Council of the
European Union

Brussels, 28 June 2023
(OR. en)

10135/1/23
REV 1

COPEN 182
EVAL 3
JAI 771
CATS 35
EUROJUST 18
EJN 6

NOTE

From:	General Secretariat of the Council
To:	Delegations
Subject:	**EVALUATION REPORT ON THE TENTH ROUND OF MUTUAL EVALUATIONS** **On the implementation of the European Investigation Order (EIO)** **REPORT ON PORTUGAL**

ANNEX

EVALUATION REPORT ON THE

TENTH ROUND OF MUTUAL EVALUATIONS

On the implementation of the European Investigation Order (EIO)

REPORT ON PORTUGAL

Table of Contents

Table of Contents 3

1. EXECUTIVE SUMMARY 6

2. INTRODUCTION 8

3. TRANSPOSITION OF DIRECTIVE 2014/41/EU 10

4. THE PORTUGUESE JUDICIAL SYSTEM 10

4.1. Public Prosecution Service 10

4.1.1. Judicial Cooperation and International Relations Department 11

4.1.2. Departments of the MP competent in the investigative phase 13

4.2. Court system 13

4.2.1. Courts of first instance 13

4.2.2. Courts of Appeal 14

4.2.3. Supreme Court of Justice 14

4.2.4. Constitutional Court 14

5. COMPETENT AUTHORITIES 15

5.1. Issuing authorities 15

5.2. Executing authorities 17

5.3. Central authority 17

5.4. The right of the suspected or accused person or victim to apply for an EIO 18

6. SCOPE OF THE EIO AND RELATION TO THE OTHER INSTRUMENTS 19

7. CONTENT AND FORM OF THE EIO 24

7.1. Challenges relating to the form 25

7.2. Language regime and problems related to translation 26

7.3. EIOs containing multiple requests 28

7.4. Additional EIO, splitting of EIOs, conditional EIOs 28

7.5. Orally issued EIOs 29

8. NECESSITY, PROPORTIONALITY AND RECOURSE TO A DIFFERENT TYPE OF INVESTIGATIVE MEASURE 29

9. TRANSMISSION OF THE EIO FORM AND DIRECT CONTACTS 31

10. RECOGNITION AND EXECUTION OF THE EIO, FORMALITIES 33

10.1. Recognition and execution in line with the mutual recognition principle 33

10.2. Compliance with formalities 34

11. ADMISSIBILITY OF EVIDENCE 37

12. RULE OF SPECIALITY 39

13. CONFIDENTIALITY 40

14. GROUNDS FOR NON-EXECUTION 42

14.1. Dual criminality 42

14.2. Ne bis in idem 43

14.3. Fundamental rights 43

15. TIME LIMITS 44

16. GROUNDS FOR POSTPONEMENT OF RECOGNITION OR EXECUTION 46

17. LEGAL REMEDIES 46

18. TRANSFER OF EVIDENCE 49

19. OBLIGATION TO INFORM - ANNEX B 50

20. COSTS 51

21. COORDINATION OF THE EXECUTION OF DIFFERENT EIOS IN DIFFERENT MEMBER STATES AND/OR IN COMBINATION WITH OTHER INSTRUMENTS 52

22. SPECIFIC INVESTIGATIVE MEASURES 53

22.1. Temporary transfer 53
22.2. Hearing by videoconference 55
22.2.1. Presence of Portuguese authorities during the execution of an EIO for a hearing by videoconference 56
22.2.2. Portuguese EIOs for hearing via videoconference to ensure compliance with formalities 57
22.2.3. Hearing of defendants by videoconference at trial stage 57
22.2.4. Hearings via Skype or other COTS systems 58
22.3. Hearing by telephone conference 58
22.4. Information on bank and other financial accounts and banking and other financial operations 59
22.5. Covert investigations 60
22.6. Interception of telecommunications 62
22.6.1. Scope of the concept of 'interception of telecommunication' and use of Annex A or C 63
22.6.2. Transmission of intercepts 65
22.7. Cross-border surveillance 66

23. STATISTICS 67

24. TRAINING 69
24.1. Initial training for future judges and prosecutors 69
24.2. Ongoing trainings 70

25. FINAL REMARKS, RECOMMENDATIONS AND BEST PRACTICES 72
25.1. Suggestions by Portugal 72
25.2. Recommendations 73
25.2.1. Recommendations to Portugal 73
25.2.2. Recommendations to the other Member States 74
25.2.3. Recommendations to the European Union and its institutions 75
25.2.4. Recommendations to Eurojust/Europol/EJN/EJTN 75
25.3. Best practices 76

1. EXECUTIVE SUMMARY

Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (‘Directive’) 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 already gathered practical experience based on direct communications between European judicial authorities. Thus 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.

Portugal was among the first Member States to be evaluated within the tenth round of mutual evaluations. The information provided in the questionnaire and during the on-site visit was precise and comprehensive, and the evaluation visit to Portugal was extremely well prepared and organised by the Portuguese authorities. The Portuguese practitioners were also extremely open to discussing the strengths and weaknesses of the Portuguese system, which enabled the evaluation team to obtain an in-depth overview of the application of the Directive in Portugal.

As a result of the evaluation, the evaluation team established that the EIO generally works well in practice, and the Portuguese practitioners were also satisfied with the mechanism. It should be noted that in Portugal, the understanding and appreciation of mutual recognition and mutual trust plays a decisive role in the application of the Directive. In fact, Portugal should be commended for the authorities’ general attitude towards recognising and complying with the EIOs of other Member States to an outstanding degree.

Nevertheless, the evaluation team identified some shortcomings that need to be addressed at national and European level, resulting in recommendations under Chapter 25.2.

One overarching issue appears to be the interaction of the EIO with other instruments in the field of judicial cooperation in criminal matters. The scope of the Directive is clear in that it limits the EIO to the purpose of gathering evidence. In practice, however, problems can occur due the choice of the wrong instrument or to the parallel application of various instruments. In executing requests, the Portuguese authorities take a pragmatic and flexible approach, in order to accommodate the requests from other Member States as far as legally possible, but the evaluation reveals that further clarity is needed regarding interaction with other instruments.

With the creation of the e-Evidence Digital Exchange System ('e-EDES'), secure means of communication are in the process of being established at Union level. Although the system is still in the pilot phase and the participation and level of connection of the various Member States differs greatly, the system will undoubtedly enhance the efficiency of the EIO. However, as the current iteration of the system cannot handle large files, an alternative solution should be identified. The issue of connecting Eurojust to the system also needs to be addressed.

The evaluation team found that the EIO form is not entirely fit for purpose. Amending the form would therefore facilitate cooperation. The evaluation also confirmed that the legislator should provide clarifications with regard to:

- the speciality principle;
- the concept of confidentiality;
- the concept of interception of telecommunications;
- the application of the EIO to ensure that the accused person attends the main trial.

Furthermore, the application of the Directive in relation to the Convention implementing the Schengen Agreement ('CISA')[1] in respect of cross-border surveillance should also be further clarified in order to ensure legal certainty.

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

2. INTRODUCTION

Following the adoption of Joint Action 97/827/JHA of 5 December 1997[2] ('Joint Action'), a mechanism has been established for evaluating the application and implementation at national level of the international undertakings in the fight against organised crime.

Under Article 2 of 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 the Directive, the tenth round of mutual evaluations will focus on the EIO.

The tenth round of mutual evaluations aims to provide real added value by offering the opportunity, via on-the-spot visits, to consider not only the legal issues but also particularly the relevant practical and operational aspects connected with 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 in all stages of the 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 the better functioning of cross-border judicial cooperation in criminal matters within the area of freedom, security and justice.

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

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

Portugal was among the first Member States evaluated during this round of evaluations, as provided for in the order of visits to the Member States adopted by CATS on 29 June 2022 by a silence procedure[3].

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 of 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[4].

The experts entrusted with the task of evaluating Portugal were Ms Judith Herrnfeld (Austria), Ms Anu Juho (Finland) and Mr Francisco Jiménez-Villarejo Fernández (Spain). In addition, two observers were present: Ms Christine Janssens (Eurojust) and 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 Portugal's detailed replies to the evaluation questionnaire, the findings from the evaluation visit carried out in Portugal between 14 and 16 February 2023, where the evaluation team interviewed the representatives of the Ministry of Justice, the Public Prosecution Service (*Ministério Público* ('MP'), the judiciary, the Judicial Police and the Bar Association.

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

3. TRANSPOSITION OF DIRECTIVE 2014/41/EU

The Directive was implemented by Law No 88/2017 of 21 August ('Law No 88/2017'), which entered into force on August 22, 2017. In implementing the EU instruments on mutual recognition, Portugal took the approach of implementing the instruments through separate legal acts. Discussions have taken place as to whether the implementation of all instruments should be united in one legal act.

The implementation follows the Directive nearly verbatim. Therefore implementation appears to be complete. It does not, however, differentiate between the procedure for issuing an EIO and the procedure for executing one, although practitioners have claimed that this raises no problems for the application of the Directive.

In addition, practitioners have voiced a preference for the adoption of regulations at Union level instead of directives, because regulations provide for a common European framework, whereas directives leave more room for different implementation.

4. THE PORTUGUESE JUDICIAL SYSTEM

4.1. Public Prosecution Service

The MP is a constitutional body entrusted with the power to prosecute, to participate in the implementation of the criminal policy defined by sovereign entities, to represent the State and to defend the democratic legality and the interests laid down by law (Article 219(1) of the Constitution of the Portuguese Republic (the 'Constitution').

The MP has its own statute and is considered to be an autonomous magistracy from a procedural standpoint. Although the MP is granted competencies other than jurisdictional competencies or competencies that go beyond those attributed to the courts, it belongs to the judiciary and participates autonomously in the administration of justice.

In the Portuguese system, the MP is the competent judicial authority in the investigative phase of criminal proceedings (‘*inquérito*’), and it is competent to prosecute based on the principle of legality, and also to defend democratic legality. Responsibility for the execution of the sentence also lies with the prosecutor. The MP is represented in all criminal courts (county courts, appeal courts and the Supreme Court of Justice). The MP is an integral part of the judiciary; it is autonomous and characterised by its broad powers of initiative.

The MP covers three main levels: the General Prosecutor’s Office (national competence), the Regional Prosecutor’s Offices (regional competence, in the areas of Porto, Coimbra, Lisbon and Évora) and the District Prosecutor’s Offices (local competence, one for each of the 23 districts/counties). The Office of the Prosecutor General, the highest body of the MP, is headed and directed by the Prosecutor General. These three levels correspond to an administrative structure. Indeed, the judiciary’s activities are carried out by prosecutors acting in the Public Prosecution Departments and the Courts (first instance, local and central; Courts of Appeal; the Supreme Court; the Constitutional Court).

4.1.1. Judicial Cooperation and International Relations Department

The Judicial Cooperation and International Relations Department (‘DCJRI’) operates under the Office of the Prosecutor General and is responsible for ensuring international judicial cooperation and for supporting the Office of the Attorney General on international relations. The DCJRI acts as the central authority in matters of international judicial cooperation in criminal matters; these functions are attributed to the Office of the Prosecutor General[5].

[5] Article 21(1) of Law 144/99 of 31 August 1999 on the International Judicial Cooperation in Criminal Matters Act.

More specifically, the DCJRI is responsible for: carrying out the administrative phase of these cases within the context of traditional interstate cooperation; ensuring the functions of the national correspondent for Eurojust and the point of contact for the European Judicial Network in criminal matters (EJN) and other judicial cooperation networks; supporting public prosecutors with the preparation and execution of requests for international judicial cooperation; coordinating and leading the national network of magistrates involved in international judicial cooperation, and collecting and processing information on the application of international and EU legal instruments in this field.

The DCJRI also provides legal support, collects, processes and disseminates legal information and carries out studies, particularly in the fields of European Union law, foreign law, international law and human rights. It has a translation service that supports the activity of the MP, in particular within the scope of international judicial cooperation procedures in criminal matters and the representation of the Portuguese state before the European Court of Human Rights. It also provides information on the Portuguese law applicable in a given criminal procedure when requested by a foreign judicial authority, or on foreign law at the request of a Portuguese judicial authority.

It provides information on applicable international instruments and Portuguese legislation, and on the bodies that facilitate international judicial cooperation in criminal matters, as well as specific information on each form of cooperation - both traditional types (extradition, MLA and transfer of sentenced persons) and those that are more typical of the EU level (the EIO and mutual recognition and cooperation between asset recovery offices). A specific section of the DCJRI provides information on the legal framework in relation to comparative law and facilitates mechanisms for cooperation in civil and commercial matters.

4.1.2. Departments of the MP competent in the investigative phase

In the area of criminal jurisdiction, there are three main departments involved in the investigative phase of criminal proceedings: at national level the Central Department of Criminal Investigation and Prosecution ('DCIAP') has competence for the investigation and prosecution of serious, organised, economic and financial crimes; at regional level the regional departments of Criminal Investigation and Prosecution ('DIAPs') of Porto, Coimbra, Lisbon and Évora have the same competence as the DCIAP but at regional level; and the DIAPs at district/county level are competent to deal with all crimes and are divided into 'generic' and specialised sections.

4.2. Court system

The court system consists of three instances: the courts of first instance, which are generally the county courts; the courts of second instance, which are the courts of appeal; and the Supreme Court of Justice.

4.2.1. Courts of first instance

The district court is generally the court that is responsible for the first instance. There are 23 counties[6] in Portugal, which correspond to the main courts, whose seats conform to the current administrative districts, except for Lisbon and Porto, which are divided into three and two counties respectively. Each of the 23 counties is divided into central and local instances.

