



THEMIS 2012

THE EUROPEAN INVESTIGATION ORDER

Progress and limits of mutual recognition in the European Union

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“*Council of Europe, Rome Treaty, Schengen Agreement, Maastricht Treaty: in the shadow of this apparent, official and respectful Europe hides another Europe, more discrete, less avowable.*” On 1st October 1996, seven European judges¹ launched the famous **Geneva Appeal**, asking the Member States to ratify and apply European conventions to fight against international money laundering and, beyond that, cross-border crimes.

Indeed, in the European Union (hereinafter “EU”), the development of the Schengen Area² in the 1990’s has made life easier for its citizens, but also for criminals. Thus, **more and more cases involve transnational elements** and require an investigative measure to be carried out in another State, **gathering evidence being at the heart of criminal proceedings**. However, it was very delicate for the EU to directly intervene on criminal law, a matter attached to State sovereignty. As it was impossible to modify the national substantive laws, the EU firstly chose to develop criminal cooperation proceedings between its Member States.

The first specific answer of the EU to transnational criminality was to reinforce the traditional regime of mutual legal assistance. The latter, in its traditional form, involves classical cooperation in which one State addresses a diplomatic request to another. Today, thousands of requests³ for mutual legal assistance are sent every year under the current regime. However, **the legal assistance approach has several weaknesses and is considered as insufficient and fragmentary**. Experience shows that most judges have had cases where they were confronted with a lack of cooperation.

Therefore, a new perspective was adopted: rather than legal assistance, **mutual recognition has become the cornerstone of criminal cooperation in the EU**⁴. Born in the internal market context⁵, the principle of mutual recognition legally⁶ implies the recognition and application of foreign decisions as if those decisions were taken by a national judicial authority. In comparison to the traditional mutual assistance, mutual recognition endeavors to create an automated system, as the decision is mandatory. Moreover, it implies a diminution of the grounds for refusal which can be invoked by the executing authorities⁷.

In 2009, the Stockholm Programme⁸ considered “*that the setting up of a comprehensive system for obtaining evidence in cases with a cross-border dimension, based on the principle of **mutual***”

¹[Bernard Bertossa](#), [Edmondo Bruti Liberati](#), [Gherardo Colombo](#), [Benoît Dejemeppe](#), [Baltasar Garzon Real](#), [Carlos Jimenez Villarejo](#), [Renaud Van Ruymbeke](#).

²Schengen Agreement of 1985 and Convention implementing the Schengen Agreement of 1990.

³Note of Austria, Belgium, Bulgaria, Estonia, France, Hungary, Italy, Poland, Slovenia, Spain and Sweden concerning the proposal for a Directive, 4 April 2012. It is worth mentioning that it is difficult to have exact statistics since the system is no longer centralized.

⁴Article 82 of the Rome Treaty as amended in 2007 by the Lisbon Treaty.

⁵The principle initially applied to national laws and was named after the “Cassis de Dijon” case held en 1979 by the Court of Justice of the European Union (European Court of Justice, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, 20 February 1979).

⁶Philosophically, it should be noted that recognized otherness reinforces and completes one’s identity. Cf. Paul Ricœur, *Soi-même comme un autre (Oneself as Another)*, 1990.

⁷For example, the European Arrest Warrant puts an end to the nationality principle in the extradition system.

⁸The Stockholm Programme: An open and secure Europe serving the citizen, 16th October 2009.

recognition, should be further pursued". Consequently, on 29th April 2010, seven Member States⁹ proposed a new instrument based on mutual recognition, the European Investigation Order (hereinafter "EIO") **(First Part)**.

However, the EIO is subject to harsh criticism: the "*magical wand effect*"¹⁰ accorded to mutual recognition can be maladjusted to evidence cooperation; moreover, the EIO has been criticized for its supposedly scant care for human rights. This is why the EIO, whose modalities are actually still discussed between the EU institutions, is very controversial. But as Rome wasn't built in a day, this instrument can surely be improved **(Second Part)**.

I) **The EIO : towards an efficient instrument of cross border investigations based on mutual trust and recognition**

The EIO results in two major assets: it simplifies (A) and it automates (B) criminal cooperation.

A. **The simplification of cross border investigations by the creation of a unique instrument**

Quitting the legal assistance approach for the mutual recognition perspective required numerous different texts (1); consequently, measures have piled up, leading to a current intricate situation that should be simplified thanks to a single instrument, the EIO (2).

1) **The progressive development of criminal cooperation**

Criminal cooperation was first founded on the legal assistance principle (a), but has recently adopted mutual recognition as its cornerstone (b).

a. *Legal assistance*

Legal assistance in the EU relies on a multiplicity of instruments progressively designed to meet the ever increasing needs in criminal matters and especially in the field of evidence gathering.

The first agreement was the European Convention on mutual assistance in criminal matters, adopted in 1959 (and its additional protocols adopted in 1978 and 2001). This instrument set up the first framework for judicial cooperation, and was meant to allow the "*the widest measure of mutual assistance in proceedings*" (Article 1.1): house searches, questioning of witnesses and defendants, seizures... may henceforth be requested by one State to another.

⁹The Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden.

¹⁰Lelieur (J.), « La reconnaissance mutuelle appliquée à l'obtention transnationale de preuves pénales dans l'Union européenne : une chance pour un droit probatoire français en crise ? », *RSC 2011*, p.1.

This text was then complemented by two crucial agreements aiming at simplifying the procedure by transferring the power of decision from the executive to the judiciary. Indeed, the Convention implementing the Schengen Agreements (June 19 1990), made possible the issuing by a judge of a letter rogatory possible; similarly, the Convention on Mutual Legal Assistance in criminal matters in the EU (May 29 2000) set the principle of *judicialisation (judge-to-judge)* of cooperation.

Beside these main texts, more specific tools were set up to tackle very precise issues. For instance, the Schengen Agreements instituted cross-border observations and pursuits. The 2000 MLA Convention also organized a legal regime specific to interception of telecommunications and to infiltration. The 2001 Additional Protocol to the MLA Convention then facilitates the transfer of information related to bank accounts. Furthermore, the 2005 Council Decision on the exchange of information related to criminal records allows a judge in a requesting Member State to obtain information about the criminal past of one of its nationals in another Member State. By 27th April 2012, this system should be replaced by two decisions¹¹ creating a European Criminal Record Information System (ECRIS) that would provide for an electronic interconnection of the national criminal records databases.

