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ANNEX

EVALUATION REPORT ON THE

10TH ROUND OF MUTUAL EVALUATIONS

On the implementation of the European Investigation Order (EIO)

REPORT on SPAIN

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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 ('the Directive') was in response to a well-identified practical need for a comprehensive system, based on mutual recognition, for obtaining evidence in cases with a cross-border dimension. It replaced the previous fragmented evidence-gathering system while taking into account the flexibility of the traditional system of mutual legal assistance ('MLA'). The European Investigation Order ('EIO') was intended to create a high level of protection of fundamental rights and to implement the practical experience acquired, based on direct communication between European judicial authorities. Consequently, the EIO struck a balance between mutual recognition and mutual assistance. After the Directive had been in effect for more than five years, it was decided, as part of the 10th round of mutual evaluations, to assess the application of the main instrument for gathering evidence.

The information provided by Spain in the questionnaire and during the on-site visit was detailed and comprehensive. The evaluation visit was also well prepared and organised by the Spanish authorities, although some nuances might have been lost in translation. The evaluation team formed a good overview of the strengths and weaknesses of the Spanish system and therefore identified some key issues that need to be addressed at national and European level. This led to the recommendations made in Chapter 22.1.

The very high level of specialisation, coordination and digitalisation within the Spanish Public Prosecutor's Service ('PPO') play a key role in the field of cooperation.

As to specialization, the International Cooperation Unit ('UCIF') within the General Prosecutor's Office, as well as the units specialised in judicial cooperation at provincial level, ensure that all prosecutors receiving EIOs are specialists in international cooperation. To this end, prosecutors have knowledge of EU law and experience in this field, as well as requisite linguistic skills. However, the broader judiciary - especially investigative judges - does not share the same degree of specialisation in international cooperation.

With regard to coordination, if the EIO does not contain investigation measures restricting fundamental rights, the PPO shall be competent to recognise and execute the EIO, and the UCIF may therefore coordinate the execution. However, if an EIO falls partially under the competence of the investigating judge, it needs to be forwarded in its entirety to an investigating judge. This may cause delays in the execution of EIOs. It would therefore be beneficial to deal with measures affecting fundamental rights separately, for instance by allowing for the splitting of EIOs under Spanish law so that the remaining non-coercive measures may be executed by the PPO.

In relation to digitalisation, public prosecutors use a separate case management system ('CRIS') specifically dedicated to judicial cooperation requests, including dealing with incoming EIOs. This is a very advanced system enabling electronic transmission internally in Spain, and the automated creation of Annex B, to save all documents in terms of their processing and execution. The evaluation team praised the high level of digitalisation within the PPO in dealing with incoming EIOs but noted that it may be well worth exploring the legal and technical possibilities to grant access for the judiciary to CRIS when involved in the execution of EIOs.

The evaluation team identified a potential need to revise the Directive. In their view, the key points where the EU legislator should consider amending the Directive are as follows:

- make Annex A more effective;
- clarify the applicability of the rule of speciality and its interplay with data protection rules;
- clarify whether the notion of 'interception of telecommunications' under Articles 30 and 31 also covers other surveillance measures, such as the bugging of cars and GPS tracking. If this is not the case, it should be considered to amend the Directive to introduce special provisions that also regulate such measures, including the situation where no technical assistance is needed from the Member State concerned (*ex-post* notification mechanism).

Furthermore, and in order to ensure legal certainty, there is a need for further clarification on the application of the Directive in relation to the Convention implementing the Schengen Agreement ('CISA')[1] in respect of cross-border surveillance. The Union legislator is also invited to revisit the question of the participation of the accused person at the trial via videoconference from another Member State.

2. INTRODUCTION

The adoption of Joint Action 97/827/JHA of 5 December 1997[2] ('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') decided, following an informal procedure at its informal meeting on 10 May 2022, that the 10th round of mutual evaluations would focus on the EIO.

The 10th round of mutual evaluations aims 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, the relevant practical and operational aspects linked to the implementation of the Directive. It will allow both shortcomings and areas for improvement to be identified, together with best practices to be shared among Member States, thus helping to ensure a more effective and coherent application of the principle of mutual recognition at all stages of criminal proceedings throughout the European Union.

[1] 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.

[2] 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 organised crime.

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 a 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 the Directive.

Spain was the 24th Member State visited during this round of evaluations, as provided for in the order of visits to the Member States adopted by CATS on 29 June 2022 under the silence procedure[3].

In accordance with Article 3 of the Joint Action, the Presidency has drawn up a list of experts for the evaluations to be carried out. Pursuant to a written request sent to delegations by the Secretariat of the Council of European Union on 15 June 2022, 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 from 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[4].

The experts entrusted with the task of evaluating Spain were Mr Federico Perrone-Capano (IT), Mr Hannu Koistinen (FI) and Mr Nicholas Franssen (NL). The following observers were also present: Ms Sofia Mirandola from Eurojust and Ms Emma Kunsági from the General Secretariat of the Council.

[3] ST 10119/22.
[4] ST 10119/22.

This report was prepared by the team of experts with the assistance of the General Secretariat of the Council, based on Spain's detailed replies to the evaluation questionnaire and the findings arising from the evaluation visit to the country that took place between 23 and 25 April 2024, where the evaluation team interviewed representatives of the Ministry of the Presidency, Justice and Relations with Parliament, the Ministry of the Interior, the Public Prosecution Service ('PPO'), the judiciary and the Bar Association.

3. TRANSPOSITION

The Directive has been transposed by Law 3/2018, 11 June, that modifies Law 23/2014, 20 November, on the mutual recognition of judicial decisions in criminal matters in the European Union (*Ley de reconocimiento mutuo* in Spanish, 'LMR'), which compiles all mutual recognition instruments in one piece of legislation (see *Best practice No 1*).

If something is not regulated in the LMR, the provisions of the Code of Criminal Procedure ('CCP') and Organic Law 5/2000, 12 January, regulating the criminal responsibility of minors apply.

4. COMPETENT AUTHORITIES

4.1. Spanish criminal justice system

For a better understanding of the different authorities' roles with respect to EIOs, it is necessary to first describe the main features of the Spanish criminal justice system.

In Spain, under the inquisitorial system, criminal investigations are carried out by the investigative judge, who works directly with the police, and not by the public prosecutor ('PPOs') who is party to the investigation. PPOs may only carry out pre-investigations (*diligencias preprocesales*) that will subsequently be referred to the judge, who will then consider opening a formal investigation. Pre-investigations are not always necessary and often take place in very complex cases (for example, in drug trafficking, financial investigations and corruption cases) where it is first necessary to gather information to build a well-substantiated *notitia criminis* in order for the judge to decide on opening an investigation.

The decision of the judge to open an investigation is communicated to the parties (i.e. the PPO and the suspect) and investigations are in principle not secret: all parties are informed of the judge's decisions and can appeal against them in court. By way of exception, in a limited number of cases the investigations or certain specific investigative measures can be declared secret, where only the PPO will be aware of them, not the defence. This is the case, for instance, of special investigative techniques such as interceptions of telecommunications, searches, bugging, etc. During the formal investigations, the PPO must be notified of all measures adopted by the judge and is able to propose the adoption of any procedural measures foreseen in the CCP.

In addition to provincial PPOs with specific territorial competence for ordinary crimes, there are other specialised PPOs with national competence: 1) the Anti-drug PPO, whose competencies lie in drug-trafficking and related money laundering offences in mayor organised crime investigations; 2) the Anti-corruption PPO, with competencies in high profile corruption and other economic crimes; and 3) the PPO of the Audiencia Nacional, which is competent in different type of crimes, including those committed abroad for which Spain has jurisdiction, certain economic crimes with nation-wide effect, terrorism cases, inter alia.

Within the General Prosecutor's Office, UCIF has delegates in each Spanish province.

4.2. Issuing authorities

In accordance with Article 187(1) of the LMR, the competence to issue EIOs depends on the stage of the proceedings: a major role is played by investigating judges, who are competent to issue EIOs during the investigation phase, whereas sentencing courts are the competent issuing authorities after indictment and during the trial stage. PPOs, on the other hand, are competent to issue EIOs only during the pre-investigation phase, provided that the measure contained in the EIO does not restrict fundamental rights, and therefore play a rather minor role in the issuing of EIOs. The PPO is also competent to issue EIOs in cases involving juvenile offenders.

When deciding to issue an EIO, the investigative judges or courts must issue an order under the national procedure, since it is the only reasoned decision that can meet the content requirements of Article 189(1) of the LMR to justify the necessity and proportionality of the measure and its suitability under Spanish law, thus serving as the first filter of the legality of the measure.

Specifically, Article 202 of the LMR, on the issuing of an EIO for the interception of telecommunications, expressly requires the judge to issue a decision in accordance with the CCP before issuing an EIO.

4.3. Executing authorities

In accordance with Article 187(2) of the LMR, the PPOs are the only competent authority in Spain to receive all EIOs. Once the EIO has been registered and its receipt confirmed by the PPO to the issuing authority, the following rules apply:

- if the EIO does not contain any investigative measures that restrict fundamental rights, the PPO may recognise and execute the EIO. This is the most common scenario, corresponding to the vast majority of cases (see also Chapter 6.3);

- if the EIO contains an investigative measure which restricts fundamental rights and cannot be replaced by a less intrusive measure, it should be referred to the judge or court for recognition and execution. In practice, these measures are mainly interceptions of telecommunications, searches and bugging operations;

- the PPO will also refer the EIO to a judge or to the court if the issuing authority has expressly stipulated that the investigative measure must be executed by a court.

When the EIO is to be executed by a judge, the PPO receiving the EIO will also provide the judge with a mandatory report including an assessment on whether there are any grounds for non-execution to consider and whether it is considered lawful to execute the investigative measures.

The specific PPO competent to receive and execute an EIO depends on the type of criminal offence involved (ordinary vs specialised PPOs) and on the territory in which the measure has to be executed. However, the central UCIF is also competent to directly receive any EIO containing multiple measures affecting different places in Spain or with a lack of territorial nexus. In these cases, UCIF carries out the necessary inquiries to verify the competence and then forward the EIO to the best placed District or special PPO. In certain cases, when the information requested is in a centralised database or due to the urgency or the complexity, UCIF may also decide to execute it directly (for example, if there is no link with a specific territory or if the measures affect several territories. See also Chapter 6.3)[5].

In accordance with Article 187(3) of the LMR, when execution of the EIO is referred to a judge – which, in practice, occurs in only a very small number of cases, the competent court is as follows:

- the investigating judges or juvenile court judges in the place where the investigative measures are to be carried out or, alternatively, in the place where there is another territorial connection with the crime, the suspect or the victim. If there is no territorial connection that may be used to determine competence, the central investigating judges will be competent;

- the central investigating judges, if the EIO is issued for terrorist offences or other offences for which the National High Court is responsible, or if it concerns the notification contained in Article 222 of the LMR;

- the Central Criminal Court or Central Juvenile Court, in cases where persons deprived of liberty in Spain are transferred to the issuing State in accordance with the provisions of Article 214 of the LMR.

[5] See Dictamen 2/2021 of the UCIF on the execution of judicial cooperation instruments and the rules for their attribution within public prosecutors' offices.

The PPO may take the necessary steps to determine the competent judge or court to whom the EIO is to be sent for execution. A change to the location where the investigative measure is to be carried out will not result in a loss of competence for the judge or court which has agreed to recognise and execute the EIO.

If the EIO has been issued in relation to several investigative measures which are to be carried out in different locations, the judge or court to which the PPO refers the EIO will be competent to recognise and execute the EIO. The judge or court responsible for execution of the EIO will notify the PPO of the recognition and execution of the investigative measures and their response to the issuing authority.

4.3.1. Specialisation

It should be noted that all prosecutors receiving EIOs are specialists in international cooperation – with knowledge of EU law and experience in this field, as well as linguistic skills – enabling them to start registering and processing the international cooperation file, even if the EIO contains a number of inaccuracies, or if it is being processed in English for reasons of urgency. This is because there are PPO units which specialised in judicial cooperation at each provincial level.