The central instances have jurisdiction over the entire geographic area that corresponds to the county and are divided into civil and criminal sections. The latter prepare and hear proceedings of a criminal nature that fall within the competence of a panel of three judges or a jury. There are also sections with specialised jurisdiction, including criminal instruction sections. In turn, the local instances, which deal with and decide on matters other than those allocated to the central instance, include sections dealing with civil, criminal and small crime cases, as well as proximity sections.

[6] Açores; Aveiro; Beja; Braga; Bragança; Castelo Branco; Coimbra; Évora; Faro; Guarda; Leiria; Lisboa; Lisboa Norte; Lisboa Oeste; Madeira; Portalegre; Porto; Porto Este; Santarém; Setúbal; Viana do Castelo; Vila Real and Viseu.

4.2.2. Courts of Appeal

The courts of appeal generally serve as the courts of second instance. The courts of appeal have civil, criminal and social (labour) sections. There are currently five courts of appeal: Lisbon; Porto; Évora; Coimbra and Guimarães. Their territorial jurisdiction covers groups of counties.

4.2.3. Supreme Court of Justice

The Supreme Court of Justice is the highest body in the hierarchy of the courts of law, without prejudice to the specific competence of the Constitutional Court[7]. The Supreme Court of Justice sits in Lisbon and has nationwide jurisdiction. It is composed of sections dealing with civil, criminal and social matters, as well as one section for trials of appeals lodged against decisions taken by the High Council of the Judiciary[8].

4.2.4. Constitutional Court

It is specifically incumbent on the Constitutional Court to administer justice on matters pertaining to constitutional law. The Constitutional Court assesses unconstitutionality and illegality pursuant to Articles 277 and 283 of the Constitution and to its organic law, i.e. Law No 28/82 of 15 November 1982[9]. With its seat in Lisbon, the Constitutional Court exercises jurisdiction over the entire Portuguese legal system, and compliance with its decisions is compulsory for all public and private entities. The decisions of the Constitutional Court take precedence over those taken by other courts or by any other authority[10].

[7] Article 210 of the Constitution and Article 31 of Law No 62/2013 of 26 August 2013 on the organization of the judicial system.
[8] Articles 45, 43(1) and 47(1), (2) of Law No 62/2013 of 26 August 2013.
[9] Articles 221 and 223 of the Constitution; Article 30 of Law No 62/2013 of 26 August 2013.
[10] Articles 1 and 2 of Law No 28/82 of 15 November 1982.

5. COMPETENT AUTHORITIES

In order to acquire a better understanding of the competence of the respective authorities, it is vital to provide for a short an overview on the three phases of the criminal proceedings as per the Code of Criminal Procedure ('CCP').

The investigation (*inquérito*), which is obligatory, is led by the public prosecutor, who may delegate its powers to the police forces. During this phase, the intervention of the investigative judge (*Juge des guaranties or Juge des libertés*) is only foreseen in cases involving investigative measures such as phone interception or searches, and also for the application of all coercive measures (such as provisional arrest, appearance in police headquarters, bail), except for the identity and residence statement ('TIR')[11], for which prosecutors are competent.

The second phase of criminal proceedings (*instrução*) is not mandatory. It can be requested by the defendant when the prosecutor decides to provide an indictment or by the victims, procedurally recognised as *assistentes*, in cases where the prosecution decides to close the file.

The final, trial phase is always under the direction of a single judge or a panel of judges.

5.1. Issuing authorities

In accordance with Article 12 of Law No 88/2017, the competent authority to issue an EIO is the national judicial authority with jurisdiction to direct the proceeding at the stage where the EIO is issued. This means that an EIO can be issued by the MP and by the court.

During the investigation phase (*inquérito*), the public prosecutor is competent to issue EIOs that fall within its competence, and also in cases where an authorisation from the investigative judge is required[12]. In the event of investigative measures that - in accordance with the provisions of the CCP - must be ordered (and not only authorised) by an investigative judge, the EIO must be issued by an investigative judge[13].

[11] Article 196 of the CCP.
[12] Articles 263 and 267 to 275 of the CCP.
[13] Articles 268 and 269 of the CCP.

Some prosecution services have established internal contact points that can assist in matters related to the issuing of an EIO if questions arise for the prosecutor in charge of the investigation. The evaluation team found this to be a helpful idea to improve quality and legal accuracy.

During the trial phase, the EIO is issued by a judge.

During the on-site visit, the evaluation team noted, particularly in the case of measures that formally need to be ordered by the prosecution (with or without the authorisation of a judge), but also in the case of measures that need to be ordered by the investigating judge, that there does not seem to be a common practice as to whether the issuing of an EIO is sufficient, or whether an underlying order must be issued in accordance with national provisions. The evaluation team is of the view that, e.g. a handbook or guidelines could improve the harmonisation of practical application. In the opinion of the evaluation team, it should also be assessed whether the EIO form would include all of the information that would be contained in a 'national' order (*see Recommendation No 1*).

EIOs may also be issued by the national member of Eurojust under the terms of and in the circumstances set out in Article 8(3) and (4) of Law No 36/2003 of 22 August 2003, as amended by Law No 20/2014 of 15 April 2014. Eurojust has announced that the issuance of an EIO by the National Member could, for instance, be relevant in the scenario of action days and the coordination centre, where an EIO would need to be issued urgently. However, the national member of Eurojust has not yet made use of this power.

In the context of administrative proceedings, an administrative authority may issue an EIO, but it must be validated by the public prosecutor.

5.2. Executing authorities

In accordance with Article 19 of Law No 88/2017 and under the provisions of the CCP, the authorities that are competent to receive and execute an EIO are the same national authorities that are competent to order an investigative measure. Accordingly, prosecutors, investigative judges and trial judges are the authorities possessing competence to execute an EIO.

If an EIO was issued by an administrative authority, it will be recognised by a prosecutor and executed by an administrative authority.

This is also mirrored by the notification made by Portugal in accordance with Article 33(1)(1) of the Directive. However, information contained in the EJN Atlas could be misleading, since for the interception of telecommunications, for example, it states that the EIO should be sent to the Judicial Police (*Polícia Judiciária*). During the visit it was clarified that EIOs sent directly to the Polícia Judiciária are immediately forwarded to the competent authority. In order to avoid unnecessary delays due to the EJN Atlas containing misleading information, the experts considered it useful to recommend that the information in the EJN Atlas be aligned with the competence of the respective authorities *(see Recommendation No 2).*

Throughout the report, the evaluation team made note of the general attitude of the Portuguese authorities, namely to recognise and comply with the EIOs of other Member States to an outstanding degree (*see Best practice No 1*).

5.3. Central authority

The Prosecutor General's Office was designated as central authority by Article 10 of Law No 88/2017, in line with Article 21(1) of Law No 144/99 of 31 August on International Judicial Cooperation in Criminal Matters. In its role as central authority, the Prosecutor General's Office supports the national authorities responsible for issuing and executing EIOs, namely facilitating communication with the authorities of other Member States. The central authority also receives information for statistical purposes on all EIOs that have been issued or executed.

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

Procedural rules do not permit defence lawyers to gather evidence on their own in Portugal. Such actions may even be seen as an illegitimate interference with the investigation at both pre-trial and trial stages. Therefore the only way for a defence lawyer to gather evidence abroad would be to submit an EIO request to the relevant issuing authority. The EIO request must be issued by a prosecutor or a judge, as competent judicial authorities in the corresponding phase of the criminal proceedings, under Article 12(1) of Law No 88/201. Beyond EIO requests, defence lawyers could ask the Portuguese authorities to request that evidence be collected in other Member States.

Under Article 12(4) of Law No 88/2017, it is possible for an accused person, or a lawyer acting on their behalf, or a victim or a lawyer acting on his or her behalf to apply for the EIO. The EIO is issued on the initiative of the judicial authority or at the request of the procedural actors, within the limits in which they may request the obtaining or production of evidence, in accordance with criminal procedural law.

However, the law implementing the Directive goes beyond the requirements of the Directive; it applies to persons that are subject to the proceeding, and therefore includes the victim. This complements the victim's right under Directive 2012/29/EU[14] to provide evidence. The evaluation team welcomed this legislation (*see Best practice No 2*). It should be added, however, that lawyers were somewhat reluctant about this provision, as it is at the discretion of the judicial authorities to issue an EIO. On the other hand, public prosecutors stated during the visit that such requests were mostly executed.

[14] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

Regarding the right to appeal, and in accordance with national criminal procedural law, against a decision not to issue an EIO that is necessary, i.e. essential for the discovery of the truth and the proper decision of the case, such a refusal to issue an EIO constitutes a nullity, under the terms of Article 120(2)(d) of the CCP. When such failure to gather evidence occurs, the decision can be challenged through an appeal. Otherwise, the party affected by the omission must argue the nullity by the end of the hearing under Article 120(3)(a) of the CCP, and if it is not granted they must appeal the respective decision.

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

In accordance with Article 4 of Law No 88/2017, an EIO can be issued for the purposes of all investigative measures, with the exception of the setting up of a joint investigation team ('JIT') and of the gathering of evidence within such a team. The EIO may also be used to gather evidence in a Member State bound by the Directive, other than those which have set up a JIT, as long as the investigative measure in question is required to accomplish the objectives of the JIT. In these situations the EIO is issued by the JIT leader.

As issuing Member State, practitioners occasionally have doubts about the meaning of the expression 'investigative measure' included in the above-mentioned Article 4 of Law No 88/2017, considering the fact that it is usually used during the investigation, and the EIO may be applied in all phases of the criminal procedure. However, as long as the definition of the EIO covers all procedures or acts aiming at gathering evidence during the entire criminal procedure, including the post-trial phase, these doubts may be promptly solved.

It should be noted that the Portuguese authorities reported no major difficulties in the application of the EIO in the different phases of the criminal proceedings. In accordance with Article 4 of Law No 88/2017, the EIO may be used in the three phases of the criminal proceedings, during the investigation (*inquérito*), the *instrução* and the trial phase. The enforcement of final decisions follows a different legal framework, with different legal instruments being applicable (such as Framework Decisions 2008/909/JHA[15] or 2008/947/JHA[16]).

The Portuguese judicial authorities - following the letter of Article 1 and 3 of the Directive - take the firm view that the EIO must be only used for the purpose of gathering evidence.

For instance, if a copy of a judicial decision is needed, e.g. to demonstrate a predicate offence, in money laundering investigations, or if it is necessary during the post-trial phase to obtain a report on the evaluation of the behaviour of the convicted person during parole, it is still appropriate to use an EIO. The EIO is not, however, suitable for the service of documents. Unless the service of documents is inextricably linked to the investigative measure that is the subject of the EIO (e.g. a house search), a request for MLA should be issued for the service of documents.

Due to the EIO's focus on the gathering of evidence, different instruments may need to be applied in parallel and in a coordinated manner. In the case of asset tracing, an EIO may have to be combined with a freezing order in order to first locate assets in another Member State and immediately seize those assets. Furthermore, there are cases where an item had to be seized for evidentiary purposes as well as to ensure confiscation at a later stage.

[15] Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

[16] Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions.

In practice there were cases where authorities in other Member States used the incorrect instrument. In executing requests, the Portuguese authorities take a pragmatic and flexible approach as far as the situation allows in order to accommodate requests from other Member States.

There are items - including financial assets - which could be considered at the same time to be both evidence and ill-gotten gains and could, under Article 44 of Law No 88/2017, be subject to various provisional measures in the course of criminal proceedings, not only with a view to gathering evidence, but also with a view to an eventual confiscation (freezing for evidence-gathering and/or for confiscation). This twofold nature is possible and compatible, but the consequences are quite different. The distinction between the two objectives – freezing for evidence gathering and freezing with a view to confiscation – is not always obvious, and the objective may change in the course of the proceedings, which shows the importance of having a clear approach in order to avoid misunderstandings.

Indeed, if assets are considered only to be proceeds of crime, they can be sold in advance, and the final price may be divided between the Member States involved. On the contrary, if the assets are initially considered to be exhibits, once they have been used in trial they will return to the executing Member State, if transfer has been requested.

In principle, the Portuguese authorities respect the assessment of the issuing authority on whether the item should be used as evidence and must be transferred to the issuing State or should remain in the territory of the executing State in line with Article 44(5) of Law No 44/2017 and recital (34) of the Directive. However, there is no concrete provision under Portuguese law setting up a smooth relationship between the various instruments applicable in this field (namely the Directive and *Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders*).

Such provisions should take into account that the objective of the provisional measure may change during the course of the criminal proceedings in the issuing Member State, and the assured item that was initially used as evidence may ultimately be frozen for the effective execution of a confiscation order, as foreseen in recital (34) of the Directive. There have as yet been no cases in which the Portuguese executing authorities questioned the assessment made by the issuing authority and refused to execute the provisional measure under the Directive, demanding a freezing order. Acting as issuing authorities, the MP ensures the coordination of the various legal instruments throughout the different phases of the criminal proceedings.

The Commission should therefore take due account during any further legislation of the interoperability between the various instruments applicable in this field. As recital (34) of the Directive points out, it is crucial to maintain a smooth relationship between the various instruments. For the time being, the evaluation team recommends that the European Judicial Training Network ('EJTN') focus on the connections between these instruments (*see Recommendation 21*).

According to information obtained from Eurojust, the latter dealt with a case in which the Portuguese authorities had received an EIO for locating a person with a view to the subsequent submission of a European arrest warrant ('EAW'). In that case the EIO was executed: the suspect was located, the issuing authorities were informed, and an EAW was issued.

