The figure of 763 may be broken down into 392 requests (of a non-coercive nature) issued by the district court prosecutor's office in Luxembourg City, 33 requests issued by the district court prosecutor's office in Diekirch and 338 requests (in principle of a coercive nature) issued by the offices of the examining magistrates, i.e. the investigating judges, of the district courts of Luxembourg City and Diekirch.

[101] The figure of 709 can be subdivided into 303 requests issued by the district court prosecutor's office in Luxembourg City, 41 requests issued by the district court prosecutor's office in Diekirch and 365 requests issued by the offices of the examining magistrates, i.e. the investigating judges, of the district courts of Luxembourg City and Diekirch.

[102] The figure of 932 can be subdivided into 495 requests issued by the district court prosecutor's office in Luxembourg City, 52 requests issued by the district court prosecutor's office in Diekirch and 385 requests issued by the offices of the examining magistrates, i.e. the investigating judges, of the district courts of Luxembourg City and Diekirch.

[103] The figure of 765 can be subdivided into 445 requests issued by the district court prosecutor's office in Luxembourg City, 49 requests issued by the district court prosecutor's office in Diekirch and 271 requests issued by the offices of the examining magistrates, i.e. the investigating judges, of the district courts of Luxembourg City and Diekirch.

The table above does not indicate the number of refusals among the EIOs issued by the Luxembourgish authorities or the number of instances in which the execution of EIOs (whether issued or received by the Luxembourgish authorities) was postponed. Unfortunately, it is not possible to determine the number of refusals of EIOs issued on the basis of the data available. According to interviews with practitioners, however, such refusals are infrequent. As postponements of execution are not formalised, they are not covered by statistical reports.

In addition, the Luxembourgish authorities point out that, in order to provide a more precise answer to the question of the average time taken to execute EIOs, on which there are no formal statistics, it can – without prejudice – be estimated that around one third of EIOs are executed within a period of less than 90 days (or three months), that another third are executed within a period of between three and six months and that the remaining third (comprising the most complex cases) are executed beyond that time limit. Taking those estimated time periods into account, just over one third of EIOs are therefore executed within the time limit, while just under two thirds of EIOs give rise to the postponements provided for in the Directive.

The evaluation team considers that Luxembourg should improve the collection of statistics on all EIOs, both incoming and outgoing, until the eEDES system is fully operational in all Member States (*see recommendation 4*).

22. TRAINING

The Luxembourgish authorities inform us that, at the time of their initial training, each young magistrate follows a course on international legal assistance in criminal matters. Within the framework of the various services concerned, informal in-house training is held on, *inter alia*, EIOs. Such informal training takes place, for the magistrates concerned, at the offices of the examining magistrates, at the district court prosecutors' offices and at the Prosecutor-General's Office. Within each of those services, regular meetings are held to discuss any problems that may have arisen in the area concerned. In addition, memos are drafted explaining the scope of the legislation. The same applies to the criminal investigation department (*see best practice 9*).

It should be noted that, unlike other countries, Luxembourg does not have a judicial academy. Training is carried out at foreign training institutes, including the French National School for the Judiciary and the Academy of European Law (ERA) in Germany. Such training is still voluntary at present, except for magistrates in their initial training phase, and are carried out at the request of the person concerned.

However, this situation is about to change. A new Law of 23 January 2023 on the status of magistrates[104] includes a specific chapter on continuous training for magistrates, which will in future be organised in a more systematic and binding way (*see best practice 10*).

At present, this training is carried out informally through the passing on of knowledge and practices from one generation to the next (*see best practice 2.7.*). We must not lose sight of the fact that the number of practitioners is very small. There are only around 20 practising magistrates across the country. Given the informal nature of this training, no statistics are available in that regard.

[104] Mémorial A, 2023, No 42 of 11 September 2023.

With regard to training, the evaluation team takes the view that, given the small size of both the country and its judiciary, the option of partnerships with training institutions in other countries seems wise, as it undoubtedly reduces the costs of training in view of the subjects addressed and the fact that Luxembourgers are multilingual, and language therefore does not constitute a barrier for them.

The team notes the possibility that Luxembourg could include a course on European and international mutual legal assistance in criminal matters as a best practice in the initial training of magistrates. In addition, the team considers that the EJTN could also be involved in partnerships with national training projects, with the aim of increasing the number of EIO training courses and the interaction of the various instruments of judicial cooperation in criminal matters (*see recommendation 23*).

