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

ANNEX

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

REPORT ON ITALY

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1. EXECUTIVE SUMMARY

Italy was the first assessed member State within the 10th round of mutual evaluations in criminal matters dedicated to the European Investigation Order (EIO). The evaluation visit took place in January 2023 and was organized in a professional manner. The evaluation team appreciated the friendly atmosphere and open discussion during the meetings, the timely provision of documents (answers to the questionnaire and national legislation), and the quick responses to additional questions after the evaluation visit.

During the on-site visit, the evaluation team had the opportunity to meet with Italian representatives from various districts, who provided them with information and explanations of the legal aspects of the implementation of the EIO as well as the practical problems they had encountered in practice.

The evaluation team concluded that practical implementation of the EIO in Italy works well, whether it acts as issuing or executing State. However, there is still space for improvement not only from the side of Italian authorities but also from the other Member States.

The competent authorities to issue EIO in Italy are prosecutors and judges depending on the proceeding phase (pre-trial and trial phase). The competent executing authority to recognize the EIO is the district prosecutor, where the majority of measures or the most important ones are to be executed.

Concerning the scope of application of EIOs, except for the service of documents in criminal proceedings or the restitution of property to its rightful owner, the EIO may, according to Italian law, be used to carry out any investigative or probative measure which is likely to ensure the ascertainment of the facts of the case.

Despite Italy not having faced particular problems in filling in Annex A of the EIO, Italian practitioners assessed that there was room for improvement and therefore proposed some changes (see point 6.1.).

Contrary to the EIO Directive 2014/41/EU (EIO DIR), Italy has not indicated which other language(s) may be used when sending EIO to Italy.

As issuing State, Italy assesses the proportionality to the seriousness of the prosecuted offence and the necessity concerning the level of usefulness of the requested investigative measure. Italy also assesses the proportionality of the requested measure as executing State, and this mostly leads to using a less intrusive measure with which the same result can be reached. However, in very few cases, this has led to not executing the requested measure.

Italy has rarely had difficulties in the admissibility of evidence when it has been received through the EIO procedure. Formalities requested by Italy or the other Member State have usually been granted.

As there is no explicit provision of the rule of speciality in the EIO DIR, Italy considers that evidence obtained through the EIO procedure comes into the full possession of the issuing authority even if the said authority afterwards takes part in a JIT. As executing authority, Italy has not been asked for consent to use the evidence gathered through EIO in another crime. In such a hypothetical situation, it cannot be excluded that Italy would assess whether the EIO would be executed if issued for the new offence.

When a possible ground for refusal arises, the predominant practice is that the Italian executing authorities, before making such a refusal, enter into a direct or indirect dialogue with the issuing foreign authority and, in the second case, via EJN and/or EUROJUST.

Regarding dual criminality as grounds for refusal, Italian practitioners had not encountered cases where double criminality was verified or applied concerning the categories of offences listed in Annex D of the EIO DIR. These categories of offences are fully and perfectly reflected in the offences provided for and punished by Italian law.

As for the *ne bis in idem* principle, Italy was not confronted to a particular problem. In case Italy conducted a parallel investigation with the other Member State, Eurojust was asked for help and organizing coordination meetings where it was decided which Member State would proceed to trial (raising conviction) or, if it concerned two different crimes, who would proceed with the trial and for which crime.

As for the time limits, no difficulties were noted since the deadlines are generally respected. However, the failure to comply with the deadlines arose in cases of particular complexity of the investigative measures requested. The Italian issuing authorities are particularly rigorous in assessing the urgency of an EIO. As executing authorities, if investigative measures are marked as urgent, they respect it and carry out the EIO as a matter of urgency.

Concerning the transfer of evidence, the Italian authorities used electronic means, or it was handed over delivery to the issuing authority's representative. In exceptional cases diplomatic channels were used as well. The prosecutor may also order the temporary transfer of the corpus delicti or objects serving as evidence when it does not impede the expedited conduction of the ongoing prosecution, agreeing on transfer modalities and deadlines for their return with the issuing authority. In such a case, during the trial phase the authorization of the competent judge is needed.

As a general rule, the costs are borne by the executing State, which may, however, share the amount of the expenditure with the issuing State. However, given that the requested investigative measures and the taking of the evidence were neither very intrusive nor expensive, Italian authorities have not asked and have not been asked to share the cost.

Italian legislation provides for a legal remedy against the recognition decree. However, Italy does not have legal remedies against issuing EIO. The EIO DIR, as such, does not demand it. However, according to the CJEU judgment C-852/19, Member States may not issue EIOs for carrying out of searches and seizures or hearing of a witness by videoconference where the legislation of that Member State does not provide any legal remedy against the issuing of such EIO. It should be noted, however, that Italian law provides for legal remedies against the measures underlying the issuing of the above mentioned EIOs (the one against search and seizure is, obviously, an *ex post* remedy).

The competent Italian authorities did not send nor receive Annex B where it would be stated the impossibility of complying with the requirement of confidentiality under Article 19 (2) of EIO DIR. Italian law sets the rule of confidentiality of the investigations carried out during the investigation stage. Therefore, at the investigation stage, the communication of the decision on recognition of the EIO to the defence lawyer of a suspect, or in any case of a person concerned, must only be made in those cases where the investigative measure indicated in the EIO, Italian law provides for prior notice of the execution of the measure to the defence lawyer or for the right of the defence lawyer to be present at such execution.

Concerning the temporary transfer, the EIO DIR regulates the non-consent of the person in custody as an optional ground for refusal of execution, whereas Italy transposed it as a mandatory ground for refusal. Such a transposition may, in some cases, hamper or thwart the investigation, especially if it is inevitable the person held in custody in an executing Member State to take part in the evidentiary procedures (e.g. the identification of a person, where eyewitnesses are called to identify a perpetrator, especially if it has not been expedient due to particular reason to carry it out by photos recognition). Nevertheless, the evaluation team doesn't think there is a situation of infringing human rights if a suspected person has to undergo specific investigative measures.

Regarding hearing via videoconference, the consent of the suspected or accused person is a mandatory ground for refusal according to the transposed Italian law, whereas the wording of the EIO DIR suggests it as an optional ground. As noted by Italian practitioners, if a suspect or an accused person doesn't consent to a videoconference, they start a dialogue with the issuing State to discuss the eventual standard hearing instead and also whether an additional EIO and a list of questions are needed.

However, the evaluation team believes the possible recourse to the standard hearing, proposed within the answers to the questionnaire, is not always a solution, for instance, in urgent situations. Also, the evaluation team is not convinced by the suggestions offered during the onsite visit that issuing authorities could come to Italy if they want the interview to be done directly by them and not by the Italian bodies because this solution is not always possible, for instance when the case is in the trial proceedings, since the issuing courts might not be able to travel abroad and it wouldn't even serve a purpose.

From the perspective of the executing State, if the EIO or other documents indicate that the person in question is not a witness, Italian bodies – complying with Italian law finish questioning, give him/her guarantees and a lawyer and start hearing the person as the suspect. However, such cases are dealt with by initiating a dialogue with requesting State.

According to the Italian legislation, information on bank and other financial accounts, as well as information on banking and other financial operations, can be ordered directly by the prosecutor, while real-time monitoring banking or other financial operations that are being carried out through one or more specified accounts requires the authorisation of the preliminary investigation judge.

In some cases, Italian executing authorities were requested to perform searches in banks for providing documents. However, Italian prosecutors ordered banks to provide the requested documents instead of the requested measure since it is the less intrusive measure that leads to the same desired outcome.

Italian law enables practitioners to use covert investigations for various investigative measures. As a particularity, for incoming EIOs, Italy may promote the setting up of a JIT with the issuing state, mainly because the execution of the EIO cannot be performed in the absence of a national investigation, so one such investigation must be existent or initiated as a condition for a covert investigation to unfold in Italy. According to Italian legislation, only a police officer can act as an undercover agent.

The most significant problem was recorded in connection with the interception of telecommunications due to its interpretation and different legislation in Member States (MSs). Regarding terminology, the EIO DIR does not define what the term ‘telecommunications’ in Articles 30–31 covers nor refers back to its application under the legislation of the Member States.

Concerning the provision on telecommunications interception in the Italian Legislative Decree No. 108 of June 21st2017 (the Legislative Decree), it was transposed under the same title as the EIO DIR. However, as for the Italian CPC, the interception of telecommunications is stipulated in Book IV under the heading "Interception of conversations or communications" with a broader meaning. It covers telephone conversations or communications and other forms of telecommunication (as well as communications and conversations between people present in the same place at the same time), also encompassing situations when a bugged car crosses a border unexpectedly, and the authorities do not need the technical assistance of the authorities in the other Member States (under Article 31 of the EIO DIR).

Different understanding and transposition eliminated bugging a communication inside of the car from the application of Article 31 of EIO DIR, which led to the impossibility of using material intercepted without prior authorization from the State authorities where the target of the measure has suddenly moved after exiting the Member State.

The solution proposed by Italy is a minor amendment of the EIO DIR, that is, the replacement of Articles 30 and 31 with reference to "interception of conversations or communications". The evaluation team fully supports this idea and recommended the Commission consider such a change.

A distinct approach concerns GPS tracking, which in Italian law is not included in the definition of "interception of telecommunications" nor “communications”, and it is an investigative measure within the autonomous powers of the judicial police (without prejudice to the control and direction of investigations by the prosecutor). Therefore, it does not require using any judicial cooperation instrument, both incoming and outgoing, where any technical assistance from the other MSs is not needed. The Italian representatives showed that GPS tracking results obtained in the above-mentioned framework can however be used as evidence in trial, according to Italian law as construed in the national case-law.

Since cross-border surveillance is not expressly mentioned in the EIO DIR, the legal basis used for this measure is the Convention implementing the Schengen Agreement, which means that in case the outcome of the measure should be used, Italy as outgoing or a foreign country as incoming country has to send a Mutual Legal Assistance request. Italy confirmed that in that case, they could evaluate and execute the content of EIO, even though, for that measure, an MLA request was supposed to be sent in compliance with their national law. For sure this applies to physical cross-border surveillance, when the police surveillance unit is physically following the subject of surveillance. In this matter, it is clear that the EIO DIR is inconsistent if it does not solve the question of cross-border surveillance measure, and every Member State interprets this form of cooperation differently.

It is not apparent from the Legislative Decree that a controlled delivery can be requested or executed using the EIO instrument. In this respect, Italy has replied that particular provisions under Article 22 ("Delay or omission of the measures of arrest or seizure") and Article 42 (“Request to delay or omit arrest or seizure”) of the Legislative Decree refer - for incoming and outgoing procedures respectively - to a control delivery measure via an EIO. However, while not putting doubt on this response, the evaluation team is of the opinion that the wording of the referred text could properly notify practitioners more clearly about the possibility of using this investigative measure of high importance if it were explicitly mentioned in the Legislative Decree, similarly to the EIO DIR.

Video surveillance, as well as GPS tracking, is an investigative measure that falls within the general power of investigation of the public prosecutor and can be the object of an EIO. However, in cases in which the measure also implies audio surveillance, legal provisions related to interceptions of communications and telecommunications entirely apply.

House searches or searches in non-residential premises fall under the public prosecutor's general investigative power without any difference in the discipline. Therefore, there is no doubt that Italian public prosecutors can issue an EIO (in outgoing cases) or recognize and execute an EIO (in incoming cases) to carry out such searches.

A different discipline, however, is provided for searches in law firms, where the measure has to be authorized by the judge for preliminary investigations with a reasoned decree. Therefore, in outgoing cases, the public prosecutor can issue an EIO only based on a reasoned decree of the judge for preliminary investigations and in incoming instances, the public prosecutor can recognize the EIO but must request its execution from the judge for preliminary investigations.

2. INTRODUCTION

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

In line with Article 2 of the Joint Action 97/827/JHA of 5 December 1997, as agreed by CATS after an informal procedure following its informal meeting on 10 May 2022, the 10th Round of Mutual Evaluations will focus on the European Investigation Order (EIO), as set out in EIO DIR.