During the evaluation visit, it was argued that in such cases the SIS should in principle be used, but the question arises what powers the Member State's authorities have to execute an EAW if the whereabouts of a person in one Member State are unknown. Entering an EAW in the SIS might not be sufficient for the executing authority of the Member State in whose territory the wanted person is suspected to be located, to apply an intrusive measure such as telephone intercepts or house searches. In these situations an EAW might have to be accompanied by an EIO.

The apparent concurrence between Framework Decision 2002/584/JHA[17] and the Directive may also create problems when the presence of a person as a defendant, to participate in a trial is requested. The Portuguese authorities reported a recent case with Spain in which the Audiencia Nacional invited a Portuguese public prosecutor to request the temporary surrender of a defendant so that they could appear in Portugal, in accordance with Article 24(2) of Framework Decision 2002/584/JHA (see also Chapter 22.1).

Nevertheless, the Portuguese authority issued an EIO for a temporary transfer instead of an EAW. The execution of the EIO was refused because, under the framework of the EAW, the surrender should remain within the legal boundaries of the EAW and should not give rise to the use of a different instrument. In any case, in accordance with recitals (25) and (26) of the Directive, the legal solution in this case appears to be clear. However, the evaluation team considers that the legislator should clarify the application of the Directive to ensure the attendance of the accused person during the main *trial (see Recommendation No 20).* With regard to EIOs issued to conduct a videoconference in order to ensure the participation of an accused in the main trial, see Chapter 22.2.

The Portuguese authorities reported no cases, neither as issuing nor as executing authority, in which an EIO had been issued to obtain evidence necessary for proceedings brought before administrative authorities. In accordance with Article 5c) of Law No 88/2017, EIO is applicable for offences of a criminal nature, during the stage of the procedure that is conducted before an administrative authority, and to offences of a regulatory nature giving rise to proceedings subject to review before a court of law.

[17] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

Based on the Portuguese experience, in ongoing JITs, requests for judicial cooperation have been sent to Member States that are not JIT members. The problems mainly concern the sharing of evidence obtained through these requests for judicial cooperation with the other JIT members. For example, the Portuguese authorities mentioned a JIT that was active between December 2016 and December 2018 involving Portugal and Switzerland. Portugal obtained evidence through requests sent to Brazil and Luxembourg, but this evidence could not be shared with Switzerland, as the evidence came from outside the JIT. Conversely, the evidence gathered within the JIT could not be shared with states that were not part of the JIT, in that case Luxemburg and Brazil.

No problems have been reported in relation with EIOs issued by a JIT leader. However, it is accepted that data obtained through such EIOs may not be shared with other Member States without the permission of the executing Member State, by virtue of the principles of recognition and mutual trust, all depending on what is exclusively set out in the JIT agreement. The Commission should also take this scenario into account in the event it is decided that the rule of speciality in connection with the application of the EIO should be further clarified (see Chapter 12 on the speciality rule and *Recommendation No 20).*

7. CONTENT AND FORM OF THE EIO

The EIO as mutual recognition instrument is based on a mandatory standardised template. The EIO itself is a judicial decision that is issued or validated by the judicial authorities. After five years of experience with the new form, the Portuguese national authorities' assessment is generally positive, and they appreciate the EIO as an improvement compared to previous rogatory letters.

As regards whether the national court order should be attached to the EIO, the Portuguese authorities are convinced that neither the Directive nor Article 6 of Law No 88/2017 impose any such obligation. The Portuguese issuing authorities seem to provide it only in cases where they are explicitly requested to do so.

7.1. Challenges relating to the form

During the evaluation visit, the Portuguese practitioners made specific suggestions for best practices regarding the internal coherence and consistency of the EIO form, to make it easier to fill in. As concerns the form itself, the order of sections C and G could be reversed. In addition, practitioners mentioned that Section C and Section H contained unnecessary repetitions.

Furthermore, Annex A of the Directive does not contain a specific section for indicating the relationship between an EIO on the one hand and a freezing order or an EAW on the other hand; as a result, the executing authorities (which might not even be the same for all of the instruments mentioned) may not be aware of the existence of other measures requested.

The evaluation revealed that the amendment of the EIO form could in fact facilitate the application of the EIO (*see Recommendation No 18).* Also, Member States should ensure that section D of the EIO form includes all instruments related to the EIO, including freezing orders, EAWs or JITs, etc. *(see Recommendation No 10).*

For Portugal as executing Member State, cases were reported in which the issuing authority mentioned an incorrect address when requesting a house search or incorrect account details when requesting account information. In these cases direct email contact with the issuing authorities, as provided for in Article 7 of Law No 88/2017, is usually successful. The Portuguese authorities do not generally require the issuing authority to issue a new EIO; in most cases additional information is sufficient to recognise the EIO.

There are also cases in which an issuing authority does not use the EIO form. In such cases the issuing authorities are invited to send the appropriate form. In some cases the EIO is issued, while in others no EIO is issued. In such situations the Portuguese authorities consider the possibility of executing the request as a request for an MLA. When this is not possible the request is returned.

As issuing authority the Portuguese authorities must request that certain procedural formalities are observed. This issue will be handled under Chapter 10 on the recognition and execution of EIOs and the corresponding formalities.

7.2. Language regime and problems related to translation

As regards to the language regime, Article 6(3) of Law No 88/2017 sets out that the Portuguese authorities will only accept EIOs translated into Portuguese. In addition, the notification of Portugal, in place at the time of the on-site visit, in accordance with Article 33(1)b) of the Directive, set out that Portugal also accepted EIOs in Spanish, although Law No 88/2017 does not foresee this possibility.[18]. The evaluation team also recommended that the notification should be updated in respect of the language regime. *(See Recommendation No 3).*

As an executing authority, the Portuguese authorities sometimes experience that the translations of received EIOs are not accurate or comprehensible. This situation is mostly related to the quality of the translation itself, but it can also be connected to the structure of the original text. Short sentences, for instance, are easier to translate. In the event of translation-related difficulties, the Portuguese executing authorities attempt to understand what is written in the original language, but there are, of course, many languages that cannot be easily understood. Such issues can usually be resolved by contacting the issuing authority.

[18] The Portuguese authorities submitted a clarification of the notification, stating that following a bilateral treaty with Spain, Spanish is accepted only when EIOs are issued by the competent Spanish authorities.

The issuing authority encounters various problems. In general, it is difficult to find skilled translators who can produce quality translations of technical legal terms. Translation into a language other than German, English, French or Italian is more expensive, and may also take more time. Sometimes EIOs are translated using a third language as a *lingua franca*, which doubles the costs and increases the possibility of the meaning becoming lost. During the evaluation visit, Portuguese prosecutors explained that as issuing authorities they have even sometimes had to correct official translations of EIOs, when they could understand the language, as it was clear to them that the translation was not good. The lawyers who carried out interviews during the evaluation visit also confirmed that poor translations were a cross-cutting issue.

In urgent cases the problem of translation becomes more pressing. Although Portuguese prosecutors tend to accept English informally, they have mentioned that if a court order or court authorisation is needed, a translation into Portuguese must be submitted to the court.

There are further problems in cooperation with some Member States that do not accept translations in English. All Member States, including Portugal, should therefore consider accepting EIOs in English, at least in urgent cases (*see Recommendations No 4 and 11*).

The evaluation team considers that all Member States should call on their practitioners to use brief sentences when filling out the EIO, and make the effort to edit the text of the national order, instead of copying it (*see Recommendation No 12).*

7.3. EIOs containing multiple requests

As issuing authorities, there are good examples of EIOs addressed to different authorities that were executed without major problems. Each of the EIOs included information on the other authorities/States involved, and all requests were executed in parallel, and successfully. However, there are different experiences of EIOs sent to the same jurisdiction but to different authorities (due to the nature of the different measures to be executed, i.e. searches and hearings). Eurojust had to be involved, but the execution of the EIO was not successful: house searches were not executed, and information was provided to the suspects, jeopardising the follow-up to the investigation.

For these complex files, the idea of creating centralised focal points in the executing Member States appears to be a solution, according to the Portuguese practitioners, as Eurojust cannot replace coordination at national level. Another less drastic solution, which was sometimes applied during coordination meetings at Eurojust, would be to indicate explicitly in each individual case which authority would be in charge of coordinating all relevant proceedings internally in the Member State in question. Typically, this could be the International Cooperation Unit at the Prosecutor General's Office, as the only national authority with nationwide competence.

7.4. Additional EIO, splitting of EIOs, conditional EIOs

The Portuguese authorities have not as yet identified issues with additional or conditional EIOs. As issuing authorities, when it is foreseen that an EIO can be split in the executing Member State, Eurojust is invited to consult the desk of the MS involved, and their advice is followed: sometimes the solution is to issue one single form/EIO that will be internally redirected, whereas in other cases several EIOs are issued, splitting the cooperation procedure in several parts from the beginning. A special situation arises from the combined application of an EIO and an EAW. Indeed, such situations lead to other problems, involving the competence of the authorities and the different lengths of the procedure.

7.5. Orally issued EIOs

The Portuguese authorities believe that no practitioner would refuse an orally issued EIO, especially in cases of danger to the life of a person, kidnapping, abduction or any kind of organised crime. In these cases practitioners also consider initiating an investigation at national level in order to be able to conduct the requested investigative measure.

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

In the opinion of the Portuguese practitioners, which also corresponds to Article 11 of Law No 88/2017, whenever the need to collect evidence abroad arises, the issuing authority must assess whether the evidence would be useful and have an impact on the investigation. That assessment is no different from that which is made in national cases.

It should be noted that the Portuguese authorities are bound by the legality principle. For that reason, prosecutors must also issue an EIO in 'minor' cases. No questions or legal issues regarding proportionality have so far been reported by Portuguese practitioners. Portuguese practitioners are of the view that it is for the issuing authority to assess whether it is proportionate to issue an EIO in a specific case. Although Article 6(3) of the Directive permits the executing authority to consult the issuing authority in that regard, the executing authority may not refuse an EIO on the grounds that the EIO was issued for a minor crime, or that its execution would in the executing authority's opinion not be proportionate.

As regards the relevance of costs, and whether cost-related issues should be taken into consideration for the proportionality check, and what costs should be defined as exceptionally high, Portuguese authorities are of the opinion that such matters should be resolved by applying the consultation mechanisms provided for in Article 21(2) of the Directive.

When the executing authority receives an EIO with a coercive measure, Article 21 of Law No 88/2017 empowers prosecutors to assess whether the measure contained in the EIO could be replaced by another less intrusive measure. There are few cases in which proportionality has had to be assessed in view of applying a less intrusive investigative measure (Article 10 of the Directive) that would achieve the same results. In one case the issuing authority wished to gather banking information, and therefore requested that the bank's premises be searched.

The Portuguese executing authority then informed the issuing authority that in order to obtain banking information for an investigation in Portugal, the bank in question is summoned to do so with a production order, and that suffices. Therefore, (and complying with Article 10(3) and (4) of the Directive), there was no need to conduct a search of the bank's premises. The issuing authority agreed with this alternative solution.

Another example for the application of a less intrusive measure is that an issuing authority requested a house search in a clinic to retrieve medical information concerning a patient. Instead, a production order was issued by the Portuguese authorities. The Portuguese authorities emphasised that in such cases they would always apply the consultation mechanism before deciding which measure to apply, as this was in line with the EIO Directive, and the issuing authority could have a justified reason why a certain measure would be required.

As executing authority, prosecutors firstly assess, in line with Article 10 of the Directive, the possibility of recourse to a less intrusive investigative measure than that provided for in the EIO.

Finally, the evaluation team would note that as concerns the application of Article 10 of the Directive, the notion of non-coercive measures has not been clarified, but appears to have been influenced by the Gavanozov II judgment (CJEU, Case C-852/19), in which witnesses should be informed of their rights and obligations in the executing Member State under the supervision of a court.

The meaning and scope of the concept of non-coercive measures appears to be controversial: prosecutors see this as a common concept that is inextricably linked to the scope of domestic competences. In any case, the 'privileged' non-coercive measures under Article 10(2) point d) and Article 11 (2) points a) to e) of the Directive and Article 21(2) of Law No 88/2017 are not subject to any double criminality check, and are therefore almost automatically executed by prosecutors in Portugal.

9. TRANSMISSION OF THE EIO FORM AND DIRECT CONTACTS

Portuguese law has no specific provision regarding the means of transmission of EIOs. However, if the EIO is signed electronically using a digital certificate that proves its authenticity, it should not be necessary to send it by mail. It would be important to create a secure platform that could guarantee the security and confidentiality of the EIOs and attached documents, in the phase of transmission for execution as well as sending back the evidence gathered. At present the Portuguese authorities are sending and receiving EIOs by email, and have never experienced any security issues with this form of transmission.

The Portuguese authorities have highlighted that in the EJN Atlas, the email addresses of competent authorities are not always available, which makes the transmission of EIOs more complicated. It would be preferable if Member States could also include the email addresses of their authorities in the EJN Atlas. However, in urgent cases, it would also have to be ensured that the competent authority had access to the inbox outside business hours, which might not always be the case. The evaluation team considered that all Member States should consider adding an email address in the EJN Atlas to facilitate direct contact between the competent national authorities *(see Recommendation No 13).*

As an executing authority, the Portuguese authorities accept any kind of transmission, but are of the opinion that fax transmissions are outdated. They also accept digitally signed EIOs.

