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Subject:	**EVALUATION REPORT ON THE 10th ROUND OF MUTUAL EVALUATIONS** **on the implementation of the European Investigation Order (EIO)** **REPORT ON AUSTRIA**

ANNEX

EVALUATION REPORT ON THE

TENTH ROUND OF MUTUAL EVALUATIONS

On the implementation of the European Investigation Order (EIO)

REPORT on AUSTRIA

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1. EXECUTIVE SUMMARY

Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters ('the Directive') responded to a well-identified practical need for a comprehensive system based on mutual recognition, for obtaining evidence in cases with a cross-border dimension, replacing the previous fragmented evidence-gathering system, while taking into account the flexibility of the traditional system of mutual legal assistance ('MLA'). Moreover, the European Investigation Order ('EIO') was intended to create a high level of protection of fundamental rights and to implement the accumulated practical experience, based on direct communication between European judicial authorities. Consequently, the EIO struck a balance between the approaches of mutual recognition and mutual assistance. After the Directive had been in effect for more than five years, it was decided, within the tenth round of mutual evaluations, to assess the application of the main instrument for gathering evidence.

The information provided by Austria in the questionnaire and during the on-site visit was detailed and comprehensive, and the evaluation visit was both well prepared and well organised by the Austrian authorities. The evaluation team got a good overview of the strengths and weaknesses of the Austrian system, which enabled them to identify some key issues that need to be addressed at national and European level, resulting in the recommendations made in Chapter 23.1.

It should be highlighted that the Austrian system seems to be working well in practice, which is mirrored in the number of best practices identified, outnumbering the recommendations addressed to Austria by far.

The topic of grounds for non-execution was discussed at length during the on-site visit. Under Austrian law, all grounds for non-execution are mandatory, in contrast to the provisions of the Directive. The Austrian authorities consider that it would not be sufficient to simply render the grounds of refusal optional under Austrian law; rather, a set of criteria would have to be added for every single ground for non-execution in order to be compliant with the Austrian Constitution and requirements to limit discretionary power of the competent authority.

In conclusion, the Austrian authorities consider that a distinction between mandatory and optional grounds for non-execution would be best handled at Union level in the Directive. While duly noting Austria's concerns, the evaluation team still encouraged Austria to consider amending the transposing legislation in order to render all grounds for non-execution optional, as provided for by the Directive.

The e-Evidence Digital Exchange System (e-EDES) aims at bringing a much-needed development in the transmission of the EIO and in communication between the issuing and executing authorities, by creating a secure information channel. Even though Austria was amongst the first Member States to implement e-EDES, several shortcomings have already been identified by Austrian practitioners. In the light of these findings, it would be useful if the Commission were to look into the shortcomings identified. One of the areas for improvement would be a link between e-EDES and the EJN Atlas.

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

- include cross-border surveillance for evidence-gathering purposes;
- make Annex A more user-friendly;
- clarify the applicability of the rule of specialty in the context of the EIO and its interplay with data protection principles;
- clarify whether the notion of 'interception of telecommunications' under Articles 30 and 31 also covers other surveillance measures, such as the bugging of cars, GPS tracking and installing spywares. If not, consideration should be given to amending the Directive to introduce special provisions that also regulate such measures, including the situation where no technical assistance is needed from the Member State concerned (notification mechanism).

The Union legislator is also invited to revisit the question of the participation of the accused person at the trial via videoconference from another Member State, in light of the outcome of the case currently pending before the CJEU, if appropriate.

During the on-site visit, it was pointed out that there are often discussions on the choice of instrument between the issuing and executing authorities. For the sake of the criminal proceedings, a solution must be found, but in the long run, the interrelation of mutual recognition instruments should be handled at European level. The evaluation team therefore saw fit to invite the Commission to provide guidelines on the interrelation of mutual recognition instruments.

2. INTRODUCTION

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

Under Article 2 of the Joint Action, as agreed by the Coordinating Committee in the area of judicial police cooperation in criminal matters ('CATS'), after an informal procedure following its informal meeting on 10 May 2022, as set out in Directive, the tenth round of mutual evaluations will focus on the EIO.

The tenth mutual evaluation round aims to provide real added value by offering the opportunity, via on-the-spot visits, to consider not only the legal issues but also - and in particular – the relevant practical and operational aspects linked to the implementation of the Directive. It will allow both shortcomings and areas for improvement to be identified, together with best practices to be shared among Member States, thus contributing towards ensuring a more effective and coherent application of the principle of mutual recognition at all stages of criminal proceedings throughout the Union.

More generally, promoting the coherent and effective implementation of this legal instrument at its full potential could significantly enhance mutual trust among the Member States' judicial authorities and ensure a better functioning of cross-border judicial cooperation in criminal matters within the area of freedom, security and justice.

[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.

Furthermore, the current evaluation process could provide helpful input to Member States that may not have implemented all aspects of the Directive.

Austria was the thirteenth Member State visited during this round of evaluations, as provided for in the order of visits to the Member States adopted by CATS on 29 June 2022 under the silence procedure[2].

In accordance with Article 3 of the Joint Action, the Presidency has drawn up a list of experts in the evaluations that are to be carried out. Pursuant to a written request sent to delegations on 15 June 2022 by the Secretariat of the Council of European Union, Member States have nominated experts with substantial practical knowledge in the field.

The evaluation team consists of three national experts, supported by one or more members of staff from the General Secretariat of the Council and observers. For the tenth 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 Austria were Ms Gunilla Arph-Malmberg (SE), Mr George Gavrila (RO) and Ms Barbara Ujlaki (LU). Observers were also present: Ms Lisa Horvatits from Eurojust together with Ms Emma Kunsági from the General Secretariat of the Council.

This report was prepared by the team of experts with the assistance of the General Secretariat of the Council, based on the detailed replies of Austria to the evaluation questionnaire, the findings from the evaluation visit carried out in Austria between 12 and 14 September 2023, where the evaluation team interviewed the representatives of the Ministry of Justice, the Ministry of Interior, the Public Prosecution Service, the judiciary and the Bar Association.

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

3. TRANSPOSITION

In Austria, the basic law for mutual legal assistance and extradition is the Act on Extradition and Mutual Assistance - *Auslieferungs- und Rechtshilfegesetz* ('ARHG') from 1979. However, when the European instruments on mutual recognition were introduced, a new law was instigated, the Federal Law on Judicial Cooperation in Criminal Matters with the Members States of the European Union - *Bundesgesetz über die justizielle Zusammenarbeit in Strafsachen mit den Mitgliedstaaten der Europäischen Union ('EU-JZG'*). The Directive was transposed by amending the EU-JZG by the Federal Law Gazette I 28/2018 and entered into force on 1 July 2018. Austria has gathered together all EU legislation on judicial cooperation in criminal matters in this act, and Chapter IV Part 1 of the EU-JZG concerns EIOs (*see Best practice No 1).*

If something is not regulated in the EU-JZG, the provisions of the ARHG and the Austrian Code of Criminal Procedure ('CPC') apply.

In addition, the EIO Directive was implemented in

- the Federal Act on Financial Criminal Cooperation with the Member States of the European Union (for cooperation in administrative fiscal criminal proceedings); and
- the Federal Act on the European Investigation Order in Administrative Criminal Matters (for cooperation concerning administrative criminal law).

The focus of the visit to Austria was on cooperation in criminal proceedings within the meaning of Article 4 point a) of the Directive and the provisions of the EU-JZG.

4. COMPETENT AUTHORITIES

4.1. Issuing authorities

4.1.1. Criminal proceedings within the meaning of Article 4 point a) of the Directive

The competent authorities for outgoing EIOs are the public prosecutors' offices ('PPO') and the district and regional courts, i.e. any judicial authority can issue an EIO. In addition, in the updated notification on the competent authorities under Article 33 of the Directive, Austria has also stipulated the European Public Prosecutor's Office as a competent authority to issue an EIO. Furthermore, there is a specialised Prosecution Office for the Fight Against Serious Economic Crimes and Corruption, based in Vienna, issuing EIOs falling under its competence.

During the investigation, the prosecution service is usually competent to issue the EIO. Austria has a prosecutorial system for criminal investigations. It should be noted that the prosecution service needs to meet all the procedural requirements set out in the CPC before issuing an EIO. In the case of more intrusive measures, e.g. a house search or a telephone interception, the prosecution service needs to issue a national order and seek approval from a court before issuing the EIO.

After filing an indictment, the court that will conduct the main trial is competent to issue an EIO.

4.1.2. Administrative criminal proceedings within the meaning of Article 4 point b) of the Directive

The competent authorities for outgoing EIOs are the administrative crime authorities and the administrative courts. The administrative crime authorities are as follows:

- the district administrative authorities (*Bezirksverwaltungsbehörden*), which are the district authorities (*Bezirkshauptmannschaften*), the mayor in the case of cities with their own statutes, or the magistrate in the case of Vienna;

- the regional police departments (*Landespolizeidirektionen*) in their operational areas in municipalities where the regional police department is also the security authority of first instance[4].

If the EIO has to be issued in criminal proceedings pending before an administrative court, the administrative courts (the regional administrative courts and the Federal Administrative Court) are competent.

Special procedures are provided for in the Federal Law on the European Investigation Order in administrative criminal matters[5]. The procedure closely resembles the procedure under the EU-JZG, with the administrative authorities taking over the role of the prosecution.

4.1.3. Criminal fiscal proceedings brought by the administrative authorities within the meaning of Article 4 point c) of the Directive

In the case of fiscal offences (tax or customs offences) involving an evaded amount below EUR 150,000 (EUR 75,000 in the case of customs offences), the tax and customs offices and the Federal Fiscal Court (appeal court) are competent[6].

Special procedures are provided for in § 8a to 8l of the Federal Law on international cooperation in fiscal offences[7]. The procedure closely resembles the procedure under the EU-JZG, with tax and custom authorities taking over the role of the prosecution.

[4] Eisenstadt, Rust, Graz, Leoben, Innsbruck, Klagenfurt am Wörthersee, Villach, Linz, Steyr, Wels, Salzburg, Sankt Pölten, Wiener Neustadt, Schwechat, Fischamend, Klein Neusiedl, Schwadorf, Vienna.
[5] *Bundesgesetz über die Europäische Ermittlungsanordnung in Verwaltungsstrafsachen* - EEA-VStSG.
[6] https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties/EN/2133.
[7] *Bundesgesetz über die internationale Zusammenarbeit in Finanzstrafsachen, Finanzstrafzusammenarbeitsgesetz* – FinStrZG.