The tenth mutual evaluation round aims to provide real added value by offering the opportunity, via on-the-spot visits, to consider not only the legal issues but also - and in particular - relevant practical and operational aspects linked to the implementation of the Directive 2014/41/EU - the European Investigation Order by practitioners in the context of criminal proceedings. It will allow both shortcomings and areas for improvement to be identified, together with best practices to be shared among Member States, thus contributing towards ensuring a more effective and coherent application of the principle of mutual recognition at all stages of criminal proceedings throughout the Union.

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

Furthermore, the current evaluation process could provide helpful input to Member States that may not have implemented all aspects of Directive 2014/41/EU.

Italy was the first Member State 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 (ST 10119/22).

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

The evaluation team consists of three national experts, supported by one or more members of staff from the General Secretariat of the Council and observers. For the tenth round of mutual evaluations, it was agreed that the European Commission and Eurojust should be invited as observers (ST 10119/22).

The experts entrusted with the task of evaluating Italy were Ms Tuuli Eerolainen (Finland), Ms Anna Ondrejová (Slovakia), and Mr George Virgil Gavrilă (Romania). Observers were also present: Ms Martina Hluštíková (Eurojust), together with Ms Mária Bačová 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 findings arising from the evaluation visit that took place in Italy between 24 January and 26 January, and on Italy's detailed replies to the evaluation questionnaire together with its detailed answers to the ensuing follow-up questions.

During the on-site visit, the evaluation team met with Italian representatives of the Cabinet of the Minister of Justice, the International Affairs and Judicial Cooperation of the Minister of Justice, the General Prosecutor's Office attached to the Court of Appeal of Naples, the Court of Cassation, the Steering Board of the Italian High School for the Judiciary, the Courts of the first instance of Rome and Naples, Prosecutors' Offices attached to the Court of the first instance of Rome, Naples, Milan, Turin, Venice, Palermo, Catania and Bari.

3. TRANSPOSITION OF THE DIRECTIVE 2014/41/EU

Law provisions implementing the EIO DIR of the European Parliament and of the Council of April 13th 2014, regarding the European Investigative Order in criminal matters, have been incorporated into an Italian Legislative Decree in compliance with the principles enshrined in the Constitution and the Charter of the Fundamental Rights of the European Union, as well as into the matter of freedom and fair trial that entered into force on July 28th 2017. The decree is comprehensive and easy to understand and therefore helps the practitioners to apply the EIO DIR as issuing and executing State. Italian authorities consider the EIO DIR has had a positive impact on the mechanisms of criminal cooperation: the use of standardised forms available in all the languages of the European Union, the growing role given to judicial authorities, direct communication between competent authorities and the provision of limited and specific grounds for refusal and strict time limits. However, for the principle of mutual recognition of the judicial to function fully, proper completion and translation of the forms, a correct interpretation of the grounds for refusal laid down in supranational law and compliance with the prescribed deadlines by all the authorities involved are essential.

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

The competent authority for issuing and transmitting an EIO is a public prosecutor or judge carrying out criminal proceedings or for the application of a preventative property measure. The latter refers to, e.g., situations where evidence/information is needed for the confiscation proceedings in a criminal matter.

The competence depends on the phase of the criminal proceedings. Prosecutors are competent to issue EIO for any measure during the pre-trial investigation. Judge's authorisation, however, is needed for the interception of conversations or communication and/or telecommunications. Judges are competent to issue EIO for any measure during court proceedings. Should the judge issue the EIO, the parties must be heard before the issuance of the EIO.

If the EIO's investigative measure to be executed in Italy demands under Italian law an authorisation from the court (such as telephone and *environmental* interceptions), the public prosecutor with territorial jurisdiction to receive the EIO merely recognises the EIO and at the same time requests that it be executed by the judge responsible for preliminary investigations. The public prosecutor must inform the National Prosecutor of Anti-Mafia and Counter-Terrorism of the issuance of EIO if the offence in question is a terrorist or organised crime offence or one of the most serious offences, a list of which is to be found in Article 51 (3-bis and 3-quater) of the Code of Criminal Procedure.

The defendant, defence lawyer (according to Italian law, the defendant must always have a defence lawyer), or the person against whom the application of a preventative measure has been proposed may ask the public prosecutor or the competent judge to issue an EIO. However, the victim's lawyer does not have similar rights stipulated in the law. This is because the public prosecutor is deemed to know the best way to gain evidence in a case, also in the interest of the victim.

Any request to issue an EIO must indicate the investigative measure or evidence and the reasons justifying the carrying out of such measures or gathering of evidence, failing which the request shall not be admitted.

If the public prosecutor decides not to grant the request of the lawyer of the suspect or accused person, he/she must issue a reasoned decision. However, when the aim of the request is a seizure order, and the prosecutor believes it **cannot** be carried out, he/she must forward the request and his/her negative opinion to the preliminary investigation judge (the Criminal Procedure Code (CPC) Article 368). The preliminary investigation judge must hear the parties before making the decision.

The competent authority for recognizing and, in most cases, executing the EIO is the public prosecutor of the capital of the district of the Court of Appeal where the measure shall be executed. If several measures should be executed in different districts, the recognizing prosecutor is the one of the district where the most significant number of acts must be carried out. In cases where an equal number of measures is to be carried out in different districts of Court of Appeal, the competence falls to the district's public prosecutor where the most significant investigative measure is to be carried out. If it is not clear which district's public prosecutor should be the one to recognize the EIO, the CPC contains rules for contrasts among prosecutors (articles 54, 54-bis and 54-ter). These rules regulating general contrast situations between prosecutors also apply when executing EIOs. In the largest cities, a team of prosecutors is in charge of all incoming EIOs with a high level of expertise.

The public prosecutor must inform the National Prosecutor of Anti-Mafia and Counter-Terrorism if the offence in question is a terrorist or organised crime or one pertaining to the most severe offences (see above).

When the issuing authority requests that the court carry out the measure, or when the requested act must be carried out by the judge according to Italian law, the public prosecutor who receives the EIO recognizes it and requests it for execution by the judge for preliminary investigations.

Italy has designated, as ***central authority***, the Ministry of Justice (Article 2 of the Legislative Decree), to which the Public Prosecutor's Office responsible for recognition and enforcement, or recognition only, must send a copy of the EIO received (Article 4 (1) of the Legislative Decree), for statistical purposes. However, there is no provision concerning the abovementioned obligation in cases of EIOs issued by Italian prosecutors and judges. Therefore, there is also a lack of statistics concerning EIOs issued by Italian authorities.

5. SCOPE OF THE EIO AND RELATION TO THE OTHER INSTRUMENTS ACCORDING TO THE NATIONAL FRAMEWORK

Except for the service of documents in criminal proceedings and the restitution to the person entitled to properties derived from a criminal offence, the EIO may, according to Italian law, be used to carry out any investigative or probative measure specifically governed by the law or which is likely to ensure the ascertainment of the facts of the case and does not, except in cases and by the manner regulated by law, prejudice the physical or moral freedom of the person concerned.

There have been doubts in connection with the interception of telecommunications of Articles 30 and 31 of the EIO DIR (corresponding Articles (23-25) and (43-45) of the Legislative Decree), whether they also apply to the interception of communications between persons in the same place, e.g. GPS tracking a vehicle and simultaneous interception of conversation of persons in the car.

The Italian law on EIO does not exclude that EIO may be used for purposes other than investigation or taking of evidence. Article 2 (a) of the Legislative Decree also applies to obtaining "information or evidence already available". In practice, Italian authorities issue EIOs to acquire copies of judgements or acts relating to arrests abroad. Italy has also executed EIOs to obtain judgments, criminal records and various documents. In addition, Italy has executed EIOs requesting the service of summons.

Concerning EIOs issued for obtaining personal data necessary for the execution of an administrative decision, Italian authorities stated they had not encountered such requests.

During the on-site visit, the evaluation team was told that Italy, according to Italian law, must start its own investigation when receiving an EIO if the offence in question is such that Italy has jurisdiction in the matter, which happens, in particular, when the crime was committed in whole or in part in Italy. Therefore, the information to issuing State is provided asap, if possible, either in Section D (other helpful information) of Annex B or by the letter transmitting the evidence gathered as requested in the EIO, otherwise even before informally via e-mail communication. In such case, the Italian public prosecutor concerned will conduct a parallel investigation, where appropriate, using all the most valuable means of judicial cooperation, not excluded, in particular, the issuance of an EIO to receive the outcome of investigations carried out in the (former) issuing State, nor the proposal for the setting up of a JIT. This without prejudice, , to the provisions on the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings set out in the Framework Decision 2009/948/JHA of 30 November 2009.

Nevertheless, this might cause a *ne bis in idem* situation and unnecessary resources put into investigating the same offences in several states.

EIO and EAW

To avoid unnecessary use of FD 2002/548/JHA (EAW) and the hardship therefrom to the person in question, Italy has, instead of EAW, issued many EIOs to allow the accused to participate in court sessions via videoconference. According to Italian law, accused persons have the right to make spontaneous statements at any stage of the proceedings, and thus, under the Code of Criminal Procedure, videoconferencing for the appearance of the accused person means the person is not only heard by the court but may also be present throughout the proceedings and therefore also hear whatever evidence is presented in their case.

Italy has also refused execution of EAW in a case in which it was considered that the EAW was essentially intended to ensure the participation of the accused person in the trial, and the same result could be obtained with much less intrusion by using EIO for his/her presence through video conference.

Italian practitioners encountered a case where issuing authorities used two instruments (EAW and EIO) for temporary surrender/transfer for the same person and trial. In this case, the Public Prosecutor's Office received a very urgent request for the temporary transfer, under Article 23 of EIO DIR, of a person detained in Italy, intending to hold an ongoing trial in the issuing state against the detained person. The transfer was promptly ordered and executed by the competent Italian authorities. However, it was revealed that the issuing state had already initiated a surrender procedure against the detainee in question based on a European arrest warrant (EAW), which had already been successfully concluded with a decision of the different competent Italian authority (Court of Appeal), which had ordered the surrender of the person in question to the issuing state but deferred that surrender until the end of the sentence under execution in Italy for another offence. During the onsite visit, the evaluating team was told that the issuing state, in the end, heard the person transferred (EIO) and returned him to Italy.

Sending several orders in the same matter based on different instruments but with the same objective inevitably causes problems and should therefore be avoided.

Article 25 of the EIO DIR sets out rules on carrying out, at all stages of criminal proceedings, including the trial phase, an investigative measure, if needed, with the participation of the person concerned with a view to collecting evidence. Therefore, an EIO may be issued for the temporary transfer of that person to the issuing State or to carry out a hearing by videoconference. However, where that person is to be transferred to another Member State for prosecution, including bringing that person before a court for standing trial, a European Arrest Warrant (EAW) should be issued by Council Framework Decision 2002/584/JHA.

EIO and the Freezing Order

Problems have been encountered in Italy in cases of using EIO instead of the Certificate of Regulation (EU) 2018/1805 for freezing, seizure and/or confiscation of assets. In addition to using the wrong instrument and form/certificate, the information given was insufficient, e.g. lacking a description of the offence in question. However, an EIO for finding/locating the property to be seized would be in order and welcome.

As issuing authorities, Italy has used EIO to find/locate assets deriving from the offence under investigation, and after having received the information, Italy has then been able to issue a freezing order.

EIO and JITS

In cases where a joint investigation team (JIT) has been established, EIOs have been issued to the competent authorities of the Member States not participating in the JIT; there were no particular problems with execution, probably also due to the practice – suggested by EUROJUST's Italian Desk – of explicitly acknowledging in the EIO both the existence of the JIT and the possibility of subsequent sharing of the evidence obtained with the EIO with all other participants in the same JIT.

Italian practitioners have encountered cases where the results of EIO issued and executed before establishing the JIT were shared between all participating States of the JIT. Practitioners pointed out that, in those cases, the EIO DIR had already been implemented by all the States participating in the JIT. They also considered that an ex-post request for authorisation was unnecessary because neither the EIO DIR nor the Legislative Decree expressly lays down the speciality rule. In other words, given the general support for judicial cooperation, the evidence obtained through an EIO was considered fully available to the issuing authority even if that authority subsequently participated in a JIT. This, however, is without prejudice to any conditions or limits which may be imposed by the executing State, as such under Article 729 of the CPC.