Secure means of communication, the e-Evidence Digital Exchange System ('e-EDES'), have already been established at Union level. The reference implementation to use the e-CODEX system is operational. Portugal is participating in the pilot project and has been commended for doing so (*see Best practice No 3*). During the evaluation experts were informed that connecting all authorised personnel of the judicial authorities in Portugal would be quite a challenge for the IT administration, because there are roughly 1500 prosecutors working in Portugal.

Judges would also have to be connected, as well as the clerks who prepare the EIOs for judges. At present the use of e-EDES is voluntary: not all Member States are taking part in the pilot project and also not all authorities of the Member States that take part in the project are connected. In cooperation with the Spanish authorities, a number of EIOs have been transmitted so far to the International Cooperation Unit of the Prosecutor General's Office in Madrid, and the overall impression of the functioning of the system is very positive.

The Portuguese authorities share the view that the mandatory use of e-EDES for judicial authorities in all EU Member States would be appreciated, and that the present solution makes a roll-out for the whole country less appealing for practitioners, and even more burdensome, because the connection of the executing authority would have to be ensured before issuing the EIO using e-EDES. The evaluation team considers that all Member States, including Portugal, should ensure the earliest possible connection of all relevant national authorities to e-EDES, in order to ensure the secure transmission of data *(see Recommendations No 5 and 14).*

The EJN Atlas is widely used by the practitioners and clerks. In more difficult cases, however, sometimes also due to the incorrect spelling of names, it is common for issuing authorities to contact the central authority (whose intervention to assist national judicial authorities is expressly foreseen by Article 10(1) of Law No 88/2017) asking for information on the competent authorities of other Member States. Practice shows that the contact points of the EJN and Eurojust have only been used in very exceptional cases.

Direct communication between authorities is usually the rule. However, there are prosecution services that have international cooperation units or cooperation contact points that can be used to facilitate contact with other Member States. During the on-the-spot visit, the Portuguese authorities informed the expert team that within the different prosecution offices there are 'reference prosecutors' who can ensure quality control when requested and serve as specialised prosecutors to whom less experienced colleagues can reach out when they have questions relating to cross-border cooperation, including the application of the EIO. These 'reference prosecutors' are not part of the EJN network. The expert team considered this to be a best practice *(see Best practice No 4).*

In special cases, namely where there are delays in execution or some other difficulty, there may be a need to involve the EJN contact points, Eurojust or even the central authority.

10. RECOGNITION AND EXECUTION OF THE EIO, FORMALITIES

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

When executing EIOs, prosecutors and judges apply the Directive in a flexible manner and in accordance with the spirit of the Directive. Mutual trust and mutual recognition play a key role. EIOs are recognised and executed without formal modalities, which is in line with the Directive. The decision-making process is, in principle, a two-step process. Firstly, the competent authority recognises the EIO in question by issuing a short decision and secondly the competent authority executes it with the assistance of the police authorities, if necessary. Before recognition, prosecutors and judges shall, if necessary, request additional information from the issuing Member State, if needed. Prosecutors can use a form that is available for the recognition decision.

During the evaluation visit, however, prosecutors explained that this form is not always used. Some prosecutors will always issue a formal recognition decision, while others will not do so. The evaluation team believes that this diverging practice could be addressed and streamlined in a future handbook.

With regard to EIOs received which were issued by judicial authorities, Portuguese authorities do not check whether the issuing authority has the competence to order the measure under the applicable national law, in other words: in line with the principle of mutual recognition, the issuing authority is trusted to also be competent to issue the EIO.

When the Portuguese authorities receive an EIO for an investigative measure that would require an underlying court order in Portugal, their experience is that, in practice, the copy of the issuing court's authorisation is sometimes received, and in other cases it is not. In their view, bearing in mind the mutual recognition principle, it is not mandatory to receive the copy of the court authorisations for an investigation measure, so they would not request it. However, when the issuing authority is an administrative authority, the Portuguese authorities replied that the attachment of the relevant authorisation/validation by a judicial authority would be necessary.

10.2. Compliance with formalities

The admissibility of evidence obtained via MLA, and now the EIO, is of crucial importance in cross-border cooperation aimed at gathering evidence. Therefore Article 11(3) of Law No 88/2017 of August 21, which expressly advises issuing authorities to include information on formalities or requirements that must be followed for the evidence to be validly introduced in the Portuguese case, is commonly used.

When executing EIOs, the Portuguese authorities apply Portuguese law, but comply with the formalities indicated in section I of the EIO as long as the application of these formalities does not conflict with Portuguese national legislation. On this point the Portuguese implementation act does not seem to be fully in line with the Directive. Article 9 of the Directive states that the executing authority must comply with the formalities if those are not contrary to the fundamental principles of the law of the executing Member State. Article 18(2) of Law No 88/2017 goes a step further, as it allows an executing authority to refuse to comply with formalities based on the requirements of national law (which is a broader category, not necessarily limited to fundamental principles).

In practice, however, no major problems have arisen, as prosecutors and judges confirmed during the evaluation visit that they were complying with the formalities requested by the issuing authorities. Practitioners also added that when necessary the executing authority will negotiate with the issuing authority.

According to the Portuguese authorities, problems can arise when the issuing authority omits to mention a required formality in section I. In this regard, prosecutors and judges have faced deficiencies in the EIO forms, because not all issuing authorities appear to be completing section I of the EIO form when required.

When issuing EIOs, the Portuguese authorities indicate the required formalities in the EIO. Examples can be found in the request for the TIR[19] to be fulfilled by the defendant, for the duties and rights to be informed to them and for the special gathering of personal evidence for trial (hearing of witnesses, for instance) to follow special formalities (the swearing of an oath, the presence of a defence lawyer and, in many cases, hearings held via video conference).

Another example is the search of the premises of law firms, which requires a judge and a representative of a Bar Association to be present. Sometimes these formalities are difficult to describe to the authorities of other Member States. The Portuguese authorities try to cope with these issues by adopting the most practical and simple approach, for instance by introducing a set of standard texts that all colleagues can adapt to the circumstances of their case, which is considered as a best practice by the evaluation team (*see Best practice No 5*).

[19] In accordance with Article 196(1) of the CCP (Term of identity and residence), the judicial authority or the criminal police body submit to the term of identity and residence drawn up in the procedure, whoever is accorded the status of a defendant, even if he has already been identified under Art 250. In accordance with (2), for the purposes of being notified by regular mail, pursuant to Article 113 point c), the defendant shall indicate his residence, place of work or another domicile at his choice.

The Portuguese authorities have reported that the necessary procedural requirements are generally observed by the foreign authorities that have received EIOs from Portugal. As an alternative, in particular regarding the taking of statements from a witness or an accused, the Portuguese authorities have been requesting videoconferences more often, in order to ensure that various procedural requirements are properly observed.

During the evaluation visit, however, two rather problematic cases were mentioned. In one case the Portuguese authorities had informed the executing authority of the requirement that a judge and a member of the Bar Association had to be present during a search at a lawyer's premises, yet the executing authority, unfamiliar with such a formality, stated that a judge could not be made available for this. As a solution, a Portuguese judicial authority then travelled to the executing Member State to be present during the search. In another case, the Portuguese authorities had requested the hearing of a person as a defendant subject to certain formalities, but he was heard as a witness, and this difference had a huge impact on the statute of limitations, and the entire case collapsed as a result.

When executing an EIO, Member States should comply with the procedural formalities requested by the issuing Member State, as those are crucial for the admissibility of evidence in the issuing Member State (*see Recommendation No 15)*.

11. ADMISSIBILITY OF EVIDENCE

Although provided for in Article 82(2) of the Treaty on the Functioning of the European Union, the Union has not adopted any instruments on the mutual admissibility of evidence between Member States.

In Portugal the basic rule is that 'evidence that is not prohibited by law is admissible'. Therefore, if a specific type of evidence is not expressly prohibited, it will be considered admissible and, *a contrario*, evidence obtained unlawfully is inadmissible. Judges do not have the discretion to admit this evidence, since it is considered null and void and cannot be used. This is expressly provided with regard to several cases of unlawful/illegally obtained evidence (e.g. evidence obtained through torture, coercion, offence to the physical or moral integrity of persons or intrusion into private life, home, correspondence or telecommunications, or when the interception of telecommunications takes place without respecting the legal requirements).

Beyond that, the principle of the free assessment of evidence applies, and the evidence is assessed according to the rules of experience and the free conviction of the competent authority. This means that the courts can freely weigh each piece of evidence - separately and collectively - and establish their conclusion on the admissibility of evidence on their own discretion.

However, Portuguese courts would consider evidence gathered in another Member State to be inadmissible if it were collected contrary to Portuguese procedural requirements. Hence, from a defence point of view it is of particular importance to access all relevant information regarding how the evidence was collected. Mere access to the case file itself might not provide defence lawyers with all of the details necessary to contest potential procedural deviations from the Portuguese procedural requirements.

With regard to the execution of an EIO, it should be noted that investigations are governed by the principle of *locus regit actum*. However, the EIO Directive allows exceptions to this rule when requested by the issuing authority, typically based on *lex fori*. In line with Article 9 of the Directive, in Portugal there is a legal requirement for the executing authority to respect the formalities and procedures indicated by the issuing authority, provided that the requirements of national law regarding evidence-gathering in the context of similar national proceedings are respected. These provisions aim to ensure that the executing authority respects the conditions indicated by the issuing authority, to allow admissibility of evidence in the issuing Member State.

Quite recently, the admissibility of evidence was a problem in cases where evidence was collected through surveillance of the EncroChat server. Cases in Portugal are still pending. The Portuguese authorities submitted an EIO to the French authorities in order to obtain evidence gathered in French investigations. This evidence consisted of written messages exchanged between the various defendants in encrypted applications. One of the appeals submitted claims that a substantial part of the evidence in the investigation was obtained through this EIO, and that the defence did not have access to the decisions of the French authorities authorising the computer searches through which the messages exchanged by the defendants on those platforms were obtained.

It is argued that the executing authority of the EIO 'must respect the formalities and procedures of the issuing State', under Article 18(2) of Law No 88/2017.

Furthermore, it is argued that the defendants had no knowledge of or access to the decisions of the French authorities that determined the collection of evidence in the French investigation, so they could not assess the legality of these measures.

There is still no decision from the Lisbon Court of Appeal on this appeal, but in another case of the same nature the court considered that the evidence obtained through an EIO was documentary evidence, and that its validity would be assessed at the trial stage.

12. RULE OF SPECIALITY

Neither Law No 88/2017 nor the EIO Directive contains a general provision on the rule of speciality, but they do in relation to temporary transfer (Article 22(8) of the Directive and Article 34 of Law No 88/2017). However, Article 148 of Law No 144/99 of 31 December on International Judicial Cooperation in Criminal Matters expressly foresees the rule of speciality (prohibiting the use of obtained evidence).

As executing authorities, Portuguese authorities have had cases in which the rule of speciality was expressly mentioned, and in which they stated that the use of the obtained evidence outside that specific proceeding would be subject to authorisation from the Portuguese executing authorities. If such authorisation was requested, consent was usually granted.

As issuing authorities, it is usual for Portuguese authorities, similar to the MLA regime, to request the consent of the executing authority if evidence obtained in other criminal proceedings needed to be used. This is deemed to be a good practice in order to avoid legal issues regarding the validity of evidence. However, some national authorities hold the opinion that, since the Directive does not establish any limits on the use of the evidence and is based on the principle of mutual recognition, there are no obstacles to using evidence obtained by the execution of an EIO in other proceedings.

In light of these different views and uncertainty throughout the Member States, the Portuguese authorities consider that this situation should be solved by amending the Directive, as the ambiguity caused by the lack of clear rules at EU level can lead to severe consequences for the admissibility of cross-border evidence gathering.

During the evaluation visit, the Portuguese judges informed that they had not encountered problems relating to the rule of speciality during the trial phase. Prosecutors predicted that issues could arise, and that a prudent approach could prevent inadmissibility-related problems. Therefore, many of them are sending additional EIOs or asking for consent, applying Article 148 of Law No 144/99 of 31 December on International Judicial Cooperation in Criminal Matters regarding the rule of speciality.

Should the Portuguese authorities obtain information while executing an EIO and, due to accidental discovery, realise that a crime was committed, a new domestic investigation would be opened, provided that they were competent to investigate it. In such cases they would inform the issuing authority. If while executing an EIO the Portuguese authorities would wish to use some of the information/evidence obtained, they would still have to request the express consent of the issuing Member State. However, the latter scenario would not fall within the remit of the principle of speciality.

In view of the above, the evaluation team is of the opinion that the rule of speciality is one of the concepts that should be clarified by the EU legislator to ensure a uniform approach to the application of the EIO *(*see chapter 6 and *Recommendation No 20)*.

13. CONFIDENTIALITY

In the case of an executing authority, Article 30 of Law No 88/2017 guarantees the confidentiality of the facts and content of the EIO, according to the law, except in terms of what is needed for the execution of the investigative measure. The executing authority must inform the issuing authority without delay whenever it is unable to assure the confidentiality of the facts and content of the EIO.

In the case of an issuing authority, Article 16 of Law No 88/2017 guarantees the confidentiality of any evidence or information given by the executing authority, which may be subject to secrecy, except when the disclosure may be authorised by national law and does not conflict with the indication given by the issuing authority. According to national law, the investigative phase may be confidential in some cases, as is the above-mentioned 'instruction phase', albeit in fewer situations. During the (generally public) trial phase and the execution of the sentence, access to the case file may not be refused. However, in some cases involving sexual crimes or trafficking in human beings, the trial is not open to the public.

