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EVALUATIONS**
on the implementation of the European Investigation Order (EIO)
REPORT ON ESTONIA

**EVALUATION REPORT ON THE
TENTH ROUND OF MUTUAL EVALUATIONS
on the implementation of the European Investigation Order (EIO)

REPORT ON ESTONIA**

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1. EXECUTIVE SUMMARY

The 10th round of mutual evaluations focuses on 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'). The aim of the evaluation is to consider not only the legal issues but also the practical and operational aspects linked to the implementation of the Directive. It provides a valuable opportunity to identify areas for improvement as well as best practices to be shared among Member States. The evaluation further promotes the effective implementation of the instrument and aims to enhance mutual trust among the Member States' judicial authorities.

The visit was very well prepared by Estonia. The Estonian authorities were very helpful in preparation of the visit, providing all necessary documents and making practical arrangements in a timely manner. Furthermore, the evaluation team especially appreciated the open and welcoming atmosphere created by the Estonian authorities during the visit, as it allowed the evaluation team to obtain an in-depth overview of how the Directive is applied in Estonia.

The evaluation team was able to establish that the European Investigation Order (EIO) generally works very well in Estonia, and the Estonian authorities are to be commended for their general commitment to execute all EIOs to the best of their abilities (*see best practice No 1*). Nevertheless, the evaluation team identified some areas for improvement that need to be addressed at national and at EU level (see Chapter 23).

The Prosecutor General's Office (PGO) is the central body dealing with EIOs in Estonia. The PGO must be informed, for statistical purposes, about all EIOs issued by the prosecution service in Estonia. All incoming EIOs must be sent to the PGO, where specialised prosecutors decide on execution. The majority of the EIOs are forwarded to the Police and Border Guard Board, and the cooperation between the different bodies is organised in a very efficient manner (*see best practice No 2*).

With regard to the rights of victims, the evaluation team particularly welcomes the fact that Estonian law goes beyond the requirements of Article 1(3) of the Directive and gives victims the right to ask for an EIO to be issued (*see best practice No 4*).

A noteworthy topic of discussion is the recently introduced legislation that allows Estonian judicial authorities to question a person located in another State via videoconference for evidence purposes, without issuing an EIO or otherwise contacting the authorities of the State where that person is located. Although the evaluation team sees the practical advantages of such a method, it questions its legality. With the adoption of the Directive, Member States agreed that a new approach was necessary to replace the existing instruments in the area of obtaining evidence within the EU. This new approach was based on a single instrument (the EIO) to replace the existing fragmentary regime (see recitals 6 and 7 of the Directive). In the view of the evaluation team, gathering evidence in another Member State by hearing persons via videoconference without using the EIO, does not seem to be in line with the aim of the Directive. Furthermore, it should be noted that there are currently two cases pending before the CJEU that concern this issue. Consequently, a recommendation has been made to Estonia to consider refraining from using this possibility until the CJEU has given a decision on this matter (*see recommendation No 1*).

Furthermore, the 10th round of mutual evaluations has so far shown that the topic of cross-border surveillance in relation to the EIO is in need of further clarification, as Member States treat this matter differently. Estonia, in particular, has added ‘cross-border surveillance’ to their national law transposing the EIO Directive. The evaluation team invites the Commission to clarify the application of the Directive in relation to the Convention Implementing the Schengen Agreement (‘CISA’) in respect of cross-border surveillance (*see recommendation No 21*).

Lastly, the evaluation team found that there may be a need for further clarification or revision at EU level regarding the speciality rule, the application of EIOs in connection with ensuring the accused person’s presence at trial, and the need to reply to Annex C (*see recommendations Nos 18-20*).

2. INTRODUCTION

The adoption of Joint Action 97/827/JHA of 5 December 1997¹ ('the Joint Action') established a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime.

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

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

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

Estonia was the 15th Member State visited during this round of evaluations, as provided for in the order of visits to the Member States adopted by CATS.²

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

² ST 10119/22 and WK 6508/2023.

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

Each 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.³

The experts entrusted with the task of evaluating Estonia were Mr Piotr Nowak (Poland), Ms Saartje Matton (Belgium) and Ms Olga Trocka (Latvia). Observers were also present: Ms Elisabet Castelló (Eurojust), together with Ms Anastasia Pryvalova from the General Secretariat of the Council.

This report was prepared by the team of experts with the assistance of the General Secretariat of the Council. It is based on the findings of the evaluation visit that took place in Estonia from 2 to 6 October 2023 and on Estonia's detailed replies to the evaluation questionnaire, along with its detailed answers to the follow-up questions.

The evaluation team had the opportunity to meet representatives from the Ministry of Justice, the Prosecutor General's Office, the Southern District Prosecutor's Office, Harju County Court, the Police and Border Guard Board and the Estonian Bar Association. All the individuals present provided the evaluation team with a detailed explanation of their institution's role in the EIO process in Estonia.

³ ST 10119/22.

3. TRANSPOSITION OF DIRECTIVE 2014/41/EU

In the Estonian legal system, Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters has been transposed into Division 1² of the Code of Criminal Procedure ('CCP'), which entered into force on 6 July 2017.

The abovementioned division covers section 489³⁷ to section 489⁵² of the CCP. At the same time it should be pointed out that, in addition to the aforementioned sections contained in the division that relates directly to the EIO, there are cross references to other provisions of the CCP as well as a general section on international cooperation that also applies to the EIO, unless this would be contrary to Directive 2014/41/EU.

The Directive has been implemented nearly verbatim, without any major divergence that could raise concerns. The objectives of the Directive have been achieved by means of this implementation.

4. COMPETENT AUTHORITIES HANDLING THE DIRECTIVE 2014/41/EU

4.1. Issuing authorities

According to Estonian legislation, competence to issue an EIO in the pre-trial phase lies with the prosecutor, while in the trial phase it lies with the judge.

Pre-trial phase

The Prosecutor General's Office (PGO) is the chief prosecution body in Estonia. It consists of two departments: the Prosecution Department and the Internal Control Department.

Furthermore, there are four District Prosecutor's Offices:

1. Northern District Prosecutor's Office;
2. Southern District Prosecutor's Office;
3. Western District Prosecutor's Office;
4. Viru District Prosecutor's Office.

In the structure of the PGO, a separate department has been designated for international cooperation (MLA tasks). There are four individuals at the PGO who deal with international cooperation: State Prosecutor, Assistant Prosecutor, Consultant and secretary.

The Prosecutor's Office is the body that supervises and controls the conduct of investigative proceedings by the following bodies:

- Police and Border Guard Board (including Police Stations, Prefectures and Central Criminal Police);
- Estonian Internal Security Service;
- Tax and Customs Board;
- General Staff of the Defence Forces;
- Prisons Department of the Ministry of Justice and prisons;
- Environmental Inspectorate.

According to section 30 of the CCP, the prosecutor is in charge of pre-trial proceedings; the judge is only involved when specific measures (of an intrusive nature) must be taken.

During the visit, the evaluation team asked for more information about the position of the assistant prosecutor in Estonia. The Estonian representatives explained that assistant prosecutors are also prosecutors, and that their position is very similar to the district prosecutors. The difference is that assistant prosecutors do not usually go to court for general proceedings, but only for simplified proceedings. However, assistant prosecutors may attend general proceedings with permission from a district prosecutor. Assistant prosecutors handle the smaller offences. In the district offices, assistant prosecutors work more independently on their own cases. At the Office of the Prosecutor General, State prosecutors and assistant prosecutors often work closely on one (complex) case.

In terms of pre-trial proceedings, an EIO is issued in a multi-step process. First, when an investigator (police officer) finds that there is a need to obtain evidence located in another Member State, he or she contacts a prosecutor, who in turn prepares and drafts the EIO and sends it to the competent authority of the executing State. Information about the issuing of the EIO is then sent to the PGO for statistical purposes.

Measures that a prosecutor cannot order independently in a national investigation first need to be authorised by a judge before the EIO can be sent by the prosecutor, who will remain the issuing authority within the meaning of Section K of Annex A.

In Estonia, each prosecutor sends approximately 1.5 EIOs per year. It should be emphasised that Estonia has developed a handbook for prosecutors on the proper handling of EIOs. The evaluation team considers this approach to be a best practice (*see best practice No 3*). The evaluation team also noted that Estonian legislation does not allow law enforcement authorities to issue an EIO and that, consequently, the possibility of validation by a judicial authority has not been introduced.

Furthermore, the Estonian legal system does not provide for the possibility of issuing EIOs for misdemeanour cases. This type of case is dealt with by the police or other investigative authorities, and not by the prosecutor's office. Under Estonian law, a misdemeanour is an offense for which the principal punishment prescribed is a fine, detention or deprivation of driving privileges. For a misdemeanour, a court may impose detention for a term of up to 30 days.

Trial phase

In Estonia there are 155 judges; half of them deal with civil cases, the others with criminal cases. Judges who deal with criminal cases can issue an EIO. No statistics are gathered about EIOs issued by judges. Nor is any information in this regard sent to the PGO, unlike for EIOs sent in the pre-trial phase. EIOs issued in the trial phase mainly concern videoconference hearings. During the visit, the judges explained that such EIOs are mainly issued for simplified procedures and not for general court proceedings, in respect of which it is generally preferred to have all participants physically present at the hearing.

4.2. Executing authorities

In Estonia, the PGO is competent to recognise, conduct proceedings for and ensure the execution of an EIO. Although Estonia has not designated a central authority in the context of the EIO, the PGO is the central body to which all incoming EIOs must be sent.

Specialised prosecutors (the State prosecutor or assistant prosecutor) examine the EIO and decide whether it is possible to execute it. Within the international cooperation unit of PGO, the State Prosecutor covers EIOs that come from Finland, while all other incoming EIOs are handled by the assistant prosecutor. Finland sends the largest number of EIOs to Estonia, followed by Latvia. If it concerns an EIO for a videoconference, the consultant in the unit verifies the compliance of the EIOs with the Directive, checks whether there is consent for the videoconference (if needed) and forwards the EIO to the competent county court.

Within 7 days of receipt of the EIO, Annex B is forwarded to the issuing Member State (with or without a request for additional information). If the execution of the EIO depends on additional information from the issuing State, execution is postponed until such information is received. The PGO sends the EIO to the Police or to the Tax and Customs Board for execution. Materials obtained as a result of execution are forwarded by the executing authority to the PGO and from there they are sent to the requesting Member State.

During the visit, the Estonian authorities explained that district prosecutors are not involved in the execution of EIOs unless there is a link with an Estonian investigation.

4.3. Right of the suspect/victim to apply for an EIO

In Estonia, parties to the proceedings have the possibility to apply for an EIO to be issued. This right is equal to the right to make other applications for gathering evidence in accordance with the procedure laid down in section 225 of the CCP. During pre-trial proceedings and after disclosure of the file, the parties to the proceedings have 10 days to apply for a measure to be taken, such as for an EIO to be issued. The Estonian authorities explained to the evaluation team that the parties may request that an EIO be issued at any stage of the pre-trial proceedings; however, it is rare for this to happen before the file is disclosed, since this would essentially constitute a ‘blind’ application.