Practitioners also noted that a more cautious approach exists, according to which an ex-post authorisation request is required. Such an approach has also been applied outside the EIO geographical area, such as concerning an Italian – Swiss JIT due to the stricter speciality rule of Swiss law. It was a question of making available the evidence that the Italian authority participating in the JIT had previously acquired through EIOs transmitted to several EU Member States. The authorisations requested from those States were all granted with one exception.

No particular problems were reported in cases where an EU Member State participating in a JIT issued the EIO in the name and on behalf of the JIT, indicating that the evidence obtained through the execution of the EIO would be acquired by the JIT and thus in that way and in that context shared with the other EU Member States participating in the same JIT.

6. CONTENT AND FORM OF THE EIO

6.1. Challenges

In general, Italy does not have problems filling in Annex A of the EIO form. However, the practitioners think there is room for improvement. Therefore, they made the following suggestions:

1) instead of first describing the measures requested, the form should start with a description of the act/offence, after that summary of the investigation already carried out and only after that the requested measures (Section G);

2) adding a place for indicating whether the suspect is known or unknown and making it possible to put all details of each subject under investigation. Also, in the beginning, a part should be added where to place information on all suspects in the case;

3) including more measures (such as search, handing over of items and collection of scientific evidence) instead of having to explain those in open spaces. At the moment, there might be primarily a risk of incomplete, but also unclear or incorrect compilation/translation;

4) entering a box indicating the number and description of the content of documents annexed to the EIO;

5) providing, in the event of a request for the taking of statements of a witness, suspect or accused person, an obligation for the issuing authority to include the list of questions to be asked the person to be heard, to be included in Section C or in a separate Annex;

6) making box F more understandable, especially highlighting the relationship between (a) and (c);

7) providing in section H4 a single field for the indication of both the subject of requests for information on financial transactions and their relevance and necessity to overcome the current fragmentation of the information to be provided in support of requests for information on financial transactions and the reasons for their relevance and necessity.

As executing Member State, Italy has found problems when the information given in the EIO form has been incomplete, e.g. personal data, address or the role of the person to be heard, requested arrangements of the execution or section G (description of the suspected offence etc.). Also, translation errors have occurred. Furthermore, differences between the national legislations of issuing and executing Member States can lead to difficulties in execution, e.g. in connection with fraud, embezzlement or fraudulent insolvency that in some MSs is considered a crime but in others just breach of contract.

However, in most cases, it was remedied by requesting and obtaining all necessary or appropriate clarifications from the issuing authority, either directly or indirectly, through EJN and/or EUROJUST. Sometimes a misunderstanding or uncertainty has been caused by an error of translation in the EIO form, e.g. how a search should have been carried out was unclear. Following the additional information obtained, it became apparent that the EIO form had a simple translation error.

Italian authorities are, in general, satisfied with Annex B. They have, however, two suggestions for improvements:

- as the form contains a space reserved for further information that is considered helpful for the issuing authority for the successful outcome of the cooperation procedure, it is believed that this space can be used to alert the issuing authority to the incomplete or incorrect completion of the form set out in Annex A, inviting the issuing authority to make all necessary or appropriate additions and/or corrections. At a later stage, on the other hand, the information requirements laid down in EIO DIR are to be fulfilled by any means capable of producing a written record;
- provide a space for the contact person to resolve any problems that may arise in the execution of the EIO, specifying both their telephone and e-mail contact details and the language to be used.

6.2. Language regime

Italy demands that the EIOs be translated into Italian. Unfortunately, some translations into Italian have been of poor quality, usually, however, not hindering the execution. Nevertheless, in some cases, the poor quality of translations has given rise to doubts about the type of the requested measure.

According to the Legislative Decree and the written answers provided by Italy EIOs received in languages other than Italian will lead to refusing recognition or execution. However, EIO DIR states (*Article 5(2)) that Member States* ***shall*** *indicate* ***which another*** *official EU language(s), in addition to the official language(s) of the Member States concerned,* ***may*** *be used when the Member State is the executing State.* It means that a Member State may not set rules according to which they only accept orders in their language. Moreover, the EIO DIR also states that an EIO *sent without a translation should be considered 'incomplete' under Article 16(2)(a).* In such a situation, the executing authority should inform the issuing authority that the EIO is 'incomplete' instead of returning the form or treating it as 'non-existing'.

However, during the on-site visit, Italian prosecutors with whom the evaluation team met stated that they received a lot of EIOs in English. In accordance of the circular letter (issued on 26.10.2017) from the Ministry of Justice , instead of refusing an urgent EIO, they started with the execution but also contacted issuing authorities and asked for the translation.

6.3. Multiple requests in one EIO

When acting as issuing State, Italy has not had any EIO cases involving multiple foreign executing authorities, nor problems arisen due to the lack of a centralised point for coordination in the executing State.

Italy as executing MS: the rules on deciding which prosecutor recognises an EIO with several measures to be executed in various parts of the country have been explained above. In such cases, the recognising prosecutor will send the measures to be executed in the respective parts of the country, where appropriate by delegating the execution of the said measures to the judicial police.

According to the practitioners, it is possible to send several EIOs in the same case, even though Italy prefers one EIO. However, in such a situation, there should be a reference to the other orders in each order.

6.4. The issuance of the additional EIO, splitting of EIO

As executing State

Italian executing authorities have encountered cases where they received additional EIOs, i.e. EIOs issued following the transmission of results of a previous EIO of the same authority. In such cases, the subsequent EIO to the first EIO is usually assigned under Article 4 of the Legislative Decree to the prosecutor to whom the first EIO was given to ensure greater and comprehensive knowledge of the case and the continuity of relations between issuing and executing authorities. Additional measures have also sometimes been asked in an email. This has been accepted by Italian authorities even though, in the other way around, they usually would issue a new EIO.

In cases where the Italian executing authorities have become aware of EIOs also transmitted to other Italian executing authorities, all involved authorities have sought to contact each other to coordinate their activities, avoiding unnecessary and costly duplication. However, as there is no case management system containing all received EIOs, there is a risk of a lack of coordination. However, all the incoming EIOs are reported to the Ministry of Justice.

Italian authorities have never asked the issuing State to split an EIO with multiple measures. Italian internal rule is that prosecutor who received an EIO is responsible for recognising all requested measures. If the investigative measures were to be executed in several cities/districts, the recognizing prosecutor would send them out to the relevant authorities (including, where appropriate, judicial police) of the said cities/districts.

As issuing State

Italian practitioners pointed out that the Public Prosecutor's Offices issue additional EIOs in cases where the execution of a previous EIO reveals the existence of other elements to be obtained by carrying out further investigation or taking of evidence. No significant problems have been reported concerning the execution of these additional EIOs. During the onsite visit discussions, different views were expressed on whether a new EIO would be needed in all these situations, e.g. an order of interception would always demand a new EIO, but additional questions to be asked a person who had already been heard once does not require to issue a new EIO.

6.5. Orally issued EIO

The competent Italian authorities stated they had not received orally issued EIOs. However, in some cases, they have received a request for initiating or facilitating the exchange of information at the police cooperation level, then followed by the issuance of an EIO with the same purpose.

In significant and urgent cases, EIOs have been advanced in preliminary discussion, e.g. in coordination meetings in EUROJUST, and also anticipated by telephone. Also, a written EIO might have been transmitted without the relevant translation into Italian. This has been considered to be enough to start execution. However, a proper written EIO in Italian was forwarded immediately. In these cases, EUROJUST has often been involved as a facilitator.

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

When Italy acts as issuing State, it is customary to assess the requirements of proportionality and necessity based on the criteria already applied in judicial practice in domestic proceedings. Proportionality is assessed in relation to the seriousness of the prosecuted offence so that the issuance of an EIO is often avoided in the proceedings for minor offences. Necessity is assessed in relation to the level of usefulness of the requested investigative measure or gathering of evidence with a view to reaching the threshold for the delivery of a judgment of conviction, *id est* when it is established beyond any reasonable doubt that an accused person is guilty of the offence he/she has been charged with.

When Italy acts as executing State, the Italian authorities assess the proportionality of the measures in EIOs to be recognized and enforced and whether a specific result may only be achieved by carrying out that particular measure with the specifically requested modalities. When other measures are available, or there are different ways to execute the same measure, the less invasive measure or modality is chosen, e.g. if a search of premises is requested to receive banking information, but the information requested can also be achieved by asking from a bank, the Italian authorities would choose the latter measure. If another measure is unavailable, the executing State may not refuse the execution on the grounds of proportionality.

The proportionality test is connected to the seriousness of the prosecuted offence or to other possible aspects that reveal the importance of the proceedings in the issuing state. Various factors are balanced to determine whether the advantages of carrying out the requested investigative measure or gathering evidence outweigh the sacrifices that such a course of action would imply for the fundamental rights of the person concerned.

Many executing Italian authorities have found that EIOs have frequently been issued for offences of considerable tenuousness or not particularly serious. However, these latter-mentioned EIOs have mostly been recognised and executed, either for "international courtesy" or because the said EIOs did not involve particularly demanding, time-consuming or hampering activities for the persons concerned. However, irrespective of the assessment performed by Italy as executing State on proportionality aspects, the requested investigative measure must be performed by Italian authorities even if it does not seem proportionate to them. This is because the way of action originates from the obligations of the EIO DIR and is not based on international courtesy or other similar grounds. This is naturally without prejudice to the grounds for non-recognition in the EIO DIR.

Executing authorities have often discussed with issuing authorities if the measures would be exceptionally time-consuming or disproportionate/unnecessary from the executing authority's point of view. A common understanding has usually been found.

Though the evaluation team finds Italy has found acceptable ways of dealing with EIOs they deem unproportionate, it has to be noted that the proportionality test is for the issuing authority to apply, not the executing authority. Therefore, if discussion with the issuing authority or choosing a less intrusive measure does not solve the issue, the EIO, even if deemed by Italy unproportionate, should be recognized and executed.

Recourse to a different type of investigative measures

National legislation (Article 9, “Special arrangement for the execution”, of the Legislative Decree) expressly provides the recourse to a different type of investigative measure. When the Italian law does not provide for the measures requested in the investigative order or if the requirements for its execution are not met, the public prosecutor, after prior notification to the issuing authority, must take action by carrying out one or more different actions and in any case suitable for achieving the same purpose.

As it is explicitly stated in Article 9(2) of the Legislative Decree, by agreement with the issuing authority, one or more different actions in any case suitable to achieving the same purpose must be carried out, even if the investigation order does not seem proportionate in terms of the principle of proportionality. The Italian authorities reported that assessing the conditions of proportionality is connected with the seriousness of the prosecuted offence or to other possible aspects that reveal the importance of the proceedings giving rise to the issuance of the EIO.

However, the various factors are, in principle, balanced to determine whether the advantages of carrying out the requested investigative measure or gathering evidence outweigh the sacrifices such a course of action would imply for the fundamental rights of the person concerned. In practice, the Italian authorities clarified that recourse to another investigative measure was used where a less intrusive measure was more suitable to achieve the same result, e.g., a production order instead of a house search.

When the Italian executing authority decided to use the abovementioned options, the issuing authority was informed beforehand and could decide to withdraw or supplement the EIO; otherwise. the impossibility of executing an investigation order in those situations is a ground for its refusal.

In general, the Italian authorities stressed that, for the execution of EIO, it is crucial that the EIO is proportional and enforceable to establish whether an investigative measure or gathering of evidence is necessary and assess whether a specific result may only be achieved by carrying out that particular measure with the specifically requested modalities. Furthermore, they underlined that if other measures are available or there are different ways to execute the same measure, the less invasive measure or modality is certainly preferable if the same results can be obtained, likely to interfere less with the fundamental rights of the person concerned.