Defence lawyers are informed of any problems relating to the confidentiality of legal remedies during the investigation phase resulting from a lack of information on investigative measures or EIOs that have been issued. However, once the indictment has been filed with the court, it is often difficult to challenge the necessity of an EIO that has been issued.

Although authorities in Portugal have not encountered problems relating to rules on disclosure, the evaluation team shares the view voiced by Portuguese practitioners during the on-site visit that the concept of confidentiality is open and unclear: in particular, it is not clear to what extent the issuing authority should not disclose the evidence or information provided by the executing authority in accordance with Article 19(3) of the Directive.

On the one hand, the provision refers to cases where disclosure is necessary for the investigations or proceedings described in the EIO. On the other hand, there is a clear obligation that the issuing authority should, in accordance with national law and unless otherwise indicated by the executing authority, not disclose any information received. It is also questionable whether the executing authority can ask for non-disclosure of the evidence/information submitted. As mentioned above, disclosure is crucial for the defence team in order for them to be in a position to be able to properly defend the accused. Furthermore, the information will be used in a trial that is generally open to the public.

Against that background, the Commission is therefore invited to clarify the concept of confidentiality *(see Recommendation No 20).*

14. GROUNDS FOR NON-EXECUTION

Regarding grounds for refusal, the Directive reflects the compromise reached during negotiations: there is a list of grounds for refusal applicable to all measures, including in particular an explicit clause on fundamental rights for the first time in a mutual recognition instrument; in addition, there are some specific grounds that apply only to certain investigative measures.

According to the Portuguese authorities, there is no centralised information on grounds for refusal. However, the information received by the central authority shows that only a few cases of non-execution have been reported, although this could relate to cases where the execution of the EIO is not possible because the person cannot be traced. The meeting with prosecutors and judges during the evaluation visit also confirmed a very low number of refusals, both from the issuing and executing perspectives.

Portuguese authorities, when acting as executing authority, consider contacting the authorities of another Member State, as foreseen by Articles 10(4) and 11(4) of the Directive, sometimes with the assistance of Eurojust or EJN contact points, as necessary, prior to a possible non-execution or recourse to another investigative measure.

14.1. Dual criminality

As executing authority, Portuguese authorities have rarely considered applying the dual criminality test.

However, in one case, the authorities of one Member State refused to execute an EIO from Portugal, the issuing Member State, owing to a lack of dual criminality, as (the type of) bodily harm did not constitute a criminal offence in that Member State. Prosecutors stated that they would have contacted and negotiated with the issuing Member State before refusing to execute the EIO. In this particular case, non-execution could have possibly been avoided by doing so.

14.2. Ne bis in idem

According to prosecutors, it is often challenging for the issuing and executing authorities to verify whether ne bis in idem is applicable to the case at hand due to the very brief description of the facts in the EIO form. Ne bis in idem seems particularly challenging in the case of drug offences, and more specifically in cases of imports and exports of drugs with neighbouring Member States. Requests for additional information and application of the consultation mechanism is crucial in such cases. There have been a couple of cases in which the prosecutor has had to request additional information from the issuing authority, although such requests went unanswered. One of the cases involved a witness who had been a defendant in a similar case in the executing Member State.

14.3. Fundamental rights

Portuguese authorities have not had experience of the application of the grounds for refusal mentioned in Article 11(1)(f), neither when issuing nor executing an EIO. During the on-site visit, prosecutors predicted that the issue of fundamental rights may arise in future as a consequence of the Gavanozov II judgment (CJEU, Case C-852/19).

Prosecutors and judges stated that they have not heard any cases where the investigative measure or the taking of evidence had been refused because it would have been contrary to the fundamental principles of Portuguese legislation or the principles of the executing Member State in the light of one of the grounds for refusal mentioned in Chapter IV of the Directive.

15. TIME LIMITS

One of the added values of the EIO regime is the provision regarding time limits for recognition and execution. During the evaluation visit, Portuguese prosecutors expressed the view that the EIO regime has considerably increased the speed of cross-border cooperation vis-a-vis the MLA regime. Some prosecutors added that the 'mindset' has changed and that the increased involvement of Eurojust and EJN contact points has helped improve compliance with time limits.

As issuing authority, Portuguese practitioners have very different experiences. Some Member States usually comply with deadlines and can even execute EIOs quickly. Other Member States usually execute EIOs within five to nine months. It is generally asked that EIOs for video conferences be executed within six weeks. In some larger Member States, compliance with the time limits depends on the location of the executing authority. In case of a delay, the executing authority is requested to give information about the EIO state of execution and about the reasons for the delay. When such requests have no effect, EJN contact points and Eurojust are normally involved.

As executing authority, Portuguese authorities usually comply with time limits and evidence is sometimes sent well before the deadline. However, there are cases where the execution has taken longer than the time limit foreseen in the Directive. The reason for such a delay could be linked to the nature of the investigative measure requested, to the difficulty of finding the address of people targeted by an investigative measure, to the high number of requests to be executed or their complexity or, in cases where investigative measures are spread across several locations throughout Portugal, to the intervention of the various entities to obtain the execution of the EIO.

If a Portuguese executing authority anticipates that the execution of an EIO will take longer than expected, they will inform the issuing authority in line with Article 12(5) of the Directive. As issuing authority, Portuguese authorities have rarely received such notification.

The most common grounds for delay are as follows: the lack of means to respond to the high number of requests; the disorganisation of the entities that receive the EIO and even a lack of knowledge of the norms related to compliance with the EIO; the involvement of police bodies that are sometimes unaware of the formalities to be completed and do not comply with deadlines; and the high number of requests in a single EIO and the complexity of their execution, which also sometimes makes it impossible to meet these maximum deadlines.

Article 26(3) of Law No 88/2017 defines criteria of urgency. They refer, in particular, to the application of the statute of limitation in the near future, pre-trial detention of the accused as well as the urgent nature of investigations regarding crimes that the law specifies, such as domestic violence. The latter has led to discussions among Portuguese authorities, in particular whether specificities in respect of urgency under national law can be imposed on executing authorities by requesting urgent execution of an EIO. However, as issuing authority, the experience has been good, since most executing authorities have respected claims for urgency and have acted accordingly.

Portuguese authorities tend to adopt a pragmatic and flexible approach to incoming urgent EIOs upon executing them. They therefore begin executing measures on the basis of mutual trust and accept that formal requirements will be satisfied at a later stage. For example, in cases where the EIO has been drafted in English, there have been instances where the authorities have already begun executing the EIO even though a translation has not yet been made available.

The importance of accepting the use of one common/widespread language was thus emphasised in order to facilitate the execution of urgent requests *(see Recommendation No 4)*. According to the judges, they have been executing EIOs in urgent cases by following requests made by issuing Member States. No issues have been reported.

In relation to urgent cases, participants also agreed that a timely involvement and intervention of Eurojust can be crucial.

16. GROUNDS FOR POSTPONEMENT OF RECOGNITION OR EXECUTION

Article 24 of Law No 88/2017 contains a provision on the grounds of postponing recognition or execution corresponding to Article 15 of the Directive.

On the basis of the discussions held during the on-site visit, Portuguese authorities seem to attach great importance to the principle of mutual recognition. In the light of their experience, no issues have arisen for postponements of recognition or execution of EIOs. There have been only a few instances where the requested measure negatively affected the domestic investigation.

From the issuing perspective, Portuguese authorities have not faced problems in practice with postponements.

17. LEGAL REMEDIES

With regard to transposition, lawyers voiced concerns that the reference to guarantees of fundamental rights in the executing Member State stipulated in Article 14(2) of the Directive is not transposed in Article 45 of Law No 88/2017. They also stated that this matter has not been taken up in national jurisprudence.

In the investigative phase there are certain investigative measures which need a judicial authorisation or have to be ordered by a judge (for example, search and seizure of a house or interception of telecommunications). Orders and authorisations by a judge on investigative measures are subject to an appeal in the investigative phase.

Both practitioners and lawyers informed the evaluation team that information concerning legal remedies are generally not included in the order and are therefore not passed on to the person concerned by the measure in cross-border cases. In the opinion of the evaluation team, information on available legal remedies is essential for the person concerned to effectively seek judicial control. In light of the above, Portugal should consider a notification regarding legal remedies to the person concerned by the EIO if there is no danger of the investigation being compromised (*see Recommendation No 6*).

Aside from the need for judicial authorisation or orders by a judge, the investigative judge may ask for decisions taken in the investigative phase by a prosecutor, if considered a violation of fundamental rights by the defence, to be reassessed. However, according to lawyers, there is no harmonised procedure; therefore, it is not always certain that the court is going to rule on the matter.

In respect of the right of the defence to apply for an EIO, there are no legal remedies available if no EIO is issued by the MP.

During the 'instruction' phase (see Chapter 5), the judge may be asked by the defence or the victim to re-evaluate whether there were enough grounds for the indictment or for closing the investigation. The legality of the acts or investigative measures taken by the prosecutor in the investigative phase may also be scrutinised. Under Portuguese law, a house search may only be carried out with judicial authorisation, whereas a company search may be carried out based on the decision of a prosecutor. Both examples may be reassessed by the pre-trial judge (in the investigative phase) or the instruction judge (in the instruction phase), and the decision taken by the court may be subject to appeal.

All of the national remedies provided in similar domestic cases are also available in the case of the EIO; however, as for search and seizure, for example, the defence will only know about the measure when it takes place and may only challenge it afterwards before the issuing national authorities.

It is the view of both prosecutors and lawyers that the defence will not be given access to information at the investigation phase when the prosecutor has issued an EIO. The defence's access to information concerning investigations and the issuance of an EIO take place simultaneously at the trial phase.

Defence lawyers have stated that challenging a measure executed in Portugal is less effective than challenging the measure in the issuing Member State. However, owing to a lack of information available to them, defence lawyers face problems with regard to effectively challenging the issuance of an EIO. Practice shows that in many EIOs Section J is not filled in, which is in line with the Gavanozov I judgment (CJEU, Case C-324/17). The evaluation team considers that Portuguese authorities could request additional information in relation to point 2 of Section J in order to obtain information on legal remedies.

With the Gavanozov I judgment (CJEU, Case C-324/17), the CJEU held that Article 5(1) of the Directive must be interpreted as meaning that, when issuing an EIO, the judicial authority of a Member State does not have to include a description of the legal remedies in Section J. Consequently, Portuguese prosecutors – as the executing judicial authority – are not double-checking proactively or systematically the existence of legal remedies in the issuing Member State.

Only if there are specific reasons for concern in a particular case could the prosecutor – as executing judicial authority – request additional information. If, following assessment on a case-by-case basis, the executing authority can unequivocally establish that there are no legal remedies, the EIO should be refused, as required under the EIO regime in light of Article 47 of the Charter of Fundamental Rights of the European Union. As the concept of 'legal remedy' is still unclear and possibly broad following the Gavanozov II judgment, this is a difficult assessment for the executing judicial authority to make. As issuing authority, Portuguese authorities have had some cases in which the executing authorities, following the Gavanozov II judgment, asked about the existence of legal remedies. The Portuguese authorities replied with reference to Article 45 of Law No 88/2017 and the EIO was executed.

Lawyers consider that cross-border cooperation challenges the right to an effective defence. They have often faced cases where the defendant could not afford a lawyer in either Member State, jeopardising the right to a fair trial. Lawyers are also concerned that a decision to execute an EIO sometimes cannot be challenged if the evidence has already been sent to the issuing authority.

18. TRANSFER OF EVIDENCE

When executing EIOs, prosecutors send any evidence gathered by email, if possible. Evidence is seldom sent by post, except when a large amount has been gathered. If the representatives of the issuing authority are present during the execution of the EIO, in accordance with Article 15 of Law No 88/2017, they will take the evidence gathered along with them. As issuing authority, the Portuguese authorities receive the collected evidence by email and post from the executing Member State. Portuguese authorities use electronic signatures when signing EIOs, and they also recognise and execute EIOs by electronic signature.

From a practical point of view, according to the Judicial Police, there are no technical means to transmit the intercepted telecommunication online to the judicial authorities in Portugal or to the issuing Member State. Police save the data collected on memory sticks or on CD and send it to the competent prosecutor and judge for validation every 15 days in accordance with Article 188(3) of the CCP. After the judge has reviewed the material on the CD or memory stick, it will be sent to the issuing country. The Judicial Police have also stated that they may occasionally send collected material to the issuing state on a daily basis without it being controlled by a prosecutor or a judge. Other issues relating to the interception of telecommunications will be dealt with in Chapter 22.6.

The courts record the hearings of the parties and witnesses in their national trials. When executing an EIO for the hearing of a person via videoconference, minutes are drafted and sent to the issuing authority as provided for in Article 24(6) of the Directive.

Gathering cross-border e-evidence, as is the case in roughly 80% of today's investigations, involves some form of digital evidence: digital data (photo, video and text message) stored and downloaded from seized devices, social media output or cloud service providers, meaning terabytes of data. Therefore, exchanging large data packages is a major challenge. Practitioners need technical means for their secure and efficient cross-border exchange framework, providing our home authorities with a consistent and updated data management approach at EU level. The e-EDES will provide a solution to some of these needs. As per the current state of play, e-EDES will be able to handle messages of up to 4 gigabytes. For larger files, alternative solutions need to be found. Furthermore, the role of Eurojust, tasked with facilitating cross-border cooperation, should not be underestimated. A solution for connecting Eurojust directly to the e-EDES still needs to be found, although national desks have the option to connect to the respective national systems.