Although effort to automate criminal cooperation has been undertaken since the 1990's, these measures are still based on legal assistance; thus their effectiveness depends on a political decision, as the *judicialisation* process launched with the MLA Convention is not fully implemented¹². Consequently, a request might be accepted or refused depending on the good or bad diplomatic relationships between the two countries, the current criminal policy... Rather than a judicial cooperation, these measures refer to political cooperation. The classic judicial cooperation then lacks automaticity and security. That is why mutual recognition has become a new priority.

b. Mutual recognition

In the wake of the Hague¹³ and Stockholm Programmes¹⁴, that referred to mutual recognition as “*the cornerstone of judicial co-operation*”¹⁵, two further steps were taken.

In 2003, the Council adopted a decision that set up **orders freezing evidence or property**¹⁶. Thanks to this new instrument, a judge from one Member State may prohibit the destruction, transformation, or removal of goods located in another Member State, which could constitute a piece of evidence in a criminal procedure in the issuing State. This order may concern any type of property

¹¹Council Framework Decision about organization and exchange of information extracted from criminal record, 26 February 2009, and Council Decision on the establishment of ECRIS, 6th April 2009.

¹²The MLA Convention does not replace the previous instruments, and the most sensitive measures are still left to political decision.

¹³The multiannual Hague Programme, adopted at the European Council of 4th and 5th November 2004, sets out 10 priorities for the Union with a view to strengthening the Area of Freedom, Security and Justice (AFSJ) in the next five years.

¹⁴The Stockholm programme similarly sets out the priorities to foster the AFSJ for 2010-2014.

¹⁵As said in the Tampere Council of 1999.

¹⁶Council Framework Decision 2003/577/JHA of 22nd July 2003 on the execution in the EU of orders freezing property or evidence, which came into force in 2005.

which was used to commit an offence, or which constitutes the product of this offence (legal acts, personal property, or real estate). This measure generally refers to the conservatory seizure of these goods before their transfer to the issuing State; hence, freezing only generates provisional consequences and does not organize the transfer of the frozen goods, which is dealt with by other texts¹⁷ : therefore, a two-step procedure is necessary.

Finally, in 2008, the latest measure adopted to enhance cooperation in the field of gathering evidence is the **European Evidence Warrant (EEW)**¹⁸. This new tool endeavours to speed up the procedures and the standardization of evidence requests. It aims at obtaining objects, documents and data from another Member State for use in legal proceedings: while the freezing order only allows preserving evidence in the State where it is located, the EEW aims at collecting and transferring it.

As we can see, a broad range of measures was adopted during the past few decades in order to strengthen criminal cooperation in the field of evidence. However, if this productive activity does demonstrate the relevance of EU intervention, it also shows that cooperation is fragmented and generates pernicious effects. Although these agreements always seek to improve European cooperation, in reality, this real stacking up of tools hinders effective cooperation.

2) The will to create a new and unique instrument to put an end to this fragmentation

This piling up of instruments generates crucial shortcomings (a); thus, the solution would consist in replacing all these different tools by one comprehensive measure (b).

a. *Problems stemming from this fragmentation*

Rather than fostering cooperation and making it more efficient, the adoption of numerous measures in the field of criminal evidence results in a “*currently fragmented legal regime*”¹⁹, described by some authors as a real “*muddle*”²⁰. At least three pernicious effects stem from this state of affairs.

Firstly, **the adoption of so many different instruments makes the subject of cooperation in evidence matters a very complex one**. Instead of replacing the previous instruments, each new tool co-exists with them²¹. Hence, for each investigative measure, a judicial authority may have to choose between different instruments of cooperation: for instance, a judge willing to obtain evidence from a

¹⁷The 1959 and 2000 Conventions and the European Evidence Warrant.

¹⁸Council Framework Decision 2008/978/JHA of 18th December 2008 on the European Evidence Warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.

¹⁹European Commission *Making it easier to obtain evidence in criminal matters from one Member State to another and ensuring its admissibility*, Memo 09/497, 11th November 2009.

²⁰Spencer (J.R.), « The problems of trans-border Evidence and European Initiatives to resolve them », 2007, *Cambridge Yearbook of European Legal Studies*, mentioned by Murphy (C.), “The European Evidence Warrant; Mutual recognition and mutual distrust ?” in C. Eckes and T. Konstantinides (eds), *Crime within the Area of Freedom, Security and Justice: A European Public Order*, Cambridge: Cambridge University Press, 2011.

²¹On the contrary, the EAW replaces the extradition procedure, and leaves no choice to judges but to use this new instrument.

foreign Member State may use either the freezing order, or the European evidence warrant, or finally the classical way of mutual assistance. The situation is intricate, all the more so since these different instruments do not always cover the same scope: the EEW excludes some types of evidence (DNA sampling, interviewing of suspects or victims) whereas the mutual assistance instruments cover the broadest scope possible. As a consequence, European judges are requested to “juggle” with a wide variety of instruments whose scopes sometimes overlap. Hence, the current state of affairs “*makes the application of the rules burdensome and may cause confusion*”²².

Secondly, **the identification of foreign authorities is not always easy** (as it implies being familiar with the foreign judicial organization) and may vary according to the instrument used (Central authority for criminal record information, judges for the EEW, and even the Ministry of Justice in some States despite the illegality of this situation).

As a result of this fragmentation, **the practice of judicial cooperation in the field of criminal evidence is way less developed than it could be in theory**. This failure can be due to Member States as far as transposition is concerned (as regards to the EEW, it has only been transposed in Denmark !), but also to judges, since the freezing order has scarcely been used, and no EEW has been issued yet.

Some remedies have been designed to cope with these issues: on the European Judicial Network (EJN) website, an “Atlas” facilitates the identification of the competent foreign authority (but it does not work for the freezing order yet); a list of better practices has been drawn up²³; and judges can request assistance from Eurojust or the EJN. Nevertheless, these solutions remain scant. Thus, the adoption of the European Investigation Order (EIO) would constitute the only satisfying solution.

b. Solutions generated by the EIO

European institutions have all denounced this situation, and called for a new instrument which would replace all the co-existing measures²⁴. Therefore, as foreseen in the Stockholm Programme, a proposal for a new comprehensive instrument was launched. It significantly simplifies the gathering of evidence, by replacing all previous measures, and encompassing the widest scope possible.