4.2. Executing authorities

The competence for executing an EIO depends on different criteria, such as, for example, which phase of the criminal proceedings the request concerns, what kind of measure is requested or whether it concerns an administrative criminal proceeding or a criminal fiscal proceeding. However, if an authority receives an EIO for which it is not competent, it must ex officio transfer the EIO to the competent body.

Under § 25a CPC, a prosecution authority that considers itself not to have jurisdiction for the investigative measure requested, should adopt urgent measures if necessary, and then transfer the proceedings as well as documents to the competent prosecution authority. In the same way, an EIO which falls under the jurisdiction of an administrative authority or a financial crime authority must be transferred to the competent authority, in accordance with § 55c(5) EU-JZG. The Austrian authorities state that there are no problems with identifying the authority which executes the EIO. When the PPO receives an EIO, they assess whether it constitutes a criminal act under Austrian law and, if so, they can execute it under the criminal justice system. Otherwise, they would hand over the EIO to an administrative authority.

In the PPO of Vienna, there is a specialised department for international cooperation; other PPOs do not have specialised units.

4.2.1. Criminal proceedings within the meaning of Article 4 point a) of the Directive

The competent authorities for incoming requests for the recognition and execution of an EIO are, in principle, the PPOs.

In Austria, there is decentralised competence for incoming EIOs, meaning that the competence lies with the PPO in the jurisdiction where evidence needs to be collected. When multiple measures are requested in different parts of Austria, the PPO receiving the EIO splits it, and forwards it to the other PPOs competent for execution. This decentralisation is sometimes perceived as cumbersome by practitioners, in particular in complex cases (which are roughly 10% of all requests).

The Austrian Desk at Eurojust had also recommended centralisation. During the on-site visit however, the Austrian delegation explained the constitutional background, meaning that the allocation of a case to a judge has to be based on strict, foreseeable and transparent rules. Any different approach would need a constitutional change.

In the opinion of the Austrian authorities, there is no need for a centralised point for coordination of EIOs. One has to keep in mind the geographical factors: Austria shares its border with seven countries and, therefore, most international cooperation involves bordering countries. A centralised solution would therefore undermine the very good cooperation which takes place in the close border areas of Austria.

If the EIO concerns information from criminal proceedings, the transfer of files or the conduct of hearings, and charges have already been brought in Austria, the regional courts and district courts (*Landesgerichte* and *Bezirksgerichte*) are competent. The EIO must then be transmitted to the court before which the proceedings are pending.

In addition, the specialised Prosecution Office for the Fight Against Serious Economic Crimes and Corruption, based in Vienna, executes EIOs falling under its competence.

In the case of transit through Austria for the temporary transfer of a person in custody under Articles 22 and 23 of the Directive, competence lies with the Federal Ministry of Justice.

4.2.2. Administrative criminal proceedings within the meaning of Article 4 point b) of the Directive

The competent authorities for incoming EIOs are in principle the administrative crime authorities (see Chapter 4.1.2).

If the EIO concerns information from criminal proceedings (at the appeal stage) pending before an administrative court or the transfer of the corresponding files, the administrative courts (the regional administrative courts and the Federal Administrative Court) are competent. The EIO must be transmitted to the authority before which the proceedings are pending.

4.2.3. Criminal fiscal proceedings brought by the administrative authorities within the meaning of Article 4 point c) of the Directive

If the EIO concerns a fiscal offence (tax or customs offence) involving an evaded amount below EUR 150,000 (EUR 75,000 in case of customs offences), the tax and customs offices, as the fiscal crime authorities, are responsible for the recognition and enforcement of the EIO. The EIO must be transmitted to the central authority within the meaning of the Directive, the Competence Centre for International Cooperation in Fiscal Criminal Investigations ('CC ICFI').

4.3. Central authorities

In criminal proceedings, the Ministry of Justice is designated as the central authority. However, the Ministry of Justice does not have much competence when it comes to EIOs, its role being more of an advisory nature. The Ministry of Justice should, however, receive reports on refusals to recognise and execute EIOs, but not many reports are sent in practice. The cases reported mainly concerned the ex-post authorisation of optical and acoustic surveillance in Austria, which is not possible.

Austria has nominated a central authority for criminal fiscal proceedings brought by the administrative authorities (tax and customs offences), namely the above-mentioned CC ICFI.

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

An accused person has the right to request the collection of evidence in accordance with § 55 CPC. The right to such a request is not unlimited; it has to be reasonable and concerning evidence which is admissible, relevant and suitable to prove a substantial material fact. It follows from §6(6) point 1 CPC that a victim who is a private party also has the right to request the taking of evidence pursuant to §55 CPC.

The Austrian authorities have explained that these general rules of the CPC mean that if such a request involves gathering of evidence in another Member State, the Prosecution Service could issue an EIO. The rights of the defendant relate to the gathering of evidence, but not to how the evidence should be obtained.

If the public prosecutor refuses to act on the request from the suspect or the victim, the refusal can be appealed to the court with reference to violations of personal rights during the investigation phase, in accordance with § 106 CPC. During the trial, the presiding judge will decide on producing evidence. If the judge decides not to grant such a motion, the Court of Lay Assessors will decide on the motion - § 238(1)-(3) CPC. There are no further possibilities to challenge this decision, other than to appeal the final judgement.

Another possibility is to appeal for nullity on the basis of a violation of fundamental rights - §281(1) subpara 4 and §345 CPC.

According to the representative of the Bar Association, the suspect is not usually represented by a defence lawyer during the investigation stage unless the suspect is detained, which limits the practical application for such requests. It is assumed that if the defence asks for an investigative measure that would require the issuance of an EIO, the prosecutors would usually abide by the request and the lawyers would therefore rarely need to use the possibility to appeal.

5. SCOPE OF THE EIO AND RELATION TO OTHER INSTRUMENTS

Austrian legislation provides that an EIO can be used both during the investigation phase and during the main trial. While there is no limitation to these two phases, there is no evident need for an EIO at a later stage as the gathering of evidence is concluded when the judgement is final. The Austrian authorities believe that there is no need to issue an EIO during the execution of a judgement.

In accordance with § 55(2) EU-JZG, an EIO should not be issued for establishing a joint investigation team ('JIT'), for the service of procedural documents, for obtaining criminal records of other Member States and for cross-border surveillance, in case the latter involves police measures.

Discussions sometimes take place between the issuing and executing authorities on the choice of instrument but, in the opinion of Austrian practitioners, these can in general be easily resolved by requesting or supplying additional information.

A representative of the Ministry of Justice noted that, except for the Council Framework Decisions 2008/909/JHA[8] and 2002/584/JHA[9], none of the mutual recognition instruments touches upon the interrelation between them and issues are encountered in practice. The representative noted that, in the long run, the interrelation of mutual recognition instruments should be handled at European level (see *Recommendation No 21).*

When it comes to the interrelation between EIO and the European arrest warrant ('EAW'), the Austrian delegation noted that there are many possibilities to execute evidentiary measures also on the grounds of an EAW, such as trying to locate a person, or using telephone interception for that purpose, and executing a house search. Not all Member States share the same view, some require an EIO to first locate the wanted person. The Austrian authorities usually do not issue an EIO for the purpose of locating a person.

In general, the location of a person can be ascertained via police cooperation channels or – if not and the requirements are met – an EAW is directly issued by the Austrian authorities. Although some Austrian practitioners state that they sometimes, along with the EAW, simultaneously issue an EIO for the sake of safety. It would be possible to issue an EIO to locate a victim in an abduction case, as long as there is an ongoing criminal investigation.

[8] Council Framework Decisions 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.
9 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

As executing Member State ('executing State'), Austrian authorities do encounter EIOs for locating persons, but their execution does not cause any problems.

A problem that has arisen in Austria is that some Member States issue an EIO requesting a video conference for the purpose of ensuring the attendance of an accused person during the main trial, and not only for evidence gathering purposes. The Austrian authorities are of the opinion that an EAW should be issued for the purpose of a defendant standing trial. Under Austrian law, it is not permissible for a defendant to stand trial via video conference.

The relation between EIO and JIT is usually not problematic. It is, however, necessary to get the approval of the court when it comes to intrusive coercive measures within a JIT. However, the Austrian delegation could imagine that issues might occur when there are overlaps between the JIT investigations, but it would not be parallel investigations.

While it is clear from the wording of Article 3 of the Directive that gathering of evidence between JIT partners does not fall within the scope of the EIO, during the onsite visit the evaluation team learned that such a practice exists or may exist in Austria. For example, if a coercive measure requested by a JIT partner to be executed in Austria would concern a person who is not subject of the Austrian investigation (and court authorisation is needed), an EIO might be required in such a case. The evaluation team notes that there are diverging views between Member States as to the need to issue EIOs between JIT members in such cases.

In the opinion of the Austrian authorities, the rule of speciality does not apply in the context of EIOs, therefore, evidence which is gathered through an EIO issued by a JIT member can be shared not only with the other JIT members, but also outside the JIT.

EIOs that request copies of judicial decisions or copies of case files can be regarded as gathering of evidence and do not pose any problems in practice.

The Austrian authorities have pointed out that the distinction between freezing for evidentiary purposes and for the purpose of confiscation sometimes causes challenges in practice. These measures are interlinked, and the purpose may change during the course of the investigation. In Austria, the measures are handled by different authorities and are dealt with by different procedures. This distinction based on the purpose of the measure is very cumbersome and artificial. Before the application of the EIO, such measures could be requested in a single MLA request. The practitioners, and also the evaluation team, see this issue as a weakness of the EIO in comparison to the MLA system.

Under Austrian law, all information in the case file is considered as evidence, even if it has been gathered through police cooperation channels. The Austrian authorities have encountered problems with certain Member States, which limit the use of information as evidence. However, if the executing authority insists on an EIO being issued for the same evidence already received through police channels, this would be possible under Austrian law. In Austria, there are limited rules on the admissibility of evidence. The exclusion of evidence is possible only under specific circumstances, such as that a person was not informed properly of his or her rights when being heard as a witness, or when statements were obtained through torture or threats. The lack of detailed provisions on admissibility is balanced out by the assessment of the reliability of the evidence by the judge during the main trial.

In the experience of Austrian practitioners, both as issuing and as executing State, it is very common in the context of administrative proceedings that EIOs are issued to obtain personal data necessary for the enforcement of an administrative decision, e.g. to identify the owner and/or driver of a vehicle that committed an infringement of traffic rules.

The Austrian authorities informed the evaluation team that the national house search order is always attached to an EIO when it is sent to another Member State. According to Austrian jurisprudence, the national order should be served to the person affected since it contains information on legal remedies. However, they do not always receive information that the national order has been served as requested, despite reminding the executing authority about it.