In addition, the international cooperation delegated prosecutors assigned to the special anti-drug and anti-corruption PPOs, the PPO at the National High Court, the PPOs of Madrid, Barcelona, Valencia, Malaga, Alicante and Palma de Mallorca, and the public prosecutors at the UCIF, are also EJN Contact Points, which puts them in an ideal position to apply effectively the principle of direct communication to be used for an EIO (*see Best practice No 2*).

Both the public prosecutors specialised in international cooperation and the UCIF, whose assistance and coordination with regard to the network of specialist prosecutors is provided for in State Prosecution Service Instructions Nos 2/2003, 1/2011 and 1/2015, are able to provide assistance when necessary.

During their visit, the experts noted that the PPO's degree of specialisation in judicial cooperation throughout the territory of Spain described above is not mirrored in the judiciary, where there are around 30 judges in the country specialised in international cooperation, albeit not in all judicial districts. Therefore, the recommendation to the judiciary is to undertake measures to ensure a sufficient level of specialisation for investigating judges dealing with judicial cooperation throughout the territory of Spain (see *Recommendation No 1*).

4.3.2. Dedicated case management system

Public prosecutors use a separate case management system (CRIS) specifically dedicated to judicial cooperation requests, including for dealing with incoming EIOs. This is a very advanced system which electronically transmits EIOs within Spain to the correct competent authority, automatically creates Annex B, and reminds users of deadlines and to save all documents related to their processing and execution. The evaluation team praised the high level of digitalisation within the PPO in dealing with incoming EIOs (see *Best practice No 3*). During the visit, the experts came to the conclusion that it may be well worth exploring the legal and technical possibilities of allowing the judiciary to access CRIS when involved in the execution of EIOs to enable a more efficient communication between the judiciary and public prosecutors, to avoid delays in urgent cases where measures are to be executed by judges and to offer the judiciary a better overview of EIO cases than is currently available (see *Recommendation No 2*).

4.4. Central authority

Article 6 of the LMR provides that the Ministry of the Presidency, Justice and Relations with Parliament ('Central Authority') is the central authority responsible for assisting the judicial authorities.

There is a *general reporting obligation* for the mutual recognition instruments regulated by law, according to which judges or courts that transmit or execute mutual recognition instruments will record the information in the quarterly statistical bulletins and forward it to the Central Authority. Every six months the PPO will send the Central Authority a list of the mutual recognition instruments issued or executed by the PPO.

The main role of the Central Authority is to help resolve any problems that may arise in the transmission of mutual recognition instruments if requested to do so.

The Central Authority has specific competence only in relation to authorising a person to transit through Spain – be it in the context of an EIO or EAW. Notably, it informs the issuing State if it cannot guarantee that the person sentenced will not be prosecuted, detained or otherwise subjected to any restriction of liberty in Spain for any offence committed or sentence imposed prior to leaving the executing State.

4.5. The right of the suspected or accused person or victim to apply for an EIO

Under Article 189(1) of the LMR, the issuing authority may issue an EIO, either ex officio or at the request of one of the parties. This means that not only may the PPO ask the investigating judge to issue an EIO, but the legal representative of the accused or victim may do so as well, if he or she is appearing in a private or even a civil prosecution ('*acusación particular*'). The judge will decide by assessing the necessity, legality and proportionality requirements referred to in that provision.

5. SCOPE OF THE EIO AND RELATION TO OTHER INSTRUMENTS

5.1. Scope of the EIO

In accordance with Article 186 of the LMR, an EIO may be issued for gathering evidence in other Member States or to transmit evidence already available. It covers all investigative measures, with the sole exceptions of the establishment of a joint investigation team ('JIT') and the taking of evidence within that team, as well as the transfer of criminal records. However, where a JIT requires investigative measures to be carried out in the territory of a Member State which is not part of the JIT, an EIO may be issued to the competent authorities of that State.

Accordingly, Article 187(1) provides that the issuing authorities may issue EIOs for the execution of measures that they are able to order or execute pursuant to the provisions of the CCP, i.e. each and every one of the investigative measures provided for in Spanish procedural law.

On the matter of the different stages of the criminal proceedings, the last paragraph of the first section of the preamble of the LMR states that '*in criminal matters, according to the provisions of the Program of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters, this principle is to be applied at every stage of the criminal proceedings, before, during and even after conviction*.' Nevertheless, Article 187(1) of the LMR, concerning the authorities competent to issue an EIO, refers specifically to the trial stage but not to the subsequent stage of enforcing the sentence. However, the PPO has adopted a position allowing for such EIOs. In conclusion, therefore, no problems have arisen when Spain is the issuing State and the EIO is used at all stages, including enforcement – although such EIOs are quite rare in practice.

Finally, the Spanish legal system does not provide for the possibility of issuing EIOs in administrative proceedings, only in criminal proceedings (Articles 186(1) and 187(1) of the LMR). However, the Spanish authorities are obliged to execute EIOs issued by another Member State in administrative proceedings, where the decision may give rise to criminal proceedings. Reference is made to validation by a judicial authority (Article 2(c) point (iii) of the Directive), the necessary checks by the PPO, and, where appropriate, using the relevant consultation procedure (Article 6(3) of the Directive).

In that regard, the practical criteria established by the PPO[6] can serve as guidance on the application of the EIO, stating that requests for assistance relating to foreign administrative proceedings and issued in order to obtain the personal data necessary for the enforcement of administrative decisions must be executed in Spain provided that they can be appealed before courts competent in criminal matters.

The procedure used for the recognition and execution of any type of EIO, including EIOs initially issued in administrative proceedings, is for an international cooperation file to be opened by the PPO[7]. As regards EIOs issued by administrative authorities, Article 205(2) of the LMR allows a Spanish public prosecutor to carry out filtering or precautionary actions, namely returning EIOs that have not been issued by the competent issuing authority or validated by the competent judge, court or prosecutor in the issuing State.

5.2. Thin line between the use of an EIO and other instruments

In practice, some issues have arisen when comparing EIOs and other judicial cooperation instruments.

- **EIO vs EAW.** From the point of view of an issuing authority, Spanish judicial authorities have raised doubts as regards the possibility of requesting via an EIO temporary surrenders of suspects or accused persons to be heard in court and during at pre-trial judicial investigation. In general, Spanish authorities indicated that they tend to issue an EAW only where the person will subsequently be held in pre-trial detention in Spain or when their physical presence is necessary, otherwise they would issue an EIO for the purpose of hearing the suspect or the accused.

[6] Conclusions 37 and 38 of the 2007-2014 UCIF compendium on mutual assistance concerning judicial cooperation in administrative proceedings (Article 3(1) of the 2000 Convention and Article 49 of the Schengen Convention).

[7] The PPO assesses whether the requested information is available in public registers and databases and, at police level, whether or not the measure impinges on fundamental rights. Finally, the possibility of legal remedy before the criminal courts in the issuing State is checked. Where the measure could not have been authorised under Spanish law in a similar domestic case and it follows from the consultation procedure that no appeal before the criminal court is possible in the issuing State, the PPO will refuse to recognise and execute the EIO (Article 207(1)(g) of the LMR) and will reject EIOs issued in administrative proceedings where the investigative measure concerned would not be authorised under Spanish law, on the basis of the principle of proportionality and the criterion of equivalence with similar circumstances in Spain.

This resulted from a legislative reform aimed at avoiding the abuse of EAWs issued only to notify the accused of criminal proceedings clarifying that the EAW should not be automatic but only as a last resort if an EIO is not possible. Furthermore, it should be noted that in Spain, in certain cases EIOs may be used to hear a suspect and allow for their participation at trial by videoconference. EIOs to obtain statements by the suspect are usually issued in the framework of 'Petruhhin' cases, when another Member State informs Spain of an extradition request against a Spanish national, because in those situations it is usually very difficult to issue an EAW.

Some coordination is necessary to execute EIOs for the purpose of entry and search, which must be carried out in the presence of the person concerned when that person is in turn also required to be present by an EAW and two different executing authorities are involved. In such cases, and to avoid unnecessary transfers owing to the fact that the local investigative court is competent to execute an EIO while the Central Investigating Court is competent to execute an EAW, there is some coordination necessary between the various competent judicial authorities and the SIRENE Bureau. Eurojust is often involved to facilitate these cases, both when Spain is the issuing or the executing State of the EAW and EIO for the search.

- **Locating persons**. As issuing State, no problems have arisen in this regard, since other channels, especially law enforcement information, tend to be used in practice. As executing State, it is not unusual to receive EIOs for such purposes with a view to issuing an EAW for prosecution. Ordinarily, EIOs require that technological investigative measures for the purpose of locating a person (i.e. obtaining traffic and geolocation data related to the telephone communications of third parties and close associates) are received in parallel with an EAW. Spanish authorities tend to distinguish between two scenarios: if the purpose is strictly to locate a person, then police cooperation is sufficient; if the purpose is also to obtain evidence, then an EIO is necessary.

- **Seizure and freezing.** Questions sometimes arise in relation to seizures since, when determining whether to issue a freezing certificate or an EIO, it is not clear whether the measure relates to the proceeds of an offence or to evidence.

  Also, from an executing perspective, Spanish authorities have received EIOs requesting both banking information and that an account be blocked. As the blocking of an account falls under the scope of Regulation (EU) 2018/1805 on the mutual recognition of freezing orders and confiscation orders, a freezing certificate would be necessary for this measure. This was also communicated to the issuing authority. It is apparent that provisional measures could create confusion with regard to the scope of an EIO.

- **EIOs and JITs.** In general, no problems have arisen regarding the interplay between JITs and EIOs. In two specific cases, a question concerned evidence previously obtained via EIOs/MLAs from other States before setting up a JIT. In both cases it was decided to issue EIOs to the JIT members so that they could share the documents available to one of them before the team was set up. In general, according to Spanish practitioners, when EIOs are issued by a Member State that is party to a JIT, it is good practice to state in Section D that the EIO is being issued within the framework of the JIT and to request authorisation for the evidence gathered resulting from the execution of the EIO to be shared with its members. In principle, Spanish practitioners do not see any obstacles to sharing evidence, as long as data protection rules are complied with.

- **EIO vs MLA.** Generally speaking, EIOs are used exclusively to gather evidence, both when issuing and executing them, and not for other procedural purposes such as requesting procedural documents or such as service of documents or notifications, in which case MLA is used. Nevertheless, as issuing State, there have been instances where Spanish authorities have used an EIO to obtain copies of judicial decisions. Spanish executing authorities have received some EIOs that were not strictly for evidentiary purposes, such as:

- EIOs intended for the service of procedural documents and summons, which would be covered by Article 5 of the 2000 MLA Convention. If the PPO considers that the purpose of the EIO is solely to serve a document, the issuing authority is informed of the fact that another request under the 2000 MLA Convention must be sent. If, however, the request for the service of a document is made alongside a request for the taking of evidence or is instrumental to implementing the requested measure (for example, an entry and search warrant prior to a home search), the service of documents based on the EIO would be executed.

- EIOs requesting a copy of ongoing proceedings before the Spanish courts to assess whether possible parallel investigations exist and, if so, their scope.

- EIOs requesting a copy of a judicial decision. In such cases, the public prosecutors consider that the request is fully covered by the EIO insofar as it seeks to gather evidence to establish the existence of a predicate offence in a money-laundering investigation or the circumstantiated occurrence of recidivism as an aggravating circumstance, among others.

- In 2022, several EIOs were received requesting the criminal records of individuals under investigation. If such EIOs did not contain any other measures, they were not executed, with a reference to the EU system for obtaining criminal records, ECRIS.

- EIOs were encountered for the purpose of identifying DNA profiles, despite there being a police channel and an instrument specifically designed for this purpose in the Prüm system. However, according to the guide published in 2019 by the Ministry of Justice, the National Commission for the Forensic Use of DNA is not opposed to the EIO being used both for the cross-border collection of samples and for the identification of DNA profiles in Spanish databases. This is especially the case when the law of the issuing State requires it in order for the information to be used as evidence, in accordance with the law of that Member State.

- EIOs have been received requesting investigative measures and, at the same time and as an alternative, indicating a request that proceedings be transferred to Spain.

- EIOs received for the purpose of obtaining information on the legal requirements or particular features of the Spanish legal system. These EIOs were refused because they clearly had no evidentiary purpose, although in order to respond to the legal enquiries the public prosecutor put the issuing authority in contact with a member of the EJN.