They pointed out that EIO has frequently been issued for offences of considerable tenuousness or not particularly serious. However, those authorities have reported at the same time that, in any case, they recognised and executed such EIOs because the said EIOs did not involve particularly demanding, time-consuming or hampering activities for the persons concerned. there were no cases where a measure did not exist or would not be available in a similar domestic case.

The Italian judicial authorities referred the successfully resolved cases using the consultative procedure leading to the execution of the EIO. For example, executing authority (the Public Prosecutor's Office of Milan) received EIOs to obtain a large volume of documents related to several tens of IP addresses and several tens of bank accounts on which the proceeds of online frauds committed by members of criminal groups had been paid into those accounts. In some cases, the issuing authority had been consulted through EUROJUST and agreed on an appropriate reduction of requests to ensure the successful execution of EIO in a reasonable time. On the other hand, another executing authority (the Public Prosecutor's Office of Rome) reported that it had often received disproportionate or unnecessary requests, such as searching bank agencies or branches for the sole and unique purpose of obtaining documents related to opening a bank account. In these cases, the EIO was executed by carrying out a measure other than the one requested, *id est*, by obtaining the relevant documents through the issuing of a production order. Therefore, the expected result has been fully achieved using a less invasive measure, and the foreign issuing authority did not raise any objection.

In conclusion, the judicial authority is entrusted with examining the ability of the means required to achieve the objective set by the criterion that, for the same effectiveness, the means with less onerous consequences should always be preferred. Proportionality and appropriateness require the restriction imposed on the individual and the value of the purpose pursued by the public authority in exercising its function.

If the measure proves to be disproportionate, it 'shall give rise' to an 'equivalent' act, less intrusive but capable of achieving the same objectives; if the investigative measure appears to be 'disproportionate' and communication shall be given to enable the issuing authority to assess whether to insist on the request or instead to make a different submission based on any suggestion made by the executing authority.

To that end, therefore, the provision must be read in conjunction with the provisions of Article 9 (1) and (2) of the Legislative Decree concerning the possibility, notified to the issuing authority for that purpose, of proceeding with a different act, which is equally suitable for achieving the same objective in a less intrusive situation.

Adopting an alternative means of proof is always required if it leads to less intrusiveness in individual rights.

8. TRANSMISSION OF THE EIO FORM AND DIRECT CONTACTS

Italy has encountered some difficulties in identifying the competent authorities for executing EIOs issued by Italy. The issuing authorities have, when necessary, received valuable support from EJN and EUROJUST contact points posted in each district of court of appeal, and also the International Judicial Cooperation Office at the Ministry of Justice (*where also the EJN National Correspondent is based*) provides constant and generalised support to the issuing authorities to identify the competent foreign executing authority precisely and rapidly. In addition, the "*Judicial Atlas*" and the EJN website, in general, have been very helpful, if not fundamental. Also, fruitful support has been received from the Italian Desk at EUROJUST, from the Italian Liaison Magistrate to France and several Liaison Magistrates to Italy.

After identifying the foreign judicial authority holding territorial jurisdiction to execute EIOs, the Italian issuing authorities have generally transmitted EIOs directly and only resorted to the mediation of the EJN, EUROJUST or Liaison Magistrates in occasional and exceptional cases.

The competent executing authorities encountered some cases where EIOs were received from issuing authorities through EUROJUST and EJN contact points posted on the territory. These cases usually were complex, the offences serious and with coordination needs.

Italy's approximation is that more or less 5 % of cases are handled by EUROJUST.

The access to contact point information of other Member States on the EJN website has only the contact points of Italy, not other practitioners. The evaluation team does not consider this to be appropriate or practical. The help needed from the other Member States can be quickly achieved if all the practitioners can directly contact the EJN contact points in any State.

According to most Italian authorities, the transmission of EIOs by electronic mail ensures rapidity and confidentiality, and it is the best transmission method. Moreover, it must be without prejudice to any particular need in every case, for example, due to the enormous volumes of documents to be transmitted and attached to an EIO. However, for some other authorities, transferring an EIO in PDF format and linked to an ordinary electronic mail message is deemed sufficient to ensure the origin and authenticity of the request only if transmitted through EUROJUST.

Electronic mail should be well-secured to ensure confidentiality. Therefore, until the e-EDES is in use, secure telecommunication connections within EJN and EUROJUST are considered safe.

In mainstream judicial practice, the transmission of an EIO is followed by direct contacts between the issuing and executing authorities, and this does not usually require any mediation. However, when several EIOs to be executed in various States are issued simultaneously, EUROJUST has frequently been involved in coordinating execution in all States concerned.

9. RECOGNITION AND EXECUTION OF EIO AND FORMALITIES

As a rule, the recognition and execution, whether Italy is the issuing or executing state, seems smooth without any major problems.

As issuing State

In cases where the EIOs are issued for interrogating suspects or accused persons, Italian law envisages some safeguards, such as recognising the right to be assisted by a defence counsel of choice or appointed by the court or for witnesses having the right to remain silent, as well articulated modalities of taking statements, especially regarding the notices and warnings that have to be given in advance to the person that has to be interrogated. Italy has not encountered problems with these matters.

When issuing EIOs Italian authorities have as a rule received Annex B from the executing state.

As executing State

When executing EIOs, Annex B has also been sent by the recognising prosecutor to the issuing State.

Italy has refused EIOs sent in other language than Italian, as stated above (see point 6.2.). Also, if EIO has not been dated, stamped and signed by the issuing authority, Italy has refused to recognize the EIO. The opinion of the evaluation team is that in the latter cases, the issuing authority should be given the possibility to amend the order.

During the on-site visit, the practitioners said that also an electronic signature would be acceptable if the authenticity could be ensured .

Italian authorities have encountered problems with EIOs where an accurate description of the facts or offences was missing.

As stated above (point 4), if the measure executed in Italy demands authorisation from the court under Italian law, the public prosecutor recognises the EIO, and, at the same time, requests that it be executed by the judge responsible for preliminary investigations.[1] It is, therefore, unnecessary to transmit an authorisation order from the court of the issuing State.

However, cases were reported where the receiving Italian authority, to avoid any risk of violating the person's fundamental rights and freedoms, requested the issuing foreign authority to transmit the judicial order based on which the EIO was issued. These cases according to Italy were only a few.

10. ADMISSIBILITY OF EVIDENCE

As the rule of speciality is not laid down in EIO DIR, Italy, as a rule, does not consider this would have any bearing on the admissibility of evidence gathered through EIO.

The Italian authorities, either as issuing or executing authorities, did not encounter any particular problems related to the admissibility of evidence stemming from non-compliance with certain formalities or procedures in the execution of the EIO.

There have been no problems with situations where one State would request certain formalities to secure admissibility, and the other would consider them to conflict with its public order. Italy often asks for certain formalities to ensure the principles of Italian law (in practice, principles of fair trial) are followed. In some cases, the issuing Italian authority has requested and obtained permission for their participation in taking evidence carried out in the executing State to ensure compliance with the formalities required by Italian law for the admissibility and use of the evidence. That is the case, in particular, concerning the questioning of suspects or accused persons and the scrupulous observance of all the formalities laid down in Articles 62 to 66 of the Code of Criminal Procedure, with more specific reference to the formulation of all the notices and warnings required by those Articles.

[1] Article 5 of the Legislative Decree No 108/2017

11. SPECIALITY RULE

Italy, as executing State, does not lay down conditions or limitations on using evidence obtained through EIO. Also, as there is no explicit provision of a general rule of speciality in EIO DIR, does not think any approval from the executing State would be needed when using the evidence received from EIO. The exception is the various situations of temporary transfers where the provision of the rule of speciality is included in the EIO DIR (Articles 22 and 23). On the other hand, according to the answer sheet Italy has never needed to use evidence requested for one crime to another. Italian practitioners noted that the amendment of the indictment is not considered to be a different offence.

It also relates to situations where evidence has been received before the founding of a JIT. Italy considers that evidence obtained through the EIO procedure comes into the full possession of the issuing authority even if the said authority afterwards takes part in a JIT. Hence, in such cases, the evidence has been deemed to be accessible to all participants of the JIT.

However, when forming a JIT with a third country (e.g. with Switzerland), the various third States sought consent to use the evidence previously received by Italy through EIO; the consent was given by the various executing Member States in all cases, but in one after additional information were provided for by the Third State.

As executing State, Italy has not been asked for consent to use the evidence gathered through EIO in another crime. In such a situation, Italy would assess if EIO would have been executed for the new offence. If yes, then consent would be given. This seems to contradict the above idea that the evidence obtained through the EIO procedure comes into full possession of the issuing authority.

If Italy wished to use evidence obtained in the execution of an EIO, the Italian executing authorities have requested and obtained the consent of the issuing State. According to one authority, this would, however, not apply to crimes committed in Italy. It seems though that this opinion is not generally accepted

The information obtained from Italian authorities left the evaluation team unsure of what procedure would apply. It seems that there is no uniform procedure or rules for this in Italy.

In cases where the execution of an EIO reveals that a crime was committed other than the one that gave rise to issuing an EIO, the Italian executing authorities open a new domestic proceeding in particular, where it appears that the offence was committed in whole or in part in Italy). In these cases, some executing authorities notified the issuing authority of initiating the domestic investigations for their due information and possibly coordinating them with the investigations carried out abroad. Other executing authorities, instead, reported that they do not have to or can inform the issuing authority when Italian law provides that investigative measures are covered by secret under Article 329 of the CPC.

The evaluation team believes Italy might benefit from national rules or unified practice concerning interpreting the rule of speciality. However, it must be emphasized that these issues derive from the fact that the EIO DIR does not give clear guidance on whether the rule of speciality would apply. Therefore, the Member States would benefit from guidelines or, indeed, an addition to the EIO DIR.

12. CONFIDENTIALITY

By Article 19 (2) of EIO DIR, the executing authority must guarantee the confidentiality of the facts and the substance of the EIO, except to the extent necessary to execute the investigative measure. If the executing authority cannot comply with the confidentiality requirement, it shall notify the issuing authority without delay.

The Article mentioned above was incorporated into the Italian Legislative Decree by Article 6(1), according to which in case it would be impossible to ensure the confidentiality of the facts and the content of the investigation based on terms indicated in the EIO by issuing authority, the Italian executing authority must indicate this fact in Annex B.

The Italian practitioners stated they had not sent or received Annex B concerning the notification of the impossibility of complying with the confidentiality requirement under Article 19 (2) of EIO DIR.

Italian law imposes the rule of confidentiality of the investigations carried out during the investigation stage. Therefore, at the investigation stage, the communication of the decision on recognition of the EIO to the defence lawyer of a suspect, or in any case of a person concerned, must only be made in those cases where, concerning the investigative measure indicated in the EIO, Italian law provides for prior notice of the execution of the measure to the defence lawyer or for the right of the defence lawyer to be present at such execution (in the case of search and seizure).

At the trial stage, evidence is taken during an adversarial hearing.

According to most Italian authorities, the transmission of EIOs by electronic mail ensures rapidity and confidentiality, and it is the best transmission means. However, it is without prejudice to any possible particular need in each single case, e.g. due to a considerable number of documents to be transmitted and attached to an EIO.

In case an EIO contains in its body and/or attachments particularly confidential and/or sensitive information, it was emphasised that its protection could be better ensured by effectively implementing the ad hoc evidence digital exchange platform, which the EU Commission is designing, *id est* the e-Evidence Digital Exchange System (e-EDES), and in the meantime by resorting to the Secure Telecommunications Connections within EJN and EUROJUST.

13. GROUNDS FOR NON-EXECUTION

The few refusals reported by the Italian executing authorities concerned EIO not accompanied by a translation into Italian or EIO without the issuing foreign authority's date, stamp and signature. In some cases, the recognition of the EIO was partial because the Italian authorities refused to question the persons who, according to Italian law, should have been questioned as suspects, thus with the right to assistance from a lawyer and the right to remain silent. Lastly, several cases have been reported in which recognition of the EIO has been postponed under Article 14 of the Legislative Decree No 108/2017 (which is the provision implementing Article 15 (1) (a) of the EIO DIR in Italy), because the EIO directly or indirectly concerned acts which were the subject of an ongoing Italian criminal proceedings covered by the secrecy referred to in Article 329 of the CPC because it was still at the stage of the investigation.