5.1. Cross-border surveillance

The interpretation of cross-border surveillance and also the applicable legal framework is very different across the Member States. In some Member States, this measure is a form of police cooperation based on Article 40 of the Convention implementing the Schengen Agreement ('CISA')[10]. Other Member States are, however, of the opinion that cross-border surveillance can also be considered as a judicial measure, as a means to gather evidence in real time and, therefore, the EIO should be applicable.

This is an area of cooperation in which there is a lack of a uniform approach between the Member States. There is no union legislation on cross-border surveillance to be used as evidence in criminal proceedings and, therefore, it would be desirable to have a specific provision in the Directive (*see Recommendation No 20*).

Austrian practitioners reported that the unfolding of the measure depends on how surveillance should be carried out, namely if there are also technical means or only face-to-face observation. When an EIO is received, there is a specialised unit in the Ministry of Interior responsible for cross-border surveillance and they make observations on the spot. The replies from practitioners show that this measure is based on the use of the EIO and is implemented by the police on the basis of the order of the prosecutor in a timely manner, given that there is an on-call service in prosecution units.

It should be noted that Austria has bilateral treaties with several neighbouring Member States regulating both police and judicial cooperation in criminal matters, which actually allows for ex-post notification of cross-border surveillance in urgent cases.

[10] Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders

For example, there is a bilateral treaty with the Czech Republic in force containing both police and judicial cooperation articles. Article 28(2) of this treaty allows for ex-post notification in urgent cases[11]. Similar provision are contained in bilateral treaties on police cooperation with Slovenia, the Slovak Republic, Germany, Hungary and Italy. According to the information from the Austrian police, these provisions are used from time to time in urgent cases.

6. CONTENT AND FORM OF THE EIO

6.1. Challenges relating to the form

In the opinion of the Austrian authorities, the EIO form is cumbersome and time-consuming to fill out. This is partly due to the fact that, compared to the form for the EAW, no attachment that contains part of the information is provided for and the length of the form may result in omissions.

In particular, in the early phase of the application of the EIO, in 2018 and 2019, incomplete forms were very common. While the situation has improved, Austrian practitioners still receive incomplete or inaccurate EIOs. For example, questions for persons to be interviewed might be missing or there is no timeframe stipulated for a requested interception. In such cases, clarification is usually provided through direct consultation.

The Austrian authorities provided some other examples. In one case, the content of the EIO was incomplete because information on the (estimated) amount of the evaded tax was missing. This information is required, among other things, to determine competence in Austria. In another case, the amount of tax evaded was very low, EUR 8,000, so the Austrian executing authority asked the issuing authority for further information regarding necessity and proportionality. The response was that there was a typo, and the right amount was EUR 8,000,000.

11 https://ris.bka.gv.at/NormDokument.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004858&FassungVom=2024-01-01&Artikel=28&Paragraf=&Anlage=&Uebergangsrecht=

A revision of Annex A to make it shorter and more user-friendly might be worth considering *(see Recommendation No 20)*. The Austrian authorities also suggested transferring section H to section C so that special requirements are not omitted. Furthermore, it would be helpful if the issuing authorities mentioned other related instruments in section D *(see Recommendations No 1 and No 8)*.

The issues relating to the e-EDES will be dealt with under Chapter 8.

6.2. Language regime and problems related to translation

In accordance with §55d(1) EU-JZG, an EIO to be executed in Austria must be translated into German, unless the issuing Member State ('issuing State'), when acting as executing State, allows for an EIO to be received in German. In the latter case, Austria will accept an EIO in another language (§ 55(3) EU-JZG). This is in line with what Austria has notified to the Commission in accordance with Article 33 of the Directive.

The practitioners stated that they could, in exceptional cases, accept an EIO in English, as long as it does not need to be presented for a judge. In the court, all proceedings are in German and all documents need to be translated into German. All Member States, including Austria, should consider accepting EIOs in English, at least in urgent cases (*See Recommendations No 2 and No* 9*.)*

In the experience of practitioners, when Austria is the executing State, questions occasionally arise concerning the quality of translations, because of the suspected use of an online translating tool rather than a qualified translator in the issuing State. In one case, due to the poor translation, the questions for the witness to be heard were difficult to understand. It is to be noted that, according to Austrian practitioners, the automatic translation provided by e-EDES is not very satisfactory. In a few cases, translations were not provided at all. When they receive an EIO with an unacceptable translation, the Austrian executing authorities usually ask for a new translation. In one case, the Austrian executing authority translated the EIO into German at its own cost *(see Recommendation No 10).*

It is the evaluation team's understanding that the online translation tool provided in e-EDES was never intended for formal translation of an EIO. On the contrary, it should only be used to obtain an understanding of the basic content, with a view to deciding on the competent executing authority or taking preparatory steps in urgent cases.

As issuing authority, a few cases have been reported where it was difficult to determine the applicable language regime of the executing State, for which reason the Austrian authorities would like to see the EJN Atlas updated with accurate information on the applicable language regime *(see Recommendation No 11).*

6.3. EIOs containing multiple requests

Austrian authorities reported no serious issues relating to additional or conditional EIOs, or the splitting of EIOs.

The Austrian authorities have no problems executing multiple requests. In the case of multiple measures involving several competent executing authorities in Austria, Austrian practitioners recommend issuing a single EIO. One of the competent PPOs would, in that case, coordinate the execution of the various measures with the other PPOs. In reality, it would be the police who would be responsible for coordinating i.e. multiple house searches. The issuing authority would be informed via Annex B that the EIO would be executed by different PPOs.

The Austrian authorities stated that the practical arrangements seem to be the main difficulty when it comes to the coordination of the execution of multiple EIOs that have to be made in an often very tight timeframe. The practical arrangements cover in particular communication with police forces, which also have to make their own preparations. Some cases have been resolved via direct contacts, others with the support of Eurojust.

6.4. Orally issued EIOs

The Austrian executing authorities are of the opinion that an oral EIO goes beyond the scope of the Directive. However, an orally issued EIO could perhaps be accepted in a very urgent case as long as a written EIO is issued as soon as possible. No cases of orally issued Austrian EIOs have been reported to date.

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

§5 CPC provides for a general legal assessment of necessity and proportionality when authorities and courts exercise coercive measures and executive powers.

This general principle of proportionality also applies to the procedures laid down in the EU-JZG pursuant to §1(2) EU-JZG, read in conjunction with §9(1) of the ARHG. An EIO is issued following an assessment of the proportionality of the measure, where the main criteria are the seriousness of the crime and the expected sentence in the event of a conviction. As part of the proportionality assessment, the issuing authorities also check whether other less intrusive measures would be sufficient.

When Austria is the executing authority, legal remedies have questioned the proportionality of an EIO. However, the courts have ruled that the proportionality of EIOs issued by another Member State cannot be reviewed in Austria[12].

The Austrian practitioners stated that there have not been many cases where Article 10 of the Directive had to be applied in practice. As an example of recourse to a less intrusive measure, Austrian practitioners mentioned EIOs issued for the search of the premises of a bank/financial institution. Instead of ordering a house search, the Austrian executing authorities issued a production order to the bank for specific documents. The Austrian executing authorities usually inform the issuing authority of the recourse before execution.

[12] 22 Bs 256/18k Higher Regional Court of Vienna.

8. TRANSMISSION OF THE EIO FORM AND DIRECT CONTACTS

Austrian practitioners consider it sufficient to transmit EIOs by electronic means. This is also considered secure enough by the Austrian authorities. If, however, the executing authority requests the original EIO to be sent by post, the Austrian authorities have to comply with this request under §56(7) EU-JZG. To ensure more secure communications, the PPO of Vienna was amongst the first authorities to join e-EDES on 14 June 2022, which allows the secure exchange of EIOs within e-CODEX[13] *(see Best practice No 2 and Recommendation No 12)*. For authorities that do not yet take part in e-EDES, the transmission of EIOs via e-mail or fax is deemed sufficiently secure.

Even though Austria has implemented the e-EDES, several shortcomings were identified by practitioners. As in e-EDES, Annex A is a mask to be filled in; the issuing authority has to fill in and issue the EIO and then extract the documents as a pdf needed for the Austrian case file. Consequently, issuing an EIO via e-EDES takes much longer. Also, any communication made within e-EDES has to be transferred to the Austrian digital case file by extracting them from e-Edes. Furthermore, the quality of the machine translation is very bad and is no longer accepted by the PPO Vienna. In the light of these findings, it would be useful if the Commission could look into the shortcomings already identified *(see Recommendation No 22)*. Another area for improvement would be a link between e-EDES and the EJN Atlas *(see Recommendations No 23 and No 25).*

The Austrian authorities use the EJN Atlas to identify the competent authority in another Member State. In a few cases, the competent authority in the EJN Atlas was incorrect or not up to date. The existence of an updated list of executing authorities would be helpful *(see Recommendation No 11).*

[13] Regulation (EU) 2022/850 of the European Parliament and of the Council of 30 May 2022 on a computerised system for the cross-border electronic exchange of data in the area of judicial cooperation in civil and criminal matters (e-CODEX system), and amending Regulation (EU) 2018/1726.

The Austrian authorities are in direct contact with the competent authorities of other Member States. In more complex or problematic cases, if needed, Austrian practitioners seek the assistance of the Federal Ministry of Justice, the EJN and Eurojust. Eurojust was mentioned on multiple occasions during the on-site visit, not only as reliable transmission channel for EIOs, but also in relation to its coordination role. There is good contact with the Austrian Desk at Eurojust.

9. RECOGNITION AND EXECUTION OF EIO AND FORMALITIES

9.1. Recognition and execution in line with the mutual recognition principle

The principle of mutual recognition underlies the spirit of the Directive. As such, executing authorities are bound to recognise EIOs transmitted to them without any further formalities and to execute them in the same way as if the investigative measure had been ordered by an authority of the executing state (Article 9(1) of the Directive), a formula which pursues efficiency, simplicity and expediency, as well as seeking to limit excessive requests for additional information.

In case of Austria as executing authority, §55e(1) EU-JZG pertains to the necessary orders from the prosecution authority or the court in order to execute the investigation measure. §55e(5) EU-JZG transposes Article 12(3) of the Directive and requires a decision to be taken within 30 days on the execution of the EIO. Austrian law does not provide for a formal recognition decision. §55f EU-JZG provides that the EIO should be executed without delay, and no later than within 90 days.