19. OBLIGATION TO INFORM - ANNEX B

Article 25 of Law No 88/2017 contains most of the provisions corresponding to Article 16 of the Directive on the obligation to inform, but omits to include the content of Article 16(1)2 of the Directive. This missing provision specifies the obligation for the competent authority of the executing Member State, when it receives an EIO, to send Annex B to the competent authority of the issuing Member State.

The Directive is based on the active exchange of information and active communication with direct contact. Sending Annex B is a requirement to establish direct contact between the competent authorities in the issuing and executing Member States.

As issuing authority, Portuguese authorities are of the view that Annex B is generally received in a timely manner. However, there are instances where Annex B is not received and the executing authority is asked to send it. The evaluation team is of the opinion that all competent authorities in the executing Member States should send Annex B systematically when receiving an EIO *(see Recommendation No 16).*

As executing authority, Portuguese authorities send Annex B and other additional information, in accordance with Article 25 of Law No 88/2017, mostly via email. During the evaluation visit, prosecutors admitted that, in practice, Annex B is not sent in every instance, but no specific reason was given. The evaluation team therefore formulated a recommendation so that they send it in every instance (*see Recommendation No 7*).

20. COSTS

In the view of the Portuguese authorities, there are no pre-determined criteria for considering that costs are exceptionally high. Costs may be considered exceptionally high when investigative measures involve the extraction of data from mobile phones and computer equipment, forensic examinations or other measures that require expertise. Portuguese authorities do not consider the costs for the intervention of the mandatory defence counsel to be exceptionally high and thus to be borne by the issuing state.

As issuing authority, Portuguese authorities neither reported any delays owing to exceptionally high costs nor did they encounter any difficulties while carrying out consultations relating to the cost of executing an EIO.

As executing authority, Portuguese authorities reported that, in one instance, a consultation was conducted as a result of the high costs involved; however, the issuing authority decided not to assume any costs. The EIO was therefore amended and the range of items to be examined was limited in order to reduce costs. The consultation and subsequent agreement that had to be reached resulted in the EIO being amended and delayed its execution.

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

Law No 88/2017 includes several explicit provisions in which Portuguese authorities *may* request the assistance of Eurojust.[20] Furthermore, Article 13(6) of Law No 88/2017 provides for the mandatory[21] notification of Eurojust if an EIO is sent to two or more Member States, thus very elegantly incorporating information obligations in accordance with Article 21(5) of the Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA ('Eurojust Regulation'). The expert team considered this provision as best practice *(see Best practice No 6)*.

The statistics provided by Eurojust (see Chapter 23) confirm that the Portuguese authorities indeed reach out to Eurojust not only in bilateral cases (e.g. facilitation and follow-up to the execution of EIOs, particularly in urgent cases), but also in multilateral cases (coordination).

Portuguese authorities reported that the main difficulties encountered in multilateral cases relate to a lack of communication and coordination between the judicial and police authorities involved in the Member States, for instance in relation to joint action days. Joint action days are mostly prepared with the support of Europol and Interpol at police level and with Eurojust at the level of the judicial authorities. Coordination meetings at Eurojust (including interpretation) can address difficulties in communication and ensure a coordinated approach between the authorities involved.

[20] Article 12(3) - the EIO may also be issued by the national member of Eurojust;
Article 13(5) and (6) - the assistance of the national member of Eurojust may be required for the identification of the competent authority for execution and/or for coordination of execution;
Article 18(4) - if necessary, the national enforcement authority will request the support of the national member of Eurojust, especially when the EIO requires a coordinated execution;
Article 19(10) - when certain circumstances are met, the national member of Eurojust may execute an EIO transmitted to it by a competent authority of the issuing State); and
Article 21(6) - consultation of the national member of Eurojust when a replacement measure requires coordination with the issuing authority).

[21] The issuing national authority *shall* inform the national member of Eurojust in cases where EIOs are transmitted in the same case to at least two Member States.

Practical or legal issues, including the resources required for an action day, can be anticipated and addressed beforehand at a coordination meeting. At the request of the national authorities, Eurojust can also set up a coordination centre to facilitate a coordinated and simultaneous execution of measures (such as arrests, hearings, searches and asset recovery measures) in multiple countries on the joint action day.

22. SPECIFIC INVESTIGATIVE MEASURES

22.1. Temporary transfer

In general terms, recital 25 of the Directive clarifies that when a person is to be transferred to another Member State for the purposes of prosecution, including bringing that person before a court for the purposes of standing trial, an EAW should be issued in accordance with Framework Decision 2002/584/JHA, and only when a person is to be transferred to another Member State for the purposes of gathering evidence should an EIO be issued in accordance with the Directive. This preliminary explanation is crucial to set the scene in the sometimes confusing relationship between the EAW and EIO in relation to the temporary transfer of persons held in custody (see also Chapter 6).

The temporary transfer of persons held in custody is a specific investigative measure transposed in Articles 32 and 33 of Law No 88/2017 in line with Articles 22 and 23 of the Directive.

Portuguese authorities consider that since this measure concerns a deprivation of liberty, the EIO legal framework does not offer a sufficient legal basis for the incoming transfer of persons for evidentiary purposes, underlining the need for a domestic arrest warrant issued by a judge for the practical arrangements of the transfer to be executed.

Portuguese authorities referred to Article 27 of the Constitution, which in particular requires a decision by a judge in Portugal. Given the nature of the temporary transfer under the EIO, it would follow that a person would have to be in detention while in Portugal, but it would appear that the agreement of the executing and issuing authority on the matter of the temporary transfer under the regime of the EIO is not a sufficient legal basis for deprivation of liberty under the Portuguese Constitution.

Since no requests for temporary transfer were executed, no problems have occurred so far, and there have been no situations where someone who has been surrendered to the Portuguese authorities on the basis of a request for temporary transfer has been released.

The evaluation team notes that Article 22(6) of the Directive (and, using similar wording, Article 32(4) of Law No 88/2017) clearly states that 'the transferred person shall remain in custody in the territory of the issuing State […] for the acts or convictions for which he has been kept in custody in the executing State […]'. The evaluation team would therefore like to encourage the Portuguese authorities to read their national (Constitutional) law in the light of this provision and make it workable.

As regards the issue of transit, this situation is provided for in Articles 32(10) and 33(2) of Law No 88/2017, which allow for the possibility to keep someone in detention in Portugal in the event that the person is transferred temporarily from Member State A to Member State B and is in transit via Portugal. The Ministry of Justice authorises detentions in the context of transits. The evaluation team noted that deprivation of liberty during transit through Portuguese territory does not appear to be controversial from a constitutional point of view, while under Article 32(9) of Law No 88/2017 it is.

In a recent case, a Portuguese request for the temporary surrender of a defendant was substituted by an EIO issued for a hearing because the factual and legal conditions for detention were not met. In this particular case, the executing authority refused to execute the EIO, arguing, quite rightly, that the requested measure did not fall within the scope of the Directive and that the EIO had been replaced by a request for a temporary surrender under the EAW that had been already issued.

In another case (see also Chapter 6), Portuguese authorities requested the presence of a defendant to intervene in a trial. Portuguese authorities issued an EIO for a temporary transfer instead of an EAW for a temporary surrender. The execution of the EIO was refused because the executing authority rightly argued that the surrender should remain within the legal borders of the EAW. Both cases confirm that the relationship between both instruments is sometimes problematic in practice and that careful reflection is required before the issuance of either an EAW or EIO.

22.2. Hearing by videoconference

In the context of international cooperation, a hearing via videoconference is frequently held at both pre-trial and trial stages in Portugal, saving time and costs. Videoconferences are particularly instrumental in relation to offences that involve foreign victims and committed in very touristic areas. Consent of the suspects or accused persons for the hearing by videoconference is required under Article 35(3)(a) of Law No 88/2017. The videoconference may allow for greater access to the criminal proceedings for the sake of defence rights. All Portuguese courts are equipped for videoconferences.

Typical practical problems are time differences, delays about which courts fail to inform the executing authorities or incompatibility of the video systems. Nevertheless, this tool seems to be a fairly satisfactory way of obtaining evidence and is becoming increasingly effective. There have been a number of situations in which the central authority has had to intervene to send the EIO to the local competent authority as quickly as possible so that it has arrived on time for the videoconference to take place. Furthermore, Eurojust has on occasion been requested to provide assistance, particularly in cases in which the hearing via videoconference has been urgent.

Portuguese authorities reported technical issues that impede the use of videoconference and which relate to the incompatibility of the different systems used in the individual case or security systems in place that are too stringent.

22.2.1. Presence of Portuguese authorities during the execution of an EIO for a hearing by videoconference

During the pre-trial stage, the executing Portuguese authorities must be present, along with the person that is being heard, since it is not possible to interview a person from abroad directly. During the on-the-spot visit, some judges informed the evaluation team that clerks and not judges or prosecutors conduct the videoconference on behalf of the Portuguese authorities to execute an EIO. It is true that Article 24(5)(a) of the EIO Directive requires the presence of the 'competent authority of the executing Member State' and not necessarily a 'judicial' authority, but the definition of 'executing authority' under Article 2 of the Directive and Article 3 of Law No 88/2017 implies an authority having competence to recognise an EIO and ensure its execution, namely a judicial authority.

The evaluation team believes that authorities of other Member States might be unaware of the Portuguese practice of not having *judicial* authorities present and might expect the involvement of a judicial authority 'to ensure respect for the fundamental principles of the law of the executing state'. Therefore, if an issuing authority requires a judge or prosecutor to be present, they would need to specifically request this from the Portuguese authorities in the EIO so that this can be arranged.

As regards the videoconferencing of witnesses, the evaluation team believes that the involvement of a Portuguese executing authority is crucial for many reasons. Aside from agreeing on the practical arrangements of the hearing, they need to be present in order to inform the person heard about their rights under the law of the issuing Member State, to ensure the application of Portuguese legislation (Article 35(4)(b) and (c) and (6) of Law No 88/2017), to verify the identity of the person to be heard and the uncommunication regime needed inherent to witness/expert statements.

When the status of the witness is not clear, the presence of a judicial authority is even more justified. In these cases, informal consultations are sometimes needed to clarify the procedural status of the person to be heard. Portuguese authorities agreed unanimously that victims fall within the concept of witnesses under their national legal system and should even be considered as procedural parties (Article 12(4) of Law No 88/2017).

22.2.2. Portuguese EIOs for hearing via videoconference to ensure compliance with formalities

When issuing EIOs, Portuguese prosecutors and judges informed the evaluation team that they often issue EIOs for the hearing via videoconference rather than EIOs for an ordinary hearing, as in their experience authorities of other Member States do not always adhere to Portuguese procedural formalities (see also Chapter 10). By conducting the hearings themselves via the hearing by videoconference, they can ensure that Portuguese formalities are complied with.

22.2.3. Hearing of defendants by videoconference at trial stage

The possibility of hearing defendants via videoconference throughout the main trial used to be excluded, as it was considered a measure conducted in the absence of the defendant under Portuguese law. After the pandemic, however, the mindset of the Portuguese authorities – in particular the judiciary – changed significantly in favour of a more flexible approach. During the evaluation visit, the Portuguese judges reported that in Portugal judicial authorities are divided between those who consider that a trial can take place by means of a videoconference under the EIO regime and those who consider that it cannot.

The Portuguese judges have heard cases where the accused took part in the trial via videoconference. One of the arguments supporting this approach is that accused persons unable to attend the trial would not be able to benefit from this possibility without the use of videoconferencing facilities. However, when the presence of the suspect is necessary throughout the entire trial in lengthy, complex cases, the EIO is most probably not executed.

There is therefore no common understanding about whether the presence of a defendant is necessary for the entire trial. It is a matter of national legislation, consent by the suspect, but also the international standards established by the case law of the ECtHR (e.g. direct and confidential contact between defence and suspect). In addition, it is questionable whether this would be a request in accordance with Article 1(1) of the Directive. The judges added that for each file a case-by-case assessment is required.

22.2.4. Hearings via Skype or other COTS systems

Although no cases were reported where videoconferencing was refused because it would be contrary to the fundamental principles of the law of the executing state, surprisingly, representatives from the judiciary and defence lawyers who were interviewed during the evaluation visit reported that Webex/Skype are used extensively, without issuing an EIO, allowing the defendant or witness to participate during the trial with his/her consent. In the opinion of the evaluation team, this practice is not in line with the Directive and could be considered as an infringement of the sovereign rights of the Member State where the person is located. Against that background, Portugal should reconsider the current practice of conducting cross-border hearings without issuing an EIO during the main trial (*see Recommendation No 8).*

When it comes to the hearing of witnesses, the evaluation team is of the view that there is a danger that the evidence is compromised (someone may be in the same room as the witness). Additionally, there is no way of knowing whether a false statement has been made – a criminal offence – because Article 24(7) of the Directive would not apply.

Also, the EIO form should include a section where the issuing authority is able to include the technical details for establishing the video link (*see Recommendation No 18*).

22.3. Hearing by telephone conference

Article 37 of Law No 88/2017 of 21 August transposes the possibility of the hearing of a person via telephone conference. However, it limits this possibility to witnesses or experts. National legislation makes it clear that this is not the preferred means for a person's hearing. The use of telephone conferences to hear a suspect or the accused is not provided for under domestic law.

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

No problems were reported with regard to the gathering of banking information. This measure can be ordered by prosecutors and is extensively used in the investigation phase (*inquérito).*

The examining judge must authorise the monitoring of banking or other financial operations, as provided for in Article 40 of Law No 88/2017. However, no incoming/outgoing EIOs for this measure were reported.