When a possible ground for refusal arises, the predominant practice is that the Italian executing authorities, before making such a refusal, enter into a direct or indirect dialogue with the issuing foreign authority, in the second case via EJN and/or EUROJUST. In most cases, the outcome of that discussion is positive because the procedure does not end with a refusal, but with recognition and enforcement, at least in part, of the EIO.

The issuing Italian authorities did not report any cases in which the foreign executing authority announced the refusal to execute the EIO. However, to avoid such a refusal, executing authorities first consulted, directly or indirectly, with the Italian authorities.

13.1. Dual criminality

The Legislative Decree transposing the EIO DIR contains the corresponding Article 11 concerned with the derogation from dual criminality. According to Article 10 (1), letter f) of the Legislative Decree, the ground for refusal must not apply in respect of offences listed in ANNEX D of the EIO DIR, as specified by the issuing authority in the investigation order, where the offence may be punished in the issuing State by a maximum of at least three years imprisonment or a detention security measures listed there.

Italian practitioners stated that neither as issuing nor executing authority, had they encountered any cases in which the verification of double criminality has been invoked or applied concerning the categories of offences listed in Annex D of the EIO DIR.

As Italian authorities noted, these categories of offences are fully and perfectly reflected in the offences provided for and punished by Italian law. Nevertheless, an exception is made solely to the category of offences falling within the jurisdiction of the International Criminal Court' since, in Italy, only crimes of genocide are prosecuted, whereas war crimes and crimes against humanity are not, as such, crimes of war and crimes against humanity, the constituent acts of which, however, fall within the scope of other offences, such as murder, torture, kidnapping, personal injury, etc. It should also be pointed out that in the last legislature, a draft law was drawn up and submitted for the adoption of a new 'Code of International Crimes' in order, inter alia, to complete the implementation of the Statute of the International Criminal Court by introducing war crimes and crimes against humanity into the Italian legal system.

As for the investigative measures listed in Article 10 (2) of the EIO DIR, no cases were reported in which the dual criminality test was applied.

One executing authority reported the receipt of a significant number of EIOs issued in cases of speeding in road traffic, i.e., conduct constituting a criminal offence in the issuing State but not in Italy. In any case, the EIOs were carried out because the investigative measures requested fell within the categories provided for in Article 9 (5) of the Legislative Decree, which is the Italian provision corresponding to the euro-unitary condition referred to in Article 10 (2) of the EIO DIR according to which the execution of the EIO may not be refused if the EIO itself concerns the execution of investigative measures which must always be available in each EU Member State in its capacity as executing State.

13.2. Ne bis in idem

The Italian authorities informed that the ne bis in idem definition is stipulated in Article 649 CPC. When they receive EIOs, the cases and persons are registered in the public prosecutor's office case management system, but they have no central register and a warning system or control of whether an investigation is ongoing in another public prosecutor’s office. Actually, this can be ascertained by spontaneous coordination between public prosecutor's offices.

They have no central database of investigations, whereas there is a central database of final judgments of convictions for the entire country.

In case Italy conducted a parallel investigation with the other Member State, Eurojust was asked for help and organising coordination meetings where it was decided which Member State would proceed to trial (raising indictment) or, if it concerned two or more different crimes, who would proceed with the trial and for which crime.

The evaluation team recommends that Italy set up a unique national database comprising ongoing and finalised criminal cases and received EIOs, which automatically deliver a warning message when a new EIO is registered and is related to an existing case that is or was on the docket of the national authorities. This system would enable, on the one hand, prevention of ne bis in idem situations and, on the other hand, improved and efficient execution of such new EIOs. Concretely, when a new EIO is registered and related to an already existing case that was finalised, the system would deliver a warning message, and the receiving authorities can establish whether the EIO can be executed due to the ne bis in idem principle. Similarly, when a new EIO is registered and related to an existing case that is ongoing, the system would deliver a warning message, and the receiving authorities can establish whether the EIO can be better executed by the unit where the linked case is registered, thus avoiding double work or even jeopardising the existing national case.

13.3. Immunities or privileges

For the adoption of a reasoned recognition order and thus the subsequent execution of the EIO, the district prosecutor's assessment focuses on the existence of any situations preventing recognition provided for in Article 10 of the Legislative Decree. Verifying the legitimacy of the issuing authority (under Article 10 (3)), whether the order is incomplete, whether the information contained therein is incorrect or whether it does not correspond to the type of document requested.

Likewise, as for the possible presence of a condition of immunity granted by the Italian State to the person concerned, as stipulated in Article 10(1b) of the Legislative Decree, according to which the person to be prosecuted is entitled to immunities recognised by the Italian State limiting or preventing prosecution or its continuation. Italian practitioners stated they had no case involving the immunity as issuing or executing State.

13.4. Fundamental rights

Italian authorities stated they had cases in which the investigative measure or the taking of evidence was refused because it would be contrary to the fundamental principles of the law of the executing State within the meaning of Article 24 (2) (b) of the EIO DIR.

The Italian authorities reported one case in which the Slovenian authority asked to hand over a person by using an EIO, and the competent Italian authority refused to execute it since it was not related to gathering evidence and also considering the completion of the investigative measure requested was not compatible with the State's obligations under Article 6 of the Treaty on European Union and the Charter of Fundamental Rights of the European Union (Article 10 (1) (e) of the Legislative Decree No 108/2017, corresponding to Article 11 (1) (f) of the EIO DIR.

In another case, the EIO had been recognized and executed. However, the information obtained at the time of execution – confirmed by the issuing authority in response to a request for additional information – revealed that the act was contrary to the guarantees laid down by Italian law for searches and seizures of evidence carried out in the premises used by a person who acts as a lawyer. Therefore, the documentation seized during the search was not forwarded to the issuing State but returned to persons who had undergone that search.

The Italian authorities stressed that the EIO was sent via EUROJUST, the purpose of which was to search the Italian home of a Polish citizen accused of having committed corporate offences to seize all relevant documentation, to be also found through the inspection of the electronic devices used by the suspect. The latter was a lawyer and one of the political leaders of the opposition to the current Government, as well as a member of the former Government of the issuing State.

14. GROUNDS FOR POSTPONEMENT OF RECOGNITION OR EXECUTION

Grounds for postponement of recognition or execution of an EIO under Article 15 of the EIO DIR have been transposed into Article 14 of the Legislative Decree, under which the district public prosecutor may order the postponement of recognition of an EIO for a period strictly necessary if the subsequent execution would be detrimental to the preliminary investigation or a trial already underway, or where the items or documents or data covered by the request are already subject to restrictions until the relevant domestic order is revoked. In addition, the prosecutor must also postpone the execution of the investigation order when the objects, documents and data that are the object of the request for seizure are already seized at domestic level, until the relevant measure is withdrawn/lifted.

The postponement decision must be immediately communicated to the issuing authority. The investigation order shall be promptly executed as soon as the ground for postponement has ceased.

15. TIME LIMITS

As for the time limits, the Legislative Decree transposing the EIO DIR contains the corresponding provisions compatible with the EIO DIR, i.e. Article 4 (1) and 4 (2) - Functions of the Public Prosecutor, Article 6 (1) - Communications to the issuing authority, Article 13 (1) and 13 (7) - Legal remedies. In addition, specific provisions for certain investigative measures and time limits thereto are set in Article 16 (6) - Temporary transfer to the issuing State of persons held in custody, Article 17 (3) - Temporary transfer to Italy of persons held in custody in the issuing State, Article 37 (4) - Temporary transfer to Italy, as issuing State, of a person held in custody in another Member State, 38 (2) - Temporary transfer to another Member State of persons detained in Italy.

The competent Italian issuing and executing authorities indicated that the deadlines are generally respected. The situations which gave rise to a failure to comply with the deadlines were as follows: cases of particular complexity of the investigative measures requested with the EIO; the need to ask the issuing authority for information necessary to fill in the shortcomings identified in the form set out in Annex A; non-traceability of persons to be interviewed; absence of the same persons because they temporarily travelled abroad without reliable information on the date of their return to Italy; delays by banks in responding to requests for the acquisition of documents; postponement of the execution of the EIO in order not to prejudice ongoing investigations in the executing State; various difficulties related to the containment measures of the COVID-19 outbreak. The expert team was told that, the latter issue is, nowadays, totally overcome.

When assessing the urgency of an investigative measure or the taking of evidence requested by issuing an EIO, the Italian executing authorities essentially considered, on the one hand, the seriousness of the offence and, on the other hand, the requirement for promptness explicitly or implicitly highlighted by the foreign issuing authority when filling in Annex A.

The Italian issuing authorities were particularly rigorous in assessing the urgency of an EIO, requiring the urgent execution of the investigation order only where a delay could have significantly impaired the taking of evidence or the successful execution of the investigative measure. Furthermore, when assessing the urgency of their requests, the Italian issuing authorities also considered any application of preventive measures, the imminence of the hearing and, finally, the seriousness of the offence.

The Italian authorities reported that, as the executing State, if an EIO is marked as urgent, they respect this designation and carry out the EIO as a matter of urgency. If they cannot meet the deadlines, for example due to many requested actions, they consult with the issuing State which investigative measures are the most urgent of those they asked for. No difficulties were noted.

16. LEGAL REMEDIES

As regards remedies, Italian legislation provides for a remedy against the recognition decree (Article 13). The public prosecutor at the court of first instance of the central city of the district where the requested measures have to be carried out must recognise the EIO employing a reasoned decision. If the measure, under Italian law, is to be notified to the defence lawyer of the suspect, the secretary of the district public prosecutor shall also notify the decree on recognition and execution of the EIO.

In the case of an EIO that comprises an investigative measure concerning which the Italian law provides the right for the defence lawyer to be present at the execution of the measure without prior notice (as, for example, in the case of search and seizure), the decision on recognition of the EIO must be notified to the defence lawyer of the person concerned when the measure is executed or immediately afterwards (Article 4 (4), last part).

In contrast, where an EIO comprises an investigative measure concerning which the Italian law provides for prior notice to the defence lawyer of the person concerned (as, for example, in the case of the questioning of a suspect), the decision on recognition of the EIO must be notified to the defence lawyer together with a notice of execution of the measure in question (Article 4 (4)).

Within five days of the communication referred to above, the suspect and his/her defence counsel may bring a legal challenge against the decision on recognition before the preliminary investigations judge, who must decide by reasoned order after having heard the opinion of the public prosecutor (Article 13(2)).

When a remedy is admitted, the recognition decision shall be annulled. The public prosecutor must, without delay, inform the issuing authority of the decision.

A legal challenge must not have the effect of suspending the execution of the investigation order and the transmission of the evidence obtained from the execution of the investigative measures: however, the public prosecutor may, in any case, not transmit the outcome of the executed measures if the said transmission may be of serious and irreparable prejudice to the suspected person, the accused person or, in any case, the person concerned by the execution of the measures.

When the issuing authority requests that the judge carries out the measure, or when the requested measure has to be carried out by a judge according to Italian law, the public prosecutor must recognise the investigation order and submit to the preliminary investigation judge the request for the relevant execution. Upon receiving the request, the judge authorises its execution after establishing that the conditions for recognising and executing the investigation order are met. When grounds for non-execution are met, also at the parties' request, the preliminary investigation judge shall order the annulment of the recognition decision issued by the public prosecutor. The investigation order shall not be executed in case of dissolution of the recognition decision. The public prosecutor informs the issuing authority without delay.

A legal challenge may also be brought against the recognition decision of the investigation order for a seizure for evidentiary purposes by the suspected or accused persons, their defence counsel, the person from who has been seized the evidence or the object and the person entitled to its return. They may bring their case before the same court as they could apply to in similar domestic cases and with the same terms and conditions. The judge must decide in chambers under Article 127 of the CPC. In this case, a legal challenge can also be brought against the decision made by the judge before the Supreme Court of Cassation, however only for law infringements, by the public prosecutor and the persons concerned within ten days of the decision's communication or notification. The Supreme Court of Cassation must decide in chambers within thirty days of the challenge. The challenge shall not have the effect of suspending the decision.