5.3. Cross-border surveillance

The interpretation of cross-border surveillance and also the applicable legal framework is very different across Member States. In some Member States, this measure is a form of police cooperation based on Article 40 of the Convention implementing the Schengen Agreement[8] ('CISA'). However, other Member States are of the opinion that cross-border surveillance can also be considered a judicial measure, as a means to gather evidence in real time and, therefore, that the EIO should be applicable.

According to Spanish authorities, a distinction should be drawn between simple police cross-border surveillance (i.e. tailing) and cross-border surveillance for the purpose of gathering evidence, especially when coupled with a request for bugging or GPS tracking, which is a judicial measure that requires the issuing of an EIO.

Spanish executing authorities have encountered EIOs issued for cross-border surveillance, which, in their opinion, should be assessed by a judicial authority in the light of their clear evidentiary purpose, especially if the surveillance is carried out using technical equipment, as this is clearly a factor that differentiates EIOs from the surveillance originally provided for in Article 40 CISA. The PPO's drugs unit noted that the number of EIOs requesting cross-border surveillance is growing.

[8] 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.

This is an area of cooperation in which there is a lack of uniform approach between Member States. There is no EU legislation on cross-border surveillance to be used as evidence in criminal proceedings and, therefore. the Commission is invited to clarify the application of the Directive in relation to Article 40 of the CISA in respect of cross-border surveillance and propose an amendment to the Directive, where appropriate (see *Recommendation No 27*).

6. CONTENT AND FORM

6.1. Challenges relating to the form

Spanish issuing authorities have not been experiencing many problems in terms of completing the form. A practical guide for completing the form is provided in the International Judicial Assistance Guide (*Prontuario de Auxilio Judicial Internacional*).

In general, EIOs received from other Member States contain sufficient information to be recognised for execution. Often, however, the content of the EIO is incomplete or incorrect with regard to the territorial connection, how an affected person is linked to the offence, the address of a domicile to be registered or of a witness/suspect whose testimony is required, or the IBAN of a bank account.

In some cases, there is no apparent connection between the investigative measure requested in the EIO and the facts set out in Section G, which are described so tersely and laconically that not even basic information is relayed, such as the identity of the injured party or the date and place of the matter under investigation, while the EIO contains a number of investigative measures described in a generic manner. Spanish executing authorities also encountered problems with executing investigative measures that affect individuals who are neither identified in Section E nor involved in the matter under investigation. In the opinion of the expert team, issuing authorities should complete Section G of Annex A more accurately, specifically explaining the link between the requested investigative measure, the affected person and the offence (see *Recommendation No 12*).

Furthermore, Spanish authorities think it could be useful to provide as much data as possible for the identification of the suspect affected by the EIO, instead of only the suspect's name, surname and date of birth. For instance, the suspect's address and telephone number could be very useful to identify related investigations that are ongoing in Spain. In the same vein and especially if the issuing authority is aware of related investigations in Spain, it is also useful to indicate in the EIO form if there has been already a previous police cooperation, specifying the Spanish police unit involved (see *Recommendation No 13*).

Spanish authorities generally consider that Annex A could be improved. First, Sections C and G could be combined in one of the earlier Sections of the form. This would improve readability and understanding, since the purpose of and reasons for the EIO (list of facts under investigation, their connection with the investigative measures included and the justification for those measures) should be read together.

Second, the list of investigative measures reported in Section C could be expanded to include certain important actions such as home searches and forensic expert reports.

Furthermore, during their visit, the Spanish authorities stressed the importance of mentioning all previously used instruments (i.e. previously issued EIOs, EAWs, freezing orders, JITs, etc.) in Section D of Annex A, which does not happen systematically. Currently these instruments are not indicated in the relevant form. As this information is particularly useful for the executing authority, the evaluation team is of the opinion that all Member States, including Spain, should ensure that the issuing authorities mention all previously used instruments (i.e. previously issued EIOs, EAWs, freezing orders, JITs, etc.) (see *Recommendations Nos 3 and 14*).

Finally, when requesting statements from the suspect or from a witness, there should be a separate Section in the form on the rights to be respected and the questions to be asked, as these are not always indicated by the issuing authorities. The expert team would also invite issuing authorities to attach to the EIO a comprehensive list of questions to be asked of the person to be heard.

In the light of the above, the evaluation team would invite the Union legislator to consider amending Annex A in order to make it more user-friendly (see *Recommendation No 28*).

6.2. Language regime and problems related to translation

The practitioners noted that, in some cases, the EIO is not accompanied by a translation into Spanish. Spanish authorities accept EIOs translated into Spanish or Portuguese, but not English. The experts, in accordance with recital 14 of the Directive, invite all Member States, including Spain, to indicate another language which is commonly used in the Union in their declaration concerning the language regime, in addition to their official language**.** The experts also note that it is a fact of life that the English language is often used in international judicial cooperation (see *Recommendations Nos 4 and 15*).

Spanish authorities noted that translations of EIOs from certain Member States are hard to understand, especially the parts related to the offences under investigation, the questions posed by the issuing State and even the investigative measures requested.

Spanish practitioners suggest that as a matter of good practice, the list of rights and obligations applicable to the person to be heard forwarded by the issuing authorities is standardised in each Member State in its own official language(s) to facilitate translations and execution.

6.3. Additional EIOs and EIOs containing multiple requests

The Spanish issuing authorities have not encountered any problems in relation to additional EIOs. In principle, a single form is issued, listing all the investigative measures required. From an executing perspective, additional EIOs are not automatically assigned to the same PPO/judge who executed the first EIO, although this depends on the specific circumstances of the case: it is normally possible to assign the additional EIO to the same PPO/judge, unless there is a clear and different territorial competence. The same goes for judges carrying out investigations in Spain that are linked to those in the issuing State.

Furthermore, Spanish authorities noted that EIOs containing multiple measures are sometimes challenging to execute, especially when it comes to EIOs falling within the competence of the anti-drugs PPO. This is because EIOs issued for investigations into drug-trafficking and money-laundering offences committed by criminal organisations contain relatively frequently a 'full delegated investigation' on account of the number and complexity of actions to be carried out in Spain. Their execution leads to work overload, as there is no specific basis for non-execution that could be applied and executing them in full is difficult within the time limits for execution. Likewise, especially in money-laundering cases, EIOs have been received requesting a full financial investigation. Moreover, there have been cases of several additional EIOs issued one after another.

Various regional prosecution services have expressed concerns about the splitting of an EIO into several EIOs requesting multiple investigative measures, because this is contrary to the principle of concentration of jurisdiction laid down in Article 187 of the LMR, according to which one EIO has to be executed in full by a single executing authority. This principle applies both when the requested measures should be executed by different PPOs and when the requested measures are to be executed in part by a PPO and in part by a judge. Therefore, in some cases and especially where the UCIF or Eurojust is involved, Spanish authorities elaborate a strategy together with the issuing authority so as to agree on a division of the requested investigative measures in different phases, to be requested via separate EIOs.

However, the experts came to the conclusion that the rule according to which an EIO containing multiple requests needs to be forwarded in its entirety to an investigating judge if some of the requests fall under the competence of the investigating judge may hamper the efficient execution of those investigative measures that could instead be executed by the PPO. According to the experts, said rule may cause delays in execution. For that reason, the experts recommend that Spanish authorities further explore practical and legal possibilities to deal with the requested measures affecting fundamental rights separately, for instance by allowing for the splitting of EIOs under Spanish law so that the remaining non-coercive measures may be executed by the PPO (see *Recommendation No 5*).

As stated already in Chapter 4.3, if the EIO does not contain any investigative measures that restrict fundamental rights, the PPO is competent to recognise and execute the EIO. In practice, this means that the coordination of EIOs with multiple requests not affecting fundamental rights may still be necessary. The UCIF may therefore coordinate the execution of the EIO (see *Best practice No 4*).

6.4. Orally issued EIOs

Spanish law does not provide for orally issued EIOs. However, the PPO has a flexible approach to the form of the EIO. If the issuing authority informs the PPO in brief of the essential content of the future EIO and explains the needs (cases of risk to the safety and security of persons), even orally (by telephone or otherwise) or by email, there would be no problem in initiating the procedures for the recognition and urgent execution of the EIO on the basis of the principle of mutual trust and provided that the issuing authority sends Annex A as soon as possible.

6.5. Underlying judicial decision

The EIO is an instrument based on mutual recognition, and the Directive, unlike the EAW, does not require any underlying domestic warrant to be attached to it. In some Member States and depending on the investigative measures involved, the EIO is directly issued without any underlying domestic order. Therefore, if an EIO is appropriately formulated and the facts and requested measures are sufficiently well described, there should be no need for the issuing authorities to attach an underlying judicial decision or for the executing authorities to request one.

As stated above, as a rule, in Spain the PPO is the competent authority to recognise and execute EIOs. However, EIOs affecting fundamental rights must be authorised by a court, and in these cases the courts are the executing authorities (see Chapter 4).

According to the PPO, it is usually sufficient to indicate the judicial decision in Annex A. The 2020 Specialist Public Prosecutors' Annual Meeting conclusions established that the receiving authority for EIOs should not require that the underlying judicial decision in the national proceedings on which the EIO is based be submitted, other than in exceptional cases.

The court is informed by the prosecutor's mandatory report on the prosecutor's opinion that there is no need for the underlying judicial decision from the issuing State. Nevertheless, courts have sometimes requested a copy of the judicial decision authorising the measure as additional documentation. During the discussions in Madrid, the evaluation team was told that the request for the underlying judicial decision is for information purposes, especially in cases where the EIO is incomplete and does not contain a sufficient description of the facts and no translation is required. However, there are some Member States that do require the associated domestic judicial decision to be sent as well.

The evaluation team shares the opinion of the Spanish authorities. Executing authorities should not insist on the underlying judicial decision provided that Section G of Annex A has been appropriately completed (see *Recommendations No 16)*.

The Spanish authorities would consider it useful to establish common criteria and guidelines (possibly in an EU Handbook, similarly to the handbook on the EAW) which would also clarify that it is not necessary to attach the underlying national judicial decision to the EIO. The expert team would also invite Eurojust and the EJN to update their Joint Note on the practical application of the EIO from 2019 (see *Recommendation No 30*).

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

Article 189(1) of the LMR provides that the EIO must be sent when the issuing authority is satisfied that an EIO is 'necessary and proportionate' and that the requested investigative measure(s) could have been ordered under the same conditions in a similar national case.

In line with Article 6 of the Directive and Article 189 of the LMR, the Spanish practitioners acknowledge that it is for the issuing authority to decide on the appropriateness of issuing the EIO, on the investigative measure best suited to obtaining evidence, its necessity and proportionality for the purposes of the main proceedings, as well as the availability and feasibility of the measure(s) in a similar domestic case. Similarly, the expert team is of the opinion that the issuing authorities should carefully assess proportionality and necessity when issuing an EIO, especially in the event of minor offences (see *Recommendation No 17*).

When the EIO concerns a measure that must always be available under Article 10(2) of the Directive, recognition by the PPO is almost automatic. The only exception to execution by the PPO is the identification of persons holding a subscription of a specified telephone number or IP address, since under Spanish law (Article 588 b. xi. of the CCP) judicial authorisation is required in this instance.

If the EIO contains a coercive measure, Article 187(2)(b) of the LMR also assigns to the PPO, the task of assessing its proportionality and whether the measure contained in the EIO could be replaced by another less intrusive or non-coercive measure.

When carrying out this proportionality test, the public prosecutor receiving the EIO is obliged to order that the coercive measure contained in the EIO be replaced by a different measure that is less restrictive of fundamental rights (Article 10(2) of the Directive, transposed in Article 206(2) of the LMR).

The most frequent scenario in which Spanish PPOs executing an EIO have used a different investigative measure concerns searches of bank premises to obtain documents and information. In such cases, the PPO decides, by means of a decree, to replace the measure with a request or order to the bank to provide the information sought, assessing proportionality in a manner that weighs the information contained in EIOs against the high thresholds required for searches of homes and registered offices in Spain. In the vast majority of cases, the issuing authority agreed during consultation to use this alternative measure.