Where the suspect, the victim or their representative makes a reasoned request as to why an EIO should be issued, the Prosecutor’s Office usually consents to it. It is also possible to re-submit a similar request in the trial phase before the court, who then decides whether an EIO should be issued. The law in Estonia provides for possibilities beyond the requirements of Article 1(3) of the Directive, since victims may also request for an EIO to be issued. The evaluation team welcomes this legislation as it supplements the victim’s rights under Directive 2012/29/EU (*see best practice No 4*).

If, during judicial proceedings, the court refuses to issue an EIO, it is possible to file an appeal against the court’s decision with the circuit court, that will review the grounds for refusal. A decision issued in appeal proceedings can in turn be appealed with the Supreme Court, that will assess whether the refusal to issue an EIO constitutes an infringement.

The Estonian practitioners added that victims and suspects are informed in writing of their right to request that evidence be gathered. In practice, victims rarely make use of their right to request the issuing of an EIO. According to the Estonian authorities, possible reasons may include the fact that most cases in Estonia are settled with a plea-bargain, or that victims often do not want to be involved in the proceedings to such an extent.

The evaluation team also had the opportunity to meet with an Estonian defence lawyer on this matter. According to the defence lawyer, the rights that are in place to make it possible for the suspect or victim to apply for an EIO generally work well in Estonia. On the other hand, it was mentioned that it can be difficult to prepare all necessary steps within the 10-day time limit after disclosure. Indeed, the defence lawyer confirmed that parties can request that an EIO be issued at any stage during the pre-trial proceedings, but that doing so before disclosure of the file would be applying for a measure ‘blindly’, as mentioned above. Although the evaluation team understands the concerns raised by the defence lawyer, it does not consider the rights for a suspect or victim to apply for an EIO to be insufficient since a request for an EIO is treated like any other request for a (domestic) investigative measure. Furthermore, as the defence lawyer would not have to prepare the actual EIO, the period of 10 days does not seem unreasonable in the view of the evaluation team. On top of that, Estonian authorities explained that the 10-day time limit can be extended if the criminal case is voluminous or complicated (section 225(1) CCP). In practice, Estonian authorities often agree with a request to extend the time limit.

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

Scope of the EIO

Article 3 of the EIO Directive was properly transposed by means of section 489³⁷ of the CCP, which states that an EIO is a request which is issued or validated by a judicial authority of a Member State of the European Union for the performance of a procedural act in another Member State to obtain evidence or transfer or deposit the evidence located in another Member State in order to prevent the destruction, transformation, moving, transfer or disposal of a physical object that is used as an item of evidence.

In addition, the above provision also indicates that the EIO does not apply in cases where it is necessary to obtain evidence located in the Kingdom of Denmark or the Republic of Ireland. The setting up of a Joint Investigation Team (JIT) is also excluded from the scope of the EIO. All investigative measures performed under Estonian law (the CCP) fall within the scope of the EIO Directive. More specifically, it is possible to request that Estonia conduct the following procedural acts under the CCP:

1. the hearing of a suspect, witness, victim, expert, specialist witness, third party or a civil defendant
2. the confrontation or hearing of witnesses for the purpose of comparison of statements
3. the linking of statements or testimonies to the relevant setting
4. the presentation (of a person or thing) for an identification line-up
5. the inspection of a crime scene, corpse, document or other object or item of physical evidence
6. the physical examination of a person or postal item
7. the requesting of data from a telecommunications undertaking
8. the carrying out of searches
9. the conducting of investigative experiments
10. the conducting of expert assessments
11. the fingerprinting of a person and the taking of a sample of their DNA
12. the taking of material for comparison
13. the carrying out of covert operations:
 - a. covert surveillance, covert collection of samples for comparison and conducting of initial examinations, covert examination and substitution of an object
 - b. the covert examination of a postal item
 - c. the secret interception of auditory or visual information
 - d. the simulation of a criminal offence
 - e. the use of an undercover agent

During the visit, Estonian practitioners explained that the EIO should be used for evidence gathering only. An EIO requesting the transmission of a judgement would be executed by Estonian authorities if the EIO is made for evidentiary purposes.

Estonia has also received EIOs requesting summonses to be served on persons or requesting that the signature of the person in question be obtained as acknowledgement of receipt of a procedural document. In the view of Estonian authorities, the execution of such measures does not fall within the scope of the EIO. In such situations, Estonia has instructed the issuing State to transmit procedural documents directly to the addressee or to use the 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and issue letters rogatory. The evaluation team suggested that, since there is no established format for letters rogatory, the Estonian practitioners could also accept Annex A and not ask the issuing State to issue a new request (that will need to be translated again) but execute it in accordance with the applicable legislation for requests for legal assistance other than EIOs. The Estonian practitioners agreed with the evaluation team that, in theory, this would be possible; however, they expressed their fear that, in practice, this would result in Member States always using Annex A, even when it should have been clear that an EIO was not the appropriate instrument. In a situation where Estonian authorities receive a ‘hybrid’ EIO, for example to serve documents and to hear the person, they would accept such a request.

The Estonian practitioners mentioned they have also received EIOs for freezing assets. In such cases, Estonia has asked the issuing State to send the appropriate freezing certificate in accordance with Regulation 2018/1805 on the mutual recognition of freezing orders and confiscation orders. The evaluation team inquired whether it is possible under Estonian law to consider assets (e.g. luxury goods, money, real estate) to be evidence, thereby allowing for a seizure based on an EIO. The Estonian practitioners indicated that, in principle, this would not be possible, but exceptions could be made provided that the issuing authority provided sufficient reasons and justification why and how the assets must be considered as evidence in Section C of the EIO.

Regarding the relationship between the EIO and the EAW, Estonia explained that they have not issued EIOs for the sole purpose of locating a person. Locating a person by means of an EIO may be necessary when Estonia wants to hear the person, but the Estonian practitioners agreed with the evaluation team that an alert in accordance with Article 34 of the Schengen Information System (SIS) could be more appropriate when there is no indication of where the person of interest might be.

The Estonian practitioners confirmed that they will accept and execute an EIO where the issuing State requests the temporary arrest of a suspect for the purpose of subsequent interrogation in the executing State. Such a request must be sufficiently reasoned and it must be clear that the issuing State's intention is the temporary arrest for a specific purpose (such as an interrogation); the Estonian practitioners do not see the need for an EAW since its objective is completely different (namely the surrender of the individual).

During the visit the Estonian practitioners, both prosecutors and judges, mentioned that they consider whether an EIO could be an effective alternative to an EAW, especially with regard to a hearing via videoconference. The evaluation team highlights this as a best practice, particularly in connection with recital 26 of the EIO Directive (*see best practice No 5*).

Estonian law does not provide for the issuing of an EIO for the enforcement of an administrative decision. Furthermore, Estonia has never received an EIO from another Member State in this regard but should that happen, an EIO issued by an administrative authority will be executed if it has been validated by a competent judicial authority of the issuing State, in accordance with the Directive.

The Estonian authorities have issued EIOs to request permission to use information previously received through other channels (such as from police to police) as evidence in an investigation. However, Estonian authorities also indicated that no subsequent EIO is issued when the source of the information has consented to the use of the information as evidence. During the visit, the evaluation team enquired whether this principle also applies when the 'source of information' is not a competent judicial authority. The practitioners assured the evaluation team that in most cases, a subsequent EIO will be sent. The appropriate judicial route is always taken when the information has been received through police channels. On the other hand, Estonia has never received EIOs from other Member States to formalise information previously received from the police. Permission to use as evidence has been requested of Estonia in respect of information provided by the Financial Intelligence Unit (FIU); however, the PGO does not have the competence to authorise this. In these instances, the PGO would advise the issuing State to issue an EIO requesting the gathering of the required evidence, rather than authorisation for previously obtained information from the FIU.

Procedures in which an EIO may be issued

In Estonia, it is possible to issue an EIO in both the pre-trial and trial phase of criminal proceedings. The execution of judgments does not constitute a part of court proceedings in Estonia and Estonia has not issued any EIOs in this phase of proceedings.

Estonia executes EIOs issued at all stages of criminal proceedings but is of the opinion that an EIO cannot be issued in the phase of execution of a judgment. Since Estonia has never received EIOs issued in the context of execution of a judgment from other countries, there have been no misunderstandings with other countries in this regard.

6. CONTENT AND FORM OF THE EIO

6.1. General challenges

According to Estonian law, the EIO should be drawn up in the form set out in Annex A. The Estonian issuing authority certifies that the content is accurate and correct. No other document or decision is necessary to issue an EIO. As issuing authority, both prosecutors and judges commented that they have generally not encountered any problems in completing the form. Prosecutors also have the possibility to clarify doubts in the practical guidelines available and in the Handbook on Legal Aid prepared by the PGO.

At the same time, Estonian practitioners indicated that Annex A is somewhat illogical, and that finding information in it is difficult for those who are not used to working with it. In its current form, Annex A requires the issuing authority to first indicate, at the beginning of the form, which measures need to be carried out, and it is only further down (in Section G) that the issuing authority can provide justification for these measures. According to the Estonian practitioners, it would be preferable if the measure and its justification were presented consecutively. Furthermore, the Estonian practitioners pointed out that the form also contains fields and parts that are irrelevant for a standard case and are often left empty. In the view of Estonia, a good option would be to remove any unnecessary information fields from the EIO form, in order to make the document more compact and precise.

It was also suggested that the form should be made electronic/machine-readable, as the transmission of information currently causes a heavier workload for both sides. This is especially relevant in cases where the request entails the checking of ten or more IP addresses or bank accounts, and the recipient of the EIO does not have the possibility to copy those numbers on the screen. However, this issue could easily be fixed by asking the issuing State to send an unofficial Word version of the EIO.

Furthermore, the Estonian authorities mentioned that information on the EJN website is mostly available in English only, and this may cause difficulties for some district prosecutors wishing to find out which measures are available in other Member States.

As executing authority, Estonia frequently finds that the content of the EIO is incomplete, inconsistent or inaccurate. In such cases, the issuing authority is always consulted. The most common situations are those in which EIOs transmitted to Estonia have not been signed by the issuing authority. There are also situations in which the description of the offence in Section G of the EIO is insufficient for the purpose of explaining the necessity of and giving justification for the investigative measures requested. Estonia has also encountered cases in which there were discrepancies between the information contained in different sections of the EIO, errors in bank account numbers, Section C of the EIO did not clearly state which investigative measures were requested or other inaccuracies. In such cases, the Estonian authorities generally send additional questions together with Annex B to the issuing authority, as well as reminders when no reply is received. The evaluation team finds it important to recommend to all Member States to pay particular attention to the quality of the EIO, making an effort to keep the perspective of the reader in mind when completing the form (*see recommendation No 5*).

6.2. Language regime

When issuing an EIO, the Estonian prosecutors have at their disposal a table indicating the language requirements of all EU countries. The table is continuously updated with the relevant information. In this way, practitioners can easily verify the language requirements for each Member State. However, the Estonian practitioners indicated that they have already encountered difficulties with some Member States who have officially declared that they also accept EIOs in English, but do not do so in practice. The evaluation team is of the opinion that all Member States should accept EIOs in English, especially in urgent cases (*see recommendation No 6*).