The Italian legal order also took into account the judgment of the Court of Justice of the European Union C-852/19 of 11 November 2021, Gavanazov, according to which if national legislation does not provide for remedies against the issuing of an EIO for the purpose of searches and seizures and the organization of a hearing of witnesses by videoconference, is not compatible with EU law.

The judge responsible for preliminary investigations decides in closed session on the objection and accepts it if he finds that the search has been ordered ‘outside the cases provided for by law’. Thus, the defects which may be inferred from the opposition are only those which relate to the substantive conditions laid down by law for carrying out the search, the only defects in which the interference with the freedoms of the individual may be regarded as arbitrary.

Italy does not have legal remedies against issuing EIO. Accordingly, the EIO DIR, as such, does not demand it. However, according to the above mentioned CJEU judgment C-852/19, Member States may not issue EIOs for carrying out searches and seizures or hearing a witness by videoconference where the legislation of that Member State does not provide any legal remedy against the issuing of such EIO.

17. TRANSFER OF EVIDENCE

The provisions of the EIO DIR concerning the transfer of evidence were transposed to Article 12 of the Legislative Decree in compliance with the EIO DIR. Accordingly, the public prosecutor must, without delay, transfer to the issuing authority the minutes of the outcome of the investigative measures, the documents and objects that are the subject of the request, and the minutes of the evidence or the evidence obtained in another proceeding. The transmission may be made by direct delivery to the issuing authority's representative.

The Italian authorities also reported that as regards the cases where the handing over of evidence involved a large number of documents, in the prevailing judicial practice, the transfer of evidence was followed by a direct dialogue between the issuing and executing authorities, which usually does not require any intermediation. If possible, they used electronic means. There is also the option of taking evidence in person, but this depends on a case-by-case basis. In very few cases they also used diplomatic channels.

Regarding the relevant provision, the prosecutor may also order the temporary transfer of the corpus delicti or objects serving as evidence when it does not impede the expedited conduction of the ongoing domestic prosecution, agreeing on transfer modalities and deadlines for their return with the issuing authority. In such a case, during the trial the public prosecutor must ask for the authorization of the competent judge. The judge must decide after having heard the parties.

Concerning the suspensive effects of the transmission of the result of investigative measures, Article 12 of the Legislative Decree provides for the transmission must be without delay to the issuing authority of the reports of the acts carried out, the documents and matters covered by request, as well as the reports of evidence or documents obtained in other proceedings, but does not refer to any suspensive effect pending an appeal brought in Italy, which, on the other hand, is optional under Article 13 (2) of the EIO DIR.

On the contrary, Article 13 of the Legislative Decree clearly states that a legal challenge must not have the effect of suspending the execution of the investigation order and the transmission of the evidence obtained from the execution of the investigative measures. However, the public prosecutor may not transmit the outcome of the executed measures if the transmission may be of serious and irreparable prejudice to the suspected person, the accused person or, in any case, the person concerned by the execution of the measures.

Regarding the transfer of evidence, Italian authorities have not stated any difficulties.

18. OBLIGATION TO INFORM – ANNEX B

The issuing Italian authorities reported that they had regularly received Annexes B. However, there were a few cases of non-receipt of Annex B, in which the receipt of the EIO was thus established through the activation of direct or indirect communication channels with the foreign executing authority. To this end, EJN, EUROJUST, and, more rarely, central authorities were involved.

In the procedure of obligation to inform, a decisive role is assigned to the public prosecutor of the capital of the district of the Court of Appeal where the requested acts must be carried out. They must first notify the issuing authority of receipt of the investigation order within seven days of receipt, with the transmission of the specific form set out in Annex B of the EIO DIR, sending a copy of the order to the Ministry of Justice and informing, for coordination of investigations, the Anti-Mafia and Counter-Terrorism National Prosecutor in the case of inquiries relating to the offences referred to in Article 51 (3-bis) and (3-quater)of the Criminal Procedure Code.

Once such information requirements have been fulfilled, the district public prosecutor must decide about the recognition of the EIO within thirty days of receipt or within the different time limit specified by the issuing authority, but no later than sixty days. The issuing authority must be informed without delay before the relevant decision is taken that the conditions for the recognition and execution of the EIO are not met to remove, if possible, any ground for refusal. Likewise, without delay, the issuing authority shall be informed to consider whether to make a new request or withdraw the investigation order where the relevant content is not proportionate.

The decision to refuse the recognition and execution or the delay in its execution must be forthwith notified to the issuing authority. Similarly, the challenge against the order and the relevant measure to annul the recognition decision must be promptly notified.

The Italian executing authorities reported that upon receipt of the EIO form, they had duly fulfilled their obligations by promptly sending to the issuing foreign authority the form set out in Annex B, duly completed with the inclusion of all the requested data.

According to the Italian issuing and executing authorities, the form in Annex B fully meets the requirements for which it was drawn up. There are, however, two suggestions; as Annex B contains a space reserved for further information that is considered helpful for the issuing authority for the successful outcome of the cooperation procedure (Section D of Annex B), it is considered that this space can be used to alert the issuing authority to the incomplete or incorrect completion of the form set out in Annex A, inviting the issuing authority to make all necessary or appropriate additions and/or corrections. At a later stage, on the other hand, the information requirements laid down in Article 16 (2) of the EIO DIR are to be fulfilled by any means capable of producing a written record. Therefore, another suggestion is to provide in Annex B a space for communicate who is the person meant to resolve any problems that may arise in the execution of the EIO, specifying both their telephone and e-mail contact details and the language to be used.

19. COSTS

The Italian judicial authority may request to participate directly in the execution of the investigation order, agreeing with the competent foreign authority on the manner in which the measure is to be carried out.

As a general rule, the costs are borne by the executing State, which may, however, share the amount of the expenditure with the issuing State, agreeing on the arrangements for distributing the surplus in the case of significant expenditure.

The Italian authorities stated that, in practice, no consultations about sharing the costs related to the measures were carried out between the issuing and the executing authorities. Furthermore, in this regard, they indicated that it is impossible, or at least extremely difficult, precisely quantify costs before the complete execution of the requested measure, which hinders consultations about sharing the costs.

In general, given that the requested investigative measures and the taking of the evidence were neither very intrusive nor expensive, no particular problems have arisen in practice concerning quantifying and sharing the costs as either the executing or issuing authority.

As for the criterium, which costs would be considered by the Italian authorities as exceptionally high, they answered that according to some executing authorities, high costs were considered concerning storing some evidence, as well as from technical consultancy/expert reports or telephone and environmental interceptions. However, no request was made for sharing these costs with the issuing State. Furthermore, no cases were reported where the costs of appointing mandatory defence counsel were considered exceptionally high costs to be shared with the issuing State.

Moreover, no cases were reported in which an EIO was not executed or that execution would be delayed due to the exceptionally high costs of the measure to be carried out.

20. COORDINATION OF THE ENFORCEMENT OF DIFFERENT EIO IN DIFFERENT MEMBER STATES AND/OR IN COMBINATION WITH OTHER INSTRUMENTS

Italian authorities have encountered several cases where the execution of EIOs concerned parallel or linked proceedings in several Member States or several investigative measures or cooperation instruments and had been executed *simultaneously in a single day.* In those cases, as a rule, the support of EUROJUST was requested and obtained; more rarely, but always with a positive result, European Judicial Network (EJN) was involved.

21. SPECIFIC INVESTIGATIVE MEASURES

21.1. Temporary transfer

The Legislative Decree comprises two distinct titles for incoming EIOs and outgoing EIOs, respectively. As such, the matter of temporary transfer is regulated in four articles of the Legislative Decree from these two perspectives.

For incoming EIOs, the temporary transfer from Italy to the issuing State is executed only by request for authorization from the public prosecutor to the competent judge (Article 16 of the Legislative Decree). In contrast, in the case of a temporary transfer from abroad to Italy, it is within the competence of the prosecutor to order the holding of the person in custody for the duration of the temporary transfer in the prison of the place where the investigative measures are to be performed (Article 17 of the Legislative Decree).

As Italian practitioners said, the order of the prosecutor is sufficient for the deprivation of the liberty of the person transferred to Italy since the order issued by the Italian prosecutor lies based on the detention order of the issuing State.

Regarding the possibility and the consequences in case the issuing State revokes the grounds for detention of that person, the practitioners answered that, theoretically, the person would be released since there is no more a legal basis for his/her detention, but there is no practical experience with such a case.

Indeed, resulting from the questionnaire answers, there have not been any cases of EIOs on the temporary transfer to Italy of individuals detained in other EU Member States.

To prevent future situations of deprivation of liberty contrary to the requirements in Article 5 of the European Convention on Human Rights, it would be good if Italian Legislative Decree mirrored the EIO DIR. The latter expressly regulates that the transferred person remains in custody unless the State who issued the legal basis for custody applies for his release (Article 22(6) and Article 23(2)).

For outgoing EIOs (Articles 37-38 of the Legislative Decree), the prosecutor and the competent judge may issue an EIO to carry out an investigative measure or take evidence. However, they must agree with the executing authority on the transfer modalities and the deadline by which the person in custody must be returned to/from the executing State.

Italian law does not envisage any particular procedure to determine, before the issuing and transmitting of an EIO, whether a detainee will consent to his/her temporary transfer to another Member State.

Concerning the incoming cases, compared to the EIO DIR, where the consent of the person is an optional ground for refusal, the national legislation regulates the consent as a mandatory condition for the possibility of execution (Article 16(1) of the Legislative Decree). The Legislative Decree (Article 16(4)) stipulates several requirements of the consent; it must be given by any means capable of producing a written record and validly given, by the modalities set forth by domestic law and after the person was able to speak with their (his/her?) defence counsel.

During the on-site visit, practitioners noted that according to Italian legislation, the person is not obliged to be present at trial. It is the same regarding the transfer of the person under an EIO. However, the evaluation team argue that while the presence in the trial is a right of the accused that he/she can waive, in the case of the temporary transfer based on an EIO, we are dealing with the unfolding of a criminal investigation and performing investigative measures to ensure evidence.

For instance, an EIO can be issued for the temporary transfer of an accused (held in custody in an executing Member State) to take part in the evidentiary procedure of identification of persons, where eyewitnesses are called to identify a perpetrator, especially if it has not been expedient due to particular reason to carry it out by photos recognition. This evidentiary procedure can be video recorded, and the witnesses' reactions and statements can be presented to the judge, who decides on the case's merits.

Thus, if the person's consent is a mandatory ground for refusal, such an evidentiary procedure of identification of the person would not be possible and can hamper obtaining the necessary evidence and thwart the whole investigation.

Practitioners also raised the issue of possibly infringing human rights if the accused person was transferred to another State without his consent. However, *the evaluation team doesn't think there is usually a situation of violating human rights if a suspected person has to undergo specific investigative measures. For instance, when the EAW instrument is used, a suspect might have to undergo investigative measure against their will and it is not considered as the violation of human rights.*

Regarding incoming EIOs for the temporary transfer of the person, the Italian authorities encountered only one case. However, the issuing authority (BE) used two instruments (EAW and EIO) for temporary transfer for the same person and trial. In this case, the Public Prosecutor's Office of Venice received a very urgent request for the temporary transfer to Belgium of a person detained in Italy under Article 22 of EIO DIR, intending to hold an ongoing trial in Belgium against the detained person that consented with the temporary transfer. Accordingly, the competent Italian authorities promptly ordered and executed the transfer. However, the consultation between the executing authority (the Public Prosecutor's Office as mentioned above) and the central authority (the Ministry of Justice) revealed that Belgium had already initiated a surrender procedure against the detainee in question based on a European Arrest Warrant (EAW), which had successfully concluded with a decision of the different competent Italian authority (the Venice Court of Appeal), which had ordered the surrender of the person in question to Belgium but deferred that surrender until the end of the sentence under execution in Italy for another offence.