9.2. Compliance with formalities

In the replies to the questionnaire, Austrian executing authorities indicated that they do not currently require the relevant judicial authorisation to be attached to the EIO.

During the on-site visit, it was confirmed that consideration was being given to amending §55a(1) no. 9 EU-JZG in this respect. This amendment would be a reaction to the judgment of the CJEU in case No C-724/19, *Spetsializirana Prokuratura*, where the prosecution service issued an EIO to gain access to location and traffic data associated with a telecommunication. However, under the national law of the issuing authority, this measure could only be ordered by a judge and the prosecution service did not apply for a court order in respect of that measure. Instead, the EIO was issued without any underlying court decision or authorisation. The CJEU held that, in such cases, the public prosecution service cannot issue an EIO.

From the perspective of Austria as an issuing authority, there is usually a reference to the Austrian national court orders in the EIO. Considering the judgment mentioned above it is envisaged to make this obligatory with the next amendment of the EU-JZG. The national court order is however not attached to the EIO, except when the requested investigative measure concerns a house search; in those cases, the national order is usually attached as, under Austrian legislation, the person concerned by the measure needs to be served with the court order upon execution of the house search.

From the perspective of Austria as an executing authority, §55d(6) EU-JZG provides that a request to execute an EIO, which requires procedures deviating from Austrian law, must be complied with unless such procedures would violate essential domestic legal principles (transposing Article 9(2) of the Directive). There were cases where the Austrian executing authorities requested a copy of the national court order from the issuing State in the case of a search and seizure measure.

Austrian practitioners further explained that some Member States require the suspect to give his or her statement under oath during a hearing. While this is not provided for under Austrian law, if this formality is explicitly required, the Austrian executing authorities comply with the request, even if it has no consequence under Austrian law. The evaluation team considers that this approach to complying with procedural formalities unknown under Austrian law is a best practice, as such flexibility contributes significantly to an expeditious and proper execution of the EIO and takes into consideration the admissibility of evidence in the issuing state (*see Best practice No 3).*

As issuing authority, the Austrian practitioners indicated that – other than the serving of the national search order to the concerned person - they do not usually require particular formalities in the execution of the EIO.

During the on-site visit, it was pointed out that, under the EIO regime, it is much easier to allow for the presence of foreign officials/lawyers during the execution of investigative measures in Austria. Under the old MLA regime, the Ministry of Justice had to authorise their presence. Now the prosecutor in charge of the EIO execution can decide on the presence of foreign officials or lawyers.

10. ADMISSIBILITY OF EVIDENCE

Article 82(2) TFEU concerning the possibility of adopting minimum rules in view of the mutual admissibility of evidence has not yet been implemented, creating space for uncertainties concerning the admissibility of evidence pertaining to the different legal systems of different EU Member states.

As issuing authorities, the Austrian authorities do not usually require specific formalities in the execution of EIOs. Austrian practitioners have thus not encountered any particular issues relating to the admissibility of evidence stemming from non-compliance with certain formalities or procedures in the execution of EIOs. There are limited rules on the admissibility of evidence embedded within the Austrian CPC: evidence is generally considered to be admissible unless declared inadmissible by law.

The exclusion of evidence is possible only under specific circumstances, such as when a person was not informed properly of his or her rights when being heard as a witness or statements were obtained through torture or threats, etc. If the judge declares such evidence as admissible the judgment may be annulled during an appeal. When the court authorisation for a real time surveillance measure (e.g. telephone interception, audio/video surveillance in a private place) or collection of telecommunication traffic data is challenged successfully, the Court of Appeal will order the deletion of the evidence gathered through the annulled measures.

11. RULE OF SPECIALITY

Neither the EU-JZG, nor the Directive contain a general provision on the rule of speciality, the only exception being the provision in relation to temporary transfer (Article 22(8) of the Directive, transposed by §55g(6) EU-JZG). The evaluation team notes that there are different interpretations among Member States as to the applicability of the speciality rule to the EIO, as well as to the scenarios it applies to, linked also to questions of legality, opportunity and confidentiality. Several situations can be distinguished where the rule of speciality could potentially be applicable or give rise to differing interpretations.

From the replies to the questionnaire, as well as the information provided during the on-site visit, it emerges that in general, Austria considers that the speciality rule does not apply in the framework of the execution of EIOs.

There is an exception however, as the speciality rule is specifically foreseen in relation to the surveillance of communication. § 55l(3) EU-JZG provides that the results of such a surveillance cannot be used by the issuing authority in other proceedings for another punishable act than the one mentioned in the EIO, unless Austria as executing authority has given prior consent.

So far, Austrian practitioners reported to have not encountered any cases where the evidence obtained through an EIO issued by Austrian authorities was needed in other domestic proceedings.

As the Austrian authorities are bound by the legality principle, a domestic investigation would need to be initiated if the results of the execution of an EIO reveal that a crime other than the one that gave rise to the issuing of an EIO had been committed. During the on-site visit, Austrian practitioners explained that, from their point of view of an executing authority, they would not need to seek consent from the issuing State if they need to use the evidence obtained in the framework of the execution of an EIO for another crime in a national proceeding.

The issuing State is therefore not necessarily informed about the opening of national proceedings or the use of evidence for other purposes. However, the Austrian authorities confirmed that they would seek consent from the issuing State to use evidence collected within the framework of the execution of an EIO, if requested by the issuing State *(*see *Recommendations No 3* and *No 13).*

In relation to the question of whether there are specific speciality rules provided for in national legislation, the Austrian authorities referred to *Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA* ('LED').

According to the Austrian interpretation, the LED provides for the free flow of data when the data protection principles (e.g. proportionality, necessity and legality) are abided by. The LED also includes specific provisions on the exchange of data with third countries, such as the consent requirement, their conclusion being that there is no requirement to seek consent between Member States.

The evaluation team notes that there are different views on the subject of whether the rule of speciality applies to the EIO, and if so, to what extent and under what circumstances. The evaluation team considers that the data protection rules of the LED are not interchangeable with the rule of specialty, even though both concepts are undeniably intertwined, and that data protection rules certainly have speciality rule features. The speciality rule is, however, concerned with the *use limitations of evidence*, while data protection is rather concerned with the *purpose principle of the collected data*.

In light of these findings, and considering that these issues are not specific to Austria, the evaluation team invites the EU legislator to clarify the applicability of the rule of speciality in the context of the EIO and its interplay with data protection principles (see *Recommendation No 20*).

12. CONFIDENTIALITY

During the on-site visit, Austrian practitioners considered that the confidentiality requirements of Article 19 of the EIO Directive concern rules of disclosure and transparency in terms of availability of information and access rights to the public.

In Austria, all documents related to the issuance, recognition and execution of the EIO are part of the national case file (including the national order and EIO form). Before the indictment, access to the case file may be limited; after the indictment the case file must be disclosed to the suspect and his counsel to the full extent.

Austrian practitioners reported some problems relating to the rules of confidentiality. During one investigation, it was necessary for the Austrian issuing authority to obtain a decision from another Member State in order to assess whether investigations in Austria were barred due to application of Article 54 of the CISA. The decision was submitted by the executing authority under the condition that it would not be subject to access to the case file, which would render the information submitted useless for the criminal procedure in Austria.

In another case, the executing authority wanted to keep parts of the communication with the Austrian issuing authority confidential. The latter informed the executing authority that, in accordance with the CPC, all official communications are part of the prosecution file, and that Article 19 of the Directive does not provide for such an exemption from the rules on disclosure.

13. GROUNDS FOR NON-EXECUTION

The grounds for non-recognition and non-execution provided for by the Directive (Article 11 and other grounds mentioned in Chapter IV of the Directive) constitute an exhaustive list, which needs to be interpreted restrictively, as these grounds constitute an exception to the principle of mutual recognition. Therefore, under the EIO regime, no margin is available to refuse the execution of EIOs on grounds that are not included in the Directive.

13.1. Transposing legislation

All grounds for non-execution under Austrian law are mandatory, provided for in §55a EU-JZG. This is in contrast to the rules and principles originating in the provisions of the Directive, where all grounds for non-execution are optional. Thus, it should be up to the discretion of the executing authority to decide on a case-by-case basis, and not a predetermined decision of the national legislator, applicable without exceptions to all situations.

During the on-site visit, the Austrian authorities explained that the grounds for non-execution are mandatory, in order to be consistent with the mandatory grounds of refusal within the framework of the EAW, which under Austrian national legislation are also all mandatory grounds. It was noted that Austria has been criticised for this practice in the past.

The Austrian authorities consider that, following the jurisprudence of the CJEU and in accordance with the national legal framework, which require certain criteria on which the grounds for non-execution may be based, the implementation of solely optional grounds would be quite problematic. It would not be sufficient to simply render the grounds of refusal optional under Austrian law, but rather a set of criteria would have to be added for every single ground for non-execution in order to be compliant with the Austrian Constitution, which seems like a very difficult, if not impossible, task for the legislator (e.g. what criteria to include for the non-execution based on the *ne bis in idem* principle), and could prove to be counterproductive if the criteria are too restrictive or incomplete.

In conclusion, the Austrian authorities consider that a distinction between mandatory and optional grounds for non-execution would be best handled at Union level in the Directive, as Austria is not the only Member State where all or some of the grounds for non-execution have been transposed as mandatory.

While duly noting Austria's concerns, the evaluation team still encourages Austria to consider amending the transposing legislation in order to render all grounds for non-execution optional, as provided for by the Directive *(see Recommendation No 4).* The current relevant transposition risks negatively affecting the application of temporary transfers (see Chapter 20.1.) and hearings by videoconference (see Chapter 20.2). During the on-site visit, the Austrian delegation underlined that the EU legislator did make a differentiation between mandatory and optional grounds for non-execution in other instruments for judicial cooperation in criminal matters.

On the other hand, the evaluation team considers that the grouping of all grounds of non-execution in one single article in the EU-JZG constitutes a best practice, as it provides for a clear and comprehensive framework on this subject *(see Best practice No 4).*

13.2. Grounds for non-execution in practice

According to Eurojust, the two most frequent grounds for non-execution identified in Eurojust's casework have been dual criminality (Article 11(1) point g) of the Directive) and the *ne bis in idem* principle (Article 11(1) point (d) of the Directive).

Austrian practitioners reported very few cases where grounds for non-execution were invoked, whether as issuing and executing authorities. If, however, an issue relating to possible non-execution arises, the Austrian authorities usually consult with the relevant authority where such a step would make sense. For example, if the offence listed in the EIO is clearly not punishable under Austrian law, there is no point in having a consultation.