As executing State, Estonia officially accepts EIOs in two languages: Estonian and English. The evaluation team considers this a best practice (*see best practice No 6*). It was also pointed out that other Member States may experience difficulties in finding translators to translate Estonian documents that were sent to them as part of the process of execution of an EIO. The Estonian practitioners are aware of this difficulty and are willing to help an issuing State to get in touch with a sworn translator in Estonia who could help with translation of documents. In the past, and only by way of exception, the Estonian authorities have accommodated the issuing State and provided an English translation of the execution documents themselves. The Estonian courts have reported that they have not encountered problems with translation, either as the executing authority or as the issuing authority.

Estonian practitioners pointed out that, sometimes, direct contact with the other Member States can be difficult, especially when the counterpart indicated in the EIO does not speak English. To ensure the effectiveness of direct contact, the evaluation team finds it very important to recommend to all Member States to make sure the point of contact indicated in the EIO speaks English to a sufficient level (*see recommendation No 7*).

6.3. Multiple requests in one EIO

When Estonia receives an EIO that needs to be executed by several courts (for example for the hearing of several witnesses), the PGO will forward the EIO to all competent courts. The individual courts will then send the results themselves to the issuing authority.

6.4. Issuing an additional EIO, splitting an EIO, conditional EIO

Concerning the matter of additional EIOs, Estonian representatives argued that their goal is always to issue one comprehensive EIO indicating all conditional and alternative requests. This approach saves time and makes it possible to receive all the necessary information from the executing State in one reply. According to the Estonian authorities, it also brings considerable savings in terms of translation costs. Nevertheless, whenever it is necessary for Estonia to issue an additional EIO, the previous steps are always clearly indicated in Section D. As executing State, Estonia would also prefer to receive one single EIO containing all the requested measures, although additional EIOs will be executed as well.

As issuing State, when issuing an EIO that contains investigative measures that will need to be executed by several authorities in the executing State, Estonia will send the EIO containing all measures to one authority, assuming that the executing State itself will forward the request to the appropriate authorities for execution, rather than splitting it into separate ‘smaller’ EIOs and sending them to the competent executing authorities directly. In a situation when there is any doubt as to the preferred approach, the evaluation team recommends to all Member States issuing an EIO that they check with the executing State how they wish to receive an EIO that is to be executed by multiple authorities (*see recommendation No 8*).

6.5. Orally issued EIO

Estonia explained that there have been no instances of an oral EIO. Should this happen, Estonia would refer to the Directive and ask for a written and signed EIO. However, the Estonian practitioners indicated that in the event of urgency, they would be willing to make the necessary practical arrangements in anticipation of an EIO that has been announced orally.

The evaluation team indicated that the term ‘oral EIO’ is somewhat misleading or confusing, as it suggests that such an oral request could replace a written, formal EIO. This is not the case, and an oral request – regardless of whether it leads to mere preparatory measures or action being taken – will always need to be followed by the written, official request in the appropriate form as soon as possible.

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

Article 6 of the EIO Directive was properly transposed by means of section 489⁵² of the CCP. Under Estonian law, an EIO may only be issued and transmitted if it is necessary to achieve the purpose of criminal proceedings and proportionate taking into account the rights of the suspect or accused.

In Estonia, before an EIO is issued, proper consideration is always given to an assessment of whether it is strictly necessary for the proceedings and whether, taking into account the nature of the offence, it is justified to request procedural measures from another State. The Estonian authorities also take into account fundamental rights and the available capacity. Furthermore, proportionality criteria are also covered in the handbook and discussed during training sessions.

In general, EIOs are issued as a last resort when it is not possible to collect further information at national level. When issuing an EIO in the trial phase, the court also considers whether the purpose of the requested measure can be achieved by other means or by other procedural measures. According to the Estonian authorities, the statute of limitations is a very clear indicator as to when it is no longer proportionate to issue an EIO.

In the experience of practitioners, Estonian EIOs have been refused because of proportionality reasons relating to, for example, the long period for which bank records were requested. In most cases, however, consultation with the executing authority and the provision of additional information has resulted in the successful execution of the Estonian EIO.

As executing authority, Estonia will only assess the proportionality of the individual investigative measures that are requested in Section C, not of the EIO itself. The aforementioned proportionality test consists in, taking into account the facts described in Section G, the Estonian authorities verifying whether such a measure could also be taken in a purely national procedure and/or whether there is a less invasive measure that could be used to achieve the same goal. The evaluation team is of the opinion that the Estonian approach in this regard is the (only) correct one and calls on all Member States to refrain, when acting as the executing authority, from assessing the necessity of the EIO itself being issued since, according to the evaluation team, the discretion to do so cannot be derived from the Directive (*see recommendation No 9*).

When acting as an executing authority, Estonia did experience some problems relating to proportionality in relation to EIOs requesting the search of a witness's premises. Estonian legislation is stricter on this issue than it may be in other Member States. In these situations, Estonia always consults the issuing authority and usually, an agreement can be reached on how the EIO can be executed.

8. TRANSMISSION OF THE EIO FORM AND DIRECT CONTACTS

If an EIO is sent to Estonia for execution and additional information is needed from the issuing State, it is generally requested through the PGO. If, however, it is necessary to discuss organisational issues concerning execution, the Estonian executing authority communicates directly with the official who issued the EIO. If necessary, Eurojust and EJN will also be involved to request further information.

The Estonian authorities confirmed that all prosecutors and judges have access to the EJN Judicial Atlas, which is considered an essential tool in determining the competent authorities to whom the EIO is to be sent. Unfortunately, as was pointed out by practitioners, the EJN Atlas sometimes provides different options as regards the competent authority for the transmission of the EIO. Despite the confusion this may cause, no EIO has been returned to Estonia after being sent to the wrong addressee. Estonian prosecutors have also turned to the police, who may be able to advise as to the competent authority through contacts they have already established in the State in question. Given the importance of establishing direct contact, the evaluation team recommends that all Member States keep the (contact) information in the EJN Atlas correct and up to date (*see recommendation No 10*).

The Estonian practitioners consider the fact that the EJN Atlas is available only in English to be a weak point of the tool, in view of the fact that not all administrative staff are sufficiently proficient in that language. The evaluation team considers this a valid point and would recommend that the EJN work on a multilanguage Atlas tool (*See recommendation No 22*).

Furthermore, Eurojust has proven to be very helpful in determining the competent authority, for example in Member States who do not have a central point to receive EIOs. In particular, Estonia mentioned a very positive experience with the German representative at Eurojust, who has created a table to indicate where Estonia should send an EIO addressed to Germany.

For Estonia, transmitting EIOs by electronic means is sufficient, and there is no need to send the original by post. Estonia considers it sufficiently secure for EIOs to be sent from an official's work e-mail address. In the evaluation team's view, transmission of the EIO by electronic means is the most practical working method, and Member States are encouraged to use this method where possible (*see recommendation No 11*).

It has been noticed by Estonian practitioners that foreign law enforcement authorities have sometimes used personal e-mail addresses, which is not considered to be safe by the Estonian authorities. The evaluation team agrees with Estonia that Member States should refrain from using personal e-mail addresses like Gmail when issuing an EIO or in correspondence about its execution (*see recommendation No 12*).

The adoption of the e-EDES system was also discussed during the visit. The PGO explained that the Estonian prosecution service will implement a new and updated electronic system at the beginning of 2024. Subsequently, the national system will be connected to e-EDES so that Estonia will be able to send and receive EIOs this way. In addition to prosecutors, the Estonian police will also have access to this system. Estonian courts have not started preparations to connect to e-EDES.

Estonia is in favour of direct communication after the EIO has been transmitted. In Estonia, both the courts and the Prosecutor's Office issue EIOs independently and communicate directly with the executing authority on issues arising from execution. The team of experts highlighted as good practice the fact that the Estonian authorities always seeks direct contact during execution of an EIO to clarify any doubts or problems (*see best practice No 7*).

9. RECOGNITION AND EXECUTION OF AN EIO AND FORMALITIES

Section 489⁴⁶ of the Estonian CCP stipulates that the Prosecutor's Office, and in particular the Prosecutor General's Office, is competent to receive and recognise an EIO transmitted to Estonia, to conduct proceedings concerning the EIO and to ensure its execution. The Prosecutor's Office may require an investigative authority to execute the EIO or to refer it to another competent judicial authority for execution. Within seven days following receipt of an EIO, the Prosecutor's Office provides a corresponding notification to the competent authority of the issuing Member State.

However, under the abovementioned section, if the EIO has not been issued or certified by a judge, court, pre-trial investigation judge or prosecutor of the issuing Member State, the Prosecutor's Office returns the EIO to the issuing Member State. In practice, Estonia would not just return such an EIO; the Estonian authorities would always contact the issuing State asking for a properly signed EIO so it can be executed. At the same time, if the EIO that has been submitted contains deficiencies or obvious inaccuracies, the Prosecutor's Office consults the issuing State regarding the remedying of these deficiencies.

When executing EIOs, prosecutors and judges apply the Directive in a flexible manner and in accordance with (the spirit of) the Directive. Mutual recognition and trust play a key role. EIOs are recognised and executed without formalities, which is in line with the Directive. The decision-making process is a simple one-step process. At the pre-trial stage, the PGO recognises the EIO without any formalities and forwards it for execution to the competent authority. This is usually the police, namely the special unit competent for international cooperation.

Where it is not possible to comply with one or more requests, the PGO will attach an explanatory note to the documents sent back to the issuing State, clarifying the reasons behind the partial execution. It should be noted that such a cover note is always provided by the Estonian executing authorities, including when the EIO has been executed completely (*see best practice No 8*). Since this approach facilitates the understanding of what measures have been executed, the evaluation team recommends that all Member States provide such a cover note when sending the outcome to the issuing State (*see recommendation No 13*).

Estonian judges receive incoming EIOs during the trial stage via the PGO, from which time they are independent in recognising and executing the EIO. Before recognition, prosecutors and judges request additional information from the issuing Member State, if necessary.

During the evaluation visit, it was established that the PGO, when recognizing an EIO, does not check whether the issuing authority has the competence to order the measure under the applicable national law. In other words: in line with the principle of mutual trust, the issuing authority is trusted to also be competent to issue the EIO. However, when the issuing authority is an administrative authority, the Estonian authorities stated that the request must be validated by a judicial authority.

Estonia has not encountered any cases in which the issuing authority did not complete Section I of the EIO and where issues regarding formalities later arose. As issuing State, Estonia applies the principle of mutual trust and does not require any formalities for execution; Estonia agrees that executing States carry out the requested measures in accordance with their own law, as stipulated in the abovementioned section. When executing an EIO, the instructions described by the requesting State in the EIO are followed, except where compliance with those instructions would be contrary to general principles of Estonian law. Estonian practitioners mentioned the example of a case in which the issuing authority requested that the defence counsel be present during the witness hearing in Estonia. The Estonian authorities explained that, under Estonian law, a witness has the right to have a legal representative present when testifying; however, the defence counsel of the suspected person does not have the right to participate in the hearing of a witness. After consultation, the issuing authority agreed to the hearing of the witness being conducted without participation of the defence counsel.