This new tool would first **put an end to the fragmentary regime** by substituting all the already existing measures in the field of gathering evidence. All the previous instruments in this area would thus be replaced by this single instrument: not only the 1959 and 2000 Conventions and the Schengen Agreements (in so far as they deal with this subject), but also the freezing order, and finally the EEW. The intricate current situation would then be significantly simplified, as only one instrument

²²Stockholm Programme, *op.cit.*

²³Joint Action of 29th June 1998 on good practice in mutual legal assistance in criminal matters (98/427/JHA).

²⁴Such a calling was, for instance, made by the European Council in the Stockholm Programme and by the Commission in its memo 09/497, *op cit.*

would replace the traditional mutual assistance procedures as well as the recent mutual recognition tools²⁵.

This simplification would also apply to **the scope of the EIO, which would be as broad as possible**: the EIO has a “*horizontal scope and therefore applies to almost all investigative measures*”²⁶. Unlike the EEW, whose scope had been drastically limited, the EIO “*shall cover any investigative measure*” (Article 3) aiming at obtaining evidence, except the setting up of a joint investigation team (Article 13) and cross-border observations. Consequently, an EIO would be used to request house searches, seizing, questioning of suspects, victims, witnesses or experts, but also information on bank accounts, hearings by videoconference or teleconference, analyzing any documents, monitoring financial transactions, covert investigations, controlled deliveries or interception of telecommunications. Besides, the very wide scope of the EIO concerns a large range of authorities: Article 2 refers to “*a judge, a court, an investigating magistrate or a public prosecutor competent in the case concerned or any other competent authority as defined by the issuing State*”.

Thanks to its very broad scope, and as it replaces the existing measures, the EIO is meant to implement a one-stop shop, significantly simplifying the current fragmentary regime and promoting cooperation in the area of gathering evidence in criminal matters.

Beyond this rationalization, the EIO would entail another major benefit, by making the judicial cooperation process much more automated. Whereas cooperation used to be a simple possibility for the requested State, it tends to become a mandatory duty.

B. The efficiency of cross-border investigations founded on mutual recognition

The current proposal endeavors to reinforce the efficiency of cross-border investigations by developing mutual recognition and automaticity. It relies on the prominent role of the issuing authority (1) and on the technical improvement of the process, making the EIO more efficient (2).

1) From a request to an order: the prominent role of the issuing authority

Establishing the issuing authority as the main character involves on the one hand an increase of its powers (a) and on the other a decrease in those of the executing authority (b), these two powers operating like communicating vessels.

²⁵However, the measures will not be deleted : they will remain for Denmark (which does not participate in the EIO) and non EU States.

²⁶Council of the European Union, “Initiative for a Directive of the European Parliament and the Council regarding the European Investigation Order in criminal matters”, **Recital 8**, Brussels, 21 December 2011.

a. *The growth of the issuing authority's powers*

This extension is based on the recognition of two steps: firstly, the competence of the issuing authority, and secondly, the order itself.

To achieve efficient mutual recognition, both the issuing and executing authorities must **recognize each other's competence**. Contrary to the legal assistance system, where the issuing and executing States negotiate at government level, mutual recognition allows this first stage to be skipped. Indeed, the request is directly transferred from the issuing authority to the executing authority²⁷. The EIO is based on this system²⁸, as its name fits fully: the authority does not issue a "European investigation *request*" but a mandatory²⁹ "European investigation *order*". For example, if a murder is committed in Spain with a weapon located in Germany, a Spanish judge will be able to give the order to a German prosecutor to seize and transfer it. Thus, this system generates two linked assets that make the EIO a very efficient tool: firstly, it results in **much quicker and automatic judicial cooperation**. Secondly, it entails a "*decentralizing effect*"³⁰ by putting the emphasis on the issuing authority. Hence, the EIO is a new step in the *judicialisation* of criminal cooperation.

Mutual recognition also suggests that the **order is recognized by the executing authority in its content**. This recognition is clearly extended to a maximal point with the EIO. Whereas the freezing order and the EEW apply to pre-existing pieces of evidence, the EIO concerns "*the measure to be executed and not the evidence to be collected*"³¹. Consequently, the issuing authority will have to clarify the nature of the measures that should be executed, the location of the execution, and its modalities. This implies a considerable increase in the issuing authority's powers: not only does it require a piece of evidence to be transferred, but it also explains how this proof has to be collected. Moreover, in the EIO system, mutual recognition is also reinforced by the **wide liberty given to the issuing authority**. Indeed, the issuing authority is in charge of confirming that the proportionality principle is respected and that the investigative measures could have been ordered under the same conditions in a similar national case³². Thus, the executing authority has no choice but to trust the issuing authority that the measure ordered is proportionate. The only leeway enjoyed by the executing authority lies in its ability to use a more proportionate measure when it exists³³. It may also decide to

²⁷This suppression is only a faculty in the traditional legal assistance system. For example, the 2000 MLA Convention has imposed a complete *judicialisation*.

²⁸As it is recalled by Article 6 of the current proposal.

²⁹Initiative for a Directive of the European Parliament and the Council regarding the European Investigation Order in criminal matters, *Detail Statement*, 23th June 2010, p.17 : "*the execution of the foreign decision is mandatory*".

³⁰Interview of Aled Williams, President of Eurojust. Intervention organized by The Institute of International and European Affairs (IIEA) on 7th March 2011.

³¹*Detail Statement*, *op.cit.*, p.20.

³²Council of the European Union, "Initiative for a Directive of the European Parliament and the Council regarding the European Investigation Order in criminal matters", **Article 5a.1(b)**, Brussels, 21 December 2011.

³³Council of the European Union, "Initiative for a Directive of the European Parliament and the Council regarding the European Investigation Order in criminal matters", **Article 9.1(c)**, Brussels, 21 December 2011.

use a different measure if the one ordered does not exist or is restricted to a list of offences in its national law³⁴.

b. The diminution of the executing authority's powers: the limitation of the grounds for refusal

Mutual recognition is based on mutual trust between the different Member States. With such confidence, orders should be received and executed without contestation. Hence, this implies the limitation of the grounds for refusal. In the legal assistance approach, these grounds may be so numerous or wide that a request can nearly be refused for almost any reason. **Mutual recognition results in a limitation of these grounds.** However, in the first two instruments based on mutual recognition (freezing order and EEW), the grounds for refusal still remain too wide. With the EIO, the objective is to reduce these grounds to the smallest portion in order to create a truly automated system. **The initial proposal contained only four different general³⁵ grounds for refusal:** the immunity or privilege of the accused; the fact that the EIO harms essential national security interests; the impossibility to use a similar measure authorized by the executing authority's law if the measure ordered cannot be applied³⁶; and finally, in an administrative procedure, the fact that this measure would not be allowed in a similar case. As mentioned above, classical grounds such as proportionality, dual criminality and "*ne bis in idem*" were abandoned.