The most common grounds for non-execution encountered by the Austrian authorities, both as issuing and executing State, are the absence of dual criminality and national restrictions on the use of certain investigative measures in accordance with Article 11(1) points g) and h) of the Directive, respectively.

Lastly, the Austrian authorities informed the evaluation team during the on-site visit that consideration was currently being given to amending the 'fundamental rights' and other grounds for refusal under Austrian law, which are rather broadly formulated in the EIO, in order to reflect the CJEU's jurisprudence, which would reduce the scope of application of grounds for refusal in line with the CJEU's case law.

One issue that was discussed with the evaluation team was that if a house search is requested, it is essential that the stated address for the search is correct. If the EIO contains an incorrect address, the EIO is considered invalid and would not be executed. However, if the Austrian police identified the correct address, the prosecutor would solve the issue through direct consultations with the issuing authority. The reason for this strict approach is that a house search is subject to a judicial approval and the relevant address cannot be changed informally.

13.3. Dual criminality

Austrian practitioners encountered no cases where the dual criminality test under Article 11(1)(g) of the Directive was applied in relation to the category of offences set out in Annex D, or where the dual criminality test was invoked in relation to the investigative measures listed in Article 10(2) of the Directive, acting either as issuing or executing authorities.

13.4. Fundamental rights and fundamental principles of law

As executing authorities, recurring problems arise in Austria in respect of EIOs where the issuing authority requests a videoconference to enable the accused to participate in the whole trial. Such requests cannot be executed in Austria, because the Austrian authorities consider that they would not be compliant with fundamental principles of procedural law in Austria, in particular the principle of immediacy (§ 13 CPC), the right to a fair trial (Article 6(1) of the European Convention on Human Rights ('ECHR')) and the right of (immediate) access to a lawyer (Article 6(3) point c ECHR). In addition, according to the Austrian authorities, it can be argued that Article 1 of the Directive sets out its aim as the gathering of evidence, whereas participation in the whole trial goes far beyond the gathering of evidence.

During the on-site visit, it was made clear that hearings via videoconference during the main trial are never accepted in Austria. In the evaluation team's view, occasional hearings of accused persons during trial via videoconference could, however, also serve the purpose of evidence gathering. Therefore, the evaluation team invites Austria to provide for the possibility of allowing at least occasional hearings of the accused via videoconference during the main trial. At the same time, it should be noted that Austria is not the only Member State to share this point of view.

The very question of whether the participation of the accused person at the trial via videoconference from another Member State is allowed under the Directive is the subject of a pending case before the CJEU (see case No C-285/23, *Linte*). The evaluation team recommends that the Union legislator revisit the question, in light of the outcome of the pending case, if appropriate (see *Recommendations No 5 and No 24*; also see more information on this subject in Chapter 20.2).

13.5. Ne bis in idem

In accordance with the Directive, Austrian legislation provides for the *ne bis in idem* principle as a ground for non-execution, with an exception not specifically provided for by the Directive: when the accused person has requested a specific investigative measure or gathering of evidence in the proceedings before the issuing authority (§55a(1) point 3 EU-JZG.)

The Austrian authorities have not encountered specific issues relating to the violation of the *ne bis in idem* principle. Nevertheless, the representative of the Bar Association mentioned during the on-site visit that, in his opinion, the *ne bis in idem* principle is sometimes violated – without, however, giving a concrete case example - and constitutes one of the weaknesses of the EIO regime.

14. TIME LIMITS

The provisions on time limits for recognition and execution constitute one of the added values of the EIO regime and had a positive impact on judicial cooperation.

All the time limits provided for by Article 12 of the Directive have been adequately transposed into national legislation by §55e(5) (including Article 32 (2) of the Directive on the decision on provisional measures), §55f(1) and §55j EU JZG.

The Austrian executing authorities usually comply with the time limits. Upon further questions from the evaluation team regarding Austria's compliance with time limits during the on-site visit, Austrian practitioners indicated that they could not think of any examples where time limits were not complied with, even in complex cases involving multiple investigative measures. Austria's compliance with time limits therefore constitutes a best practice *(see Best practice No 5).*

As issuing authority, Austrian practitioners reported cases where time limits were not complied with. The reasons for the delays are often not communicated by the executing authority. The assessment of urgency, with Austria acting as an issuing authority, is undertaken primarily in accordance with the criteria of section B of Annex A. An important criterion not explicitly mentioned in the EIO is, however, the fact that the suspect is currently being detained.

As executing authority, the Austrian authorities indicated in the questionnaire that they usually follow the urgency assessment of the issuing authority; during the on-site visit, Austrian practitioners mentioned that, in cases where the urgency requirement is not apparent from the content of the EIO, they would undertake their own assessment. If this assessment concludes that the execution of the EIO is not urgent, the Austrian authorities would then apply the standard time limits. In the opinion of the evaluation team, it would be advisable for all Member States to consult with the issuing authority or request additional information when there are doubts about the need to comply with the execution of an EIO within a specific timeframe in urgent cases (*see Recommendation No 14).*

Furthermore, the evaluation team recommends that Member States aim to adhere to time limits to the best of their ability, and to inform the issuing State about delays by indicating the reasons for the delay (*see Recommendation No 15)*.

For urgent cases, the evaluation team also invites Member States to grant the possibility for the national member of Eurojust to issue EIOs as provided for under Article 8(4) of Regulation (EU) 2018/1727 on the European Union Agency for Criminal Justice Cooperation (Eurojust), replacing and repealing Council Decision 2002/187/JHA ('Eurojust Regulation').

15. GROUNDS FOR POSTPONEMENT OF RECOGNITION OR EXECUTION

§55f (2) EU-JZG contains a provision on the grounds for postponing recognition or execution, corresponding to Article 15 of the Directive. In accordance with this provision, the execution of an investigative measure requested in the EIO will be postponed if: 1) it would endanger the purpose of current investigations, or 2) the evidence is required in domestic criminal proceedings.

In the Directive, the grounds for postponement of recognition or execution are formulated in permissive language, whereas in the EU-JZG they are mandatory grounds for postponement.

Austrian national law does not explicitly lay down the criteria for determining the moment from which the grounds for postponement cease to exist (Article 15 (1)a) and b) of the Directive), but does provide for the obligation to inform about the postponement, its grounds, probable duration and the end of the postponement of execution (§55j(5) and (6) EU-JZG, as provided for in Article 15(2) and Article 16(3) point b) of the Directive).

Data concerning cases in which the execution of an EIO has been postponed is not collected by the Austrian authorities and they could not think of any concrete examples in practice.

16. LEGAL REMEDIES

16.1. Information about legal remedies

As issuing authority, in the case of an investigative measure requiring an order from the prosecution service or an authorisation from the court, the order has to be issued or authorisations have to be obtained before an EIO can be issued. These decisions/authorisations also have to be submitted to the person concerned and the suspect, unless this information would endanger the ongoing investigations, together with an information about legal remedies. In case of a successful remedy, the effects also cover the issuing of the EIO.

As issuing authority, Austrian law furthermore provides for the executing authority of another Member State to be notified in the event that an objection for violating a law has been raised, or a legal remedy against the measure contained in the EIO has been filed in Austria (§56a EU-JZG). Together with §55j(8) EU-JZG, which requires Austria as an executing State to inform the issuing authority of another Member State about legal remedies sought against the execution of an EIO, these articles transpose Article 14(5) of the Directive.

During the on-site visit, the evaluation team learned that there were no immediately known cases of legal remedies sought against prosecution or court orders to issue EIOs; however, it should be noted that there is no reliable data available on this topic. The representative of the Bar Association in Austria also indicated that defence lawyers do not seem to have much experience with legal remedies in relation to EIOs. Concerning time-limits, the aforementioned representative considered that 6 weeks to file a remedy against a prosecution order is sufficient; however, the 14-day time limit for remedies against a court decision is too short.

One possible reason for the lack of practical experience mentioned by the representative of the Bar Association is that EIOs are most commonly issued in the pre-trial phase, where suspects often do not yet have legal representation; therefore, the time limits for a possible remedy have often already expired. In addition, factoring in the cost-benefit aspect of filing a legal remedy, challenging the investigative measure requested in an EIO would only make sense if there was a clear violation of the rights of the suspect.

16.2. Availability of legal remedies

Austrian law does not provide for specific legal remedies against the investigation measures executed within the framework of an EIO and, therefore, the remedies available are the same as those against similar orders/authorisations of investigative measures issued in domestic cases. According to §55e(4) EU-JZG, legal remedies are available: 1) against a decision taken by the public prosecution office to execute the European investigation order; 2) against the court decision; and 3) against rights violations in the course of executing the measure. It is further specified that the reasons for issuing an EIO can only be examined in the issuing State, in accordance with Article 14(2) of the Directive. In Austria, legal remedies have a suspensive effect on the transfer of evidence.

The remedies available under national law are differentiated according to the authority whose decision is challenged: §106 CPC is applicable in the case of a remedy against orders of the prosecution service, §88 et seq. CPC in the case of a remedy against orders of the competent court authorities.

16.2.1. Legal remedy against orders of the prosecution service under § 106 CPC

Under §106 CPC, any person claiming to have their personal rights violated in investigation proceedings by the prosecution authority may raise objections to the court if

- the exercise of a right under the CPC has been refused; or
- an investigative or coercive measure has been directed or executed in violation of provisions under the CPC.

There will be no violation of personal rights if the statute abstains from a binding regulation regarding the conduct of the investigation by the prosecution and if this discretion was used within the spirit of the statute.

This remedy is applicable both against the decision to execute the EIO, as well as against the way the investigative measure is executed by the Austrian authorities.

In the case of a remedy sought against the approval of an investigative measure, any objection raised against the direction or execution of that measure must be joined to the complaint, and the competent court will decide on both complaints.

Objections must be raised with the prosecution authority within six weeks of becoming aware of the alleged violation of personal rights, setting out the way in which the objection ought to be addressed, among other elements. If the objection concerns measures taken by another criminal investigation authority, the prosecution authority has to provide said criminal investigation authority with an opportunity to make a statement.

The prosecution authority has to assess whether the alleged violation of rights exists and, insofar as the objection is justified, has to comply with the objection and notify the person who raised the objection of that decision, and of the way the objection was complied with. The person nevertheless has the right to request a decision by the court if they consider that the objection was not complied with. In this case, or when the prosecution authority fails to comply with the objection within four weeks, the prosecution must refer the objection to the court without delay. The court has to serve the statements of the prosecution authority and the criminal investigation authority to the person raising the objection to allow him or her to provide comments within a period set by the court, not exceeding seven days.