During the evaluation visit it was established that as an issuing authority, some Estonian practitioners send a description of the rights of the suspect or witness to be presented to them before the hearing. In the opposite situation Estonia has also experienced that the issuing State requested Estonia to follow their procedural formalities during a hearing. However, during the visit the Estonian practitioners indicated that they have some doubts as to the use of such a notification as, ultimately, the person in question cannot invoke the issuing State's rights before the Estonian authorities; nor do they consider themselves competent to communicate rights under foreign legislation to the person concerned. Following specific procedural formalities of the issuing State is generally considered cumbersome.

The evaluation team pointed out that, sometimes, those formalities can be required under pain of nullity by the legislation of the issuing State and that, at least in those cases, and where Estonian law allows, those formalities should be followed, even if they are inconvenient. The evaluation team and the Estonian practitioners agreed that requests under Section I might seem less of a burden if the issuing State were also to include a brief explanation as to why it is important that those requests are met, and what the consequences could be if a specific formality is not complied with. The evaluation team would therefore recommend that, when using Section I, all Member States clarify why the formalities are important and also clearly indicate which formalities are essential (cf. above: pain of nullity) (*see Recommendation No 14*).

10. ADMISSIBILITY OF EVIDENCE

In general, according to the Estonian authorities, no problems have arisen in relation to the admissibility of evidence. By way of example, Estonia mentioned that the rules on searches in Finland and Sweden, for instance, are different to those under Estonian law. On several occasions, Estonian defence lawyers have asserted that searches in other Member States based on an Estonian EIO have not been carried out in accordance with Estonian law. However, during the visit, the Estonian judges confirmed that these assertions have so far been unsuccessful. The Estonian courts consider searches carried out in accordance with the law of the executing State to be acceptable.

11. SPECIALITY RULE

There are no specific provisions in Estonian law regarding the speciality rule. However, and notwithstanding the absence of any specific stipulation in the Directive, the Estonian authorities are of the opinion that the speciality rule also applies to EIOs, and not only to the standard MLA process. Consequently, the Estonian practitioners will always request the approval of the executing State before using evidence that was obtained in response to an EIO for any other purpose or case than the one indicated in the relevant EIO. Since the Estonian authorities expect other Member States to do the same, the letter accompanying an executed EIO never contains any explicit limitation on use.

The PGO has informed the prosecutors who issue EIOs that they must always seek the consent of the executing authority, and the responses from the District Prosecutor's Offices show that this is indeed the approach followed. This is deemed to be a good practice in Estonia, in order to avoid legal issues regarding the validity of evidence. Prosecutors issuing EIOs have stated that they have not asked for consent to use the evidence within the same criminal case in situations where it was also used to prove another offence or the guilt of another person. Nor is authorisation sought if the criminal cases are separated or joined.

In the event that Estonia, as issuing State, receives material from the executing State in response to an EIO showing that another crime under their jurisdiction has been committed, Estonia will open a new investigation without asking the executing State's permission. However, if this information about a new crime was obtained through an investigative measure that, in national proceedings, could not be used for that 'new crime' (e.g. interception of telecommunications for petty theft), the Estonian authorities will not start a new investigation unless the information is subsequently shared with them by means of spontaneous exchange of information (Article 7 Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union).

Estonia always requests consent from the executing State before sharing the evidence obtained through an EIO with other countries. When requesting consent, Estonia has not referred to any specific provision of the Directive.

In general, Estonia does not restrict the use of evidence in other criminal proceedings and they grant corresponding authorisation. The exception is where evidence given to a foreign country also relates to Estonian proceedings, and the prosecutor in the Estonian case considers it necessary to limit the use of the evidence obtained. The use of information will also be limited by the Estonian authorities where Estonia has requested bank information in the context of the execution of an EIO, and that information would also be used in administrative procedures. As there are strict restrictions on the use of bank information, Estonia has not considered it possible to authorise its use in non-criminal proceedings.

As executing State, Estonia has not encountered any cases in which they wanted to use the evidence they obtained through execution of an EIO. However, if such a case were to arise in the future, consent would be requested. As executing State, if the Estonian authorities were to obtain information while executing an EIO and realise by accidental discovery that a crime had been committed, a new domestic investigation would be opened, provided that they were competent to pursue that investigation. In such cases the Estonian authorities would inform the issuing authority.

During the evaluation visit, the Estonian judges informed the evaluation team that they had not encountered any problems relating to the speciality rule during the trial phase. Prosecutors predicted that issues could arise and that a prudent approach could prevent admissibility-related problems.

With regard to the principle of speciality, the evaluation team notes that opinions differ between Member States regarding its application in the context of the EIO. While some Member States assume it is a general principle in international cooperation, others interpret the absence of a specific provision in the Directive to mean that it is permitted to use the evidence for other purposes as well. The evaluation team is of the opinion that it would be useful if the application of the speciality rule in the context of the EIO could be clarified (*see recommendation No 18*).

12. CONFIDENTIALITY

When Estonia acts as executing State, national legislation guarantees the confidentiality of the facts and other content of the EIO, except for what is permissible and required to execute the investigative measure. The executing authority must inform the issuing authority without delay whenever it is unable to ensure the confidentiality of the facts and other content of the EIO.

For Estonia, when acting as issuing State, the EIO is part of the materials of the criminal case. Information relating to pre-trial proceedings may be disclosed only with the authorisation of, and to the extent specified by, the Prosecutor's Office. Disclosure of information concerning pre-trial proceedings is permitted in the interests of the criminal proceedings, of the public or of the data subject, provided that this does not inordinately encourage crime or render detection of a criminal offence more difficult; that it does not prejudice the interests of Estonia or of criminal proceedings; that it does not endanger a business secret or harm the activities of a legal person; or that it does not prejudice the rights of the data subject or of third parties, particularly where personal data of a special category are disclosed. Disclosure of the EIO to the defence counsel and the suspected or accused person is carried out in accordance with sections 223(3), 224 and 224¹ of the CCP, in the same way as for the file overall. When the Prosecutor's Office declares pre-trial proceedings to have been completed, it submits a copy of the criminal investigation file to the defence counsel. At the request of the suspected or accused person, the defence counsel will then present them with the materials. Estonia has never sent or received any notifications under Article 19(2) of the Directive.

According to Estonia, disclosure of the entire case file, including any EIOs issued, is critical for the defence counsel to enable them to properly defend the accused person. Furthermore, the information is used in a trial that is generally open to the public. During the trial stage and the execution of the sentence, access to the case file may not be refused.

The Estonian authorities explained that they had not encountered any problems relating to rules on disclosure or confidentiality. Furthermore, there had not been any issues with Estonian banks or other companies informing their clients about the order for information. Companies in Estonia are not allowed by law to disclose this information.

13. GROUNDS FOR NON-EXECUTION

13.1. General

The EIO Directive lists several optional grounds for non-execution. Article 11 of the Directive has been transposed into section 489⁵¹ of the Estonian CCP, where the grounds for refusal are also listed as optional. However, section 489⁵¹ CCP also refers to section 436 CCP, which regulates more generally the '*Impermissibility of international cooperation in criminal proceedings*'. Its strict wording suggests that the grounds for refusal contained in the section are mandatory in the event that international cooperation could endanger public security, is contrary to the general principles of Estonian law or the cooperation requested is for the purposes of bringing charges on account of race, ethnicity or religious or political beliefs. During the visit, the Estonian authorities explained that they do not see any legal conflict between the optional grounds for refusal in the Directive and the mandatory grounds in section 436 CCP. The Estonian practitioners indicated that, in practice, requests that violate the fundamental principles of Estonian law are always refused and that the outcome of the assessment of an incoming request would not be different with a less coercive phrasing of the ground for refusal. Furthermore, according to section 433 CCP, provisions relating to international cooperation in criminal matters must always be interpreted in accordance with the underlying international legislative instrument, thus eliminating the risk that any refusal would violate the wording, objective or purpose of the Directive (see also Chapter 21.2).

According to the Estonian authorities, there has not yet been a need to refuse the recognition or execution of an EIO based on one of the grounds of refusal. Nevertheless, sometimes it is not possible in practice to execute a specific EIO, for instance because the person cannot be traced or the suspect to be interviewed by videoconference has not given their consent. The meeting with prosecutors and judges during the evaluation visit also confirmed that refusal is rare, from both the issuing and the executing perspective. When acting as executing State, the Estonian practitioners are committed to assisting the issuing State to the best of their abilities and will always consider contacting the authorities of another Member State, sometimes with the assistance of Eurojust or EJM contact points, if necessary.

As issuing State, Estonia has experienced that EIOs have been refused because they were issued by the assistant prosecutor. It appeared that there was confusion as to the role of the assistant prosecutor in Estonia (see also Chapter 4.1). After consultation and explanation by Estonia, the EIOs were executed.

In addition, there have been situations where execution has not been explicitly refused, but more than six months passed from the issuing of the Estonian EIO and despite direct contact and communication via Eurojust, no reply was received. The Estonian authorities consider these situations to constitute a refusal of an EIO in practice. The evaluation team notes that Member States should inform each other about delays and should in any event reply to (multiple) communication attempts of the issuing State (*see recommendation No 15*).

As executing State, Estonian practitioners always contact the issuing State when any issues arise concerning execution of the EIO. Anything that is unclear can be discussed through direct contact.

Furthermore, the Estonian authorities must be applauded for consulting the competent authority of the issuing State before refusing to execute the EIO.

13.2. Dual criminality

Generally, Estonia did not experience any issues with regard to dual criminality and the EIO, either as issuing or as executing authority. However, the practitioners specifically mentioned one case where Estonia requested the surveillance of members of a criminal organisation and the EIO was refused, seemingly because the executing State invoked a lack of dual criminality. In that case, in spite of consultation with the counterparts, no solution was found.

13.3. Ne bis in idem

The Estonian authorities indicated that when the investigation is still ongoing, it is often difficult for the issuing and the executing authorities to verify whether ne bis in idem is applicable to the case at hand due to the very brief description of the facts in the EIO form. The Estonian authorities underline that direct consultation is crucial in such cases. Furthermore, the Estonian practitioners confirmed that all incoming EIOs are checked in the police system for possible links with national investigations.

13.4. Fundamental rights (Article 6 TEU and Charter)

As the issuing State, Estonia encountered one case where an EIO was refused because of a possible fundamental rights infringement. In this case, Estonia wished to hear a witness in the executing State via videoconference. However, this individual was also subject to criminal proceedings in the executing State and information had become available that he had not complied with measures imposed on him within the criminal proceedings in that Member State. Therefore, in addition to hearing, Estonia asked for information to be transmitted about this non-compliance with the imposed measures. This information could be used in the Estonian court proceedings to verify the credibility of the witness statement. The executing State deemed the measure unlawful and argued that the provision of such information could infringe the right of the witness to not incriminate himself and disproportionately restrict his privacy. Execution of the Estonian EIO was therefore refused.