However, the EIO draft has changed over the legislative process³⁷: even though this tool seeks to introduce more efficiency, it should not hurt States' sovereignty too much. As a consequence, **in the new version, the grounds for refusal depend on the coercive degree of the measure³⁸.** For non coercive measures, the previously mentioned grounds for refusal are maintained with the addition of the principle of "*ne bis in idem*". Coercive measures can also be refused on the basis of additional grounds, such as dual criminality, non-existence of the measure in the executing State law or the principle of territoriality³⁹. The latter is restricted to two conditions. Firstly, the alleged offence must have been committed outside the territory of the issuing State and wholly or partially on the territory of the executing State. Secondly, the "*conduct in connection with which the EIO is issued is not an offence in the executing State*"⁴⁰. Nevertheless, dual criminality cannot constitute grounds for refusal if the EIO concerns one of thirty-two infractions that are listed in the directive and if the infraction is

³⁴The latest version of the Directive specifies that this possibility is restricted to the orders concerning a coercive measure.

³⁵ Far from the general grounds for refusal set out in Article 10, additional specific grounds for refusal have been inserted in the draft for the measures that imply a sensitive limitation of fundamental rights. For instance, Article 19, relating to the temporary transfer of persons held in custody for the purpose of conducting an investigative measure, provides for specific grounds for refusal if the person concerned does not consent, as well as Article 21 relating to hearings by videoconferencing.

³⁶It should occur when the investigative measure indicated in the EIO does not exist under the law of the executing State or when its use is restricted to a list or category of offences which does not include the offence covered by the EIO.

³⁷It should be recalled that the initial proposal of the EEW also limited the grounds for refusal. The States wanted to defend their sovereignty and several grounds for refusal were reintroduced during the negotiation.

³⁸Article 10 presents some other categories of measures that can be reattached to coercive or non coercive measures.

³⁹Although this principle is not specifically mentioned in the Article 10.1(b) which concerns coercive measures but in Article 10.1(a), its application is restricted to "the use of a coercive measure".

⁴⁰This mention could reintroduce a control of proportionality, even if this perspective is controversial.

punishable in the issuing State by no more than three years' imprisonment. Then, even if the current draft is no longer as radical as the initial proposal, it **significantly reduces** the possibilities of refusing an EIO. The considerable limitation of the grounds for refusal therefore plays a major role in the automation of the process. The latter could not exist without considering the technical aspects.

2) Technical aspects that make the EIO more efficient

Two technical aspects play a major role in the automation of the EIO. On the one hand, the proposal for a directive imposes a significant reduction of deadlines for the execution of the order (a). On the other hand, the proposal forces the issuing authority to use a standardized document (b).

a. The significant reduction of deadlines

Whereas in the mutual legal assistance regime, no time limits are specified⁴¹, mutual recognition generally involves time limits to strengthen mutual confidence. Indeed, reducing deadlines is a way to foster mutual trust between Member States⁴². If justice requires time, **unnecessary delays must be avoided** for at least three reasons. They have a negative impact on the quality of the evidence; furthermore, every accused person has a right to be judged within a reasonable time; finally, time limits give an idea of the timeframe within which its request will be executed. Thus, Article 11.1 of the current proposal states that “...*the investigative measure shall be carried out with the same celerity and priority as for a similar national case*”. As mutual confidence should not be limited to a general formula, **the proposal also imposes particular time limits**: first, grounds for refusal or all decisions that have an impact on the recognition or the execution of the EIO would be taken as soon as possible and no later than **30 days** after its receipt by the competent executing authority⁴³. Then, if the order is recognized, the executing authority would have **90 days** to execute it. If this delay cannot be respected, then a new one shall be issued from a discussion between the two authorities. Finally, the gathered evidence shall be transferred “*without undue delay*”. The draft proposal also allows the issuing authority to specify that the order is urgent⁴⁴: this emergency must then be taken into account by the executing authority. The EIO is the first instrument to set up specific delays. As such, it underlines the firm will of the Member States and European institutions to avoid unnecessary delays and provide for swift and efficient cooperation.

⁴¹The 1959 Convention specifies that the request should be executed “as soon as possible”.

⁴² It is considered as a major step forward for Aled Williams. As a judge, he had to wait one year an answer to a request addressed to Spain and he admits one can wait eighteen months for an answer from the UK. Interview of Aled Williams, *art. cit.*

⁴³This delay can be augmented up to 60 days if difficulties appear.

⁴⁴Council of the European Union, “Initiative for a Directive of the European Parliament and the Council regarding the European Investigation Order in criminal matters”, **Article 11**, Brussels, 21 December 2011.

b. The use of a standardized document

Several other technical and practical aspects of the EIO help judicial cooperation to become quicker and easier. Firstly, the EIO would be transferred in a standardized document. The choice was made to create a **short and clear form**. It contains sub-chapters about, for example, the investigative measures, the persons concerned, the type of procedure, the identification of the issuing authority, and the reasons for the emission of the EIO. Secondly, the transmission of the document should be made **by any means capable** “*of producing a written record under conditions allowing the executing State to establish authenticity*”⁴⁵. Member States can establish central authorities in order to operate the transfers and the EJM can be used. Moreover, if a problem concerning a particular point in the document occurs (an omission or an error), it should be solved by “*direct contacts*” between the issuing and executing authorities. The purpose is to avoid the nullity of an EIO because of negligence. Furthermore, it should improve the mutual confidence between the authorities and it emphasizes decentralization, even if central authorities can interfere, “*if required*”⁴⁶. Last but not least, **language differences will no longer hinder judicial cooperation**. Indeed, the proposal allows a State to accept the transmission of an EIO in a different language from its official one. Furthermore, the issuing judge would have to specify the language(s) he speaks⁴⁷. This is important because this question is often considered nowadays as an obstacle to judicial cooperation⁴⁸.

All these aspects of the EIO aim at deleting as many obstacles as possible to its efficiency. As a consequence, **the EIO appears as a major step towards quicker and automated judicial cooperation in evidence matters**.