During the on-site visit, the evaluation team was informed that legal remedies are usually adequately addressed by the prosecution authorities, so that objections do not usually need to be referred to the courts.

16.2.2. Legal remedy against orders of the court in accordance with §88 et seq. of the CPC

Under §88 et seq. CPC, legal remedies against a court order authorising or ordering a measure are decided by the court of appeal and have to set out, among other information, the way in which the rights of the person have been violated. Complaints have to be lodged in writing or electronically or, in cases of oral delivery, have to be put on record at the court within 14 days from publication or from the time the person becomes aware of the non-resolution of the violation of the personal rights.

If the complaint concerns a court order approving a request by the prosecution authority in the investigation proceedings, the complaint has to be lodged with the court that took the decision, which has to forward the complaint, where applicable along with a statement, to the court of appeal without delay. However, under §88(4) CPC, complaints are considered to have been lodged within the deadline if they have been filed with either the prosecution authority or the court of appeal.

The complaint and the relevant file have to be presented without delay to the court of appeal, which must not, however, delay the course of proceedings; if necessary, copies of those parts of the file that are needed for the continuation of the proceedings must be withheld under §88(3) CPC.

16.3. The role of the case file in the criminal proceedings

A very important feature is that all information in a case file is to be considered evidence in the main trial, even if it is obtained through police cooperation. No additional court validation is necessary (see in Chapter 10 for more on the admissibility of evidence and 16.4 on access to the case file). All procedural steps have to be included in the case file.

All relevant data are inserted in a Case Management System, which is a unique register for all criminal and non-criminal cases in Austria. Austria is currently in a transition phase and uses both paper and electronic files; its aims to handle all files electronically by end of 2025. Irrespective of the format the documents are kept in, all the steps of the procedure, such as the issuance or receipt of an EIO, are registered in the case file. Upon receipt of an EIO, cross-checks are carried out on the names included in the EIO to identify possible links to national investigations. However, it is not possible to run searches for individual telephone numbers or bank accounts.

16.4. Access to the case file

Under Austrian law, the suspect/accused person has a right of access to the case file, but this right can be restricted under certain circumstances during the pre-trial phase if access to all the case files risks hindering the prosecution's case. The whole case file has to be revealed to the suspect when the indictment is filed with the court at the latest. Depending on the measure, persons that are not accused but who are affected by the measure also have a right to access the evidence that has been gathered.

As executing authority, Austria has to inform the affected person of the investigative measure in all cases that an EIO has been executed, because the person concerned has the right to challenge the decision to execute the EIO and therefore has to be informed about the legal remedies at some point. The Austrian authorities have informed the evaluation team after the on-site visit that in practice, the decision/order of the prosecution service or of the competent court authorities is often transferred to the issuing state together with the collected evidence and the issuing State is asked to inform the suspect and other affected person present in the issuing state. In case of very intrusive investigative measures (i.e. those listed in § 147(1) CPC), however, the prosecution authority or the court will inform the suspect and other affected persons directly.

Austria therefore requires information from the issuing State about the appropriate time from which the suspect may be informed of the execution of an EIO.

For some investigative measures (e.g., hearings of a suspect or witness, or search and seizure), the recognition order, and thus the EIO, will be revealed in advance or on-site to the person/legal entity subject to the measure, who also has the possibility of challenging the recognition and would have access to the case file, and thus the EIO, in any case. The EIO is part of the recognition/execution decision under § 55e (1) EU-JZG.

With respect to banking information and information from financial institutions, the Austrian executing authorities and the relevant financial institutions are in general ordered not to reveal the order (including the EIO) or information contained therein to the account holder. As a result, account holders are, in general, not informed of the evidence gathering and the execution of the EIO.

Another exception to the rule that the person/legal entity concerned is eventually served with the full order (including the EIO) is evidence collected from telecommunications service providers, as under national law, they do not have a legal remedy against orders. They will only receive the order, which does not contain the reasons for executing the EIO.

During the on-site evaluation, the representative of the Bar Association reported that they have good electronic access to the case file; however, new parts of the case file are not always automatically uploaded and thus access needs to be requested, which can be an issue if the defence is not aware of the existence of new measures or files. This is a practical issue not related specifically to the EIO.

17. TRANSFER OF EVIDENCE

Article 13 of the Directive has been transposed by §55l EU-JZG. Under Austrian law, evidence obtained through the execution of an EIO must be transmitted without delay to the issuing authority or to one of its representatives, unless the EIO requires the evidence to remain in Austria. Specific provisions relate to cases of interrogation by technical means involving audio and video transmissions or by the way of telephone conference, where only the protocol is transmitted, and to cases of surveillance of communications, where the speciality rule is specifically provided for (§55l(3) EU-JZG).

During the on-site evaluation, the Austrian authorities indicated that, in principle, evidence can be transferred immediately to the issuing authorities present during the execution of an EIO. In principle there is no suspensive effect on the transfer of evidence if a legal remedy has been filed, except with regard to information from bank or financial institution, where a legal remedy from the bank or financial institution would have suspensive effect. The Court of Appeal may grant a suspensive effect based on the application of the person concerned in case the requirements are fulfilled. Another exception would be, for example, for items seized on the premises of different categories of professions, such as lawyers or other professions bound by professional secrecy, where the transfer of evidence first needs to be authorised by the courts.

In this regard, concerning the suspensive effect of the legal remedies mentioned in Chapter 16 of the present report, §55l(4) EU-JZG provides that, in the case of a legal remedy exercised against one of the acts provided for in § 55e(4) EU-JZG (i.e. 1. against a decision taken by the public prosecution office to execute the EIO; 2. against the court decision; and 3. against rights violations in the course of executing the measure), the court competent for deciding on the legal remedy must, upon request or ex officio, postpone the transmission until a decision on the legal remedy has been taken, unless the urgency of the proceedings conducted by the issuing authority or the protection of subjective rights in these proceedings outweigh the interest of legal protection, and unless a complaint has suspensive effect anyway under the law. Furthermore, the transmission must, in any case, be postponed if transmission would seriously and irrecoverably violate the rights of the person concerned.

As issuing authority and pursuant to §56b EU-JZG, transposing Article 14(7) of the Directive, evidence obtained by another executing State must be destroyed when the execution of the EIO or the execution of the measure contained therein has been retrospectively declared impermissible in the executing State. Austrian authorities reported that there have been no known cases where this provision was applied.

18. OBLIGATION TO INFORM

The obligation to inform provided for under Article 16 is an important aspect of the Directive, its purpose being to establish direct communication between the issuing State and the executing State and to allow the issuing authority to follow up on the development of the execution in the executing State.

In this regard, the obligation to send Annex B to the issuing authority in order to acknowledge receipt of the EIO serves as an assurance that the EIO has been received, and at the same time serves to calculate the starting point for the time limits provided for under Article 12 of the Directive.

The Austrian issuing authorities have encountered many cases where Annex B was not sent by the executing authorities. In such cases, the Austrian authorities generally enquire after a while about the status of the execution. In some cases, a reminder was sent; in one case, the EIO was sent again. If this approach does not result in the executing authority sending Annex B, the issuing authority usually uses the support of the Federal Ministry of Justice, the EJN or Eurojust.

As executing authority, the Austrian authorities replied in the questionnaire that Annex B is usually sent to the issuing authority as provided for in § 55j point 1 EU-JZG. During the on-site visit, it was indicated that some practitioners contact the competent issuing authority via direct e-mail communication, rather than sending Annex B. The e-mail is then integrated into the digital file. Moreover, when EIOs are received through Eurojust, the sending of Annex B is not considered necessary.

In general, Austrian practitioners consider Annex B to be fit for purpose; however, practitioners mentioned during the on-site visit that, in practice, contact information is often filled out in an incomplete manner by the executing authorities (e.g., e-mail address and/or telephone number is missing), which makes it more difficult to establish direct contact.

The evaluation team encourages Members States to provide complete contact details in Annex B in order to achieve its purpose of making it possible to establish direct communication for a more efficient and timely execution of the EIO *(see Recommendation No 16).*

19. COSTS

The Austrian authorities, acting as issuing authorities, have not encountered any difficulties while carrying out the consultation with the authorities of other Member States on whether and how the costs related to the execution of an EIO could be shared, or on how the EIO could be modified due to the costs. In a few cases, however, while acting as executing authority, when costs increased to EUR 50,000 or more, consultations led to a reduction in the period for which a telephone interception was requested.

As regards the criteria for exceptionally high costs, the reasoning of EU-JZG refers to recital (23) of the Directive and the examples contained therein, such as complex expert opinions, extensive police operations or surveillance activities over a long period of time. It should be noted that the costs for appointing mandatory defence counsels are not considered to be exceptionally high.

20. SPECIFIC INVESTIGATIVE MEASURES

20.1. Temporary transfer

During the on-site visit, Austrian practitioners reported no particular issues related to temporary transfer. §55g EU-JZG regulates the transfer of persons in custody with Austria as executing State, whether the person is detained in Austria or abroad. It seems that the national provisions mirror the Directive and, in addition, contain specific elements to be included in an agreement between the judicial bodies necessary for the execution of such EIOs *(see Best practice No 6)***.**

In contrast to the EAW, the temporary transfer of the person in custody can be performed using the EIO instrument only with a view to gathering evidence.

Under §55a(1) point 10 EU-JZG, the execution of an EIO is not to be granted in the case of an EIO for the purpose of transferring a person in custody if such transfer from Austria is likely to prolong the custody. The Austrian legislator decided not to make use of the ground for refusal under Article 22(2) point a) of the Directive; it is therefore irrelevant whether a person consents to the transfer when Austria is acting as executing State. It should be borne in mind that, under §55a(1) EU-JZG, all transposed grounds for non-recognition or non-execution are mandatory, leaving no room for discretion (see Chapter 13.1 and *Recommendation No 4*).

In the provision regulating the situation where Austria is an issuing State, reference is made to the consent declaration which must be attached to the EIO (§56(4) EU-JZG).

20.2. Hearing by videoconference

Hearing by videoconference in criminal proceedings is an innovative approach which has revolutionised the way in which evidence is obtained and presented, ensuring greater efficiency, accessibility and accuracy in the pursuit of justice. The adoption of videoconferencing technologies could lead to a more efficient judicial system, reducing case backlogs and accelerating the pace of justice. With the elimination of physical attendance requirements, judicial bodies could handle more cases in less time, leading to quicker resolution and alleviating the burden on the judicial system.

Against this background, it is most likely that the evolution of the legal landscape will include an ever-increasing and widespread use of investigative measures involving hearings by videoconference in criminal trials. It is thus of the utmost importance to ensure a proper infrastructure and legal framework for videoconferencing.