It should be pointed out that the EIO did not mention the previous EAW procedure. Thus, the subsequent use of the EIO by Belgium resulted in the decision on the temporary transfer of the detainee being taken in Italy by the Public Prosecutor's Office at the Venice Court rather than the Court of Appeal of the same city. In other words, the use of the EIO affected the correct identification of the Italian competent authority for execution. In this case, the EIO appears to have been issued to avoid the deferred surrender ordered in the EAW procedure.

21.2. Hearing by videoconference

To avoid unnecessary use of EAWs and the hardship therefrom to the person in question, Italy has instead of EAW issued a large number of EIOs to allow the suspect or accused to participate in court sessions via videoconference. According to Italian law, suspects and accused persons have the right to make spontaneous statements at any stage of the proceedings under the Code of Criminal Procedure. Thus, videoconferencing for the appearance of the suspect or accused person means the person is not only heard by the court but may also be present throughout the proceedings and also hear whatever evidence is presented in their (his/her?) case.

National legislation (Article 18 (1) of the Legislative Decree) expressly allows recognising and executing an EIO received from a foreign authority to hear a suspect, accused, witness, technical consultant or expert via videoconference. The execution, however, is expressly conditioned to the consent of the suspected or accused persons . The same is envisaged by Article 39 (2) of the Legislative Decree regarding EIOs issued by Italian authorities.

The consent of the suspected or accused person is a mandatory ground for refusal according to the transposed national law (Article 18(2) of the Legislative Decree), whereas the wording of the EIO DIR suggests it as an optional ground.

According to the answers in the questionnaire, the non-consent of the suspect or accused person does not necessarily entail a non-execution of the EIO. That is because Article 9 (1) of the Legislative Decree, implementing Article 10 of the EIO DIR, provides that when "the conditions set by Italian law are not met (...) to execute" the investigative measure or the taking of evidence as outlined in the EIO, the competent Italian executing authority "*shall proceed with the execution, after having informed the issuing authority, by carrying out one or more different measures capable all the same of reaching the same aim*". Hence, should the suspect or accused person not consent to a hearing via videoconference, the Italian executing authority may execute the EIO by proceeding with an "ordinary" hearing of the suspect/accused person after discussion with the issuing authority unless the foreign issuing authority - after having been informed - prefers to withdraw the EIO.

When asked if there is a need for additional EIO and the list of questions from the issuing State, the Italian practitioners clarified that a refusal of a suspect/accused to be heard by videoconference is followed by a dialogue between the Italian executing authority and the foreign issuing authority and, within this context, these two aspects are commonly agreed upon. They also added that the issuing of a new EIO is not strictly necessary because the impossibility of carrying out videoconferencing due to the lack of consent makes it necessary for the Italian executing authority to directly contact the issuing foreign authority to verify whether the latter considers appropriate that the Italian authority take the statements of the suspect or accused person.

Moreover, the evaluation team think it is not always a solution. For instance, in an urgent situation as already experienced, when the suspect is detained for a short period in the executing MS, the hearing by videoconference (VDC) could be performed swiftly before he/she is released. Whereas, the subsequent recourse to the standard hearing and the corresponding necessary formalities (drafting of the list of questions, rights and obligation of the suspect/accused person, its translation and communication to executing MS) might make the execution of the measure impossible due to time constraints and the possibility of a suspect/accused person to abscond.

In addition, the standard hearing is, in fact, recourse to a different investigative measure by which the accused person is neither seen nor heard directly by the magistrates dealing with the case and must decide on the merits.

During the on-site visit, Italian practitioners suggested that the requesting State has the option to issue the EIO for hearing in person and participate in that interview by coming to Italy. However, this solution is not always possible, especially in the trial phase, e.g. when the case is in the trial stage, since the issuing courts might not be able to travel abroad and it wouldn't even serve a purpose. Moreover, where the EIO is issued by the judge who decides the merits of the case, it is in the interest of justice for that same judge to be the one who interacts with the accused and is thus entirely sure that he/she was adequately notified of the facts of accusation and legal classification before determining the case and delivering the judgment.

Legal systems are different throughout the EU from the perspective of the issuing State and a legislative solution in the executing State that determines blunt and automatic refusal of EIOs with the object of hearing by videoconference on the sole position of the suspect/accused, irrespective of any other factors, does not support the progress of the case.

During the on-site visit, related to the situation when a standard hearing replaces the hearing by videoconference, the question of the possibility of using coercive measures to bring a person, suspect/accused or witness, before the judicial authorities for such a hearing if he/she would not appear based on summon and without justification or refuses to appear, has been raised. The answers provided were mixed; some were in the sense that you could not force him/her to come, while others said it is possible to bring a suspect/accused before a prosecutor/judge but only for identification purposes.

Further subsequent clarifications from the Italian representatives showed that the answers were somewhat confusing because the question referred indiscriminately to the suspect/defendant and the witness, namely to two situations governed differently by Italian law. In fact, witnesses and similar subjects who do not appear without justification or refuse to appear can be forcibly brought before the judicial authority (art. 133 CPC). On the contrary, suspects/accused persons can be forcibly brought before the judicial authority only for the purpose of their identification or carrying out measures other than interrogation (such as, for example, for confrontations and personal recognition), because in any case the suspect/accused person has the right not to answer (art. 61, 132, 375, 376 and 490 CPC).

According to the answers in the questionnaire, in practice, no specific problems occurred concerning hearings by videoconference during the trial stage since, in nearly all the cases, the said procedure took place in the courtrooms equipped for audio-video links in the venue of the competent judicial authorities. The proper operation of these video-audio links and all the other technical aspects have been taken care of by the competent office of the Penitentiary Administration Department of the Ministry of Justice, which is the public body entitled to handle the videoconference equipment in the courtrooms.

In the investigation phase, Italian authorities debated the possibility of a public prosecutor delegating the execution of the measure (*id est* the carrying out of a hearing by videoconference) to the judicial police, since Italian law provides for such a delegation in similar national cases, except for when the person to be heard is in custody. In cases where the issuing authority did not authorise the measure to be delegated to the judicial police, then the interrogation is always carried out by the public prosecutor in his office, that is to say in the venue of the competent judicial authority.

Some challenges were encountered when the incoming EIO's content did not clearly show whether the person to be heard was being investigated for the offence referred to in the EIO or whether it was investigated for an offence connected to the offence referred to in the EIO.

Italian practitioners provided more detailed information on the previously mentioned aspects during the on-site visit. From the perspective of the executing State, if the EIO or other documents reveal that the person in question is not a witness, then they have to stop and start a dialogue with the issuing MS to give him/her guarantees and a lawyer and start hearing him/her as the suspect. A similar approach is adopted when it is clear from documents that this person perpetrated the crime, and the indicated measure is hearing a witness.

From the perspective when Italy as issuing State, for the statement to be valid in the national case, the person in question must be given a prior warning based on his/her status in the investigation. Thus, the issuing Italian authorities must fill in the form in a very detailed way to be sure all formalities are observed by the executing State.

The issue of the need to carefully respect all formalities was already addressed in the answers to the questionnaire. It is mentioned that there are no cases of refusal to comply with some formalities considered in conflict with the fundamental principles of the law of the executing State.

Italian issuing authorities occasionally encounter problems in cases of EIOs issued to take statements from suspects or accused persons in connected or linked proceedings because Italian law envisages some safeguards *(basically amounting to the recognition of the right to be assisted by a defence counsel of choice or appointed by the court and - without prejudice to the cases where such persons take on the role of witnesses after having been definitively convicted - having the power to remain silent),* as well as articulated modalities of taking statements, especially concerning the notices and warnings that have to be given in advance to the person that has to be interrogated. In this respect, in some cases, the issuing Italian authority asked and was allowed to attend the taking of statements carried out in the executing State to ensure compliance with the formalities required by Italian law to admit and use the collected evidence. An EIO issued by the competent Spanish judicial authority to hear a suspect was rejected because the issuing authority did not provide, either in the EIO or later, a sufficient summary of the facts under investigation.

Italian practitioners pointed out that they have not encountered any case where Italian executing authorities refused a hearing by videoconference because they deemed it contrary to the fundamental principles of the Italian legal system, nor have there been any cases where an EIO issued for a hearing via videoconference by Italian issuing authorities had been rejected because considered contrary to the fundamental principles of the legal system of the executing State.

During the on-site visit, practitioners responded that it is not contrary to the fundamental principles of the Italian legal system if the accused is informed during the videoconference that a guilty plea can lead to lower penalty intervals and simplified proceedings. The Italian legislation comprises similar provisions.

21.3. Hearing by telephone conference

Italian executing authorities have rarely received EIOs for the hearing of persons via telephone conference. However, no specific problems were encountered concerning the procedures and formalities of hearings via telephone conference, which was performed using technical modalities similar to the ones applied to videoconferences. However, they may not issue an EIO for the telephone conference since their law does not allow it.

Existing Italian legislation does not allow in any cases for a telephone conference to be used to hear a suspect or accused person. The Legislative Decree (Article 19) regulates the possibility for Italy as executing State to hear a witness, a technical consultant or an expert by telephone conference when it comes to recognize and execute an EIO.

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

The EIO DIR regulates in distinct Articles the three types of evidence that can be obtained from banks and other financial institutions. As such, Article 26 refers to information on bank and other financial accounts, Article 27 regulates information on banking and other financial operations, and Article 28 (1a) indicates the monitoring in real-time of banking or other financial operations that are being carried out through one or more specified accounts.

Thus, Articles 26 and 27 regulate information from the past concerning accounts and operations, respectively, while Article 28 (1a) regards operations that will be carried out in the future.

According to Italian legislation, only this last type of evidence requires the authorization of the preliminary investigation judge, while the first two types can be carried out directly by the prosecutor.

Italy has two distinct titles of the Legislative Decree for incoming EIOs and outgoing EIOs, respectively. As such, banking-related investigative measures are regulated from these perspectives.

Incoming EIOs

According to Article 20 (1) of the Legislative Decree, an investigation order issued to obtain information and/or documents in banks and financial institutions must be carried out under the modalities referred to in Articles 255 and 256 of the CPC.

Article 255 of the CPC - `*Seizure in the bank*` - states that *documents, titles, securities, amounts of money deposited in current accounts and anything else held in banks, even if contained in safe deposit boxes, may be seized if the judicial authority has justified grounds to believe that they relate to the offence, even if they do not belong to the accused or are not registered in his name*.

Article 256 regulates the fulfilment of the obligations by the persons who receive the order issued by the judicial authority based on Article 255; they must immediately deliver any requested document, even the original ones if ordered so, as well as data, information and software, also by copying them on a suitable medium etc.

According to Article 20 (2) of the Legislative Decree, the public prosecutor must, where necessary, provide for the gathering, in real-time, of computer-related or electronic flows from or to banks and financial institutions by filing a request with the preliminary investigation judge under Articles 266 et seq. of the CPC (Interception of conversations or communications).

Lastly, as regulated by Article 20 (3) of the Legislative Decree, when the investigation order does not indicate the reasons why the documents and/or information are relevant, the prosecutor must ask the issuing authority to provide an indication thereof and any other information for prompt and effective execution of the requested measure.

Outgoing EIOs

According to Article 40 of the Legislative Decree, when an investigation order aims to make enquiries or obtain documents from banks or financial institutions, the request must be transmitted using the form included in Annex A, Section H4. To that purpose, mention must be made of the reasons justifying the relevance of the enquiries and any helpful information to identify the relevant banks or financial institutions, plus indicate the authority that has ordered the measure.

Article 40 of the Legislative Decree does not have a similar structure as Article 20 of the same Decree; namely, it does not comprise a provision for gathering, in real-time, computer-related or electronic flows from or to banks and financial institutions, as Article 20 has in paragraph 2.

The clarifications provided by Italy show that Article 40 is relevant only for information and/or documents from the past concerning accounts and operations and not for monitoring - in real time - banking or other financial operations.