This may also occur when the EIO requests entry to the registered office of a company in order to obtain commercial information that is duly registered and/or declared (statements of accounts, invoices, financial statements, accounting records, etc.). Unless, the search of the premises is needed in order to avoid loss of evidence, such information could be obtained more easily (and with a lesser impact on fundamental rights) by means of a simple request to the entity concerned, but in any case, after due consultation with the issuing authority.

If the PPO instead considers that a less intrusive alternative measure is not available, they will forward the EIO requesting an investigative measure affecting fundamental rights (for example, searches) to the judge competent for its execution. In practice, the executing investigative judge may then again scrutinise the proportionality of the measure and may even refuse its execution if its necessity and proportionality are not clearly warranted by sufficient information. Since lack of necessity and proportionality is not a ground for non-recognition, according to the investigating judges, non-execution in such cases may be justified by the fact that 'the investigative measure would not be available in a similar domestic case' or that it would infringe fundamental rights.

However, very often, the judges' approach in granting such measures is more flexible than it would be in domestic cases, in light of the principles of mutual trust and mutual recognition. Nevertheless, the experts consider it paramount that investigative judges who have to execute an EIO affecting fundamental rights refrain from refusing the execution of the EIO based on their own assessment of the proportionality of the requested measure against domestic standards, and instead rely on the proportionality check done by the issuing authority in line with the Directive. It became clear during the visit that this was not always the case in practice (see *Recommendation No 6*). Furthermore, in those cases, the experts consider it to be very important for the executing judge to consult with the issuing authority.

8. TRANSMISSION AND DIRECT CONTACTS

Article 8(1) of the LMR allows for the transmission of mutual recognition instruments by any means that leave a written record under conditions enabling their authenticity to be established.

Article 18 of the LMR states that the Spanish judicial authorities are to accept documents by registered post or by IT/electronic means if the documents are signed electronically and their authenticity can be verified. Furthermore, communications by fax are also admissible, provided that the original documents are then sent to the issuing judicial authority. In practice, all EIOs are accepted that are sent in a way which allows for the verification of its authenticity.

The PPO is still receiving EIOs both by ordinary post and as an email attachment in pdf or electronic format. This can create problems, specifically duplication when documents are first registered. Therefore, the PPO does not consider it necessary to send the EIO by post if it has already been sent by email, especially when the form has been signed electronically.

As issuing State, it is not considered necessary to send documents by ordinary post, but issuing authorities are advised that, in the case of any doubt, and if both methods are used, the executing authority should be informed.

It is worth noting that Spain is a pioneer in adopting the e-Evidence Digital Exchange System ('e-EDES') and is already looking into the possibilities of the interoperability between e-EDES and the Fiscalia's case management system (*see Best practice No 5*). All Member States are encouraged to explore the possibilities of implementing e-EDES (*Recommendation No 18).*

The general rule is direct transmission and communication between judicial authorities, in line with the second subparagraph of Article 8(1) of the LMR.

In the event that the competent executing judicial authority is not known, Article 8(2) of the LMR allows for the issuing authority to request the relevant information by all necessary means at its disposal, making express reference to the EJN Contact Points. Spanish judges and prosecutors are consequently familiar with the use of the EJN Judicial Atlas. Article 8(3) of the LMR adds that the Spanish National Member at Eurojust may, where applicable and in accordance with Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA, be called upon to provide assistance with the transmission of mutual recognition instruments.

Furthermore, when judges and courts need assistance with communication, they usually turn to the International Relations Service of the General Council of the Judiciary or to the Spanish Network of Specialist Judges (REJUE), and even to prosecutors specialised in international cooperation. An example of this is the informal requests received by the above-mentioned specialised prosecutors from investigative judges when the time limit for enforcement has passed and direct communication with the enforcement authority has been unsuccessful.

Prosecutors may alternatively request the assistance of the UCIF or the special prosecutor for international criminal cooperation appointed for their province. In cases involving the coordination of EIOs issued to more than one Member State, and in particular those that have to be executed on the same action day, Spanish judicial authorities also very often rely on the efficient assistance of Eurojust.

8.1. Prior cooperation and consultation

An example given by Spanish courts underlines without a doubt the need for due preparation. In one case, an EIO issued for a house search was not executed since, following an investigation by the Spanish police authorities, no link could be established between the suspect and the property to be searched. This could have been avoided by proper prior cooperation at police level and preparatory work. There were also other examples where unnecessary work, delays and ultimately the non-execution of the EIO could have been avoided through prior coordination.

Contact between authorities is common and encouraged through the various outreach tools (such as the 'Prontuario' – police records) and assistance networks. Spanish authorities are of the opinion that it is vital to include the police in this preparatory work. It is often the police of the issuing State that is best placed to know what evidence needs to be obtained during the inspection, and this connection also facilitates the transfer of evidence and the on-site copying of mass storage devices.

Cooperation in the context of the EIO is much more than purely filling in Annex A. The evaluation team shares the opinion of the Spanish practitioners that cooperation between authorities is important in issuing and executing States both before an EIO is issued and during its execution, just as cooperation with the police is important (see *Best practice No 6*).

Consequently, it could enhance the efficiency of the execution of the EIO if executing authorities are informed of operational contacts at police level prior to the issuing of the EIO (see *Recommendation No 19*).

9. RECOGNITION AND EXECUTION, FORMALITIES

Regarding recognition and execution, the Directive seems to have been transposed properly in Articles 205-209 of the LMR. The PPO plays a key role in recognising and executing EIOs received by Spain, as it is the competent receiving authority for all EIOs (see Chapter 4.2).

When recognising and executing the EIO, the PPO does not review the substance of the case in question, as this approach would run counter to the instrumental nature of the case opened by the PPO. The PPO issues an order to recognise and execute the EIO, unless one of the grounds for non-execution or postponement is present (see Chapter 13).

Furthermore, the Spanish executing authorities take into account the formalities requested by the issuing State, provided that these do not conflict with the fundamental legal principles of Spanish law.

As regards compliance with formalities indicated by the issuing State, Spanish authorities noted that most difficulties arose with the hearing of witnesses and/or suspects. Spanish authorities reported several cases in which EIOs did not include the required information on the rights and obligations of the person making the declaration as a witness or a suspect in Section I, which is normally resolved through direct consultation or with the assistance of Eurojust.

As an example, in some Member States, there is a requirement for the suspect to complete the form, together with a declaration of residence, and the forms are not attached to the EIO. These situations are handled by contacting the issuing authority directly before the EIO is executed in order to clarify the specific status of the person to be heard and the applicable procedural guarantees.

In order to respect the guarantees of the person being questioned, and to ensure that the EIO is executed correctly, the evaluation team would suggest to Member States that, in case of formalities and procedures expressly requested in the EIO in relation to the hearing of persons, the issuing authorities of all Member States, including Spain, should consider attaching a letter of rights linked to the procedural status of the person to be heard (see *Recommendations Nos 7 and 20*). The evaluation team would suggest that the EJN create a repository on the procedural rights applicable to the hearing of persons depending on their procedural status (see *Recommendation No 31*).

The cases which more often raise doubts as to their compatibility with the fundamental legal principles of Spanish law are requests to hear a person as a witness in situations where this person would be considered a suspect under Spanish law. This is often because, in some Member States, there may be an intermediate status or *tertium genus* between the status of suspect and witness that does not exist in Spain.

In such cases, Spanish authorities nevertheless hear the person as a witness as requested but, if the person makes self-accusatory statements, the authorities interrupt the hearing and consult the issuing authority on whether it would be possible to continue the hearing with all procedural guarantees applicable to suspects under Spanish law, namely the assistance of a lawyer and the right to remain silent. In some cases, this has resulted in a new EIO being issued with a different line of questioning, given the issuing authority's interest in continuing to hear the accused person.

Similar situations have occurred with the taking of biological samples or specimens from a person: under Spanish law, the procedure must be authorised by a judge.

10. ADMISSIBILITY OF EVIDENCE

The second paragraph of Article 186(1) of the LMR establishes the principle of non-inquiry in relation to the admissibility of evidence gathered through an EIO: '*Investigative measures carried out by the executing state shall be considered valid in Spain, provided that they do not contradict the fundamental principles of the Spanish legal system nor are contrary to the procedural guarantees recognised therein',* reflecting a well-established case-law of the Spanish Supreme Court.

This rule does not amount to an automatic declaration of validity but is merely a non-discrimination clause concerning evidence based on its foreign origin, albeit clearly subject to a review by the issuing judicial authority.

For this reason, if there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO is incompatible with Article 6 TEU and the EU Charter of Fundamental Rights, the evidence could be declared inadmissible. The possibility of declaring the evidence inadmissible does not relate to compliance with the procedural requirements/formalities in the abstract, but to the real, actual and established infringement of the right to a fair hearing during the gathering of evidence or other procedural guarantees in accordance with the law of the executing State. However, Spanish authorities could not recall any similar issue having occurred in practice and, in general, they had very rarely encountered problems during criminal proceedings concerning the admissibility of evidence gathered via EIOs.

11. RULE OF SPECIALITY

The Directive does not contain any provisions regarding the rule of speciality. Member States – and sometimes even practitioners in one Member State – differ in their opinions regarding the interpretation of the rule of speciality in the context of EIOs.

In accordance with Article 193(1) of the LMR, personal data obtained during the execution of an EIO may be used in the main proceedings for which the EIO was issued in the issuing State, and in other proceedings directly related to the EIO, or, in exceptional cases, to prevent an immediate and serious threat to public security (in the issuing State). Pursuant to Article 193(2) of the LMR, Spanish authorities may use the data in other criminal proceedings only with the consent of the executing State or the data subject. It is not clear, however, whether this rule is based only on the data protection regime or on the speciality rule.

In their written answers, Spanish authorities described cases in which they had discovered new offences committed in Spain during the execution of an EIO. In such cases, if a new investigation is opened in Spain, the issuing authority is informed, at least in principle.

During the evaluation visit there were discussions on the rule of speciality from the point of view of the issuing State. If an issuing State found out that the evidence gathered via the EIO is also needed in other (criminal) proceedings, the question remains as to whether consent is needed from the executing State.

Following discussions, evaluators had the impression that, in practice, the rule of speciality does not seem to be an issue for Spain. The guiding principle should be mutual trust, therefore it is not necessary for the issuing State to request Spain's consent to use the evidence gathered for other purposes. The executing State needs to be able to trust that the issuing State uses the evidence gathered in an appropriate way. The evaluation team shares the opinion that there should be no need for the strict application of the rule of speciality but would invite the EU legislator to clarify the applicability of this rule in relation to EIOs (see *Recommendation No 28*).

12. CONFIDENTIALITY

Article 19 of the Directive has been transposed properly in Articles 194 and 213 of the LMR.

With Spain as executing State, Article 213 LMR clearly establishes the obligation of Spanish executing authorities to maintain confidentiality, in accordance with the terms and for the time specified by the issuing authority, without the power to disclose the existence and content of the EIO itself unless authorised to do so by prior consultation with the issuing authority.

That said, the degree of confidentiality depends on the nature of the investigative measure requested. Some measures require that the person concerned be informed in advance (for example, for blood sampling or for hearing a witness), while others require that the person concerned be informed at the time the measure is executed (for example, entry and search) and a third group of measures (notably interception of telecommunications) allow the person concerned to be informed after execution, which means that in many cases the right to challenge the investigative measure can be exercised only when the evidence has been sent to the issuing State in the main proceedings.

In Spain, the person concerned is only informed when the issuing authority allows confidentiality to be lifted, following an ad hoc consultation procedure initiated for that purpose with the issuing authority. In this respect, the Spanish public prosecutor or judge always considers that confidentiality is the general rule when issuing EIOs during the pre-trial investigation phase in the vast majority of EU Member States and that the legal system of the issuing State sets the confidentiality conditions during the execution of the investigative measure by the Spanish authorities, without prejudice to the *lex loci* principle or criterion.

Indeed, Article 22 of the LMR establishes that when a person affected is domiciled or resides in Spain, they must be notified of the foreign judicial decision being executed (i.e. the EIO), but only once the criminal proceedings are no longer confidential or such notification jeopardises otherwise the investigation. Serving such notice will amount to recognition of the right to intervene in the proceedings, if considered convenient, by appearing in person together with a lawyer and legal representative, and to exercise all available legal remedies against the decision of the Spanish executing authorities.