23. FINAL REMARKS, RECOMMENDATIONS AND BEST PRACTICES

23.1. Suggestions by Luxembourg

The Luxembourgish authorities complain of recurrent cases in which, without explanation, the foreign executing authorities only partially execute the EIO, forcing the issuing authority to return to the matter or, in order to avoid further loss of time, to abandon the full execution initially envisaged.

They feel that, in many cases, they are dependent on the goodwill of executing authorities who give no priority to execution and show little concern for its quality, even refusing to execute it in full or in part.

Another recurring problem, which also concerns Luxembourg as an executing authority, is the often very long time taken for execution, which seems to be a burden shared by all European executing authorities.

While the EIO is undoubtedly a step forward insofar as it simplifies and unifies procedures compared with the previous, and in principle much more cumbersome, international letters rogatory procedure, it does not erase with a stroke of the pen the recurring difficulties faced by many European courts and the police services that assist them of being increasingly overloaded with ever more complex cases and struggling to deal with them within a reasonable time frame. This chronic problem naturally has repercussions for the execution of EIOs.

23.2. Recommendations

23.2.1. Recommendations to Luxembourg

1. Regarding the coercive measures referred to in Article 21 of the transposing law, which are to be taken in Luxembourg for the seizure of items, documents, funds or property of any kind, the provision of information or documents ordered in accordance with Articles 66(2) to (4) of the Code of Criminal Procedure, a search or any other investigative measure involving a similar degree of constraint:

   1.1. respect the optional nature of the grounds for non-recognition and non-execution, which constitute exceptions to the mutual trust that is essential for proper application of the EIO. Accordingly remove or amend Article 24 of the transposing law, in which the optional grounds for refusal provided for in Article 11(1), points (g) and (h) of the Directive are made mandatory, which runs counter to the Directive (*see Chapters 12.1 and 20.6.1*);

   1.2. reassess the relevance of an automatic review of the procedure's formal validity by the council chamber (Articles 26 to 28 of the transposing law), in the light of the facts that: (i) a review of the legality is already carried out beforehand by the Prosecutor-General and by the investigating judge, (ii) an appeal could be more in line with the requirement to introduce legal remedies equivalent to those available in similar national proceedings, and therefore also more in line with Article 14 of the Directive (e.g. application for a declaration of invalidity provided for in Article 7 of the Law of 23 December 2022), and (iii) the transfer to the issuing authorities of the items, documents or information seized must be efficient and done without delay and must not be subject to a procedure likely to cause significant delays without adding any value with regard to the review already carried out by the public prosecutors and investigating judges (*see Chapter 15*).

2. Supplement the Fiches Belges by specifying the scope of application in Luxembourgish law of:

   i) telecommunications interception measures (Article 32 of the transposing law and Articles 30 and 31 of the Directive) (*see Chapter 20.6.1*);

   ii) investigative measures implying the gathering of evidence in real time, continuously and over a certain period of time (Article 28 of the Directive and Article 38 of the transposing law) (*see Chapters 5 and 20.8*);

   iii) cross-border surveillance, in particular via the placing of a GPS beacon under the vehicle to be monitored (*see Chapter 5.6*).

3. Connect all national authorities competent for the EIO to eEDES as soon as possible, irrespective of whether the measures are coercive (*see Chapter 8*).

4. Until eEDES becomes fully operational, improve the gathering of statistics on all EIOs, both incoming and outgoing (*see Chapter 21.2*).

5. The executing authorities must have sufficient means and human resources at their disposal to be able to comply with the deadlines provided for in the Directive (*see Chapters 13 and 19*).

23.2.2. Recommendations to the other Member States

6. The issuing authorities should fill in the statement of facts consistently and sufficiently comprehensively for the measures requested (*see Chapter 6.1*).

7. The issuing authorities should stay within the scope of EIOs and not issue an EIO for purposes other than obtaining evidence (*see Chapter 5.1*).

8. The issuing authorities should ensure that EIOs are accurate and comprehensible. They should also use short sentences and precise language when issuing an EIO, rather than copying the text of the underlying national order, to allow easy and precise translation (*see Chapter 6.2*).