Relying on mutual recognition, the EIO simplifies and reinforces cross-border investigations. Indeed, this proposal gives birth to a unique instrument benefitting from completely *judicialised procedures*, standardized requests, limited grounds for refusal and strict deadlines. However, such an instrument cannot exist without controversy. All the advantages can develop pernicious effects and every step towards more efficient judicial cooperation runs the risk of infringements to individual freedom.

⁴⁵*Ibid*, Article 6.

⁴⁶*Ibid*, Article 6.

⁴⁷A French prosecutor could thereby mention to a German one that he speaks German, and the latter could answer to him in his native language if France allows the transmission of the EIO written in German.

⁴⁸Interview with Valery Turcey, liaison magistrate in Germany.

II) The European Investigation Order, a harshly criticized instrument that should be improved

As many grounds for criticism have arisen and undermined the initiative (A), a lot of suggestions help to improve the EIO (B).

A. The EIO, a flawed initiative undermined by numerous weaknesses

Although the proposal for a directive governing the process of evidence gathering in the European Union might seem attractive, numerous grounds for criticism have come up⁴⁹ and highlighted technical issues (1) and a lack of individual protection (2).

1) A problematic mechanism with technical issues

The EIO greatly suffers from initial assets that finally turned into drawbacks. Indeed, the very wide scope of the EIO (a) and its grounds for refusal (b) have been harshly criticized.

a. A questionable wide scope

This breadth first refers to the investigative measures that can be requested. As said previously, the EIO potentially covers any investigative measures. So while the drafters took care to define precisely the type of proceedings concerned by the EIO (Article 4)⁵⁰, they provided for a very wide spectrum of measures without defining them properly, and by doing so, inserted a **certain degree of unpredictability** which is not welcome especially in criminal matters. This situation could also lead a State to execute an investigative measure and gather a piece of evidence when the collected information could not be used in national proceedings⁵¹.

Besides, this problematic and extremely wide scope also deals with the persons concerned : the EIO extends far-beyond the suspects or accused persons to **any individual who becomes connected with an investigative process** (victim, witness, or expert), which harshly questions the standards of individuals' protection as far as their liberty and security are threatened.

Finally, the EIO concerns an **undeniable multiplicity of authorities**: the draft provides for a wide definition of the issuing authority insofar as it leaves each State the choice to decide which national authority will be competent to issue an EIO. Therefore, police authorities or even Coast

⁴⁹All criticisms cannot be tackled in this statement.

⁵⁰It refers to **criminal proceedings (...)** ; **proceedings brought by administrative authorities** or by **judicial authorities** in respect of acts which are punishable under the national law of the issuing state by virtue of being infringements of the rules of law and where decisions may give rise to proceedings **before a court having jurisdiction in criminal matters**.

⁵¹For example, in the United Kingdom, information resulting from the interception of telecommunications cannot directly be used in proceedings.

Guards (for example in Sweden)⁵² could issue an order. That is why the addition of Article 5a which specifically provides for **judicial validation** when the issuing authority is not a judicial one, is welcome⁵³. Therefore, a judicial authority would certainly intervene in the process of issuing an order. But isn't there a need for judicial intervention on both sides? At least, to ensure that the EIO won't become a "*self-validating stamp*", a judicial authority from the executing State⁵⁴ should intervene to control that the investigative measure can be executed in a similar domestic case⁵⁵.

Thus, the breadth of the EIO, initially exposed as an important asset of the mechanism of mutual recognition in evidence matters, could also be seen as a **glitch in security**. Besides, this particularly wide scope poses an important **problem of legal basis**. Indeed, according to the second recital, the EIO would be based on Article 82 (1) of the TFUE which provides for judicial cooperation in criminal matters. But given the scope of the EIO, one can ask whether we are facing a mechanism of judicial cooperation or a tool for "*interstate police cooperation in the guise of mutual recognition*"⁵⁶. And while the very wide scope of the EIO remains problematic, this new tool has to face other criticisms dealing with its limited grounds for refusal.

b. Limited and intricate grounds for refusal

Limiting the possibilities to refuse an EIO was a clearly displayed objective. Nonetheless, the few grounds for refusal give rise to a certain intricacy.

Firstly, the territoriality exception⁵⁷ is arranged in a very complex way. Indeed, refusal is tributary of three conditions⁵⁸ making the exception **more difficult to use** by a requested State.

Then, the current Article 10 goes even further in the complexity of mechanism of refusals by establishing a distinction between measures which can only be refused on the general grounds (Article 10.1a) and those whose execution can be refused also on the basis of the double criminality principle (Article 10.1b). According to Debbie Sayers, this approach which distinguishes the nature of the requested measure "*does nothing of legal certainty and is likely to lead to **confusion** and **inconsistency in transposition***"; she considers "*there is a need for greater clarity, coherence and consistency (...) in all these refusal provisions*"⁵⁹.

But the main problem raised by these limited grounds for refusal lies in the **threat to the**

⁵²Answers to the questionnaire related to issuing authorities in application of the initiative for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters, Brussels, 4th October 2010.

⁵³Article 5a was inserted in the latest draft of the Directive.

⁵⁴In the matter of the executing authority, the current proposal defines it only by its competence to recognize and to execute the order. Here again, the scope is extended but without specific definition, the enforcement of the EIO could face any dispute on the ability to execute an order and could then lead to a dispute on the admissibility of the collected proof.

⁵⁵For now, the power to control that the investigative measure can be executed in a similar domestic case is in the hands of the issuing authority, which might seem contradictory : the executing authority is better placed to control that.

⁵⁶Peers (S.), "The proposed European Investigation Order", *Statewatch Analysis – Update*, November, Statewatch, London, 2010.

⁵⁷The principle of territoriality permits the requesting State to retain an opportunity to exercise jurisdiction if, for example, the offence was committed in its own territory.

⁵⁸The offence must have been committed outside the territory of the issuing State and wholly or partially on the territory of the executing State ; the ordered measure must be coercive ; the conduct must not be an offence in the executing State.

⁵⁹Sayers (D.), *ibid.*

sovereignty of the requested State. By limiting the number of grounds for refusal, the territoriality exception, and the use of the double criminality exception, Member States are little-by-little losing powers to control the opportunity for the execution and to argue with the issuing State in the process of evidence gathering.