14. TIME LIMITS AND GROUNDS FOR POSTPONEMENT OF RECOGNITION OR EXECUTION

One of the added values of the EIO is the provision regarding time limits for recognition and execution. During the evaluation visit, the Estonian authorities expressed the view that the EIO Directive has considerably increased the speed of cross-border cooperation compared to the MLA regime. Some prosecutors added that the ‘mindset’ has changed and that the increased involvement of Eurojust and the EJM contact points has helped improve compliance with time limits. In the event of a delay, the executing authority is requested to give information about the stage of execution and the reasons for the delay. When direct requests have no effect, EJM contact points and Eurojust are involved.

As executing authority, Estonia usually complies with time limits and submits evidence as soon as possible. Section 489⁴⁷ CCP stipulates that if it is not possible to decide on the question of recognition within the time limit stipulated in subsection (1) of this section, the Prosecutor’s Office notifies the competent authority of the issuing State without delay, explaining the reasons for the delay and stating the additional time required for reaching a final decision, that may not exceed 30 days. Also, if it is not possible to carry out the procedural operation requested in the EIO within the time limit stipulated in subsection (3) of this section, the Prosecutor’s Office notifies the competent authority of the issuing State immediately, providing information about the reasons for the delay and consulting with the competent authority of the issuing State regarding the time for execution of the EIO.

Most commonly, the complexity or labour-intensive nature of a request will be the cause for a delay in the execution of the EIO. The Estonian authorities tend to adopt a pragmatic and flexible approach to incoming urgent EIOs when executing them. For example, in cases where the EIO has been drafted in English, there have been instances where the authorities have already begun executing the EIO even though a translation has not yet been made available, because Estonian special units established for international cooperation are sufficiently fluent in English and can deal with a request made in English. Only where a specific measure requires the authorisation of a pre-trial judge will the relevant documents be translated into Estonian, since this is the sole official procedural language. The PGO and the specialised international cooperation police unit work closely together and, thanks to their expertise and direct contact, they work efficiently and effectively in tandem in executing EIOs (*see best practice No 2*).

As a rule, in the role of the executing State, Estonia complies with the time limits and will seek to execute an EIO within a shorter time than the time limit imposed by the issuing State or resulting from the Directive. In particular, the assessment of urgency in Estonia is based on the criteria of the issuing State and on the seriousness of the criminal offence, whether a person is in custody, whether the trial date is imminent or on other reasons justifying the urgency of the request. However, there have been cases in which the EIO was flagged as urgent by the issuing State but the content of the EIO reveals no urgency.

The work is organised in such a manner that by the time the Annex B form is sent, the Estonian authorities have taken a decision on the execution of the EIO. Therefore, the decision on execution and the contact details of the executing authority are also transmitted to the issuing State. Usually, an EIO is executed within 2 months of being received.

Estonia has extended the time limit for the execution of an EIO in cases where the execution could jeopardise criminal proceedings in Estonia. In such cases, the issuing State is always informed of the delay in the execution of the EIO.

As issuing authority, the experience has been mostly positive, since most executing authorities have respected claims of urgency and have acted accordingly. However, some prosecutors issuing EIOs have stated that there have been issues with the time limits, which appear to be caused by a high workload in the executing State. The COVID-19 pandemic further aggravated the situation. It can also be noted that responses are delayed during the summer holidays. Estonia seldom receives notifications on the decision to execute an EIO or on the possible extension of the time limit but has also experienced delays because the EIO contained requests for many actions to be taken, and the executing State was therefore unable to execute the EIO on time. In such situations, Estonia contacted Eurojust for information and eventually the necessary answer was provided.

The evaluation team would like to repeat its recommendation to all Member States about the importance of informing each other about delays in execution (*see Chapter 13.1 and recommendation No 15*). In addition, it is recommended that all Member States make sensible use of the ‘urgent’ label - which includes not sending the EIO at the last moment - and should provide the executing State with all relevant information to substantiate the urgency (*see recommendation No 16*).

15. LEGAL REMEDIES

The application of legal remedies is subject to the procedure laid down in the CCP and there is no specific provision under Estonian law in relation to a legal challenge to the EIO. The investigative measures referred to in the EIO are subject to the same legal remedies as other procedural measures in criminal proceedings in national cases. Under section 228(1) of the CCP, if a party to proceedings or a non-party, finds that a violation of procedural requirements during the performance of a procedural operation or in relation to the issuing of an order by the investigative authority has resulted in a violation of their rights, they are entitled to file a complaint against such an operation or an appeal against such an order with the Prosecutor's Office before the statement of charges is issued. It is thus possible to file a complaint against any order or action by a prosecutor, including the issuing of an EIO or any measure taken in execution of an EIO in Estonia.

The complaint is first dealt with by the Supervision Department of the Prosecutor General's Office. Under section 230 of the CCP, the decision made by the Supervision Department may still be appealed to the pre-trial investigation judge of the district court in whose area of jurisdiction the contested order was made or the contested procedural operation was conducted. Thus, it was established during the evaluation that all of the national remedies provided for in similar domestic cases are also available in the case of an EIO. In the pre-trial phase there are certain investigative measures which require judicial authorisation or have to be ordered by a judge (for example: search and seizure of a house or interception of telecommunications). Orders and authorisations by a judge in respect of investigative measures are subject to an appeal in the investigative phase. In the opinion of the evaluation team, information on available legal remedies is essential so that the person concerned can seek effective judicial review, where this review can also be ex-post since the interests of the person(s) concerned must always be carefully balanced with the secrecy and protection of the criminal investigation.

During the visit, judges commented that to their knowledge, there have been no cases of appeal against the issuing of an EIO in Estonia. At the same time, it must be noted that no statistics are gathered in this regard. The defence lawyer present during the visit did not provide any examples of the use of legal remedies in the context of the EIO but commented that from the defence side, there were no noteworthy issues on this matter.

16. TRANSFER OF EVIDENCE

According to section 489⁴⁸ of the CCP, the Prosecutor's Office must transfer to the requesting Member State any evidence that is in the possession of the Prosecutor's Office or of the relevant investigative authority, as well as the evidence that was obtained as a result of the execution of the EIO.

As was discussed during the evaluation visit, the Estonian authorities acting as executing State send any evidence gathered by email if possible. Evidence is seldom sent by post, except where a large volume of evidence has been gathered. If the representatives of the issuing authority are present during the execution of the EIO, they can take the evidence gathered with them. The Estonian authorities are able to transmit intercepted telecommunications online or to save the data collected on a data storage device.

Nevertheless, the transferring of evidence from Estonia to the issuing State may be suspended in the event of ongoing Estonian national proceedings linked to the (facts described in the) EIO. In such a case, the Estonian authorities consult the issuing State and an agreement is reached on the temporary transfer of the evidence.

As issuing authority, the Estonian authorities usually receive the collected evidence by email or by post from the executing Member State.

17. OBLIGATION TO INFORM - ANNEX B

Sections 489⁴⁶ and 489⁴⁷ of the CCP contain most of the provisions corresponding to Article 16 of the Directive on the obligation to inform. Within seven days following receipt of an EIO, the Prosecutor's Office provides a corresponding notification to the competent authority of the requesting Member State. Even though the CCP does not explicitly mention Annex B, the EIO and all its Annexes have been enacted in Estonia by a regulation of the Minister in charge of the policy sector. This means that Estonia will always use Annex B as corresponding notification. If necessary, Annex B may be accompanied by a request for additional information.

As executing authority, the Estonian authorities send Annex B and any additional information mostly electronically, using professional secured e-mail. According to the Estonian practitioners, adding a signature to Annex B is superfluous and cooperation could be more effective without it.

The Directive is based on the active exchange of information and active communication with direct contact. Sending Annex B is a requirement to establish direct contact between the competent authorities in the issuing and the executing Member States. As issuing authority, the Estonian authorities are of the view that Annex B is generally received in a timely manner. The evaluation team is of the opinion that all competent authorities in the executing Member States should send Annex B systematically when receiving an EIO (*see recommendation No 17*).

During the evaluation visit, prosecutors stated that there have been cases where they have not received Annex B from the executing State. In such cases, each prosecutor assesses the urgency of the measure. If the measure is not urgent, the prosecutor does not take any action and awaits a reply from the executing State. If the request is urgent, the prosecutor forwards the request to the executing State or requests help from the Estonian representative at Eurojust. That method has ensured that replies are received.

18. COSTS

Article 21 of the Directive was transposed in section 489³⁸ of the CCP. According to this provision, when Estonia is the requesting or the requested State, it bears all costs that are related to the execution of the relevant EIO on its territory. Also, the costs of the appointed defence counsel are always borne by Estonia when acting as an executing State.

As issuing State, Estonia mentioned one example where the executing State did not wish to purchase a USB stick for storing the collected material. In order to receive a reply, Estonia had to send a USB stick. However, this is considered an isolated incident and no other significant problems have emerged concerning costs.

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

There have been cases where Estonia has been asked to execute an EIO in a single action day. Such EIOs have been executed both by direct contact with other Member States and under the coordination of Eurojust. There have been no problems in planning such action days. The Estonian authorities always try to accommodate the issuing State, and Estonian resources are organised in such a way that procedural measures can be carried out in a coordinated manner and on a day that suits the issuing State.

20. SPECIFIC INVESTIGATIVE MEASURES

20.1. Temporary transfer

In the Directive, temporary transfer is covered in Articles 22 and 23. The law of 26 July 2017 has transposed the temporary transfer in section 489³⁹ and section 489⁴⁰ CCP, apart from Article 22(3) of the Directive (applicable *mutatis mutandis* to the temporary transfer under Article 23), that seems to be missing from the CCP. The evaluation team does not necessarily consider this to be problematic given the pragmatic and flexible approach of the Estonian authorities when executing an EIO. The division of the costs related to the temporary transfer are covered by section 489³⁸(3) CCP.

There have been no cases regarding temporary transfer in Estonia, either in an issuing or in an executing capacity.

20.2. Hearing by videoconference

Legal framework

Hearing by videoconference, as referred to in Article 24 of the Directive, is transposed in section 489⁴¹ CCP. The transposition of Article 24 of the Directive led to lively discussions between the evaluation team, the Estonian practitioners and Ministry representatives regarding the following three issues.

Firstly, the additional ground for refusal set out in Article 24(2)(b) of the Directive is not included in section 489⁴¹. The fundamental principles are only mentioned in section 489⁴¹(3)(5) CCP and concern the situation where a request for a videoconference has already been granted and the person concerned is informed of their rights. The representatives of the Estonian Ministry of Justice clarified that the general provisions of the CCP, and section 436 CCP in particular, are equally applicable to the EIO and, consequently, must be read in conjunction with Division 8 ('Cooperation in Criminal Matters between the Member States of the European Union') of the CCP. Section 436 CCP lists the situations in which the Estonian judicial authorities must refuse a request for international cooperation, including '*if such cooperation is contrary to general principles of Estonian law*'. Thus, Estonia considers Article 24(2) of the Directive to be fully transposed.

The evaluation team expressed its concern about the fact that the Directive only contains optional grounds for refusal while the phrasing of section 436 CCP suggests that the listed grounds of refusal are mandatory. The Estonian practitioners indicated that, in practice, requests that violate the fundamental principles of Estonian law are always refused and that the outcome of the assessment of an incoming request would not be different with a less coercive phrasing of the ground of refusal. Furthermore, according to section 433 CCP, provisions relating to international cooperation in criminal matters must always be interpreted in accordance with the underlying international legislative instrument, thus eliminating the risk that any refusal would violate the wording, objective or purpose of the Directive. The evaluation team considers the clarifications and nuances provided by the Estonian authorities to be sufficient and, consequently, does not deem the Estonian transposition of the optional ground of refusal in Article 24(2)(b) problematic (see also Chapter 13.1.).