13. GROUNDS FOR NON-EXECUTION

The grounds for non-recognition and non-execution listed in Article 11 of the Directive have been transposed in Article 207 of the LMR. However, the grounds for non-execution do not appear to have been transposed directly in line with the Directive, as in the Spanish legislation they are mandatory. The same is true for the additional grounds for refusal provided for the specific investigative measures listed in the Directive. Spain is encouraged to reconsider the mandatory nature of the grounds for refusal and make them optional under national law, in line with the Directive (see *Recommendation No 8*).

From the point of view of Spain as issuing State, the large majority of cases resulting in non-execution were not based on grounds for refusal listed in Article 11 of the Directive but were a consequence of shortcomings in the EIO form, such as insufficient information, the absence of a signature or translation errors. However, the expert team notes that similar formal shortcomings in the EIO's content should not lead to an automatic refusal to execute, but rather to consultations with the issuing authority.

Similar issues were encountered by Spain as executing State, however in these situations Spain refused to execute the EIO because of mistakes in the form which had not been rectified during the consultation procedure. Spanish authorities stated that, if no reply is received from the issuing authority after a waiting period of between two and three months, the EIO would be not executed. Before a ground for non-execution is invoked, a consultation is launched in which the issuing authority is requested to correct, complete or clarify the EIO. The fact that, at times, issuing States do not respond at all to requests and reminders to correct defects in the EIO raises doubts on the effective working of direct contacts.

As regards specific grounds for refusal under Article 11 of the Directive, the Spanish executing authorities stated that most cases resulting in non-execution occurred in relation to EIOs issued for administrative offences (Article 207(1)(g) of the LMR). Furthermore, additional cases based on other grounds for refusal were reported. For instance, a case where execution of an EIO issued for the hearing of a journalist in relation to a case of the illegal recording of private conversations was refused on the basis of the applicable rules on limitation of criminal liability relating to freedom of the press (Article 11(1)(f) of the Directive).

Spanish authorities emphasise the role of consultation before and during the execution of the EIO, especially before refusing execution. Contact between authorities is common and encouraged through the various outreach tools (such as the '*Prontuario'*) and support mechanisms such as the EJN and Eurojust. The experts agree on the importance of prior consultations before refusing execution, which often allow certain issues to be clarified and for applicability of the ground of non-execution that was initially invoked to be dismissed. To this end, however, it is essential that the executing authorities indicate what specific ground for non-execution under the Directive is being taken into consideration.

In the light of the above, the expert team would encourage the executing authorities of all Member States, including Spain, to consult the issuing authorities before either applying any of the grounds for non-execution provided for in the Directive or refusing the execution of EIO due to formal shortcomings (*Recommendations Nos 9* and *21*).

13.1. Double criminality

The PPO encountered problems in relation to EIOs issued for tax or public finance offences when the amount or fee defrauded is not specified and the EIO contains intrusive investigative measures such as inspections, since the facts under investigation may not constitute a criminal offence but and administrative infringement and cannot be investigated using equivalent measures under Spanish law.

As executing authority, Spanish prosecutors do not apply the dual criminality test in relation to EIOs requesting measures under Article 10(2) of the Directive, transposed in Article 206 of the LMR. Indeed, Article 207(2) of the LMR clarifies that the grounds for refusal based on the principle of double criminality 'shall in no case apply to the investigative measures referred to in Article 206(1)'.

13.2. Fundamental rights and fundamental principles of law

Spanish authorities are not aware of any instance of non-execution of an EIO owing to the risk of a violation of EU fundamental rights.

Spanish authorities additionally described an instance in which the fundamental principles of law were a ground for non-execution in relation to EIOs requesting permanent bugging – a measure that under Spanish law must necessarily be limited to a specific time (see Chapter 19.5).

14. TIME LIMITS

In general, Spanish authorities comply with the time limits laid down in Article 208 of the LMR. However, a distinction should be made between EIOs being executed directly by PPOs and those that fall within the competence of the investigative judges.

According to Spanish authorities, EIOs recognised and executed by Spanish public prosecutors are typically executed in under four days in investigations that are not particularly complex. Delays might occur in the execution of EIOs concerning information held by external parties (for example, banks, telephone companies, public administration) or because of the complexity of the procedures requested. In these cases, reminders are sent by the PPO.

Conversely, EIOs with intrusive measures are sent for execution to the investigating judge. More often, these entail risks of delays in their execution, sometimes owing to the fact that they involve complex cases where additional information is often needed. Furthermore, some delays may also be caused by internal rules governing the allocation of EIOs by the PPO to judges, depending on where the EIO is to be executed.

Notably, in some judicial districts there is an internal agreement among courts which allows PPOs to forward EIOs for execution by a judge to a specific investigating court, thereby avoiding any delay and enabling appropriate communication to be maintained with the issuing authority. Indeed, there is a greater risk of delay with EIOs to be executed in judicial districts where there is no such agreement and the EIOs are distributed among all investigating courts.

Urgent EIOs are usually handled following the criterion indicated and justified by the issuing authority. This approach is based on the principle of mutual trust. The same criteria are applied as in domestic cases:

- the person under investigation is in detention or is subject to measures restricting their mobility or rights;
- there is an imminent risk of the disappearance of evidence that could prejudice the success of the investigation;
- time limitation periods are imminent and/or trial dates have been set.

Spanish authorities also stated that, at times, there is a need for urgency following mistakes made by the issuing States themselves. For example, a poor procedural strategy in the issuing State may lead to undue delays in the issuing of the EIO that result in recourse to the urgency clause. Another typical example of instances of self-created urgencies are requests regarding videoconferences, which become urgent simply because the request was submitted too late before the date of the testimony given by the issuing State (see Chapter 19.3).

However, when execution of the EIO lies with the investigative judges, it is not always possible to allow for the urgency indicated by the issuing authorities to be taken into consideration, because the EIO is not necessarily submitted directly to the on-duty judge. Such delays are usually avoided when the issuing authorities inform Eurojust or the Spanish judges directly (also via underlying police-to-police cooperation or via the CGPJ) to warn them of the need for urgency. Additionally, the PPO can refer the case directly to the on-duty judge, should the EIO be urgent. The evaluation team emphasizes the importance of proactive collaboration and also the importance of effective police-to-police cooperation. However, it should be noted that the initial problem might lie with the internal allocation of EIOs to the judges.

15. LEGAL REMEDIES

In relation to EIOs issued by Spain, a distinction should be made between those issued by investigative judges or courts and those issued by PPOs, bearing in mind that the latter are very rare. When the investigating judge or a court issues an EIO, this decision is subject to the legal remedies provided for by the CCP, in the first instance before the investigating judge (application for reconsideration or petition for amendment) and in the second instance before the Court of Appeal (appeal).

However, Article 13(4) of the LMR provides no judicial remedy against a PPO's decision to issue an EIO during its pre-investigation, without prejudice to its subsequent assessment in any criminal proceedings, in accordance with the provisions of the CCP. In this context, it should be noted that the PPO carries out preliminary investigations which are directed towards the subsequent initiating of proceedings before an investigating judge and, once the file has been lodged with a court, the EIO issued in the preliminary investigations could be challenged by the person concerned before the judge.

As regards the execution of incoming EIOs in Spain, a distinction should also be made between those executed by investigative judges and those executed by PPOs. Article 24 of the LMR establishes the possibility of resorting to the remedy provided for in procedural law against decisions handed down by Spanish judges and courts on the recognition and enforcement of EIOs. The Spanish competent judicial authority will notify the issuing authority of any appeal filed, as well as the decision handed down.

Furthermore, in accordance with the Directive, Article 24(3) of the LMR provides that the substantive reasons for the order or decision may be challenged only in an action brought before the relevant issuing authority in the issuing State. Therefore, scrutiny is limited to breaches of due process, to a fair trial and to compliance with the procedural requirements of Spanish law, and not to the substance of the case.

Article 24(4) of the LMR excludes the possibility of lodging an appeal against the orders of the public prosecutor executing an EIO, without prejudice to possible challenges of substance before the issuing authority and its subsequent assessment in the criminal proceedings conducted in the issuing State.

Discussions with Spanish authorities during the evaluation underlined the fact that Spanish legislation, both in theory and in practice, guarantees a person concerned the same legal remedies against the measures requested in an EIO as in a domestic case. On the executing side, Spanish legislation and judicial authorities in Spain also respect the main rule resulting from the Directive that the substantive reasons of the investigative measures should be challenged in an issuing State. There are no reasons for concern on legal remedies from these points of view.

However, how legal remedies are used effectively by the defence in Spain is an entirely different matter. This is interlinked with the seemingly limited knowledge of Spanish lawyers concerning EIOs in general. During discussions with representatives of the Bar Association, it became clear that (defence) lawyers' knowledge of EIOs is relatively low. If lawyers, especially ones not specialised in cross-border cases, are not familiar enough with EIOs, the effective use of an available legal remedy could be affected.

16. OBLIGATION TO INFORM

Spanish issuing authorities encountered cases where Annex B had not been received. In such cases, the EJN Contact Points or Eurojust were contacted. One case was referred by the PPO in which a reminder was sent by post, as no email address had been provided in the EIO.

Annex Bs are always sent by Spanish PPOs receiving EIOs, as Annex B is generated automatically via their case management system. On the form itself, the PPO also notifies the competent executing authority in case the public prosecutor receiving the EIO in the first instance lacks competence. The PPO also informs the issuing authority if the measure has been sent for execution to a judge; however, it is very important that the judge competent for execution then also issues Annex B, but this is not always the case (see *Recommendation No 10*).

However, on many occasions, authorities continue to send requests for information on the enforcement status to the PPO that initially sent the Annex B; they are then (again) given the contact details of the competent executing authority to which they should specifically address their query. In the end, the information contained in the email received as a confirmation message from the issuing authority, rather than Annex B itself, provides the information necessary for further communication between the authorities concerned.

The Spanish authorities consider it essential that the email address is always included as mandatory information in Annex B (as well as in Annex A).

Based on the above observations, the evaluation team is of the opinion that executing authorities should systematically send Annex B and should always include an email address (see *Recommendation No 22*).

17. COSTS

The Spanish issuing authorities have not encountered any difficulties in relation to costs. The Spanish executing authorities have encountered some problems with the cost of transferring evidence gathered in connection with searches carried out in Spain in accordance with Article 21 of the Directive.

As a best practice, in order to avoid this kind of problem and also for reasons of greater effectiveness and efficiency, officials of the issuing authority are usually authorised to observe the execution of the investigative measure and can immediately take the evidence gathered (Article 211 of the LMR and Article 13(1) of the Directive).

Furthermore, in the event of EIOs requesting expensive expert property valuations, the executing PPO sometimes requests that the cost is borne by the issuing State. The issuing State usually agrees to cover this expense.

No cases were encountered where the execution of the EIO had been delayed or the EIO had not been executed owing to exceptionally high costs.

18. COORDINATION OF AN EIO ISSUED TO SEVERAL MEMBER STATES

From the perspective of issuing State, several EIOs can be issued to different Member States within the same investigation. Although not expressly provided for in the LMR, Section D of the form provides for this by having a space for indicating whether EIOs have been sent to another Member State. Normally, their execution does not give rise to problems beyond the investigative strategy drawn up by the judge or prosecutor or by the judge with the assistance of the prosecutor and the criminal police who assist them. When several EIOs need to be executed simultaneously in different Member States, it is very common for Spanish judicial authorities to consult Eurojust, with the UCIF recommending that Spanish prosecutors promote such assistance.

19. SPECIFIC INVESTIGATIVE MEASURES

19.1. Temporary transfer

During the on-site visit, Spanish practitioners informed the evaluation team that temporary transfers are hardly ever used in practice, either by the executing or issuing State, as practitioners in general would prefer a hearing by videoconference, if the circumstances of the case allow for it.

19.2. Hearing by videoconference

Article 24 of the Directive on hearings by videoconference is transposed under Article 216 of the LMR.