Besides jeopardizing the sovereignty of a requested state, it also threatens the rights of individuals concerned by the execution of an EIO. Indeed, if limiting the grounds for refusal is a way to ensure the effectiveness of judicial cooperation in criminal matters (Recital 12), what is at stake is the essential respect of fundamental rights. As Debbie Sayers sums up, the EIO is “*a further step in the evolution of the mutual recognition agenda and the deepening of criminal cooperation among Member States*” but “*it has far-reaching implications for individual rights because of its breadth, its application to individuals who are not suspects and the nature of its invasive provisions*”⁶⁰.

2) An unsatisfactory tool with a lack of individual protection

Under the former mutual legal assistance mechanism, the executive was heavily involved in the process, which was seen as an important protection for citizens. Henceforth, the mutual recognition model has directly exposed individuals to other European criminal justice systems without establishing minimum procedural standards and without reinforcing individual rights of the person concerned by an EIO. Thus, **essential safeguards are missing**.

a. Procedural rights

The lack of specific protection that was previously contained in instruments on mutual legal assistance is an important source of criticism. Yet, “*mutual recognition requires mutual trust, which demands proportionality and fair process*”. Overlooking this at its peril, the EIO could be seen as a “*myopic measure lacking in foresight or perspective, ignoring the move to strengthen procedural protections*”⁶¹. Indeed, it lacks articulated protection in relation to the right to fair trial including notably the access to a lawyer, the presumption of innocence and the equality of arms which have to be respected in any form of proceedings⁶². Therefore, such rights should be observed both by requesting and requested authorities while issuing and executing an EIO. But in this matter a **real step backwards** can be highlighted compared to former instruments based on mutual legal assistance. For example, while the 2000 MLA Convention makes a reference to “judicial authority of the requesting Member State” ensuring to ensure the respect of primary procedural rights in case of hearings by videoconference, or sets out that the measure subject to agreement must be conducted in accordance with relevant international instruments including the ECHR, the draft omits such a statement and does

⁶⁰Sayers (D.), *ibid.*

⁶¹Sayers (D.), *ibid.*

⁶²Article 6.1 of the European Convention on Human Rights.

not mention anything about the respect of fundamental procedural rights in the execution of an EIO. All in all the British Parliament sums up this situation in this way : “*a national judge may have no choice but to enforce the order of a court of another Member State without himself examining the facts and merely on the basis of a form containing a number of boxes that have been ticked. For such a system to be acceptable there must be confidence that the individual (...) has been and will be treated fairly. Compliance by Member States with minimum standards for criminal investigations and prosecutions is, therefore, essential*”⁶³. But the Roadmap for strengthening procedural rights of suspected or accused persons in criminal matters proceedings published in 2009 is clearly not sufficient enough given the very wide scope of the EIO which can implicate limitations of individual rights not only for the suspected or accused person but also for victims or witnesses. Therefore, efforts have to be made and actions have to be set up in order to increase the protection of procedural rights. But substantial rights also deserve to be fully protected.

b. Substantial rights

Article 1.3 of the draft arranges that the Directive shall not have the effect of modifying the obligation to respect fundamental rights and legal principles. Recital 17 sets out that the Directive respects fundamental rights and observes the principles recognized by Article 6 of the TUE and by the Charter of Fundamental Rights of the European Union; and that nothing may be interpreted as prohibiting refusal to execute an EIO when objective elements establish that the measure was discriminatory⁶⁴. But still, this ground for refusal only appears in a recital and not in Article 10 of the proposal setting out the general grounds for refusal. Moreover, **the draft does not make the violation of human rights a specific ground for refusal** and does not make any specific reference to other fundamental rights, except for personal data protection. Is it too obvious that an EIO can be refused in case of violation of fundamental rights, or is it unforgivable neglect?

Nevertheless, a reference to personal data protection has been inserted, taking into account particular criticisms on the lack of protection of the right to privacy. But still, **the EIO fails to adequately set out privacy rights and personal data protection**⁶⁵ because the new Recital 17a only makes a reference to the provisions on the protection of personal data in the framework of police and judicial cooperation in criminal matters. This approach is welcomed by the European Data Protection Supervisor (EDPS) but the latter still points out the **insufficiency of the Framework-Decision on Data Protection** which is “not fully satisfactory” in terms of protection. Thus, the preservation of personal data in the framework of the EIO remains **too light** because it lacks specific mention to

⁶³<http://www.publications.parliament.uk/pa/1d200405/1dselect/1deucom/28/28.pdf>

⁶⁴Recital 12 : “nothing may be interpreted as prohibiting refusal to execute an EIO when there are reasons to believe, on the basis of objective elements, that the EIO has been issued for the purpose of prosecuting or punishing a person on account of his or her sex, racial or ethnic origin, religion, sexual orientation, nationality, language or political opinions, or that the person's position may be prejudiced for any of these reasons”.

⁶⁵Article 16 of the TFUE and Article 8 of the Charter of Fundamental Rights of the European Union.

minimum standards⁶⁶. Yet, this issue might be a cornerstone of the mutual recognition system because according to the EDPS, “*setting a (high) common standard for data protection in this sensitive area will promote mutual confidence and trust between member states and reinforce the judicial cooperation on mutual recognition*”⁶⁷.

In conclusion, one can question whether this lack of fundamental rights' protection, both procedural and substantial, is not in the structure itself of mutual recognition since the EIO mechanism seems in this matter to be a step back in comparison with the MLA Convention, which provided for specific protection such as the use of coercive measures only in restricted situations, and gave the consent of the person concerned particular importance which does not necessarily show through the current draft. Because of its too wide scope, its few grounds for refusal and its lack of individual protection, the EIO must be subject to improvement.

B. The EIO, a promising initiative subject to improvement

In spite of the latest modifications, some improvements remain to be made, both because blurred points should be clarified (1) and additional points would have to be considered (2).

1. Blurred points that should be clarified

Numerous proposals, either relevant or far-fetched, have been put forward to fix appropriate protection of fundamental rights (a) and to respond to several technical issues (b).

a. About fundamental rights

Suggestions to reinforce the protection of fundamental rights in the implementation of the EIO abound. This point crystallizes the deepest fears of European democracies since the EIO would permit an issuing State to oblige a requested one to execute intrusive measures. Given the fact that State sensibility differs from one State to another when it comes to fundamental rights⁶⁸, we can understand that one could show reluctant towards jeopardizing the liberty of its citizens through the implementation of the EIO, as efficient as this tool might be. Therefore, the drafters will have to search for a compromise to comfort each aspiration to protect the rights of any person concerned and to agree on the way they expect to achieve **conciliation between efficiency and protection of fundamental rights**.