9. The issuing authorities must use professional translators to translate EIOs, rather than online electronic translation systems (*see Chapter 6.2*).

10. The Member States should connect all competent national authorities to eEDES as soon as possible (*see Chapter 8*).

11. The executing authorities should always respect the deadlines and swiftly inform the issuing authorities of any potential delay (*see Chapter 13*).

12. The executing authorities should favour direct prior contact and be proactive in order to ensure optimal execution of EIOs (*see Chapters 7 and 8*).

13. Executing authorities should consider transmitting the results of partial execution of EIOs instead of waiting for them to be completed, whenever doing so is in the interest of the case or its urgency, and should consider consulting the issuing authorities to that end (*see Chapter 20.4*).

14. Executing authorities should consider writing and sending final and interim reports on execution (*see Chapter 20.4*).

15. Executing authorities should consider keeping electronic copies relating to the execution of EIOs which have been sent out, at least until receipt by the issuing State has been confirmed, and should consider sending scans before sending by physical post (*see Chapter 20.4*).

16. Executing authorities should always send Annex B within the deadlines set in Article 16 of the Directive (*see Chapter 17*).

17. Executing authorities should accept EIOs sent electronically which comply with Article 7 of the Directive, not just EIOs that have been sent (on paper) by post (*see Chapter 8*).

18. When indicating a language in addition to the official language(s) of the Member State concerned (Article 5 of the Directive), Member States should choose at least one language which is commonly used in the EU in which the EIO can be completed or into which it can be translated when the Member State concerned is the executing State, as recommended in recital 14 of the Directive (*see Chapter 6.2*).

23.2.3. Recommendations to the European Union and its institutions

The European Commission is invited to:

19. clarify the scope of application of:

19.1. the concept of interception of telecommunications in the context of EIOs (*see Chapter 20.6.1*);

19.2. EIOs to cross-border surveillance for the purpose of evidence-gathering in criminal proceedings and in the context of mutual legal assistance (*see Chapter 5.6*);

19.3. the speciality rule in the context of EIOs (*see Chapter 10*).

20. In addition, the Commission is invited to:

20.1. incorporate the freezing certificate into the EIO for all situations in which the issuing authority needs not only to locate funds, but also to seize them for evidential purposes, i.e. with a view to obtaining proof of an offence (*see Chapter 5.1*).

20.2. consider making the form more user-friendly and developing 'smart forms' to save repetition, as well as including a section on the technical information necessary for the receipt of electronic banking data (*see Chapter 6.1*);

21. develop a secure, interoperable system for cross-border videoconferencing (*see Chapter 20.2*);

22. develop guidelines for when costs may be deemed exceptionally high, to give guidance to national authorities when they consult each other on that issue. The guidelines could mention asking Eurojust to facilitate such consultations if necessary (see Article 31 of the Regulation on freezing and confiscation orders, which already contains a provision to that effect (*see Chapter 18*)).

23.2.4. Recommendations to Eurojust/Europol/EJN/EJTN

23. The EJTN should increase the number of training sessions related to the EIO, possibly as part of a partnership with national training projects. Such training should cover the interaction between the various instruments for judicial cooperation in criminal matters (*see Chapter 22*).

24. Taking into account its experience, Eurojust is invited to draw up guidelines on 'excessive costs' to give guidance to the judicial authorities (*see Chapter 18*).

23.3. Best practices

This section includes a list of best practices to be adopted by the other Member States.

Luxembourg must be congratulated on:

1. having provided in its transposing law (Law of 1 August 2018) that all EIOs must be dealt with as a matter of urgency and given priority (Article 18 of the Law) (see Chapter 3);
2. the fact that the Luxembourgish judicial and police authorities:
   2.1. demonstrate a high standard of professionalism, experience, proactivity and cooperative spirit to ensure that EIOs are executed to the greatest extent possible and to ensure preservation of the evidence required (see Chapter 12.1)
   2.2. systematically complete and send off Annex B (see Chapter 17)
   2.3. are willing to be pragmatic and simplify matters for the sake of execution, and to put the file in order after an EIO (see Chapter 20.6.1)
   2.4. proactively cooperate in fast-tracking and simultaneously executing EIOs issued by different Member States when participating in 'action days' (see Chapter 19)