Secondly, the evaluation team noted that section 489⁴¹(6)(2) CCP requires the executing authority to provide the issuing State not only with the identity information of the person concerned (Article 24(6) of the Directive) but also with contact information, namely a phone number and/or an email address; this is information that the evaluation team considers strictly private. The Estonian authorities were invited to explain to the evaluation team why this information is of importance to the Estonian authorities and whether they had already encountered any difficulties in this regard or reluctance from other Member States (or individuals) to provide this contact information. The Estonian practitioners have not encountered any particular difficulty and indicated that the main reason behind the inclusion of contact information is the enabling of future direct communication between the Estonian authorities and the person concerned, which immediately led to the third and last point of discussion.

Lastly, the evaluation team noted with some concern the recently introduced possibility that can be found in section 489⁴¹ CCP, read in conjunction with section 69(5) CCP, that allows the Estonian judicial authorities, whenever the technical situation allows, to question a witness, an expert or a suspect in another State (both within and outside the EU) without the help of that other State and without notification (a priori or a posteriori).

When asked about the reasons or justification behind this new provision, the representatives of the Estonian Ministry of Justice stressed the practical advantages for all parties concerned and confirmed that they do not consider this practice to constitute a violation of the Directive nor of the other State's sovereignty. Furthermore, the Estonian practitioners emphasised that this procedure is based on consent and the voluntary cooperation of the person concerned and is never used lightly. For instance: the opportunity provided for in section 69 CCP is never used in a substantial general court procedure but only in a simplified procedure (which takes place largely in writing). In practice, according to the practitioners, this procedure is mainly used for Estonian citizens living abroad.

While the evaluation team does see the practical advantages of this method, it has its doubts as to its legality, since ultimately, and notwithstanding the voluntary nature, the method is aimed at and results in the gathering of evidence abroad for which, in principle, an official request should be sent through the appropriate judicial channels. At the very least, an a posteriori official request for permission to use the information resulting from the hearing as evidence in Estonian proceedings should be considered. However, the Estonian authorities argued that, as they at all times remain on Estonian soil, the investigative measure could (and should) be considered to have been executed in Estonia and that, consequently, there is no need to seek the other State's permission to use the evidence obtained. The evaluation team does not agree with this reasoning and would like to point out that, if that reasoning were to be followed, a large part of the Directive would become obsolete given the technological possibilities that are at our disposal.

When asked why, as an alternative and by way of courtesy, the Estonian authorities do not officially notify the other State a posteriori and through the appropriate channels of international cooperation that a person residing on that State's territory was officially questioned by Estonian law enforcement, the Estonian practitioners pointed to the existing legal framework that does not contain any provisions governing this specific situation, and argued that they would not know what foreign authority to send such a notification to. In addition, the Estonian authorities are of the opinion that, given the lack of a unified framework, such a notification would only create confusion with the other Member State.

The evaluation team was interested to know the position of the Estonian courts vis-à-vis the admissibility of evidence gathered using section 489⁴¹ in conjunction with section 69(5) CCP, and was informed that the Estonian courts have gradually moved towards the acceptance of this method and the evidence resulting from it.

There are currently two cases pending before the European Court of Justice (C-255/23 'AVVA and others' and C-285/23 'Linte') following requests for a preliminary ruling by a Latvian court. Latvia has adopted national legislation similar to section 69 CCP; consequently, the outcome of these cases is of particular relevance to Estonia as well. The evaluation team is interested to learn the position of the CJEU in this regard and considers that a ruling of the CJEU on the matter is necessary given the substantial differences in opinion among the Member States that could lead to (further) fragmentation and mutual distrust.

The intense discussions between the evaluation team and the Estonian authorities, as well as the pending court cases, show that the practice where one Member State hears a person outside its territory via videoconference without the involvement of the other State is disputed, and opinions regarding its legality differ considerably. With the adoption of the Directive, Member States agreed that a new approach was necessary to replace the existing instruments in the area of obtaining evidence within the EU. This new approach was based on a single instrument (the EIO) to replace the existing fragmentary regime (see recitals 6 and 7 of the Directive). In the view of the evaluation team, gathering evidence by hearing persons via videoconference in another Member State without using the EIO does not seem to be in line with the aim of the Directive. Consequently, the evaluation team would recommend that the Estonian authorities refrain from the use of section 69 CCP until the CJEU has issued a decision on the matter and, if necessary, adjust its legislation and practice accordingly once a ruling is issued (*see Recommendation No 1*).

Issuing State

The Estonian practitioners have not yet encountered any significant problems when issuing an EIO for a hearing via videoconference. Requests for hearing via videoconference are usually executed promptly.

Executing State

As executing State, requests for a hearing via videoconference are always received by the PGO. When the request concerns the pre-trial phase, the PGO will also be responsible for the execution of the EIO and the hearing will be conducted on police premises; the practical arrangements are left to the police. Normally, this kind of request can be executed without any difficulty. However, requests for a pre-trial hearing to take place in a courtroom or before a prosecutor are problematic, as this is not provided for by Estonian law. When receiving such a request, the Estonian practitioners will consult the issuing State to find a solution.

If, on the other hand, the requested hearing is aimed at evidence gathering in the trial phase, the PGO will, based on the place of residence of the person concerned, send the EIO to the competent local court, which will arrange execution of the foreign request. The representatives of the Estonian judiciary informed the evaluation team that some Member States fail to respect the timing that has been agreed upon and keep the Estonian judge and court staff waiting for hours. While the evaluation team understands that court proceedings are difficult to predict, the spirit of good cooperation and courtesy would require the issuing State to strive to abide by the schedule, or at the very least to keep the executing State informed as the proceedings advance, thus minimising the risk of loss of time on the part of the executing State.

Hearing of a suspect or accused person

Section 489⁴¹(2) CCP stipulates that the hearing of a suspect or accused person via videoconference is only permitted if the person in question gives their consent. Consequently, if the suspect or accused person does not consent, the execution of the EIO can (and will) be refused.

The Estonian practitioners confirmed that, when requested, they will also facilitate the participation of the accused in their trial via videoconference. While the participation of the accused (i.e. their appearance in person in court and bringing them to court) is considered one of the fundamental principles of criminal proceedings, the Estonian authorities consider the accused's audio-visual participation to be an exception in national cases, provided that the accused person gives their agreement. This exception can be found in section 269²(4) CCP, according to which a criminal case may be heard without the participation of the accused if bringing them to court would involve complications, if it is possible for them to participate in the trial by means of a technical solution that complies with the requirements mentioned in section 69 CCP, and if the court is convinced that accused's right of defence is ensured. Furthermore, the Estonian practitioners explained that this is mostly used in national cases in a simplified procedure, and not within a general court procedure.

The Estonian practitioners indicated that, while their legislation allows for a suspect or an accused person to be heard via videoconference (subject to their consent), Estonian law does not contain any provisions governing the issuing or executing of an EIO to ensure that the suspect or accused will also effectively be present at the hearing. Such a request would require a European Arrest Warrant since it does not aim at evidence gathering thus excluding the use of the EIO.

The evaluation team notes that there are differing views between Member States about whether, in the context of the EIO Directive, a defendant may participate in a trial in another Member State via videoconference for the purpose of giving evidence. The question on whether this is allowed under the Directive is the subject of a case pending before the CJEU (see case No C-285/23, ‘Linte’). The evaluation team recommends that the Commission revisit this question in the light of the outcome of the pending case, if appropriate (*see recommendation No 19*).

20.3. Hearing by telephone conference

Although it is possible under Estonian law, the Estonian practitioners indicated that they have not yet used this option (as issuing authority), nor have they ever received a request to conduct a hearing via telephone conference.

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

Legal framework

The EIO Directive has two separate articles for bank/financial accounts and for banking/financial operations (Articles 26 and 27). Section 1² of the Estonian CCP does not contain a specific provision that transposes those two articles of the Directive into national law, nor is reference made to other general rules elsewhere in the CCP that might apply.

The Estonian practitioners clarified that Estonian law does not require the issuing of an order by a prosecutor or judge before financial information (identity, transaction-related or other content) can be obtained; a substantiated request for this by the police suffices.

Furthermore, there are no limitations linked to the status (victim, witness or suspect) of the person whose financial information is requested. The only requirement is that the request must be sufficiently justified, which presupposes, firstly, that there is an underlying national or foreign case and, secondly, that the requested information is relevant and/or material to that case. Consequently, a refusal to provide financial information will never be (solely) based on the person's status but rather on the evaluation by the Estonian authorities of whether, taking into account all the elements mentioned in the EIO, the request is justified. If the EIO received does not contain sufficient elements to justify the financial information request, the Estonian practitioners will, before officially refusing the request, consult the issuing State in order to give the latter an opportunity to provide additional reasons.

Central bank register

The evaluation team was interested to know whether there is a central bank register in Estonia. The Estonian practitioners indicated that such a register does exist; however, only the larger bank institutions are part of it. Consequently, when Estonia receives a request to identify all the Estonian bank accounts of a specific person, a single request submitted to this register will not suffice, and the Estonian practitioners/police will, additionally, need to contact the smaller banks whose data cannot be obtained from the central register.

For the purpose of efficiency and taking into account EU Directive 2015/849⁴, the evaluation team recommends that Estonia take the necessary steps with a view to the creation of a fully centralised register that contains information on all of the banks on its territory, including the smaller institutions (*see Recommendation No 2*).

⁴ Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC.

20.5. Covert investigations

Article 29 of the Directive has been transposed into section 489⁴⁵ CCP, that must be read together with sections 126¹ to 126¹⁷ CCP ('Covert Operations').

According to section 126¹ (1), CCP a 'covert operation' must be interpreted as '*the processing of personal data in order to perform a task provided for by law with the objective of concealing the fact and the substance content of such processing from the data subject*', and thus covers quite a large variety of investigative measures, including, for instance, the covert examination of postal items and the secret interception of audio or visual information (section 126³ CCP). A covert operation requires the written approval of the public prosecutor or pre-trial investigation judge; in urgent situations, the covert operation may be initiated without written approval as long as (1) approval in a 'reproducible form' was given, and (2) written approval follows within 24 hours (section 126⁴ CCP).

Section 126⁹ CCP regulates the use of an undercover agent, defined as '*a person who uses a changed identity and conducts a covert operation to collect information on the preparation of a criminal offence for the purpose of detecting or preventing it, in confiscation proceedings or in criminal proceedings*'. The term changed identity covers both a false and covert identity.

In the past, Estonia encountered some difficulties in allowing foreign agents to act as undercover agents in Estonia. In the meantime the law has been amended and the Estonian authorities confirmed that there is no legal impediment any more to allowing a foreign national to act as an undercover agent. Consequently, if this is in the interest of the investigation, the Estonian practitioners will consider issuing an EIO for the purpose of requesting the assistance of another Member State in the form of providing an undercover agent. Civilian undercover agents are permitted in Estonia and the same provisions of the CCP apply to them.