Articles 229(3) and 230(1) of the Organic Law, 1 July, on the Judiciary and Articles 325 and 731(a) of the CCP allow for the use of videoconferencing in national criminal proceedings for the testimony of witnesses, experts, suspects and the accused, also at trial, provided that it is useful for security reasons or in the public interest or to overcome any logistical difficulties regarding relocation. Pursuant to Article 258 a. of the CCP, participation of the accused at trial via videoconference is also possible, except for trials of serious offences where the punishment exceeds five years in prison and jury trials. However, this domestic limitation is not applicable when executing EIOs issued by other Member States.

Therefore, the issuing and execution of EIOs for the purpose of hearing and allowing an accused person to participate in a trial by videoconference is possible in Spain, depending on both the circumstances of the case, ensuring that this does not infringe any of the guarantees on the right to a fair hearing, and, in particular, the accused person giving consent (see *Best practice No 7*). This occurs rather often and very smoothly in practice, although there are a few Member States that refuse to execute EIOs issued by Spain to hear the accused at trial on the ground that it would be contrary to their fundamental principles.

The evaluation team considers this a best practice, as it allows the hearing to be expedited, with a significant saving of both economic resources and procedural time and avoiding recourse to more intrusive measures, such as EAWs. The experts would encourage other Member States to consider introducing this possibility as well, if it is compatible with their legal systems and procedural guarantees.

During the evaluation, Spain was closely observing developments in this area in relation to the referral for a preliminary ruling before the CJEU (Joined Cases C-255/23 and C-285/23). On 6 June 2024, however, the CJEU concluded in these cases that there was no need to rule on the requests for a preliminary ruling as the referring court had not suspended the national proceedings whilst awaiting the CJEU's decision[9]. Another request for a preliminary ruling on the issue of EIOs requesting that an accused person be heard via videoconference at trial is now pending before the CJEU, which will hopefully provide some guidance.[10]

Given the differing views among Member States leading to recurrent issues in practice, the evaluation team considers that the EU legislator should address the question of the participation of an accused person at the main trial via videoconference from another Member State (see *Recommendation No 29*).

In general, the Spanish authorities have encountered some issues in relation to hearings by videoconference. The PPO is normally the executing authority, and the hearings are held at the premises of the prosecutor in charge of execution, where suitable videoconferencing facilities and systems are available. However, this has sometimes raised issues in practice. Indeed, in some cases, the issuing authority did not agree to the PPO executing the EIO as, under the laws of the issuing State, the hearing was to be conducted by the court. In such cases, the PPO transmits the EIO to a judge for execution.

[9] See CJEU, Judgment of 6 June 2024 in Joint Cases C-255/23 and C-285/23, *AVVA and Others (Procès par vidéoconférence en l'absence d'une décision d'enquête européenne*), paragraph 38.
[10] Case C-325/24 *Bissilli*, lodged on 2 May 2024.

Article 216(3)(e) of the LMR provides that witnesses or experts will be informed in advance of their procedural rights under both the law of the issuing State and Spanish law, including the right not to testify (*ius tacendi*), where provided for by law. Therefore, issues sometimes arise in practice when such information is not provided by the issuing authorities or where the status of the person to be heard is different under Spanish law (see Chapter 9).

The Spanish practitioners also reported problems related to the execution of EIOs for hearings by videoconference in Spain of witnesses and/or accused persons in the context of trials held in another Member State. In some cases an interpreter was not provided, although one was requested, and the Spanish public prosecutor had difficulties to follow a trial in another language, and, consequently, to carry out his role as a guarantor of respect for and compliance with the procedural guarantees and requirements in force in Spain as executing State.

As for the possibility to refuse execution of a hearing if a suspect or accused person does not give their consent, Spanish executing authorities have not encountered any cases of this. There have been cases in which a suspect or accused person has invoked their right not to testify after having consented to a videoconference.

Spanish issuing authorities have encountered cases where the executing authority did not execute the EIO because the suspect objected to it. In these cases, an addendum to the EIO was sent together with a list of questions.

Some difficulties were encountered in relation to hearings by videoconference of persons in prison. For security reasons, transfers of inmates to the offices of the PPO are avoided, meaning that either the public prosecutor travels to the penitentiary centre or a multi-videoconferencing platform is set up between the issuing authority, the PPO and the penitentiary centre, ensuring that the public prosecutor, as executing authority, is present virtually. It is important to adequately ensure the defendant's right to a fair hearing at the prison in the presence of their defence lawyer, unless the circumstances require otherwise, and their right to prior confidential communication.

Spanish authorities highlighted the fact that practical issues have often arisen concerning the compatibility of IT systems, owing to the use of different software platforms for conducting videoconferences. In order to reduce as much as possible these technical issues, Spanish authorities have developed a standard form to be sent to the issuing authorities in order to gather all the necessary technical information to facilitate the carrying out of the videoconference.

Other practical difficulties were reported, specifically in relation to the length of the videoconference or the times established by the issuing authority for the holding of trials and hearings, which sometimes last several days in succession.

The evaluation team would encourage Member States, when issuing an EIO for a hearing via videoconference, to envisage a reasonable timeframe in which the hearing could take place, to send the request well in advance and to provide a range of possible dates to carry out the video conference (see *Recommendation No 23*).

In the light of the above, the evaluation team would also encourage all Member States to take the necessary steps to ensure safe conditions and adequate equipment in the case of hearings by videoconference, in order to respect fundamental rights (see *Recommendation No 24*).

Finally, Spanish authorities noted that, in the aftermath of the Covid pandemic, Spanish judicial authorities at times contacted witnesses and suspects located abroad directly in order to hear them via videoconference on Zoom/Webex/Skype, without issuing any EIO for the competent authorities of the respective Member State. As recorded in previous reports, this practice is sometimes also followed by other Member States. Even though the CJEU has not taken any stance on this issue, Spanish authorities themselves consider this a bad practice and, in 2021, the UCIF issued an opinion stating that the issuing of an EIO is always needed for the hearing of a person located abroad via videoconference (*see Recommendation No 25*).

19.3. Hearing by telephone conference

In Spain, there is no provision for hearings by telephone conference in the CCP and therefore it is impossible to recognise and execute an EIO requesting such a hearing. For this reason, when the PPO receives an EIO for a telephone conference, they suggest – in a prior communication and always with the consensus of the issuing authority – replacing it with a hearing by videoconference. This alternative measure is normally accepted by the issuing authority, but there have been cases in which it was not and the execution of the EIO therefore had to be refused.

19.4. Covert investigations

Article 29 of the Directive on covert investigations is transposed by Article 220 of the LMR. In accordance with Article 282 a. of the CPP, undercover investigations have a very limited scope as, in domestic cases, they can only be authorised for investigations into organised crime for the commission of specifically listed offences. This limitation therefore also applies to the execution of EIOs requesting similar measures. Furthermore, Spanish legislation requires foreign covert officers to be employees of the authority or a public official in their country who are officially designated to carry out covert investigations in their Member State. Spanish law does not allow for actions by foreign officers who are private citizens working together with the justice system, or who have any other status that may appear in legislation, such as informant or special agent[11].

Spanish practitioners reported that, as executing authority, they mainly receive EIOs for covert investigations involving controlled deliveries of drugs, or for foreign undercover agents to pursue part of an investigation in Spain. In these cases, the EIOs are executed by the PPO. If additional surveillance measures (for example, the bugging of cars or telephone interceptions) are necessary, the EIO is executed by the investigative judge.

[11] The Spanish authorities informed the expert team that there is an ongoing Draft Law Project that would significantly modify the legal regime as regards undercover agents

In accordance with the Directive, the conditions in which covert investigations may be carried out must have been previously agreed with the issuing authority. At national level, this agreement is usually based on a preliminary report issued by the relevant police unit on the suitability and feasibility of coordinating the operation. Article 201 of the LMR provides that an EIO is to be issued requesting cooperation in carrying out a covert investigation, provided that the competent investigating judge or the public prosecution service, which must notify the judge immediately, considers it necessary for the competent authorities of another Member State to provide such cooperation, through officers acting under covert or false identity in the executing State.

The EIO must indicate the reasons for which a covert investigation is considered appropriate. Before an EIO is issued, a police report must be produced on the progress of the investigation, subject to the requirements laid down in Article 282 a. of the CCP, namely that there is an investigation into organised crime and that the covert officer is an officer of the criminal police or equivalent in their country.

The Spanish authorities have encountered cases in which differences in legal systems have led to problems in the execution of an EIO for covert investigations. Similarly, difficulties have arisen in the execution of this special investigative technique owing to operational problems.

On occasion, the EIO refers to an offence which is not listed in Article 282 a. 4. of the CCP (for example, tobacco smuggling) for which undercover investigations are not possible under Spanish law. EIOs are also received in which the activities of the foreign covert officer include a request for certain measures that are not fully in line with Spanish law, such as the use of drones or jammers.

Another problem arises with EIOs issued by some Member States in which they request permanent bugging, which is also not possible under Spanish law (see Chapter 19.5).

Lastly, there have been operational problems owing to the failure of issuing authorities to take practical steps once notification is given that there is no operational interest in continuing the measure.

19.5. Interception of telecommunications

19.5.1. The notion of interception of telecommunications at European level

A recurring problem across Member States is the fact that there is no common definition of 'interception of telecommunications' within the European Union. Consequently, Member States have different interpretations and practices as to whether certain investigative techniques, such as GPS tracking, the bugging of cars or installing spyware on devices to intercept conversations at source, or audio/video surveillance, legally constitute an interception of telecommunications (Articles 30 and 31 of the Directive).

In cases where Member States do not consider such investigative measures as an interception of telecommunications, these measures fall under Article 28 of the Directive, which requires additional information and the issuance of an EIO (Annex A). Only very recently, the CJEU partly clarified the notion of 'interception of telecommunications' under Articles 30 and 31, holding that it should be broadly understood as covering the infiltration of terminal devices.[12] However, the question remains whether other types of surveillance measures, such as bugging to record oral conversations, fall within said notion.

In practice, these different interpretations directly affect both the issuing and the executing Member State: it is not clear to the issuing Member State whether a specific investigative measure that is not clearly categorised as an 'interception of telecommunications' would fall under Articles 30 and 31 (or even Article 28) of the Directive and whether it would be possible to request its authorisation *ex post* via Annex C.

[12] CJEU, Case C-670/22 *M.N.*, judgment of 30 April 2024, paragraph 114.

For the most part, the measures in question require execution as quickly as possible; any hesitancy compromises the success of the investigation, especially where it is not possible to foresee in advance whether the interception will enter the territory of another Member State. Recourse to Annex C could result in a refusal if the measure is considered outside the scope of 'interception of telecommunications' under the law of the executing Member State; authorisation could therefore be requested for future cases only (via Annex A), not retroactively.

The need to adopt a broader concept of 'interception of communications' appears all the more necessary when one considers that, in many cases, knowledge of the transfer abroad of an intercepted target only becomes apparent during interception and, in some cases, at an advanced stage. In such cases, the application of Articles 28 and 30 of the Directive is not feasible, and the use of an 'in progress' or 'ex post' notification is indispensable to safeguard the admissibility of the intercept and the results of the investigation.

By way of example, sometimes the fact that a bugged vehicle is crossing borders, only becomes apparent during the interception. It is therefore necessary to inform the country in which the interception is to be carried out, without any technical assistance required. In such cases, the possibility of applying Article 31 of the Directive appears to be highly recommendable – with a notification during or after the interception was carried out, under Article 31(1) point b).

The evaluation team noted that the differences in interpretation of the concept of 'interception of communications' can seriously hamper judicial cooperation as well as the admissibility of evidence in the issuing Member State. In the light of these findings, the evaluation team believes that there is a need for the EU legislator to clarify the concept of 'interception of telecommunications', specifying if Articles 30 and 31 also cover other surveillance measures, such as the bugging of cars and GPS tracking. If not, the EU legislator should consider amending the Directive to introduce special provisions that also regulate such measures, including situations for which no technical assistance is required from the Member State concerned (ex post notification mechanism) (*see Recommendation No 28).*

19.5.2. Interception of telecommunications under Spanish law and practice

The Spanish authorities are of the opinion that the concept of 'interception of telecommunications' under Articles 30 and 31 of the Directive includes not only traditional wiretapping but all the investigative measures provided for by Article 588 a. et seq. of the CCP affecting the confidentiality of communications (i.e. bugging of oral communications). It is more questionable to include measures that do not strictly relate to an act of communication, such as the placing of GPS tracking beacons.