From the executing point of view, no significant problems were signalled during the evaluation visit. However, prosecutors reported that the time limits for the storage of information by banking and financial institutions is ten years. Banking and financial institutions are required to provide the requested information within five days in cases where the information is immediately available to them.

Portugal has an account registry in place where judicial authorities can obtain information on the holders of bank accounts before issuing production orders to be addressed to the relevant banking or financial institutions.

Whenever an EIO is to be executed in a coordinated manner with a freezing order, prosecutors will lay out the national procedural strategy. Where financial assets may be subject to various measures, not only with a view to gathering evidence but also with a view to seizure aiming at confiscation, and the objective of the provisional measure may change in the course of the proceedings in order to maintain a smooth relationship between the various instruments, Portuguese prosecutors first request the relevant information from the bank and then ask the examining judge for authorisation to seize the bank account. In urgent money-laundering operations, the prosecutor can suspend the ongoing operation, but a judicial validation is needed.

Best practice is to include information in relation to parallel freezing certificates in Section D of the EIO, signalling the need for the different mutual recognition instruments involved to be coordinated, as the financial investigation is the first part of the assets recovery cycle.

In particular, in the case of complex financial investigations, it is necessary to request large amounts of banking information which will be fed into the databases of the investigating authority. For this purpose, it would be preferable to receive the banking information in electronic format. Against this background, the EIO form should provide a box for such requests (*see Recommendation No 18*). It should also be ensured that banks and other financial institutions, as well as executing authorities, are able to process such information in electronic format (*see Recommendation No 17*).

22.5. Covert investigations

Under Portuguese law, undercover agents can be police officers or third persons who will act subject to the scrutiny of the Criminal Police. The conduct of an undercover agent is not always punishable, however: in the framework of a covert operation, he/she may carry out preparatory or instrumental acts involving any form of participation (other than being the instigator) or perpetrate an offence. Proportionality must be respected with regard to the aim to be achieved.

In covert investigations, it is possible to use surveillance, photographic documentation, document collection (especially in covert investigations used in economic/financial investigations) and audio live recordings. For some measures, it may be necessary to make a specific request, as this would have to be ordered separately. The evidence that results from covert investigations is, as a rule, the statement of the covert agent him or herself in the proceedings. All other information gathered will be used solely for intelligence purposes. A police officer or a civilian can act under a false identity and infiltration by a third party (other than a police officer) is possible, as long as his/her activity is controlled by the Criminal Police.

In accordance with Law No 101/2001 of 25 August, undercover operations can be carried out by criminal investigation officers or by a third party acting under the supervision of the Judicial Police, as long as their quality and identity is concealed, for the following offences:

- murder, as long as the perpetrator is unknown;
- offences against sexual freedom and self-determination, generally punishable by a period of imprisonment of five years or more, as long as the perpetrator is not known, or where a person aged 16 or under or other incapable persons are expressly referred to as being aggrieved by the offence;
- offences relating to stolen vehicle forgery or trafficking;
- slavery, unlawful detention and kidnapping or hostage-taking;
- human trafficking, membership of a terrorist organisation, terrorism, international terrorism and financing of terrorism; unlawful seizure of an aircraft, vessel, train or any means of transport by road, or endangering the safety of air, sea or railway goods or passengers, generally punishable by a period of imprisonment of eight years or more;
- offences committed with bombs, grenades, explosive materials or devices, firearms and booby-traps, nuclear, chemical or radioactive weapons;
- robbery in credit institutions, tax offices and post offices; criminal conspiracy; trafficking in narcotics and psychotropic substances;
- money laundering, laundering of other assets or products, corruption, embezzlement and economic participation in business and influence peddling, fraud in obtaining or diverting a subsidy or grant;
- economic and financial offences committed in an organised manner or with the use of computer technology;
- economic/financial offences with an international or transnational dimension; counterfeiting currency, securities, stamp-impressed securities, seals and other similar securities or the passing thereof and relating to the securities market.

The Portuguese authorities do not consider the EIO to be specifically designed or intended to request the support of foreign police officers in domestic investigations. In accordance with Article 160-B of Law No 144/99 of 31 August, police officers from other Member States may carry out undercover actions in Portugal, with the same status as Portuguese investigation officers, and under the terms of the legislation in force. The competent judicial authority for the authorisation is the Central Criminal Investigation Court judge, under the proposal of the magistrate of the MP attached to the DCIAP. In such situations the EIO may be applied. The Portuguese practitioners have not reported any difficulties in relation to EIOs issued for covert investigations.

22.6. Interception of telecommunications

When receiving an EIO for the interception of telecommunications, Portuguese authorities will verify first whether the underlying facts that led to the issuing of the EIO allow the collection of evidence by this means in Portugal. This is because Portugal implemented the additional grounds for refusal regarding interception set out in Article 30(5) of the Directive according to which an EIO may be refused if interception of telecommunications would not have been authorised in a similar domestic case.

The criteria are established in Article 187 of the CCP, which provides for multiple legal grounds: on the one hand, there must be reasons to believe that it is indispensable for the investigation or that evidence would otherwise be impossible or very difficult to obtain. Furthermore, the measure can only be ordered for the investigation of certain offences[22].

The interception in the above situations may only be authorized, regardless of the ownership of the means of communication used, against the suspect or defendant, a person acting as an intermediary, in respect of whom there are reasonable grounds for believing that he/she receives or transmits messages intended for or originating from a suspect or accused person, or the victim of the crime, with the respective consent, effective or presumed.

[22] the offence is punishable by imprisonment for a maximum of at least three years; drug trafficking or related offences; a suspect is in possession of a prohibited weapon or arms trafficking; smuggling; insults, threats, coercion, invasion of privacy and disturbance of the peace, when committed by telephone; threats with crime or abuse and simulation of danger signs; escape, when the accused has been convicted of any of the crimes under the previous sub-paragraphs; terrorism, violent or highly organised crime; kidnapping, abduction and hostage-taking; crimes against cultural identity and personal integrity (incitement to war, recruitment of armed forces, recruitment of mercenaries, genocide, discrimination and incitement to hatred and violence, war crimes against civilians, destruction of monuments, torture and other cruel, degrading or inhuman treatment) and provided for in criminal law concerning violations of international humanitarian law; crimes against state security (treason, military service in enemy armed forces, intelligence with foreign countries to provoke war or to embarrass the Portuguese state, aid to enemy armed forces, campaign against the war effort, sabotage against national defence, diplomatic infidelity, usurpation of Portuguese public authority and illicit delivery of a person to foreign entities); counterfeiting currency or securities equivalent to currency under Article 262, Article 264 insofar as it refers to Article 262, and Article 267 insofar as it refers to Articles 262 and 264 of the Portuguese Penal Code, as well as the counterfeiting of currency or securities equivalent to currency under Articles 262 and 264 of the Portuguese Penal Code; crimes covered by a convention on cybercrime, as referred to in Articles 3A and 3B of Law No 109/2009 of 15 September (Cybercrime Law); crimes covered by a convention on security of air or sea navigation.

Interception of telecommunications is allowed for a maximum period of three months, renewable for the same period. However, Portuguese authorities will conduct the interception for the time period requested in the EIO. Both the suspect and any person who serves as an intermediary (i.e. who receives or transmits messages intended for or originating from a suspect) can be subject to an interception of telecommunications; the victim of crime only in the event that he/she consents.

Portuguese authorities have not encountered any cases where the execution of the EIO was denied owing to the fact that the requested measure would not be available in a similar domestic case.

22.6.1. Scope of the concept of 'interception of telecommunication' and use of Annex A or C

At present, there is no uniform understanding of the term 'interception of telecommunication' within the European Union. Consequently, Member States have different views as to whether certain techniques, such as GPS tracking, the bugging of a car or installing spyware on a device to intercept conversation at the source, or audio/video surveillance, fall under the legal regime of interception of telecommunications (Articles 30 and 31 of the Directive) or not.

Portuguese authorities explained that in Portugal the provisions on interception of telecommunications are also applicable to the interception and recording of computer data transmissions, GPS tracking and the bugging of a car. This means that if no technical assistance is necessary from the executing Member State for this measure, Portuguese authorities, as issuing authority, would send a notification via Annex C in line with Article 31 of the EIO Directive. Even though Portuguese law regulates the matter from the perspective of the issuing Member State, Portuguese authorities stated that such rules would also apply if Portugal was the notified authority for the purposes of Article 31 of the Directive.

Portuguese authorities reported that there is very limited sending and receiving of Annex C in Portugal. Experience shows that the information provided in the Annex is enough for the Member State authorities to authorise the use of intercepted communication. Portuguese authorities consider that the purpose of the notification (Annex C) is not an order for recognising an investigative measure (Annex A) but a mere procedural requirement and a reflection of respect for the sovereignty of the other country that should not be interpreted extensively. In accordance with Article 43(5) and (6) of Law No 88/2017, the Central Department for International Cooperation of the Criminal Police must be competent to receive the notification and it must be immediately forwarded to the DIAP Lisboa for submission to a judge in the Lisbon Criminal Court.

Voice recording through a specific device (e.g. in a vehicle) is subject to the requirements set out in Article 6 of Law No 5/2002 of 11 January; formalities provided for in Article 188 of the CCP also apply. Voice and video recording are only possible in the event of certain offences[23].

In relation to the installation of malware, Portuguese authorities reported that this is not considered interception of telecommunications, but must be carried out through covert action as provided for in Article 19 of the Cybercrime Law. Portuguese law enforcement authorities reported that so far they have not yet executed such measures.

[23] drug trafficking; terrorism; membership of a terrorist organisation; international terrorism and terrorism financing; arms trafficking; influence peddling; undue receipt of advantages; active and passive corruption including in the public and private sectors; international trade and sport; embezzlement; economic participation in business; money laundering; criminal association; child pornography and the sexual exploitation of minors; counterfeiting; the use and acquisition of counterfeit cards; computer damage; computer sabotage; illegitimate access to computer systems; human trafficking; counterfeiting of currency; pimping; smuggling and trafficking in and tampering with stolen vehicles.

The evaluation team noted that for some of the above-mentioned measures for which Portugal would use an Annex C, authorities in some of the Member States of the evaluation team would use an Annex A. These different interpretations can seriously hamper judicial cooperation. Against these findings, the evaluation team believes that there is a need for the EU legislator to clarify the concept of 'interception of telecommunications' (see *Recommendation No 20*).

22.6.2. Transmission of intercepts

According to the Judicial Police, there is no direct transmission of intercepted telecommunications owing to technical and legal impediments. Therefore, whenever Portugal is an executing Member State, interceptions are recorded and then sent to the issuing authority.

During the evaluation it seemed that police authorities were able to reveal information gathered in the course of interceptions, e.g. on the basis of intelligence information exchange or otherwise with the issuing authority. However, according to national procedural law the results of a telephone interception should only be released once submitted to and authorised by the judge. The evaluation team therefore recommends that legal requirements to be followed with regard to the transmission of the results of a telephone interception should be set out more clearly to all stakeholders involved in the execution, facilitating decisions on the extension of the said measure (see *Recommendation No 9*).

22.7. Cross-border surveillance

For cross-border surveillance there is no clear approach. In the first instance, it is questionable whether and to what extent it is a measure of police (Article 40 CISA) or judicial cooperation. Secondly, in the event of judicial cooperation, different legal bases could apply in the EIO Directive depending on the type of surveillance. Surveillance can be conducted in a way that authorities of one Member State simply follow a person (travelling across the border). However, enforcement of the measure could also entail the use of technical devices. GPS location devices and devices for audio recordings are most commonly used.

Using audio recordings could be considered as intrusive as telephone interception, which has the same effect: the covert recording of communication. In any case it is a measure conducted in real time.

Accordingly, Article 28 of the Directive for real time measures and Articles 30 and 31 of the Directive for 'interception' of communication with and without the help of the executing Member State could be applicable. However, the issue of how the application of the EIO can aligned to Article 34(1)(b) and recital (9) of the Directive remains.

Practitioners have confirmed that there are different views across Member States:

- some do not require the submission of an EIO;
- others require an EIO only in case the results of the surveillance have to be used as evidence in a criminal investigation;
- others always require the submission of an EIO because they consider any of the measures to be of a judicial nature.

The evaluation team therefore invites the Commission to clarify the application of the EIO Directive in relation to Article 40 of the CISA in respect of the surveillance of vehicles where a GPS tracking device or device for audio surveillance in the vehicle has been attached and/or a technical device for the recording of audio/video has been installed (*Recommendation No 19*).

The situation in which a GPS tracking system installed by the authorities of other Member States would enter the territory of Portugal is regulated by Article 43 of Law No 88/2017 of 21 August. In the event that the intercepted person travels/transfers to another Member State, national law provides for a prior notification through Annex C, if the travel destination is known. If this is not possible, the authorities of the affected Member State have to be notified during the interception, or immediately after the interception. National law stipulates the rules mainly from the perspective of Portugal as issuing authority. However, Portuguese authorities see room for analogy if Portugal is the notified Member State.

23. STATISTICS

In accordance with Article 10(2) of Law No 88/2017, judicial authorities must inform the central authority, for statistical purposes, about EIOs that have been issued and received. However, the statistical data gathered may be incomplete because it is not collected by automated means. There is no statistical data available for 2017, as Law No 88/2017 came into force in late 2017. For the last four years the central authority has registered the following activities related to the application of the EIO:

	EIOS issued	EIOs executed
2018	143	65
2019	896	282
2020	896	280
2021	879	233

There is no data available on cases of refusals, or on the number of EIOs whose execution has been postponed.