The first additional ground for refusing to execute an EIO as stipulated in Article 29(3)(a) of the Directive is not included in section 489⁴⁵ CCP but can be found in section 489⁵¹(1)(3).

The first two sentences of Article 29(4) of the Directive do not seem to have been included in section 489⁴⁵ CCP but this deficiency is rectified by the general principle of interpretation and conduct in conformity with the Directive enshrined in section 433(2) CCP.

The Estonian practitioners do not recall any cases where differences in national law complicated the execution of an EIO for covert investigations.

20.6. Interception of telecommunication

Legal framework

Article 30 of the Directive, the interception of telecommunication with technical assistance from another Member State, has been transposed in section 489⁴³ of the CCP. The additional ground for refusal described in Article 30(5) of the Directive can be found in section 489⁵¹(1)(3) CCP, and the division of costs (Article 30(8)) is dealt with in section 489³⁸(2)(2) CCP.

Article 31 of the Directive, the interception of telecommunication without technical assistance from another Member State, has been transposed in section 489⁴⁴ CCP. Section 489⁴⁴ CCP does not refer to Annex C (cf. Article 31(2) of the Directive), but the responses provided by the Estonian practitioners show that Annex C is used in the correct manner and that, consequently, the absence of a specific provision regarding the use of the Annex is not problematic. The Estonian practitioners consider the Annex C form to be well structured and see no need to modify it.

In the pre-trial phase, the secret interception of messages transmitted via a public electronic communications network or of audio or visual information transmitted by any other method can only be authorised by a judge (cf. section 126⁷ CCP).

The Estonian authorities informed the evaluation team that, according to Estonian law, the person(s) involved must be informed of the interception measure as soon as it is completed. When provided with thorough reasons, the prosecutor can decide independently to postpone this notification for one year; after that point, only a judge can authorise a further postponement of the notification. As executing State, Estonia will always consult the issuing State before notifying the person(s) involved.

When Estonia is the issuing State, the person(s) concerned can appeal the decision to issue an Annex C with the prosecutor's office and, at the subsequent stage, with the court.

Scope of application

Pursuant to section 489⁴³(1) CCP, where an EIO is issued for the covert interception of messages transmitted via public electronic communications networks or of information communicated by other methods, the provisions of section 126⁷ of the CCP are followed. Thus, under Estonian law, the interception of telecommunications is not limited to the interception of telephone communications but can also involve the interception of electronic communications more broadly. The evaluation team considers this broad definition of ‘telecommunications’ to be a good practice that, once again, illustrates the flexible approach of Estonia (*see best practice No 9*).

It must however be noted that, strictly speaking, section 489⁴³(1) in conjunction with section 126⁷ CCP only applies to actual communications and cannot be used for location data (GPS). Consequently, as issuing State, the Estonian practitioners will not use Annex C for GPS data, but will instead issue an EIO. As executing State, the Estonian practitioners use a pragmatic approach and will, depending on the circumstances of the case, accept Annex C for the interception of mere location data or for the interception of location data combined with content data (e.g. a tracker that not only allows the investigating authority to track the vehicle it is attached to, but also to listen in to conversations that are held inside the vehicle). No prior authorisation or notification is required.

Issuing State

The Estonian practitioners indicated that requests for the interception of telecommunication do not usually pose any problems. The practitioners did point out that some Member States have stricter rules on accepting ex-post notifications, which can complicate matters.

Estonia had a rather negative experience when, in an important case in which several Annex C notifications were sent to different Member States, Estonia received only one response (from Poland). In the absence of any reaction from the other notified States, Estonia only used the information that resulted from the interception on Polish soil as evidence. When asked by the evaluation team, the Estonian practitioners indicated that they had not considered interpreting the non-reply as an implicit consent. The evaluation team notes that there is no consensus as to the possibility of ‘implicit consent’ when a Member State does not respond to an Annex C notification within a reasonable timeframe. The Joint Note of Eurojust and EJM on the practical application of the EIO states that the absence of approval ‘*could lead to concerns about the admissibility of the evidence*’.⁵ Therefore, the evaluation team sees fit to recommend that the Commission clarify whether the absence of a reply to Annex C can be considered to constitute the implicit consent of the notifying State to use the information as evidence (*see recommendation No 20*).

Executing State

To assess whether the interception of telecommunications would be authorised in a similar domestic case, Estonia first identifies the type of crime in question, and whether interception in Estonia would be allowed for that crime. Secondly, the substantive justifications set out in the EIO concerning the need for interception are examined, i.e. whether the principle of *ultima ratio* applies and whether it would be difficult or impossible to gather evidence in the normal course of proceedings. In particular, Estonia relies on the principle of mutual recognition and on the fact that the issuing State has considered the interception necessary, and further information is only requested if the need for action is insufficiently justified in the EIO.

When providing technical assistance for the interception of communications, there are no legal obstacles to transmitting the telecommunications directly to the issuing State (cf. Article 30(6)(a) of the Directive). However, this is not always practically feasible. The Estonian practitioners indicated that an IT solution has been developed with Finland that allows both States to transmit intercepted communications directly, but this is not the case with all Member States.

⁵ Joint Note of Eurojust and the European Judicial Network on the practical application of the European Investigation Order, June 2019 (chapter 6.7.)

20.7. Cross-border surveillance

Upon analysis of the applicable Estonian national legal framework, the evaluation team noted that, contrary to recital (9) of the Directive, an EIO can, according to section 489⁴² in conjunction with section 472 CCP, also be used for the purpose of cross-border surveillance.

The Estonian authorities explained that they do not feel bound by the aforementioned recital since it is not part of the operative section of the Directive. Furthermore, the Estonian practitioners are of the opinion that a distinction must be made between mere police surveillance without an already existing underlying case on the one hand, and surveillance within the context of a criminal investigation ordered by a judicial authority on the other hand. According to the Estonian practitioners, the latter must be considered judicial cooperation rather than (mere) police cooperation and, consequently, should fall within the scope of the Directive. The evaluation team considers this to be a valid argument. In this regard, the evaluation team also notes the *D4.3 Code of Best Practices* available on the EJM website, specifically point 68 (concerning the distinction between police surveillance and surveillance within a criminal investigation) and point 342 (concerning whether the EIO covers cross-border surveillance and the tracking of objects).⁶

For cross-border surveillance there is no clear approach. There are differences between Member States as to whether and to what extent it is a measure of police cooperation (Article 40 CISA) or of judicial cooperation. Also, within the judicial cooperation field, different legal bases could apply in the EIO Directive. This does raise some questions as to the relationship between the Directive and CISA (in particular Article 40), and the evaluation team therefore calls for clarification by the Commission in order to streamline the practice across Europe and avoid misunderstandings. (*See recommendation No 21*).

Issuing State

In accordance with the above, the Estonian practitioners will, if circumstances allow, issue an EIO for the purpose of cross-border surveillance in the context of an ongoing criminal investigation. For instance, there are well-established and efficient communication channels between Estonia and Finland, hence requests for cross-border surveillance (even urgent ones) in the context of an ongoing investigation with Finland will be made via EIO.

⁶ D4.3 Code of Best Practices - Proposal for 100 Best Practices, March 2019, EuroCoord

However, the Estonian practitioners indicated that, if necessary, and depending on the specific circumstances of the case (for instance the other Member State involved and the level of urgency), Article 40 CISA will still be used in order to carry out cross-border surveillance for the purpose of evidence gathering in an ongoing criminal investigation. This Article 40 request will then be followed by an EIO seeking the other Member State's consent to use the evidence obtained in the ongoing investigation and, at a later stage, in the criminal proceedings before the court. For example, in urgent cases, cross-border surveillance with Latvia will be requested via Article 40 CISA, followed by an EIO.

Executing State

Since they are aware of the different opinions regarding the use of an EIO for cross-border surveillance within the EU, the Estonian practitioners (in this case, the already mentioned specialised police unit) will act on Article 40 CISA requests from other Member States and, normally, the requesting authority will not be asked to subsequently issue an EIO.

20.8. Other investigative measures (e.g. house search)

Article 28 of the Directive, dealing with investigative measures implying the gathering of evidence in real time, continuously and over a certain period of time, was transposed in Article 489⁴³, read together with Article 126⁷ of the CCP and covers the “covert interception of information”.

In addition, the Estonian practitioners indicated that, in the event that a requested measure is not explicitly regulated in Division 1², they can always fall back on the other (general) rules of national law and apply them *mutatis mutandis* to requests for international cooperation.

However, it must be noted that points 2 to 4 of Article 28 of the Directive concern the relationship between the requesting and requested authority, something that presumably cannot be found in the other (general) rules of national law. In this regard, the Estonian practitioners assured the evaluation team that, even though there is no specific section in the CCP transposing the aforementioned points, section 433(2) CCP ensures that the Directive is complied with.

When asked, the Estonian practitioners stated that they do not consider house searches to fall within the scope of Article 28 of the Directive regarding ‘investigative measures implying the gathering of evidence in real time, continuously and over a certain period of time’. Furthermore, the Estonian practitioners indicated that, in their view, it does not really matter whether or not all the correct boxes are ticked and/or all the relevant sections of the EIO (in this case section H5) are properly filled out. As long as the EIO contains sufficient information and reasons to justify and explain the requested investigative measures (Section C), it is of secondary importance to the Estonian practitioners whether or not this information can be found in the appropriate section.

When sending an EIO to Estonia for the purpose of seizure (whether or not combined with a search), it is advisable to specify the object(s) of interest as this will minimise the risk of unnecessary seizures. As far as the hand-over of the goods is concerned, there is no legal obstacle that would prevent an immediate transfer of the seized goods to the requesting State.

Estonian legislation requires a court authorisation before certain measures can be conducted in execution of an EIO. The form of this authorisation may vary depending on the measure. For a search for example, the judge can simply add their signature to the prosecutor’s application (section 91(2) CCP). For surveillance measures, the court will issue a separate decision authorising the measure.

21. STATISTICS

The Estonian authorities were asked to provide statistics for the last five years concerning the number of incoming/outgoing EIOs, the number of cases refused, and the number of cases in which the execution of the EIO was postponed.

Statistical data on EIOs issued and received are collected manually; however, a new information system will soon be introduced that will collect the data automatically. It is important to emphasise that all the data presented below are only for EIOs sent by prosecutors, since courts do not collect statistics on this. The data received are as follows:

INCOMING EIOs

2018	2019	2020	2021	2022
176	505	583	942	1047

OUTGOING EIOs

2018	2019	2020	2021	2022
297	296	320	298	253

As already indicated, the above data refers solely to EIOs processed by the prosecution service. The evaluation team is of the view that such data should also be collected by courts, to permit a full overview of the application of the EIO in Estonia in both the pre-trial and the trial phase (*see recommendation No 3*).

Cases of refusal, as both issuing and executing State

2018

Executing State – 3 refusals:

- one case regarding a crime that was statute-barred;
- one case regarding a request for permission to use information received from the FIU;
- one case where Estonia was given too short notice to hear the witness.

Issuing State – no information.

2019

Executing State – 1 refusal:

- one case where the defendant did not consent to a hearing being conducted via videoconference.