When assessing whether an interception would be 'authorised in a similar domestic case', the Spanish executing authority must assess the criteria laid down in the CCP (Articles 588 a. and b.), which were amended by Organic Law 13/2015 of 5 October 2015 to strengthen procedural rights and regulate technological investigative measures. Notably, it is only possible to intercept telecommunications in the following instances: for specifically listed criminal offences or offence above a certain threshold of imprisonment, in relation to concrete offences based on objective elements and not for the purpose of preventing or discovering criminal offences where no objective elements concur, where no other less intrusive measures are available in compliance with the principles of proportionality, adequacy, necessity, exceptionality and speciality and only for a limited time period. The assessment will be based on the information provided by the issuing authority indicated on the EIO form and, if attached, in the underlying national decision. Spanish issuing authorities have not reported any cases in which the executing authority refused to execute an EIO, since the requested measure would not be available in a similar domestic case in the executing Member State.

As for transmitting the results of interceptions, Spanish authorities noted that it is usually quite complicated to immediately transmit the intercepted communications in real time since no secure channel is available. In practice, when Spain is executing State, the criminal police carries out the interception under the judge's supervision and in accordance with the legal requirements laid down in Articles 588 a. and b. of the CCP. Specifically, as regards monitoring telecommunications, Articles 588 a. vii. and 588 b. vi. of the CCP, on the supervision of the measure, stipulate that the criminal police are to provide the judge, at intervals to be determined by the judge and on separate digital media, with a transcript of relevant passages and, in addition, the full recordings.

The origin and destination of each of these must be indicated, and the authenticity and integrity of the information transferred from the central computer to the digital media on which the communications have been recorded must be guaranteed by means of an advanced electronic sealing or signature system or a sufficiently reliable warning system. Intercepted communications are therefore usually recorded on a digital medium for subsequent transmission to the issuing authorities. Therefore, establishing direct contacts at police level in parallel is useful to remedy to the lack of real-time transmission of the results of the interceptions.

Under Spanish law, bugging can be ordered only for a specific time period. This sometimes causes problems when EIOs received by Spain requiring the bugging of a car do not indicate a specific duration of the measure or request permanent bugging, which is contrary to the fundamental principles of Spanish law. In those cases, the PPO normally asks for additional information before transmitting the EIO to the judge competent for its execution.

19.5.3. The application of Article 31 and Annex C

Article 187(3) point b) of the LMR stipulates that the central investigating judges of the Audiencia Nacional are the single authority competent to authorise the notifications provided for in Article 222 of the LMR in all of the Spanish territory, based on Article 31 of the Directive. There have often been cases where an Annex C received by Spain has contained insufficient factual information regarding the punishable offences that justified interception in the issuing State, as the description of the offences under investigation has been very terse or even missing. In those cases, the prosecutor receiving the notification launches a preliminary consultation with the notifying authority before submitting the request to the competent executing judge, who usually grants the authorisation required.

The 96-hour period is considered to be rather short when additional information must be sought from the notifying State and the national authorities are often unaware; therefore, Spanish authorities suggest sending Annex C to the UCIF to facilitate the swift processing of the notification. Furthermore, they note that the involvement of Eurojust is very useful in urgent cases.

Spanish law also permits the acceptance and sending of Annex C notifications under Article 31 of the Directive for the cross-border use of direct listening devices installed in a vehicle and the applicable legal basis (i.e. bugging), and this occurs often in practice (see *Best practice No 8*). However, it is the understanding of the Spanish authorities that the Spanish judge must interpret Article 31 of the Directive in conjunction with Article 222 of the LMR.

The former states that, when it is known that the subject of the measure is or will be on the territory of the notified State, said State must be informed beforehand, and ex post notification is to be used only in cases where it is subsequently known that the person is or has been on the territory of the notified State, with the provision that the notification be made ‘immediately’ after such information becomes available.

Therefore, when the Spanish judge receives an ex post notification, he or she will have to assess whether or not it was foreseeable that the person would travel to Spain. For this reason, when sending an Annex C notification ex post, it is therefore advisable, whenever possible, to explain why travel to Spain was not foreseeable when the measure was executed.

The evaluation team would therefore suggest to Member States that, when sending Annex C *ex post*, the reason why it was not possible to send the notification before executing the measure should be indicated (see *Recommendation No 26*).

20. STATISTICS

The statistical data provided is broken down according to the division of competences between judges and public prosecutors in their capacity as both issuing authority and executing authority.

The table below shows EIOs issued and received by the courts.

	Issued					Received				
	2018	2019	2020	2021	2022	2018	2019	2020	2021	2022
Criminal courts	23	58	64	67	66	-	-	-	-	-
Provincial courts	19	30	40	46	56	-	-	-	-	-
Investigating courts and mixed courts	266	729	738	1 177	1 357	53	177	141	257	234
Courts dealing with violence against women	11	22	26	46	30	-	-	-	-	-
Juvenile courts	7	7	-	-	1	-	-	-	-	-
National Court, Criminal Chamber	-	11	-	14	16	-	-	-	-	-
Central investigating courts	50	69	98	168	61	72	146	138	239	235
Central criminal court	-	-	-	-	1	-	-	-	-	-
Central juvenile court		-	-	-	-	-	-	-	-	-
TOTAL	**376**	**926**	**966**	**1 518**	**1 588**	**125**	**323**	**279**	**496**	**469**

The following table includes statistical provided by the public prosecution service to the Central Authority pursuant to Article 6 of the LMR. It covers EIOs issued and received by the public prosecution service.

	Outgoing EIOs	Incoming EIOs	Execution rate of incoming EIOs	Refusals
2017	-	186	-	-
2018 (from 2 July)	3	1 744	1 593 (92%)	-
2019	12	3 846	3 413 (88.75%)	18
2020	18	4 552	4 354 (over 90%)	17
2021	10	4 606	-	7
2022	12	4 530	4 000 (90%)	8
2023	11	5391	5042 (93. 31 %)	3

21. TRAINING

Judicial training is provided by the Judicial College for new judges and by the Continuing Training Service of the General Council of the Judiciary ('GCPJ') for practicing and senior judges. Specific assessment mechanisms are used in each case, but the basic measure is attendance at training activities. While initial training is mandatory, further training for judges takes place on a voluntary basis.

Training for public prosecutors and other members of the judicial staff is the responsibility of the Centre for Judicial Studies ('CEJ'), although the training plan for public prosecutors – which covers both initial and continuing training – is defined by the Technical Secretariat of the PPO.

At the end of every CEJ course, participants are given a satisfaction survey (created by an external provider). The responses are taken into account when the training programme for the following year is drawn up. The written content provided by the speakers is checked for quality assurance purposes and published on the CEJ's virtual platform to make it as widely available as possible.

Since 2020, initial training for students taking the elective theory and practice course for public prosecutors has included training on the EIO, which is subsequently assessed by the CEJ.

The experts commend Spain for its broad offer of training both on the judiciary and prosecution side and activities such as the annual meeting and the dissemination of its conclusions and so-called formative Fridays (see *Best practice No 9*). At the same time, based on their findings during the visit and particularly the difficulty experienced in communicating in English with several experts, Spain is encouraged to increase the joint training for judges and prosecutors and consider involving defence lawyers in this, to increase the number of mandatory continuous trainings and to promote the existing opportunities for language training (see *Recommendation No 11*).

21.1. Training of the judiciary

Spain has a wide range of training activities on the application of the EIO.

The Judicial School, a centre for the selection and training of judges and senior judges under the CGPJ, aims to provide comprehensive, specialised and high-quality training for judges and magistrates. The Judicial School coordinates and delivers both initial training and continuous training. It is also active within the framework of the European Judicial Training Network ('EJTN'), among others.

In addition, the CGPJ's International Relations Service circulates new case-law and information relating to the EIO, and the CGPJ's Continuing Training Service organises judicial training within the Spanish system on various topics, skills and tools once judges enter the legal profession.

Training activities have included:

2023		
Name of training	**Participants**	**Duration (hrs)**
Online course on practical aspects of the EIO	112	6
Distance training course on judicial cooperation in criminal matters in Europe (distance learning), Module 4: EIO	30	100
Distance training course on a comprehensive approach to cybercrime, Module 3: Crossing borders in the fight against cybercrime	30	120
Conference of judges dealing with violence against women to unify criteria (in-person event): 50 questions and answers on the EIO – an analysis of doctrine and case-law	25	14

2022		
Name of training	**Participants**	**Duration (hrs)**
Online seminar focusing on mutual recognition instruments, Eurojust and other cooperation mechanisms (online training): Discussion on the EIO	92	12
Conference of judges dealing with violence against women to unify criteria (in-person event): EIO – Practical workshop	30	14
Distance-learning course on judicial cooperation in criminal matters in Europe (distance learning), Module 4: EIO	30	100

The initial training for trainee judges offers a course on international judicial cooperation in criminal matters (two hours) and a course entitled ‘Legal approach to new technologies’ (three and three-quarter hours). The same training was also provided as part of the course for lawyers of recognised competence from Latin American countries. The specialised judicial training for 2023, Module 2 of the 10th class, is offering the same courses.

21.2. Training for public prosecutors, judicial officers, forensic doctors, state lawyers

In addition, the role of the CEJ, an autonomous body under the Ministry of the Presidency, Justice and Relations with Parliament, is to train different members of the judicial staff: public prosecutors, judicial officers, forensic doctors, state lawyers and others. It offers both initial training (for prosecutors, judicial officers and forensic doctors only) and continuing training (for all).

As part of the initial training, new classes of trainee public prosecutors and trainee judicial officers study modules in their targeted courses that cover the EIO. For public prosecutors, there is a training module available on the EIO as part of the specialisation in international judicial cooperation.

For judicial officers in each year, there were classes available on international judicial cooperation.

With regard to continuing training, all of the training plans approved annually by decree of the Chief Public Prosecutor include conferences or workshops in different areas of specialisation. The EIO is covered in at least one session in the annual course for the network of public prosecutors specialising in international cooperation. Specifically, the 2024 training plan for public prosecutors, approved by Decree of the Chief Public Prosecutor of 2 October 2023, provides for a course on this subject, entitled ‘*Five years of the European Investigation Order in Spain*’. The course is run by the UCIF and intended for 40 public prosecutors, some of whom specialise in international cooperation.

With regard to online learning, the CEJ has created a number of courses on cooperation in criminal matters on two levels (general and specialised), which include in particular specific modules on the EIO and the other mutual recognition instruments.

Over the last five years, the following training activities have dealt with this topic:

Year	Training activity	Target audience
2021	EIO and freezing order (online)	Public prosecutors
2021	EIO (online)	Judicial officers
2020	Practical workshop on the recognition of judicial decisions in criminal matters in the EU (6th edition), recognition of judicial decisions, victim status, EAW, EIO, confiscation, the ORGA (in person)	Judicial officers
2019	Practical workshop on the recognition of judicial decisions in criminal matters in the EU (5th edition) recognition of judicial decisions, victim status, EAW, EIO, confiscation, the ORGA (in person)	Judicial officers
2019	EIO (in person)	Public prosecutors

There are also two or three courses per year on international judicial cooperation in civil and criminal matters for judicial officers and one course per year on the Spanish judicial officers' network for international judicial cooperation (RECILAJ).

21.3. National guidelines provided to practitioners

The various institutions involved in the application of the EIO provide the competent authorities with information and assistance.

The CGPJ's International Relations Service offers information and direct support to magistrates involved in the issuing or execution of EIOs (see *Best practice No 10*). This assistance is provided either directly or through the criminal division of the national network of experts in international cooperation (REJUE), which is composed of 30 senior judges throughout Spain who directly support judicial bodies in relevant matters.

UCIF has a CJEU case-law database, containing brief notes on each judgment passed, in addition to a copy of the full judgment. The files and judgments are distributed among the network of prosecutors specialising in cooperation in criminal matters. The specialist public prosecutors of each provincial or special office of the public prosecution service have the utmost theoretical and practical experience to draw on when collaborating with other public prosecutors who may find themselves needing to request international assistance. All the materials available to these specialist public prosecutors are distributed to the prosecutors in the offices where they work.