2.5. inform and consult issuing authorities when costs are exceptionally high (see Chapter 18)

2.6. have set up specialist units in the criminal investigation department, offices of the examining magistrates and the public prosecutor's office (see Chapter 4.3)

2.7. organise informal internal training sessions and regular meetings to share their experience of individual cases and discuss problems encountered when dealing with EIOs (see Chapter 22);

3. using professional translators to translate EIOs, rather than online electronic translation systems (see Chapter 6.2);
4. in addition to their official languages, having indicated an additional language commonly used in the EU, as recommended in recital 14 of the Directive (see Chapter 6.2);
5. accepting EIOs sent by fax or electronically which comply with the conditions set out in Article 7 of the Directive, not just EIOs that have been sent by post as a paper version (see Chapter 8);
6. prioritising use of the EJN Atlas to find the competent executing authority in another Member State (see Chapter 8);
7. always preferring direct contact (see Chapters 7, 8 and 12.1);
8. asking the Eurojust national desk for assistance only when direct contact is not sufficient and coordinating 'action days' (see Chapters 7 and 8);
9. including a lesson on European and international mutual legal assistance in criminal matters in judges' initial training (see Chapter 22);
10. having included in the new professional regulations for judges (Law of 23 January 2023) a special chapter on continuous training for judges, which could include the EIO, to be organised more systematically and on a more mandatory basis in the future (see Chapter 22);
11. transmitting the results of partial execution of EIOs instead of waiting for them to be completed, whenever doing so is in the interest of the case or its urgency, and consulting the issuing authorities to that end (see Chapter 20.4);

12. keeping (electronic) copies of documents relating to the execution of EIOs and sending scans before sending them by physical post (see Chapter 20.4);
13. writing and sending final and interim reports on execution (see Chapter 20.4);
14. consulting the requesting authorities before executing alternative measures and taking the most effective measure possible (see Chapter 7).

ANNEXE A : PROGRAMME DE LA VISITE SUR PLACE

mardi, 12 décembre 2023	
Heure	**Programme**
9:30 - 10:30	Mot de bienvenue 1) Introduction des évaluateurs et des autorités luxembourgeoises 2) Présentation des autorités compétentes en matière de DEE
10:30 – 10:45	Pause-café
10:45 - 12:00	Rencontre avec des juges d'instruction, des représentants du ministère public et du service de police judiciaire
12:00 - 13:15	Pause-déjeuner
13:15 - 14:45	Continuation des échanges
14:45 - 15:00	Pause-café
15:00 - 16:30	Continuation des échanges

mercredi, 13 décembre 2023	
Heure	**Programme**
9:30 – 11:00	Rencontre avec des juges d'instruction, des représentants du ministère public et du service de police judiciaire
11:00 – 11:15	Pause-café
11:15 – 12:30	Continuation des échanges
12:30 - 14:00	Pause-déjeuner
14:00 - 15:00	Rencontre avec des juges de la chambre du Conseil
15:00 - 15:15	Pause-café
15:15 – 16:30	Rencontre avec des représentants du Barreau de Luxembourg/Diekirch

jeudi, 14 décembre 2023	
Heure	Programme
9:30 – 10:30	Débriefing
10:30 - 11:00	Pause-café
11:00 – 12:00	Conclusions préliminaires

ANNEX B: LIST OF ABBREVIATIONS/GLOSSARY OF TERMS

LIST OF ACRONYMS, ABBREVIATIONS AND TERMS	ENGLISH
CISA	Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders
CATS	Coordinating Committee in the area of police and judicial cooperation in criminal matters
CJEU	Court of Justice of the European Union
EIO	European Investigation Order
EIO Directive or Directive	Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters
JIT	Joint investigation team
eEDES	e-Evidence Digital Exchange System
Mutual legal assistance	Request for mutual legal assistance
COPEN	Working Party on Cooperation on Criminal Matters
EAW	European arrest warrant
Transposing law	Law of 1 August 2018 (Mémorial A, 2018, No 787 of 11 September 2018), as amended by the Law of 23 December 2022 on the mutual recognition of freezing and confiscation orders (Mémorial A, 2022, No 680 of 23 December 2022)
EJTN	European Judicial Training Network
EJN	European Judicial Network in criminal matters