Issuing State – no information.

2020

Executing State – 2 refusals:

- one case where the suspect did not consent to a hearing being conducted via videoconference;
- one case where the witness did not reside in Estonia.

Issuing state – no information.

2021

Executing State – 4 refusals:

- one case where the EIO did not concern a criminal office;
- two cases where the suspects did not consent to a hearing being conducted via videoconference;
- one case where the witness was abroad.

Issuing State – no refusals.

2022

Executing State – no refusals.

Issuing State – 2 refusals:

- one case concerning a videoconference;
- one case concerning a covert surveillance operation.

22. TRAINING

As a best practice, the evaluation team would like to mention the special handbook on international cooperation especially written for prosecutors. Along with the handbook, the PGO has prepared an annotated EIO form which is intended to provide answers to questions that may arise when completing the form (*see best practice No 3*). The handbook and annotated EIO form are updated when necessary.

In 2022, an “ABC” training on international cooperation was organised, in which 41 prosecutors participated. A training course on international cooperation and information management procedures was organised in 2019, in which a total of 28 prosecutors participated. In addition, a total of four international cooperation training courses took place in 2017 (the number of participants is unknown, but these were organised in different districts, with a total of 54 prosecutors participating in two courses), and in 2015, with 54 prosecutors participating. The Prosecutor’s Office organises internal training for prosecutors. There has been no training on the EIO for prosecutors at national level. Some prosecutors who are more exposed to the topic have also participated in the relevant training sessions provided by the European Judicial Training Network (EJTN).

According to section 44(1) of the Courts Act, one of the judicial self-government bodies – the Judicial Training Council⁷ – is responsible for the training of judges in Estonia, which is served by the Legal Information and Judicial Training Department of the Supreme Court. The Judicial Training Council is also competent to assess the quality of training. In order to do so, all available information sources are used that provide information on the impact of training. These sources of information include, in particular: (i) anonymous written feedback; (ii) active communication with the target group (i.e. judges and court officials); (iii) persons and institutions (e.g. prosecutors and advocates) dealing with the courts; (iv) questionnaires and surveys. Estonia does not assess the quality of judicial training at national level.

⁷ In addition to judges, the Judicial Training Council includes representatives of the Prosecutor’s Office, the Estonian Bar Association, the Ministry of Justice and the University of Tartu.

Generally, the training of judges is based on an annual training programme as an impact of assessment of their training needs. The last training course on the EIO was held in 2019 and included 12 judges, 16 law clerks, four Supreme Court law clerks, two prosecutors, two advisers to the Ministry of Justice and three attorneys.

During these training courses, it is possible for the participants to exchange views and best practices. The courses are not mandatory. The team of experts noted that a specialised training course for judges on the EIO had not yet been implemented. During the visit, judges expressed a wish to receive more training and to receive the prosecutor's handbook as a source of information. The evaluation team would like to make a recommendation to Estonia accordingly (*see recommendation No 4*).

23. FINAL REMARKS, RECOMMENDATIONS AND BEST PRACTICES

23.1. Suggestions by Estonia

According to the Estonian authorities, the process for the execution of EIOs is very well established in Estonia. Estonia considers it positive that there is a single competent authority in Estonia for receiving and recognising EIOs (the PGO). In the authorities' view, this ensures that it is easy for the issuing State to find the authority to which the EIO should be sent, on the one hand, and, on the other hand, that the recognition and execution of EIOs is dealt with by specialised prosecutors, which significantly expedites this process and ensures a common practice. In addition, Estonia indicated that around 90% of EIOs are executed in Estonia by a specific department of the Police and Border Guard Board, which speeds up the execution process.

Furthermore, Estonia mentioned to the evaluation team that it considers it positive that Estonian authorities accept EIOs sent electronically and do not require paper originals. This also significantly expedites the execution of EIOs.

For Estonian issuing authorities, it is very important that the executing State clearly indicates the reason for (partial) non-execution when replying to an EIO. Estonia has encountered a few cases where such information was not sufficiently provided (*see also Chapters 13.1 and 14 and recommendation No 15*).

Regarding videoconferences, Estonian practitioners noted that practical problems have occurred, for example when it was not possible to establish a connection between the two Member States. In addition, Estonia would like the issuing State to indicate approximately how long a videoconference will last, so the Estonian court can reserve the videoconference room for the appropriate amount of time.

Lastly, Estonian authorities mentioned that the language requirements of Member States are not always clearly stated in the EJM Atlas (*see also Chapter 6.2*).

23.2. Recommendations

Regarding the application and implementation of Directive 2014/41/EU, the team of experts involved in assessing Estonia found the Estonian system to be satisfactory.

The evaluation team sees fit to make a number of suggestions for the attention of the Estonian authorities. Furthermore, based on the various good practices identified, related recommendations are made for the attention of the EU. Estonia should conduct an 18-month follow-up to the recommendations referred to below after this report has been agreed by COPEN.

23.2.1. Recommendations to Estonia

Recommendation No 1: To consider refraining from using the possibility of hearing a person abroad without issuing an EIO, as provided for in section 69 CCP, until the CJEU has issued a decision on the matter, and, if necessary, to adjust its legislation and practice accordingly (*Chapter 20.2*).

Recommendation No 2: To take the necessary steps to create a fully centralised register that contains information about all the banks on its territory, including the smaller institutions (*Chapter 20.4*).

Recommendation No 3: To introduce the possibility of collecting statistics at the courts in order to have a full overview of the application of the EIO in Estonia in both the pre-trial and the trial phase (*Chapter 21*).

Recommendation No 4: To organise more training courses on the EIO for judges and to share with them the handbook created by the PGO (*Chapter 22*).

23.2.2. Recommendations to the other Member States

Recommendation No 5: Member States should pay particular attention to the quality of the EIO, making an effort to keep the perspective of the reader in mind when completing the form (*Chapter 6.1*).

Recommendation No 6: Member States should accept EIOs in English, particularly in urgent cases (*Chapter 6.2*).

Recommendation No 7: Member States should ensure that the contact person(s) mentioned in the EIO speak(s) English at a sufficient level to allow for effective direct communication (*Chapter 6.2*).

Recommendation No 8: Whenever there is any doubt, Member States issuing an EIO are encouraged to check with the executing State how they wish to receive an EIO that will need to be executed by multiple authorities (*Chapter 6.4*).

Recommendation No 9: When acting as an executing State, Member States should refrain from assessing the necessity of issuing the EIO itself, since the discretion to do so cannot be derived from the Directive (*Chapter 7*).

Recommendation No 10: Member States should keep the information on the EJN website up to date to enable direct contact between authorities (*Chapter 8*).

Recommendation No 11: Member States are encouraged to send EIOs by electronic means where possible (*Chapter 8*).

Recommendation No 12: Member States should refrain from using personal email addresses when issuing an EIO or in correspondence about its execution (*Chapter 8*).

Recommendation No 13: When acting as executing State, Member States should include a cover note along with the evidence, to inform the issuing State efficiently about the action taken to execute its request (*Chapter 9*).

Recommendation No 14: When acting as issuing State, Member States should explain in the EIO why the requested formalities are essential (*Chapter 9*).

Recommendation No 15: Member States should inform each other about delays, and they should in any event reply to (multiple) communication attempts of the issuing State (*Chapters 13.1 and 14*).

Recommendation No 16: Member States should make sensible use of the ‘urgent’ label and should provide the executing State with all relevant information to substantiate the urgency (*Chapter 14*).

Recommendation No 17: Member States should send Annex B systematically (*Chapter 17*).

23.2.3. Recommendations to the European Union and its institutions.

Recommendation No 18: The Commission is invited to clarify the application of the speciality rule in relation to the EIO (*Chapter 11*).

Recommendation No 19: The Commission is invited to clarify the application of the EIO in connection with ensuring the accused person’s presence at their trial, also in light of the outcome of the pending case before the CJEU (*Chapter 20.2*).

Recommendation No 20: The Commission is invited to clarify whether the absence of a reply to Annex C can be viewed as implicit consent by the notifying State to use the information as evidence (*Chapter 20.6*).

Recommendation No 21: The Commission is invited to clarify the application of the Directive in relation to Article 40 of the CISA in respect of the surveillance of vehicles where a GPS tracking device or a device for audio surveillance in the vehicle has been attached and/or a technical device for the recording of audio/video has been installed (*Chapter 20.7*).

23.2.4. Recommendations for the EJN

Recommendation No 22: The EJN is encouraged to translate the Atlas into all EU languages (*Chapter 8*).

23.3. Best practices

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

Estonia is to be commended for:

1. Their general commitment to execute all EIOs to the best of their abilities (*Chapter 1*).
2. The smooth and effective cooperation between the different bodies involved in dealing with the EIO in Estonia (*Chapters 1 and 14*).
3. Creating a handbook and an annotated EIO form for prosecutors on the proper handling of EIOs (*Chapters 4 and 22*).
4. The possibility for victims to request an EIO to be issued (*Chapter 4.3*).
5. Taking into account whether an EIO could be an effective alternative to an EAW, especially with regard to a hearing via videoconference (*Chapter 5*).
6. Accepting EIOs in English (*Chapter 6.2*).
7. Always seeking direct contact during the execution of the EIO to clarify possible doubts or problems (*Chapter 8*).
8. Sending, upon execution of an EIO, the results back with a cover letter that, if necessary, provides additional clarifications or a justification as to why a specific measure could not be executed (*Chapter 9*).
9. The broad definition of ‘telecommunications’ in national law (*Chapter 20.6*).

3 October 2023 – Ministry of Justice, Tallinn, Estonia

09:30-10:00	Welcome and presentations: - Ministry of Justice - Prosecutor General's Office - Southern District Prosecutor's Office - Harju County Court - Police and Border Guard Board
10:00-12:30	Meeting with the authorities listed above
12:30-13:30	Lunch
13:30-16:30	Meeting with the authorities listed above

4 October 2023 – Ministry of Justice, Tallinn, Estonia

09:30-12:30	Meetings with representatives of: - Ministry of Justice - Prosecutor General's Office - Southern District Prosecutor's Office - Harju County Court
12:30-13:30	Lunch
13:30-15:15	Meeting with the authorities listed above
15:30-16:30	Meeting with the representative of the Estonian Bar Association

5 October 2023 – Ministry of Justice,

10:00-10:30	Final Q&A with representatives of the Prosecutor General's Office and the Ministry of Justice
10:30-12:00	Wrap-up meeting

ANNEX B: LIST OF ABBREVIATIONS/GLOSSARY OF TERMS

LIST OF ACRONYMS, ABBREVIATIONS AND TERMS	ENGLISH
CATS	Coordinating Committee in the area of police and judicial cooperation in criminal matters
CCP	Code of Criminal Procedure
CISA	Convention Implementing the Schengen Agreement
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
e-EDES	e-Evidence Digital Exchange System
EIO	European Investigation Order
EJN	European Judicial Network in criminal matters
EJTN	European Judicial Training Network
FIU	Financial Intelligence Unit
JIT	Joint Investigation Team
MLA	Mutual Legal Assistance
PGO	Prosecutor General's Office
SIS	Schengen Information System