The transposition of the relevant provisions of the Directive seems adequate, with one exception, where the Austrian law transposed the lack of consent of the suspect or accused person as a mandatory ground for non-recognition or non-execution, contrary to the Directive *(see Chapter 13.1 and Recommendation No 4).*

During the on-site visit, Austrian practitioners reported that consent procedure was handled differently in practice, with some prosecutors asking beforehand while others only request consent when the person to be heard appears before the authorities. If the person ignores the first motion, then a warrant can be issued under certain criteria.

Austrian practitioners have encountered no issues in relation to where the videoconference takes place and noted that, as the executing State, the hearing takes place at the PPO. During the trial phase, the hearing of witnesses via videoconference takes place at the courts.

Austrian authorities have not reported any difficulties in relation to the procedural status of the person to be heard. Austrian law provides for the possibility of hearing the suspect via videoconference; however, the law limits the possibility of a videoconference to the investigation: under § 153(4) CPC, it is possible for the prosecution service to take a statement and, under § 176(3) CPC, a hearing for the extension of pre-trial detention can be conducted via videoconference. Thus, during the main trial as well as the trial in appeal cases, it is not possible to hear the accused via videoconference. The only exception applies in cases of pandemic situations.

In this respect, while acknowledging the reasons for which Austrian law does not provide for the hearing of defendants by videoconference at the trial stage, it is important to note that the principle of immediacy and the right to defence can be subject to limitations where necessary and proportionate to meet the public interest of preventing and combating crime. Against this background, the evaluation team recommends that Austria amend its national law so as to be able to execute EIOs requesting the hearing of an accused via videoconference during the trial phase for evidentiary purposes *(see Recommendation No 5* and Chapter 13.4).

As already established in Chapter 13.4, the evaluation team recommends that the Union legislator revisits the question of the participation of the accused person at the trial via videoconference from another Member State (see *Recommendation No 24*).

Some Member States require the suspect to give his or her statement under oath. This is not required under Austrian law. However, if this formality is explicitly asked for, the Austrian executing authorities comply with this request even though it has no consequence under Austrian law (see Chapter 9.2. and *Best practice No 3*).

From its perspective as the executing authority, Austria has reported issues relating to the fact that the dates proposed by the issuing authorities are sometimes impossible to comply with. In the opinion of Austrian practitioners, it would be useful if the issuing authorities considered a timeframe of at least two or three weeks before the requested date and they should provide about three alternative dates for the videoconference *(see Recommendation No 17).*

The Austrian authorities are very well equipped with technical means for conducting videoconferences. From the on-site visit, it emerged that most prosecutors' offices and courts in Austria are properly equipped with audio-video links on the premises of the competent judicial authorities and are thus able to implement this investigative measure both as issuing and as executing authorities. Austria has an automated booking system within the judiciary for videoconferences which ensures that contact and technical details are pre-filled in and correct (*see Best practice No 7).*

20.3. Hearing by telephone conference

As regulated by the Directive, this measure can be implemented under national law only in relation to experts and witnesses. A request to hear suspects or accused persons by telephone is one of the grounds of non-recognition or non-execution of the EIO, as provided for by §55a(1) point 11 final thesis EU-JZG.

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

With respect to banking information and information from financial institutions, they can be obliged not to reveal the order (including the EIO) or information contained therein to the account holder. The law enforcement authorities generally make use of this possibility. As a result, account holders are, in general, not informed of the evidence gathering.

Even though there are no provisions corresponding to Articles 26 and 27 of the Directive in the EU-JZG, no difficulties were identified during the on-site visit. The respective provisions of the CPC apply.

20.5. Covert investigations

During the on-site visit, Austrian practitioners reported that this instrument of cooperation requires the use of the EIO both as issuing and as executing State, and it is not a matter of police-to-police cooperation. Only when Austria opens a domestic case based on the receipt of an EIO, and thus has jurisdiction, can they conduct the covert investigation without an EIO. There were no issues relating to the difference between the domestic legislation of the Member States. In particular, in the opinion of practitioners, the Austrian rules, described above, are rather broad and allow for an easy execution.

In accordance with §73(1) EU-JZG, the deployment of an official of a Member State operating under covert or false identity in Austria is only admissible on the basis of an order, issued in advance of such an operation by the public prosecutor responsible for the area in which the operation is planned to start, and only on the basis of a request by a judicial authority of a Member State which granted this deployment in the course of previously launched criminal proceedings or preliminary investigations.

The conditions for deploying an undercover investigator in Austria are: the offences underlying the foreign criminal proceedings must comply with the prerequisites for issuing an EAW, and if there was no possibility of clearing up the offences, or if their clarification would be seriously complicated, without the planned investigating operations.

Lastly, the law stipulates that deployment may only be ordered for the period of time that is probably required to achieve its purpose, and at most for one month. Issuing a new authorisation is only admissible if the prerequisites continue to apply, and if it can be presumed, on the basis of certain facts, that the continued operation will be successful. §55k(2) EU-JZG final thesis stipulates that undercover investigators from abroad must work exclusively under the guidance and supervision of the Federal Ministry of the Interior (Federal Bureau of Criminal Investigation).

Additional rules on conducting undercover investigations can be found in § 73 EU-JZG.

It is often difficult for members of the police forces to infiltrate organised criminal groups with a cross-border dimension for a variety of reasons, such as the need to be a relative of a member, etc. Where the possibility of using civilians as covert agents exists, the judicial and law enforcement authorities have been successful in infiltrating such groups using, amongst other means, the collaboration of members from lower levels of the organisation.

Under § 129 point 2 of the CPC, undercover investigation means the use of officials of the criminal investigation authority or of other persons commissioned by the criminal investigation authority who neither disclose nor reveal their official position or their mandate. Thus, a covert agent does not necessarily need to be a national police officer under Austrian law (*see Best practice No 8*).

20.6. Interception of telecommunications

There is no common European definition of the interception of telecommunications. At present, therefore, the interception of telecommunication is interpreted differently by the Member States. Some Member States have adopted a strict interpretation, whereby the interception of telecommunication only concerns wiretapping, while others have embraced a broader notion that covers other surveillance measures (e.g. bugging of cars, GPS tracking or surveillance through Trojan-horse-like devices or audio surveillance in private places).

Under Austrian law, the interception of telecommunications only covers wiretapping. An Annex C notification in accordance with Article 31 of the Directive is thus only possible in relation to wiretapping. It should be noted, however, that Austrian practitioners have reported no experiences with Annex C whether as an issuing or as an executing State concerning wiretapping measures.

As for the technical possibilities of channelling the intercepted conversations in real-time to the issuing authority in accordance with Article 30(6) of the Directive, the Austrian representatives noted that, as a result of the different technical standards between law enforcement authorities and service providers, the direct transmission of the intercepts is technically difficult at present, but not impossible.

However, solutions can be found on an ad-hoc basis. The Ministry of the Interior reported that there had been two cases in recent years. In one, the telecommunications were transmitted with a time lag of a few hours from one authority to the other. In the other case, the Austrian authorities transmitted the telecommunication to another Member State.

Other measures, such as the bugging of a car or GPS tracking - even when no technical assistance is required, are considered to be surveillance measures within the meaning of Article 28 of the Directive and, therefore, an Annex A is needed. It should be noted, however, that ex-post notifications and ex-post validations are not possible for such measures under the Austrian legal system.

Nevertheless, if for example a bugged car unexpectedly leaves Austrian territory, the information gathered abroad could still be used as evidence in Austria. As the executing State, Austria would inform the issuing State that ex-post validation was not possible and that they could not therefore execute the EIO and that it was up to the legal system in the issuing State to decide on the way forward. There is, however, no uniform approach amongst the Austrian practitioners. Austrian practitioners also reported that the investigative measure of installing a microphone in a vehicle so as to listen in on the conversations of perpetrators within that vehicle is extremely difficult to implement in practice enforce due to their national provisions which largely limited the usage of bugging devices.

In the opinion of the evaluation team, in light of the impossibility of ex-post validations and ex-post notifications for measures such as bugging of a car or GPS tracking, Austria should put appropriate mechanisms in place to facilitate the approval/authorisation of the relevant measure within the shortest timeframe possible *(see Recommendation No* 6*)*.

The use of malware (e.g. a Trojan) on a device is not foreseen as an investigative measure and therefore cannot be authorised. The absence of this measure could contribute to creating a safe haven as the Austrian authorities currently have no legal means for the real time surveillance of servers. Indeed, several Austrian practitioners noted that these shortcomings – the absence of legal and practical tools to enable interception of encrypted communications, which other states are equipped with – are unfortunate, especially in organised crime cases. It should be noted, however, that a High-level Working Group on access to data for effective law enforcement has been established, and its report on the real-time surveillance of servers is expected in autumn 2024.

In the light of the above, the Union legislator is invited to clarify whether the notion of the 'interception of telecommunications' under Articles 30 and 31 also covers other surveillance measures such as the bugging of cars, GPS tracking and installing spywares; and, if not, to consider amending the Directive to introduce special provisions regulating such measures, including the situation where no technical assistance is needed from the Member State concerned (notification mechanism) *(see Recommendation No 20).*

21. STATISTICS

The statistical data on the application of the Directive is collected within the case management system of the Austrian judicial authorities (Verfahrensautomation Justiz –VJ). This collection of data is largely automatic, although certain information is entered manually *(see Best practice No 9 and Recommendation No* 19*)*. The statistics provided by the Austrian authorities start from 1 July 2018, as the law transposing the EIO entered into force on that day. The statistics do not include EIOs that are handled by the administrative authorities and courts.

	Incoming EIOs	Outgoing EIOs	Refusals	
			Incoming	Outgoing
1.7.2018 – 31.12.2018	318	478	1	9
2019	1065	1977	2	30
2020	1211	2685	4	37
2021	1261	3131	2	39
2022	1056	3596	0	74
Total	**4911**	**11867**	**9**	**189**

Furthermore, Eurojust has shared the following statistics on Eurojust cases involving Austria in which EIOs have been issued/received.

EIO Austria	2017	2018	2019	2020	2021	2022	Total
Bilateral cases	3	22	52	76	93	125	**371**
Multilateral cases	4	30	53	58	69	57	**271**
Total cases	**7**	**52**	**105**	**134**	**162**	**182**	**642**

EIO Austria	2017	2018	2019	2020	2021	2022	Total
Requesting cases	1	7	29	41	60	78	**216**
Requested cases	6	45	76	93	102	104	**426**
Total cases	**7**	**52**	**105**	**134**	**162**	**182**	**642**

22. TRAINING

When the Directive was implemented and entered into force in July 2018, the Ministry of Justice issued a circular letter, a so-called *Leitfaden*. These guidelines set out the features of the law and explain how to use the instrument. It was distributed to the whole judiciary, PPOs as well as criminal courts.