⁶⁶For example, Article 23 relating to accessing information from bank accounts, does not refer to the essential need to respect privacy while collecting personal information and does not specifically mention the need to comply with specific provisions on data protection.

⁶⁷Opinion of the EDPS para.28 in Council of the European Union, note from Hustinx (P.), European Data Protection Supervisor, Opinion on the European Investigation Order, 15122/10, Brussels, 18 october 2010.

⁶⁸For example, Germany has proved to be particularly careful when it comes to fundamental rights for historical reasons.

On the one hand, they can provide for very specific and detailed protection within the mechanism of the EIO. This would lead them to insert references to specific procedural rights such as the right to fair trial including the right to be notified of criminal charges, the right to have access to a lawyer and/or an interpreter, the right to record interviews and the preservation of the presumption of innocence. This approach would also bring new fundamental rights-based grounds for refusal ground in case of human rights' violations⁶⁹ serving as a 'safety valve'⁷⁰. Besides, the Committee on Civil Liberties, Justice and Home Affairs (LIBE) also proposes, for instance, to provide for the possibility to refuse to execute an EIO if the conditions of detention in the issuing State are not satisfactory⁷¹.

On the other hand, the drafters can also choose to deal with the protection of human rights in a less detailed way, by making general references to other European tools related to such protection. But given that such instruments do not exist yet, this approach would necessarily lead **to developing a directive centralizing standards rules and minimum safeguards required in gathering evidence**, in addition to a directive detailing the procedural standards to protect the rights of any person involved in criminal proceedings⁷². Without being careless, this way of seeing the protection of fundamental rights would show the EIO's efficiency off to an advantage. Multiplying references to fundamental rights that are not necessarily protected in the same way in every Member State would certainly lead to **differences in transposition** which are not welcome since the EIO claims to harmonize the matter. Moreover, we can ask whether focusing on fundamental rights would not have the downside to **distort the essence of the instrument** which remains a tool of investigation and not a tool of criminal repression. Indeed, we think that the protection of human rights is not the real objective of the directive insofar as specific instruments dedicated to fundamental rights' preservation are in progress.

Nevertheless, current negotiations will need to determine the way the Directive intends to protect fundamental rights without losing sight of the fact that such instruments need coherence and clarity. They will also have to clarify blurred points concerning some technical issues.

b. About technical issues

Three technical points previously tackled would deserve improvement.

Firstly, the term “*investigative measure*” should be defined in order to enhance the scope's clarity. This point is important insofar as this definition can differ from one State to another. That is why the directive should explain what is specifically included as well as what is excluded from the scope to avoid any dispute. But this relevant suggestion competes against amendments lacking in

⁶⁹Debbie Sayers recommends that any « *substantial risk that the execution of an EIO would breach the human rights of any person involved should justify the mandatory refusal to execute the order* », *op.cit.*

⁷⁰FRA, « *Opinion of European Union Agency for Fundamental Rights on the draft Directive regarding the European Investigation Order* », Vienne, 14th February 2011.

⁷¹European Parliament, Committee on Civil Liberties, Justice and Home Affairs, *Amendments 55-199*, 10th February 2012.

⁷²Such directive would have to protect not only the rights of suspected or accused persons but also the rights of victims and witnesses, given that the 2009 Roadmap for Strengthening Procedural Rights is not sufficient enough.

sense. For instance, the LIBE Committee proposed to reduce the scope of the EIO by cutting out controlled deliveries. However, such a proposal is not relevant because most cross-border criminality is made up of drug trafficking which often demands under-cover controlled delivery to be dismantled.

Secondly, the need for readability requires the rewriting of Article 10 related to the general grounds for refusal: if the first version was lapidary, the last is beyond understanding. Indeed, the distinction between coercive and non-coercive measures should be plainly defined from the individual's perspective⁷³. The structure of the paragraphs also has to be gone over again in order to avoid any confusion on which exception could be used. But far from the writing problem, such a complex mechanism of refusal **threatens the instrument's coherence**. What is at stake by multiplying the number of grounds for refusal is the automated and efficient system that the drafters took care to create. Besides, the opportunity to increase the possibilities to refuse an EIO can be questioned : on the one hand because there are no real statistics establishing the most recurring grounds for refusal, and on the other hand because in practice refusals to execute a mutual assistance measure are scarce. Therefore, members of the European Parliament will have to take a stance either in the sense of keeping the initial assets of the tool (automaticity and limited grounds for refusal) or in the sense of enlarging the possibilities to refuse the execution of an EIO, given that in this case, they will have to give Article 10 as much clarity and understandability as possible to avoid misinterpretation and legal insecurity.

Finally, the standardized document that would permit a State to issue an EIO should be ameliorated. Some think that the longer the better because a thorough form would save the issuing authority from forgetting essential information and would avoid vague orders. Others think that this form could be improved by making it more interactive and practical using information technologies⁷⁴.

But while these blurred points deserve to be clarified, additional ones ought to be considered.

2. Additional points to consider

New provisions could be added with a view to improving the efficiency of the EIO in itself (a), as well as the efficiency of cooperation in criminal matters in general (b).

a. *Specific measures to improve the efficiency of the EIO*

Provisions could first be added to improve the EIO's efficiency as soon as it comes into force.

The current draft does not contain any mechanism aiming at preventing abuse in the issuing of an EIO: indeed, the issuing authority is the only one in charge of the proportionality test, but as it does

⁷³Sayers (D.), *op.cit.*

⁷⁴For example, the form could be a PDF document with appearing/disappearing provisions depending on the ordered measure and the previous ticked boxes; as the United Kingdom suggested during the discussion between European ministers the document should be prepared in electronic format to improve the celerity of the process.

not bear the cost of the execution⁷⁵, it may be tempted to issue EIOs without really checking their necessity. The EIO could paradoxically become “too big a success” with too many orders issued, for ridiculously small offences (as occurred with the EAW⁷⁶) without sufficient means for the requested authority to execute them. Thus, several authors regret that lessons from the past have not been learnt. Therefore, implementing **penalty thresholds** which would detail, for each investigative measure, which kind of offences are concerned, could deter authorities from overusing this new tool⁷⁷.

Moreover, the draft suffers from the indicative nature of the execution deadlines. Presently, Article 11 does not provide for any sanction in case the deadlines are not respected; thus, it is very likely that an investigation will be executed in much more than 90 days. Hence, the draft should set up **incentives for the executing authority to comply with the deadlines**, such as the possible resort to the infringement procedure against the reluctant State⁷⁸, or a reciprocity clause (if the executing authority does not comply with the deadline, its next requests will not be executed within those delays).