The CEJ, meanwhile, distributes any material provided through the EJTN and other institutions.

Spain also has a tool called the International Judicial Assistance Guide[13] (*Prontuario de Auxilio Judicial Internacional*) which aims to serve the needs of judges, prosecutors and other practitioners as regards judicial cooperation (see *Best practice No 11*).

The Guide offers judges, prosecutors, judicial officers and other legal practitioners a simple and user-friendly tool or handbook for participating in international judicial cooperation activities, in both active terms (issuing a request within the framework of proceedings brought by a Spanish legal body) and passive terms (receiving a request from another State).

[13] http://www.prontuario.org/portal/site/prontuario.

This tool was developed jointly by the Ministry of Justice, the PPO and the CGPJ and aims to answer the questions that come up most frequently in the day-to-day work of judicial staff. It allows users to identify the international conventions and other legal regulations applicable in this area and provides information about the different institutions that can offer additional support (European, Spanish and Ibero-American judicial networks, Eurojust, etc.), including a list of contacts.

In addition to providing detailed information about bilateral cooperation with all States, be they members of the EU or not, this site also allows users to access documents of interest.

The Guide notably includes the *Practical Guide to the European Investigation Order*, an essentially practical document with numerous links to forms, case-law, etc. The '*Best practice guide for Spanish judicial authorities seeking assistance from Eurojust, the European Judicial Network, liaison magistrates, IberRed and the Office for Asset Recovery and Management*' can also be found in this Section.

21.4. International training

Training activities which directly or indirectly cover the EIO are offered to public prosecutors and judicial officers through the EJTN and the Academy of European Law.

22. FINAL REMARKS, RECOMMENDATIONS AND BEST PRACTICES

22.1. Recommendations

Regarding the practical implementation of the evaluated Directive, the team of experts involved in the assessment in Spain was able to review the system satisfactorily. The fact that all interviews were held in Spanish may have led to the consequence that the members of the evaluation team have missed certain nuances that were lost in translation.

Based on the findings, the evaluation team identified several recommendations for the attention of the Spanish authorities. Furthermore, based on the various good practices, related recommendations are being put forward to the EU, its institutions and to the EJN.

Spain should conduct an 18-month follow-up on the recommendations referred to below after this report has been adopted by COPEN.

22.1.1. Recommendations to Spain

Recommendation No 1: Spain should ensure a sufficient level of specialisation in international cooperation for investigative judges throughout the territory of Spain (see Chapter 4.3).

Recommendation No2 : Spain is encouraged to consider granting judges access to the electronic platform used by the PPO for the execution of EIOs when they are involved in judicial cooperation in criminal matters (see Chapter 3.1).

Recommendation No 3: Spanish issuing authorities should mention all previously used instruments (previously issued EIOs, EAWs, freezing orders, JITs, etc.) in Section D of Annex A (see Chapter 6.1).

Recommendation No 4: In accordance with recital 14 of the Directive, Spain is invited to indicate another language which is commonly used in the Union in their declaration concerning the language regime, in addition to its official language (Chapter 6.2).

Recommendation No 5: in relation to EIOs containing multiple requests, including some which fall under the competence of the investigative judge, Spain should explore possibilities to deal with the requested investigative measures separately, so as to avoid delegating the whole EIO to the investigative judge (see Chapter 6.3).

Recommendation No 6: When executing EIOs which affect fundamental rights, investigative judges should rely on the proportionality check carried out by the issuing authorities and refrain from refusing to execute an EIO based on their own assessment of the proportionality of the requested measure against domestic standards (see Chapter 7).

Recommendation No 7: in case of formalities and procedures expressly requested in an EIO in relation to the hearing of persons, Spanish issuing authorities should consider attaching a letter of rights linked to the procedural status of the person to be heard (see Chapter 9).

Recommendation No 8: Spain is encouraged to reconsider the mandatory nature of the grounds for refusal and make such grounds optional in national law, in line with the Directive (see Chapter 13).

Recommendation No 9: Spanish executing authorities are encouraged to consult the issuing authorities before either applying any of the grounds for non-execution provided for in the Directive or refusing the execution of EIO due to formal shortcomings (see Chapter 13).

Recommendation No 10: Spanish investigative judges are encouraged to send Annex B automatically (see Chapter 16).

Recommendation No 11: Spain is encouraged to increase the joint training for judges and prosecutors, to increase the number of mandatory continuous training programmes and to promote the existing opportunities for language training (see Chapter 21).

22.1.2. Recommendations to the other Member States

Recommendation No 12: issuing authorities should complete Section G of Annex A more accurately, explaining specifically the link between the requested investigative measure, the affected person and the offence (see Chapter 6.1).

Recommendation No 13: Issuing authorities are encouraged to indicate any previous police cooperation, specifying the police unit involved, where appropriate (see Chapter 6.1).

Recommendation No 14: issuing authorities should mention all previously used instruments (previously issued EIOs, EAWs, freezing orders, JITs, etc.) in Section D of Annex A (see Chapter 6.1).

Recommendation No 15: In accordance with recital 14 of the Directive, Member States are invited to indicate another language which is commonly used in the Union in their declaration concerning the language regime, in addition to their official language (see Chapter 6.2).

Recommendation No 16: executing authorities should not require the transmission of the underlying judicial decision provided that section G of Annex A has been appropriately completed (see Chapter 6.5).

Recommendation No 17: issuing authorities should carefully assess proportionality and necessity when deciding whether to issue an EIO, especially in the case of minor offences (see Chapter 7).

Recommendation No 18: Member States are encouraged to explore the possibilities of implementing e-EDES (see Chapter 8).

Recommendation No 19: issuing authorities should mention in the EIO any operational contacts at police level which preceded the issuing of the EIO (see Chapter 8.1).

Recommendation No 20: in case of formalities and procedures expressly requested in an EIO in relation to the hearing of persons, issuing authorities should consider attaching a letter of rights linked to the procedural status of the person to be heard (see Chapter 9).

Recommendation No 21: executing authorities are encouraged to consult the issuing authorities before either applying any of the grounds for non-execution provided for in the Directive or refusing the execution of EIO due to formal shortcomings (see Chapter 13).

Recommendation No 22: executing authorities should systematically send Annex B and should always include an email address to facilitate direct contact (see Chapter 16).

Recommendation No 23: when issuing an EIO for a hearing via videoconference, Member States should envisage a reasonable timeframe in which the hearing could take place (see Chapter 19.2).

Recommendation No 24: In the event of hearings by videoconference, Member States should take the necessary steps to ensure that conditions are safe and that there is adequate equipment, so that the fundamental rights of the suspect or accused person are respected (see Chapter 19.2).

Recommendation No 25: Member States should refrain from directly hearing witnesses in another Member State, without issuing an EIO (see Chapter 19.2).

Recommendation No 26: when sending Annex C ex post, the notifying Member State should indicate the reason why it was not possible to issue an EIO before executing the measure (see Chapter 19.5.3).

22.1.3. Recommendations to the European Union and its institutions

Recommendation No 27: the Commission is invited to clarify the application of the Directive in relation to Article 40 of the CISA in respect of cross-border surveillance and to propose an amendment to the Directive in that sense, where appropriate (see Chapter 5.1).

Recommendation No 28: the Union legislator is encouraged to amend the Directive:

- by making Annex A more effective (see Chapter 6.1);
- to clarify the applicability of the rule of speciality and its interplay with data protection rules (see Chapter 11);
- to clarify whether the notion of 'interception of telecommunications' under Articles 30 and 31 also covers other surveillance measures, such as the bugging of cars and GPS tracking. If not, an amendment to the Directive should be considered to introduce special provisions that also regulate such measures, including a situation where no technical assistance is needed from the Member State concerned (ex post notification mechanism) (see Chapter 19.5.1).

Recommendation No 29: the Union legislator is invited to address the question of the participation of an accused person at trial via videoconference from another Member State (see Chapter 19.2).

22.1.4. Recommendations to the EJN

Recommendation No 30: Eurojust and the EJN are invited to update their Joint Note on the practical application of the EIO from 2019 (see Chapter 6.5).

Recommendation No 31: the EJN is invited to create a repository for the procedural rights applicable in connection with the hearing of persons (see Chapter 9).

22.2. Best practices

Spain is to be commended for:

1. compiling all mutual recognition instruments in one piece of legislation (see Chapter 3);
2. the specialisation of the PPO in international cooperation (UCIF and specialised unit at provincial level) (see Chapter 4.3.1);
3. a high level of digitalisation in the execution of EIOs (see Chapter 4.3.1);
4. the coordinating role of the UCIF and the possibility for the UCIF to directly execute all measures in the event of EIOs with multiple requests not affecting fundamental rights to be executed in different parts of Spain (see Chapter 6.3);
5. being a pioneer in adopting e-EDES and already looking into the possibilities of the interoperability between e-EDES and the case management system of PPOs (see Chapter 8);
6. preparing judicial cooperation at police level (see Chapter 8.1);
7. issuing and executing EIOs for the purposes of a hearing and allowing an accused person to participate in a trial by videoconference (see Chapter 19.2);
8. accepting Annex C also for bugging (Chapter 19.5.3);

9. the broad offer of training for both the judiciary and PPOs and the annual meeting and the dissemination of conclusions of PPOs specialising in judicial cooperation (see Chapter 21);

10. national guidelines on how to issue an EIO developed by the Council of the Judiciary (see Chapter 21.3);

11. the Prontuario de auxilio judicial internacional – International Judicial Assistance Guide (see Chapter 21.3).

ANNEX A: PROGRAMME FOR THE ON-SITE VISIT

Tuesday, 23 April 2024	
9.00 - 9.30	Welcome and presentation of the team and the programme of the visit
9.30 - 10.30	Information on the Spanish system (administrative structure and judicial organisation)
10.30 - 11.00	Competent authorities for issuing and executing EIOs
11.00 - 11.30	Coffee break
11.30 - 13.15	Content and form of the EIO Transmission of the EIO from and direct contacts Obligation to inform Necessity, proportionality, recourse
13.30 - 15.00	Lunch break
15.00 - 16.30	Recognition, execution, formalities Grounds for non-recognition of non-execution
16.30	Internal meeting of the evaluation team

Wednesday, 24 April 2024	
9.30 - 11.00	Specific investigative measures
11.00 - 11.30	Coffee break
11.30 - 13.00	Legal remedies Admissibility of evidence Time limits, costs
13.00 - 13.50	Meeting with the representatives of the Bar Association
14.00 - 15.30	Lunch break
15.30 - 16.30	Meeting with the representatives of the Ministry of the Interior
16.30	Internal meeting of the evaluation team

Thursday, 25 April 2024	
9.30-11.30	Scope, relationship with other instruments (coordination) Rule of speciality Confidentiality
11.30-12.00	Coffee break
12.00-13.00	Training provided to legal practitioners
13.00-14.00	Wrap-up session

ANNEX B: LIST OF ABBREVIATIONS

ACRONYMS AND ABBREVIATIONS	FULL TERM
2000 MLA Convention'	Convention on Mutual Legal Assistance in Criminal Matters between the Member States of the European Union of 20 May 2000 and the Additional Protocol
CATS	Coordinating Committee in the area of police and judicial cooperation in criminal matters
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
CRIS	case management system of the Public Prosecution Service
CGPJ	General Council of the Judiciary
CJEU	Court of Justice of the European Union
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
EAW	European arrest warrant
ECHR	European Convention on Human Rights
e-EDES	e-Evidence Digital Exchange System
EIO	European Investigation Order
EJN	European Judicial Network
EJN Atlas	Judicial Atlas of the European Judicial Network
EJTN	European Judicial Training Network
Eurojust	European Union Agency for Criminal Justice Cooperation
executing State	executing Member State
issuing State	issuing Member State
JIT	joint investigation team

ACRONYMS AND ABBREVIATIONS	FULL TERM
Joint Action	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
Central Authority	Ministry of the Presidency, Justice and Relations with Parliament
MLA	mutual legal assistance
PPO	Public Prosecution Service
UCIF	International Cooperation Unit of the Public Prosecution Service