Practitioners in Austria are thereafter provided with continuous training on the EIO on a regular basis. Since 2019, 11 national trainings courses, including on EIO, have been implemented for judges and public prosecutors and also for court staff *(see Best practice No 10 and Recommendation No 18).* The training courses cover not only the substantive legal aspects of the EIO, but also procedural and practical aspects, such as the use of the EIO Reference Implementation tool. In total, 167 judicial practitioners attended the training.

Furthermore, all interested practitioners are invited to attend the training on the EIO provided by the European Judicial Training Network (EJTN). Since 2020, six Austrian judicial practitioners have completed these training courses, two of which have been hosted by the Federal Ministry of Justice in Vienna. The EJTN seminars are published on the training platform ("Elektronisches Bildungsmanagement") as well as the intranet of the Federal Ministry of Justice and are open for application for interested persons.

Both the initial and continuous judicial training of judges, public prosecutors, court and prosecution staff in Austria are generally organised in a decentralised way. The four Higher Regional Courts in Vienna, Graz, Linz and Innsbruck are primarily responsible for the organisation and implementation of training. In this regard, the Federal Ministry of Justice acts as a supervising and coordinating authority, although the amount of training provided by the Federal Ministry of Justice itself has increased substantially in recent years. Regarding the EIO, training has been provided by the Higher Regional Courts of Vienna, Graz and Linz as well as the by Federal Ministry of Justice since 2019.

During the on-site visit to the Regional Criminal Court of Vienna, the judges reported that not many training courses are organised on the EIO; the courts do not apply this instrument very often and therefore see little value in attending training. Another factor was that the possibility for judges to take part in the international training might not be known to judges.

The Ministry of Justice also has pages about international cooperation on its intranet accessible to the whole judiciary and containing relevant links to EIO-related deliverables prepared by Eurojust and EJN. In conclusion, even though there have been several training courses available for practitioners, the evaluation team sees fit to encourage Austria to provide for more training opportunities on cross-border cooperation in criminal matters, including the EIO (see *Recommendation No 7*).

23. FINAL REMARKS, RECOMMENDATIONS AND BEST PRACTICES

23.1. Recommendations

Regarding the practical implementation and operation of the evaluated Directive, the team of experts involved in the assessment in Austria was able to review the system satisfactorily.

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

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

23.1.1. Recommendations to Austria

Recommendation No 1: The Austrian issuing authorities should mention other related instruments in section D of the EIO form (see Chapter 6.1).

Recommendation No 2: Austria should also accept EIOs in English, at least in urgent cases (see Chapter 6.2).

Recommendation No 3: In the interests of coordination, the Austrian executing authorities should inform the issuing authority if a domestic proceeding is opened following the receipt of an EIO or evidence gathered within the framework of an EIO, if the domestic case is directly related to the case for which the EIO was issued (see Chapter 11).

Recommendation No 4: While the evaluation team fully acknowledges the explanations provided and the concerns expressed by the Austrian authorities during the on-site visit, Austria is, nevertheless, encouraged to consider amending the transposing legislation in order to render all grounds for non-recognition or non-execution optional, as provided for by the Directive (see Chapter 13.1).

Recommendation No 5: Austria is invited to consider amending its national law so as to allow for the execution of EIOs aimed at the hearing of the accused via videoconference from another Member State during the trial phase for evidentiary purposes (see Chapters 13.4 and 20.2).

Recommendation No 6: In light of the impossibility of ex-post validations and ex-post notifications, Austria should put appropriate mechanisms in place to facilitate the approval/authorisation of the relevant measure within the shortest timeframe possible (see Chapter 20.6).

Recommendation No 7: Austria is encouraged to provide more training opportunities on cross-border cooperation in criminal matters, including EIO (see Chapter 22).

23.1.2. Recommendations to the other Member States

Recommendation No 8: When acting as the issuing State, Member States should mention other related instruments in section D of the EIO form (see Chapter 6.1).

Recommendation No 9: Member States should also accept EIOs in English, at least in urgent cases (see Chapter 6.2).

Recommendation No 10: When acting as the issuing State, Member States should always respect the language regime of the executing State and provide a translation if necessary, preferably not one done by an online translating tool (see Chapter 6.2).

Recommendation No 11: Member States should keep the *Fiches Belges* in the EJN Atlas up to date (see Chapters 6.2 and 8).

Recommendation No 12: Member States should speed up the process of joining e-EDES (see Chapter 8).

Recommendation No 13: In the interests of coordination, Member States, when acting as the executing State, should inform the issuing State if a domestic proceeding is opened following the receipt of an EIO or evidence gathered within the framework of an EIO, if the domestic case is directly related to the case for which the EIO was issued (see Chapter 11).

Recommendation No 14: When acting as the executing State, Member States should consult with the issuing State in the event of doubts in relation to the urgent nature of the EIO (see Chapter 14).

Recommendation No 15: Member States should comply with the time limits and inform the issuing State of delays, setting out the reasons for the delay (see Chapter 14).

Recommendation No 16: Member States should systematically send Annex B and indicate complete contact information of the executing authority (including telephone number and e-mail address) (see Chapter 18).

Recommendation No 17: When issuing an EIO for a hearing via videoconference, Member States, when acting as the issuing State, should envisage a timeframe of at least two or three weeks before the requested date and should propose about three alternative dates (see Chapter 20.2).

Recommendation No 18: Member States should provide training on EIO for clerks (see Chapter 22).

Recommendation No 19: Member States should consider introducing the automatic collection of data in relation to judicial cooperation instruments in criminal matters (see Chapter 21).

23.1.3. Recommendations to the European Union and its institutions

Recommendation No 20: The Union legislator is invited to revise the Directive with respect to the following points:

- include cross-border surveillance for evidence-gathering purposes (Chapter 5.1);
- make Annex A more user-friendly (see Chapter 6.1);
- clarify the applicability of the rule of specialty in the context of the EIO and its interplay with data protection principles (see Chapter 11);
- clarify whether the notion of 'interception of telecommunications' under Articles 30 and 31 also covers other surveillance measures, such as the bugging of cars, GPS tracking and installing spywares; and, if not, consider amending the Directive to introduce special provisions that also regulate such measures, including the situation where no technical assistance is needed from the Member State concerned (notification mechanism) (see Chapter 20.6).

Recommendation No 21: The Commission is invited to provide guidelines on the interrelation of mutual recognition instruments (see Chapter 5).

Recommendation No 22: The Commission is invited to look into the issues with e-EDES that have already been identified (see Chapter 8).

Recommendation No 23: The Commission is invited to look into the possibility of linking e-EDES to the EJN Atlas (see Chapter 8).

Recommendation No 24: The Union legislator is invited to revisit the question of the participation of the accused person at the trial via videoconference from another Member State, in light of the outcome of the case currently pending before the CJEU, if appropriate (see Chapters 13.4 and 20.2).

23.1.4. Recommendations to EJN

Recommendation No 25: EJN is invited to look into the possibility of linking e-EDES to the EJN Atlas (see Chapter 8).

23.2. Best practices

Austria is commended for:

1. consolidating all instruments for judicial cooperation in criminal matters in one legislative act (see Chapter 3);
2. participating in the e-EDES pilot project (see Chapter 8);
3. complying with procedural formalities unknown under Austrian law if requested by the issuing authority (see Chapter 9.2);
4. incorporating all grounds for non-execution provided for in one provision in the EU-JZG (see Chapter 13.1);
5. complying with time limits (see Chapter 14);
6. providing for specific elements to be included in an agreement between the judicial bodies for the execution of EIOs issued for temporary transfer (see Chapter 20.1);
7. the automated booking system for videoconferences (see Chapter 20.2);
8. allowing the use of civilians as collaborators (see Chapter 20.5);
9. the largely automatic data collection (see Chapter 21);
10. having court clerks involved in training on EIO (see Chapter 22).

ANNEX A: PROGRAMME FOR THE ON-SITE VISIT

Venue: Ministry of Justice, 1070 Wien, Museumstraße 7

Tuesday, 12 September 2023	
09:30	Welcome - introduction of the AT experts and of the evaluation team; - brief presentations by representatives of the competent units of the Ministry of Justice about their respective functions regarding the EIO;
10:30	Coffee break
10 45	Meeting with prosecutors
12 00 – 13 00	Lunch break
13:15:	Continuation of meeting with prosecutors
15:15	Coffee break
15:30 – 16:30	Meeting with prosecutors and police officers

Wednesday, 13 September 2023	
09:30	Meeting with judges
11:00	Coffee break
11:15	Continuation of discussions with prosecutors
12:15 – 13:15	Lunch break
13:30	Meeting with prosecutors
14:45	Coffee break
15:30 – 16:30	Meeting with representatives of the Bar Association

Thursday, September 14th, 2023	
09:30	Debrief
10:30	Coffee break
11:00 - 12:00	Preliminary conclusions

ANNEX B: LIST OF ABBREVIATIONS

ACRONYMS AND ABBREVIATIONS	FULL TERM
ARHG	Act on Extradition and Mutual Assistance - *Auslieferungs- und Rechtshilfegesetz*
CATS	Coordinating Committee in the area of police and judicial cooperation in criminal matters
CISA	Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders
CC ICFI	Competence Centre for International Cooperation in Fiscal Criminal Investigations
CJEU	Court of Justice of the European Union
CPC	Code of Criminal Procedure
Directive	Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 on the European Investigation Order in criminal matters
EAW	European arrest warrant
ECHR	European Convention on Human Rights
e-EDES	e-Evidence Digital Exchange System
EIO	European Investigation Order
EJN	European Judicial Network
EJN Atlas	Judicial Atlas of the European Judicial Network
EJTN	European Judicial Training Network
EU-JZG	Federal Law on Judicial Cooperation in Criminal Matters with the Member States of the European Union
Eurojust	European Union Agency for Criminal Justice Cooperation
Eurojust Regulation	Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), replacing and repealing Council Decision 2002/187/JHA

ACRONYMS AND ABBREVIATIONS	FULL TERM
executing State	executing Member State
issuing State	issuing Member State
JIT	joint investigation team
Joint Action	Joint Action of 5 December 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime
LED	Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA
MLA	mutual legal assistance
PPO	public prosecutors' offices