During the evaluation visit, Eurojust provided statistics extracted from the Eurojust Case Management System in relation to cases dealt with by Eurojust. It included information on: (i) the total number of EIO-related cases at Eurojust; (ii) the number of bilateral and multilateral cases involving the Portuguese Desk at Eurojust; and (iii) the number of EIO-related cases in which the Portuguese Desk was either 'requesting' or 'requested'.[24]

All EIO-related cases at Eurojust	2017	2018	2019	2020	2021	2022	Total
Bilateral cases	51	561	988	1295	1900	2308	**7103**
Multilateral cases	37	231	337	462	414	399	**1880**
Total cases	**88**	**792**	**1325**	**1757**	**2314**	**2707**	**8983**

EIO cases involving Portugal	2017	2018	2019	2020	2021	2022	Total
Bilateral cases	5	45	67	75	87	144	**423**
Multilateral cases	2	10	30	36	41	39	**158**
Total cases	**7**	**55**	**97**	**111**	**128**	**183**	**581**

[24] 'Requesting' means that a Portuguese national authority requested that the Portuguese Desk open a case at Eurojust vis-a-vis one or more other Member State; 'requested' means that another Desk at Eurojust opened, at the request of its national authority, a case vis-a-vis the Portuguese Desk.

EIO cases involving Portugal	2017	2018	2019	2020	2021	2022	Total
Requesting cases	2	28	58	57	68	104	**317**
Requested cases	5	27	39	54	60	79	**264**
Total cases	**7**	**55**	**97**	**111**	**128**	**183**	**581**

24. TRAINING

24.1. Initial training for future judges and prosecutors

The initial training programme of the Centre for Judicial Studies (CEJ) includes a specific programme in International Judicial Cooperation in Criminal Matters (IJCCM). In total, the training lasts for 15 hours, three of which are dedicated to the EIO, which is one of the main topics. During the evaluation it was discussed whether the time for training dedicated to the EIO could be increased due to its broad scope of application and its overall importance for the criminal investigation. Each year all future judges and public prosecutors have to take the above-mentioned training programme in IJCCM. The IJCCM programme ends with a compulsory written examination.

The CEJ has the monopoly of the initial training provided to future judges and public prosecutors. The number of future judges and public prosecutors that are trained varies each year. For example, the previous course, which was the 37th, had 105 participants and the 38th course has 93.

The evaluation team considered the obligatory training on judicial cooperation in criminal matters and the common training for judges and prosecutors as best practice (*see Best practices Nos 7 and 8*).

24.2. Ongoing trainings

The following ongoing trainings are provided by the CEJ:

Subject	Date	Participants
EIO: mutual recognition and obtaining evidence in a transnational context	11/05/2017	342
EIO: practical issues	21/11/2019	66
EIO: practical issues	21/11/2019	66
EIO: legal remedies	17/12/2020	199
EIO: practical issues	06/05/2022	296
Total	**5**	**903**

This year there will also be a training course organised in cooperation with Eurojust dealing with asset recovery, the EAW and the EIO. It will be open to judges and prosecutors. Portugal is also very active in the EJTN. In the opinion of the evaluation team, however, the EJTN should increase the number of training courses related to EIOs, perhaps in the framework of a partnership with national training programmes *(see Recommendation No 21).*

With regard to attendance, the evaluation team was informed that judges and prosecutors prefer hybrid seminars, in particular since the introduction of online training courses owing to the pandemic. The evaluation team finds these developments unfortunate because online participation does not allow for informal exchange and building networks, which in the view of the evaluation team is particularly crucial when working in the area of international cooperation – also at national level.

As shown above, the CEJ provides training for judges and public prosecutors in a systematic and regular manner in the field of IJCCM, including training on the EIO. In terms of the evaluation of the CEJ's training events, participants answer surveys on the quality of the sessions.

The relevant case law of both the CJEU and the EIO has been summarised and disseminated on the public prosecutors' intranet.

Owing to the fact that prosecutors apply the EIO far more often, either as an issuing authority or as an executing authority, judges have less practical experience with the application of the EIO. In addition, it should be noted that unlike in EAW proceedings, where judges specifically dedicated to the execution of arrest warrants are competent, there is no specialisation when it comes to the execution of EIOs. Special focus on judges regarding training activity may bring some more balance in this regard.

During the evaluation visit, the usefulness of a handbook or guidelines was discussed. Portuguese authorities had considered this idea but wanted to wait for a more extensive application of the EIO in practice that would reveal recurring problems. With regard to the application of instruments of recognition in practice and daily questions that may arise, Portuguese authorities emphasised that unlike in traditional MLAs, which involve a central authority that can be consulted and which can give advice on individual cases, instruments of mutual recognition entail direct cooperation between national authorities. In order to accommodate the need for consultation and advice in daily practice, prosecution authorities set up focal points with specific expertise in the field of mutual recognition. In the opinion of the evaluation team, this seems an excellent idea and should be extended to courts and judges.

25. FINAL REMARKS, RECOMMENDATIONS AND BEST PRACTICES

25.1. Suggestions by Portugal

The Portuguese authorities would welcome an EU handbook on the EIO to prevent/resolve current difficulties in terms of its practical application. This could adopt a similar approach and structure to the existing EAW handbook and focus on existing legal and practical issues, as well as clear recommendations and good practices, for instance with regard to:

- categorisation of investigative measures;
- fiches for evidence-gathering in each Member State;
- admissibility of evidence rules for each specific investigative measure and type of evidence;
- legal remedies;
- forensic scientific evidence;
- handling of e-evidence and big data evidence packages;
- EIOs and JITs.

With regard to the EIO form, Portuguese practitioners suggest reversing sections C and G. Also, completing sections C and H may result in some unnecessary repetition.

Difficulties may arise in the event that EIOs are sent to different authorities in the same jurisdiction owing to the nature of the different measures to be executed, i.e. searches and hearings. For these complex files, the idea of creating centralised points in executing states would, according to the Portuguese authorities, appear to be a solution.

25.2. Recommendations

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

The evaluation team saw fit to make several suggestions for the attention of the Portuguese authorities. Furthermore, based on the various good practices, related recommendations are being put forward to the EU, its institutions and agencies, and to Eurojust in particular, as well as to the EJN. Portugal should conduct an 18-month follow-up to the recommendations referred to below after this report has been agreed by COPEN.

25.2.1. Recommendations to Portugal

Recommendation No 1: Portugal should develop a handbook or other guidelines to harmonise the practical application of the Directive, e.g. whether a national order is necessary in addition to the issuing of an EIO or a formal recognition decision is made (*see Chapter 5.1).*

Recommendation No 2: Portugal should update the information in the EJN Atlas, in particular in respect of receiving authorities *(see Chapter 5.2).*

Recommendation No 3: Portugal should update the notification in respect of the language regime *(see Chapter 7.2*).

Recommendation No 4: Portugal should consider accepting EIOs in English, in particular in urgent cases *(see Chapter 7.2).*

Recommendation No 5: Portugal should connect all competent national authorities, including the courts, to the e-EDES as soon as possible, to ensure the secure transmission of data (*see Chapter 9*).

Recommendation No 6: Portugal should consider a notification about legal remedies to persons concerned by the EIO, if there is no danger that the investigation is compromised *(see Chapter 15).*

Recommendation No 7: Portuguese authorities as executing authorities should systematically send Annex B when receiving an EIO *(see Chapter 19)*.

Recommendation No 8: Portugal should reconsider the current practice to conduct cross-border hearings without issuing an EIO during the main trial *(see Chapter 22.2)*.

Recommendation No 9: Portugal, when executing an EIO issued for an interception of telecommunications, should ensure that the results of an interception are not transmitted as part of an intelligence information exchange or otherwise to authorities of the issuing Member State before the executing authority authorises the transmission *(see Chapter 22.6.2)*.

25.2.2. Recommendations to the other Member States

Recommendation No 10: Member States should ensure that section D of the EIO form includes all instruments related to the EIO, including freezing orders, EAWs, etc. *(see Chapter 7.1)*.

Recommendation No 11: Member States should consider accepting EIOs in English, in particular in urgent cases *(see Chapter 7.2)*.

Recommendation No 12: Member States should use short sentences when issuing an EIO to allow for easy translation *(see Chapter 7.2)*.

Recommendation No 13: Member States should consider adding an email address in the EJN Atlas to facilitate direct contact between national competent authorities *(see Chapter 9)*.

Recommendation No 14: Member States should connect all relevant national authorities to e-EDES *(see Chapter 9)*.

Recommendation No 15: Member States, when executing an EIO, should comply with procedural formalities requested by the issuing Member State, as these are crucial for the admissibility of evidence in the issuing Member State *(see Chapter 10.1)*.

Recommendation No 16: Member States should send Annex B systematically *(see Chapter 19)*.

Recommendation No 17: Member States should ensure that banks and other financial institutions, as well as executing authorities, are able to process banking or similar information in electronic format (*see Chapter 22.4*).

25.2.3. Recommendations to the European Union and its institutions

Recommendation No 18: The Commission is invited to consider making the form more user-friendly and restructuring it in order to avoid the need for repetition, to amend section D so that it contains all relevant instruments related to the EIO in question and to include a section on the technical information necessary for establishing a videoconference link and receiving the banking information in electronic format *(see Chapters 7 and 22.2.4)*.

Recommendation No 19: The Commission is invited to clarify the application of the Directive in relation to Article 40 of the CISA in respect of the surveillance of vehicles where a GPS tracking device or device for audio surveillance in the vehicle has been attached and/or a technical device for the recording of audio/video has been installed *(see Chapter 22.7)*.

Recommendation No 20: The Commission is invited to provide clarifications with regard to:

- the speciality principle;
- the concept of confidentiality;
- the concept of interception of telecommunications;
- the application of the EIO to ensure that the accused person attends the main trial *(see Chapters 6, 18, 20, 22.6.1)*.

25.2.4. Recommendations to Eurojust/Europol/EJN/EJTN

Recommendation No 21: The EJTN should increase the number of training courses related to the EIO, perhaps in the framework of a partnership with the national training projects. Training should include the interaction of the various instruments for judicial cooperation in criminal matters, especially those related to financial investigations *(see Chapters 6 and 24.2)*.

25.3. Best practices

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

Portugal is to be commended for:

1. the general attitude of the authorities to recognise and comply with EIOs of other Member States to an outstanding degree *(see Chapter 5.2)*;

2. introducing the possibility for victims to request an EIO *(see Chapter 5.4)*;

3. creating standard texts to explain to the authorities of other Member States national procedural formalities that are indispensable for the admissibility of evidence *(see Chapter 10.2)*;

4. taking part in the e-EDES pilot project *(see Chapter 9)*;

5. making a person in a prosecution service competent to review EIOs issued for quality control *(see Chapter 9)*;

6. notifying Eurojust in the event of information obligations from national authorities to Eurojust in accordance with Article 21 of the Eurojust Regulation *(see Chapter 21)*;

7. 15 hours of obligatory training on judicial cooperation in criminal matters with a test to be taken by the participants *(see Chapter 24.1)*;

8. common training of judges and prosecutors *(see Chapter 24.1).*

ANNEX A: PROGRAMME FOR THE ON-SITE VISIT

February 14, 2023 - Directorate General for Justice Policy - Av. D. João II, nº 1.08.01E, Torre H, Floor 2, Campus da Justiça, Lisboa

09:30-10:00	Welcome
10:00-11:00	Presentations - Legal system and judicial system - Centre for Judicial Studies
11:15-12:30	Meeting with the Judicial Police
12:30-14:00	Lunch break
14:30-15:45	Meeting with judges' representatives
15:45-16:30	Meeting with representatives of the Bar Association

February 15, 2023 - Prosecutor General's Office, Rua do Vale de Pereiro, nº 2, 1269-113 Lisboa

9:30-12:30	Meeting with representatives of the Prosecutor General's Office
12:30-14:00	Lunch break
14:00-16:30	Continuation of the morning meeting

February 16, 2023 - Directorate General for Justice Policy - Av. D. João II, nº 1.08.01E, Torre H, Floor 2, Campus da Justiça, Lisboa

9:30-12:00	Wrap-up meeting

ANNEX B: LIST OF ABBREVIATIONS/GLOSSARY OF TERMS

LIST OF ACRONYMS, ABBREVIATIONS AND TERMS	ENGLISH
CATS	Coordinating Committee in the area of police and judicial cooperation in criminal matters
CCP	Code of Criminal Procedure
CEJ	Centre for Judicial Studies
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
CJEU	Court of Justice of the European Union
Constitution	Constitution of the Portuguese Republic
COTS	Commercial Off The Shelf
DCIAP	Central Department of Criminal Investigation and Prosecution
DCJRI	Judicial Cooperation and International Relations Department
DIAP	Criminal Investigation and Prosecution
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
e-EDES	e-Evidence Digital Exchange System
EIO	European Investigation Order
EJN	European Judicial Network in criminal matters
EJTN	European Judicial Training Network
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), and replacing and repealing Council Decision 2002/187/JHA
IJCCM	International Judicial Cooperation in Criminal Matters
JIT	Joint investigation team

LIST OF ACRONYMS, ABBREVIATIONS AND TERMS	ENGLISH
Law No 88/2017	Law No 88/2017 of 21 August
MLA	request for mutual legal assistance
MP	Public Prosecution Service
TIR	information on identity and residence