Furthermore, provisions may be added so as to strengthen the EIO’s efficiency in the long run. Both the FRA⁷⁹ and the EDPS⁸⁰ have noted that the draft directive is not based on a global impact assessment of the existing measures regarding the gathering of evidence: judges in the EU have not been consulted about the difficulties they currently encounter nor about their expectations⁸¹, nor has an impact assessment been made of the EEW or the freezing order. Hence, “*can we be sure another mutual recognition instrument is the answer?*”⁸² In order to ensure long-term efficiency of the EIO, **an ex-post evaluation of this tool** should be foreseen. The current Article 32 provides for a report on the application of the EIO by the Commission five years after the entry into force of the Directive. Nonetheless, this provision is not sufficient: according to the FRA, an independent body should be in charge of collecting data about the application of the EIO, the difficulties encountered and the fundamental rights issues. This independent and data-based ex-post evaluation would allow lessons to be learned from the past, hindsight to be gained, and efficient improvement of the EIO for the future.

b. General measures to improve cooperation in criminal matters as a whole

The EIO, as any instrument in international cooperation matters, can only be successful if judges are willing to use it. General measures may ensure that judicial authorities will accept to resort to the EIO. Firstly, **appropriate information** should be provided as trust stems from knowledge. For

⁷⁵As stated in Recital 13b and article Y according to which “*all costs undertaken on the territory of the executing State which are related to the execution of an EIO shall be borne by the executing State*”. However, “*where (...) the costs (...) may become exceptionally high, [the executing authority] may consult with the issuing authority on whether and how the costs could be shared or the EIO modified*”.

⁷⁶In his conference, A. Williams gives the example of a EAW issued for thefts of a piglet, or a wardrobe door...

⁷⁷Sayers (D.), *op.cit.*

⁷⁸Theoretically, a Member State or the Commission could launch a procedure if the Member State does not comply with the deadlines.

⁷⁹Fundamental Rights Agency, *op.cit.*

⁸⁰Opinion of the EDPS, *op.cit.*

⁸¹However, such a consultation across the EU might be hard to implement, as regards to its costs and length.

⁸²Sayers (D.), *op.cit.*

instance, the lack of success of the freezing order partly results from the absence of training about its purpose or its functioning. Information may already exist⁸³; yet, it is not always obtainable, and judges may not be aware of its existence! The EU often appears as distant and hard to understand: as a French judge admits, one can be reluctant to execute an international cooperation request when one has hundreds of other cases to tackle (all the more so as one does not understand the instrument used!)⁸⁴. A larger diffusion of sources of information in courts about the EIO, criminal cooperation in general, and other States' laws would allow judges to know how to use this instrument better.

Furthermore, reluctance to resort to criminal cooperation may be entailed by the "working culture" of judges: contrary to the police, judges are not used to working in a team, as the majority of their work is carried out alone and on an independence basis. However, as soon as personal relationships are created between judges from different States, they no longer hesitate to use criminal cooperation instruments. Consequently, **changing the judicial working culture** may efficiently promote criminal cooperation in the EU: hence, the Commission recommends implementing specific training and exchange programs amongst the EU, based on the model of the Erasmus program⁸⁵, to help judges to work together and to strengthen their working network in the different Member States.

Finally, the EIO, like all other instruments based on the mutual recognition principle, relies on mutual trust between European judicial authorities. Yet, this trust cannot be complete if judges are not certain that investigative measures carried out in the executing State do or do not respect their national procedural requirements. Currently, there is a risk that the evidence obtained in the requested State does not comply with the issuing State's standards and, thus, cannot be used by the issuing authority⁸⁶. The EIO would then become useless. Confidence between two systems often results from their similarity, or at least from their common points. Therefore, enhancing European cooperation in criminal matters necessarily implies a minimum **harmonization of the provisions ruling the admissibility of evidence**. The necessity of this further step has been recognized by the Commission, which calls for a legislative proposal to introduce common standards for gathering evidence in criminal matters in order to ensure its admissibility⁸⁷; yet, a proposition still has to be launched.

In the context of fragmentary and intricate cooperation in criminal matters, the EIO would provide an opportune simplification and significantly promote the gathering of evidence in the EU; yet, significant improvements are still awaited in order to adequately protect human rights and ensure

⁸³For instance, in France, the Bureau d'Entraide Pénale Internationale (BEPI) has published a Guidebook on the Intranet.

⁸⁴Mégie (A.), "Généalogie du champ de la coopération judiciaire européenne", *Culture & Conflits*, Printemps 2006, n°62, Arrêter et juger en Europe., pp.11-14.

⁸⁵Delivering an Area of Freedom, Security and Justice for Europe's citizens, Action Plan Implementing the Stockholm Programme.

⁸⁶For instance, what if a French policeman uses interception of telecommunications to gather evidence for an EIO issued by the British police, while this piece of evidence cannot be used under British law ?

⁸⁷Delivering an Area of Freedom, Security and Justice for Europe's citizens, *op cit*.

the success of this instrument amongst practitioners. Indeed, the success of the EIO, based on mutual recognition, is highly dependent on the degree of confidence which arises between Member States. However this trust seems hard to achieve, especially in criminal matters, where, paradoxically, “*the same variable that pushes for mutual recognition (the difficulty to achieve a political consensus on common rules) also makes it more difficult to enforce (because of the breach of sufficient mutual trust)*”⁸⁸. Therefore, we may hope the EIO achieves at the same time mutual recognition and mutual trust at the same time.

Nevertheless, the EIO only represents a short-term step towards more efficient cooperation, still relying on an intergovernmental approach. In the long run, a real move forwards would be the establishment of the European Public Prosecutor’s Office⁸⁹, which is based on a supranational perspective. By seeking to develop mutual confidence and promoting cooperation between Member States, the EIO could represent a major stage towards this long-term objective⁹⁰.

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⁸⁸Maduro (M.P.), “So close and yet so far : the paradoxes of mutual recognition”, *Journal of European Public Policy*, Vol.14, No5, 2007, pp.814-825).

⁸⁹As foreseen by Article 86 of the TFEU.

⁹⁰Interview of Aled Williams, President of Eurojust. Intervention organized by The Institute of International and European Affairs (IIEA) on 7th March 2011.