As such, when it comes to EIOs with the object of monitoring in real-time banking or other financial operations, for incoming EIOs the legal ground is Article 20 (2), named "Information and documents in banks and financial institutions" , and not Article 23, called "Interception of telecommunications with the technical assistance of the Italian judicial authorities".

However, for issuing EIOs, the legal ground is not Article 40, named "Information on accounts and banking and financial operations", but Article 43, called "Request for the interception of telecommunications with the technical assistance of the judicial authority of another Member State".

While counterintuitive and unsymmetrical, this way of drafting in itself does not constitute improper transposition, provided that the Legislative Decree combined with the relevant national provisions in the CPC evoke similar principles to the ones enshrined in the EIO DIR and there are no problems in practice, and this is the conclusion that originates from the provided answers.

As executing State, Italy has encountered cases where issuing authorities requested by EIOs to search a bank for obtaining documents and attached a judge's search order. However, prosecutors ordered banks to provide the requested documents in these cases instead of issuing search warrants.

21.5. Covert investigations

Italy has two distinct provisions of the Legislative Decree for incoming EIOs (Article 21) and outgoing EIOs (Article 41), respectively. As such, the matter of covert investigations is regulated from these perspectives.

The wording of the legal texts is in line with the rules originating in the EIO DIR, and reference is made to a particular article of a pre-existing law - Article 9 of Law no. 146/2006 - which regulates the undercover operations referring to specific categories of offences, inclusively those related to drugs and psychotropic substances.

While the Italian Legislative Decree does not explicitly provide for the investigative measures that can be included or not within undercover operations, it is apparent that Article 9 of Law no. 146/2006 is drafted openly, enabling practitioners to use covert investigations for various types of investigative measures.

As a particularity, for incoming EIOs, Italy may promote the setting up of a JIT with the issuing State, mainly because the execution of the EIO cannot be performed in the absence of a national investigation, so such investigation must be existent or initiated as a condition for a covert investigation to unfold in Italy.

Also, within the same context of covert investigations but regulated separately, the Decree transposing the EIO DIR stipulates the possibility to issue (Article 42) / execute (Article 22) an EIO with the aim to omit or delay arrest, police detention, search or seizure for evidentiary purposes.

In such cases, the received EIO, together with a legislative provision similar to the one comprised in Articles 22 and 42 of the Legislative Decree, can constitute the legal basis for the judicial body to intervene at a later time to obtain more helpful evidence for the investigation and determination of the case.

According to the answers to the questionnaire, for incoming EIOs, the qualification of public official and the particular cause of justification provided for by Article 9 of Law no. 146/2006 extends to foreign police officers operating undercover in Italy that commit abstractly illicit acts giving implementation to authorized and documented operations decided by the heads of some specialized units of the most important Italian police forces (State Police, Carabinieri, Finance Police). This upon agreement with the public prosecutor or with the immediate subsequent consent of the same public prosecutor, that as a consequence plays a directing role.

To execute an EIO concerning a covert investigation, therefore, it is necessary that in Italy there is already a criminal proceeding or that it is initiated concomitantly for one of the serious offences that, according to Italian law, allow the accomplishment of undercover operations (among others, the offences of extortion, kidnapping for extortion, usury, money laundering, trafficking in persons, enslavement and facilitating illegal immigration, but most of all the offences in the field of drugs and those committed for terrorist purposes).

Therefore, it can be easily supposed that when receiving an EIO concerning a covert investigation, the competent Italian executing authority responds with a request for setting up a joint investigation team.

The evaluation team appreciates the express mentioning of setting up a joint investigation team in the national legislation that transposes the EIO DIR because it is of nature to spark in the minds of practitioners interested in obtaining evidence from abroad the idea to consider setting up a joint investigation team, a judicial cooperation instrument of high added value for combating trans-national severe crime.

The undercover operations must always be aimed at obtaining evidence, and the accomplishment of any investigative measure provided for by Italian law, in general, is allowed.

The requirements for executing an EIO with the object of covert investigations can be summarized as follows:

1) prior existence or simultaneous initiation of a criminal proceeding in Italy;
2) direction of the operations by the Italian public prosecutor having territorial jurisdiction;
3) involvement of the heads of the specialized units of the Italian judicial police, namely – depending on the case – the Central Directorate of Anti-drug Services (DCSA), the Anti-Mafia Investigative Directorate (DIA) of the Ministry of the Interior, the Special Operation Unit (ROS) of the Carabinieri and the Investigation Group on Organized Crime (GICO) of the Finance Police;
4) the responsibility of the operations is attributed to an Italian judicial police officer.

21.6. Interception of telecommunication

As executing State, Italy has two distinct provisions in the Legislative Decree, i.e. concerning the interception of telecommunication with technical assistance (Article 23) and without technical assistance (Article 24). As issuing State, Italy has another two distinct provisions in the Legislative Decree, i.e. concerning the interception of telecommunications with technical assistance (Article 43) and without technical assistance (Article 44). As such, the matter of interception of telecommunication is regulated from these perspectives and the wording of the legal texts in a way similar to the EIO DIR.

In terms of the assessment criteria used to recognize and execute an EIO on interception of telecommunications and, more specifically, the conditions needed to authorize interceptions in a similar merely national case, the executing authorities have referred that an assessment is made on a case-by-case basis on the conditions required by Articles 266 and 267 of the CPC.

Interception, recording and transcription of communications and telecommunications can be carried out if the following requirements are met:

1) there must already be serious pieces of evidence of the crime being prosecuted;
2) the said crime shall be punishable, according to Italian law, by life imprisonment or a maximum term of imprisonment of more than 5 years (many exceptions are provided to this rule, based on the kind of crime: crimes relating to narcotic and psychotropic substances; crimes relating to weapons and explosives; smuggling, crimes related to child pornography, offences connected with organized crime et alia);
3) interception must be absolutely essential for continuing the investigation. The measure may be authorized by the preliminary investigations judge for a maximum period of 15 days and extended for additional 15-day periods upon specific request of the public prosecutor.

The same applies to the interception, recording and transcribing of communications between people in the presence (so-called environmental wiretapping). This kind of interception can also be made by putting a computer capturer (trojan horse) into a mobile phone or another electronic device. In any case, the interception can be carried out at home or other similar places only if there are grounded reasons to believe that the criminal activity is taking place there.

Interceptions using the so-called trojan horse are always possible concerning offences related to terrorism and organized crime, as well as about the most serious offences against the public administration (for the latter offences provided that reasons justifying the use of the capturing device even at home or other similar places are clearly mentioned in the preliminary investigations judge's decree).

As far as offences related to organized crime (as well as other grave crimes expressly identified by the law) are concerned, the requirements are less strict:

1) there must already be enough (rather than serious) pieces of evidence of the crime being prosecuted;
2) interception must be necessary (rather than absolutely essential) to continue the investigation.

Furthermore, the measure may be authorized by the preliminary investigations judge for a maximum period of 40 (rather than 15) days and extended for additional 20-day periods (rather than 15) upon a specific request of the public prosecutor. Finally, interception at home or other similar places may be carried out even if there is no reason to believe that criminal activity occurs there.

Regarding terminology, the EIO DIR does not define the term 'telecommunications', not in Articles 30–31 (interception of telecommunications), Article 2 (definitions) or the preamble. Moreover, regarding the interpretation of the term 'telecommunication', the EIO DIR does not refer back to the law of the Member States; thus, it should be given an autonomous and uniform interpretation throughout the Union. However, there is no preliminary ruling on this issue so far by the CJEU.

When interpreting the national law that implements EU law, national authorities should do this in a way that pursues the objectives of the EIO DIR and EU law in general. An absolute and rigid prohibition on using material intercepted without prior authorisation from the State's authorities where the measure's target has suddenly moved, after exiting the Member State where the investigative measure is already authorised, might jeopardise the objective of the investigation[2].

Concerning the transposition of the provision on telecommunications interception, it was transposed into the Italian Legislative Decree under the same title as the EIO DIR. However, as for the Italian CPC, the interception of telecommunications is stipulated in Chapter IV of Book III under the heading "Interception of conversations or communications" with a broader meaning. It covers telephone conversations or communications and other forms of telecommunication, also encompassing situations when a bugged car crosses a border unexpectedly, and the authorities do not need the technical assistance of the authorities in the other Member States (under Article 31 of the EIO DIR).

[2] Report on Eurojust's casework in the field of the European Investigation Order November 2020

As to refusals of EIOs issued by Italy in compliance with Article 30 EIO DIR, cases have been reported where the German, Spanish and Slovenian competent executing authorities refused to execute EIOs issued for the interception of telecommunications, although the EIO had been issued based on an ad hoc authorizing decree of the competent judge under the Italian law. In those cases, the grounds for the refusal were the principle of proportionality or the facts that, in a similar domestic case, the interception would not have been admissible because the law of the executing State did not provide for it. A similar problem has been encountered in the relations with the Netherlands.

Many MSs do not include the interception of communications between persons present in a car in the scope of application of Article 31, even when the "bug" has been installed in Italy, the interception starts in Italy and takes place without the technical assistance of the other State. In these cases, the said MSs considered the notifications of Annexes C made by the Italian issuing authorities as insufficient and requested the prior transmission of an EIO. This happens in the cases where the car's movement from Italy to another State could not be supposed when the interception started. As a consequence, it is not possible to use for evidentiary purposes the communications intercepted in the lapse of time between the moment when the Italian authorities become aware of the entry of the car to the territory of another MS, and the moment when the foreign competent authority executes the EIO consequently transmitted by the same Italian authorities.

Referring to the different manner in which EU Member States transposed Articles 30–31 EIO DIR, Italy can be considered a good example because its (its?) national legislation is written in such a way that enables it to be construed broadly, encompassing the situation when a bugged car crosses a border unexpectedly, and the authorities do not need the technical assistance of the authorities in the other Member State and when Article 31 of the EIO DIR does apply.

As indicated above and as shown in the answers to the questionnaire, the contrary way of transposition, eliminating the bugging of a vehicle from the application of Article 31 of EIO DIR, may lead to the impossibility of using material intercepted without prior authorisation from the authorities of the State where the target of the measure has suddenly moved after exiting the Member State where the investigative measure is already authorized, in contrast with the EU objective of creating an area of freedom, security and justice.

For incoming notifications under Article 31 EIO DIR, the prosecutor of the place where the interception took place receives it and transmits it to the preliminary investigation judge, who must assess if the interception would be allowed in a similar domestic case.

The solution proposed in the answers to the questionnaire is a minor amendment of the EIO DIR, that is the replacement of – both in Chapter V and the title and text of Articles 30 and 31 – of the reference to "interception of telecommunications" with the reference to "interception of conversations or communications" or, more simply, "interception of communications".

The evaluation team would encourage the Commission to revise Articles 30 and 31 of the EIO DIR since the current wording concerns only the interception of telecommunications but not other forms of communications. For this reason, Italy often encounters refusals in executing States when using Annex C in these cases. Related to the transmission of the intercepted telecommunications to the issuing State, the Italian executing authority is indeed able, in practice, to perform it in real time.

A distinct approach concerns GPS tracking, which in Italian law is not included in the definition of "interception of telecommunications" nor "communications", and it is an investigative measure within the autonomous powers of the judicial police (without prejudice to the control and direction of investigations by the prosecutor). Therefore, it does not require using any judicial cooperation instrument, both incoming and outgoing, where any technical assistance from the other MSs is not needed. The Italian representatives showed that GPS tracking results obtained in the above mentioned framework can however be used as evidence in trial, according to Italian law as construed in the national case-law.

Furthermore, since the cross border surveillance is not expressly mentioned in the EIO DIR, the legal basis used for this measure is the Convention Implementing the Schengen Agreement (CISA), which means that in case the outcome of the measure should be used as evidence, Italy as outgoing and incoming country has to send and receive, respectively, a Mutual Legal Assistance request.

As in Italy, the Mutual Legal Assistance (MLA) requests made on the basis of CISA are not executed by the same authorities as EIOs, this kind of situation might cause problems in execution. On the other hand, many MSs issue an EIO requesting cross-border surveillance since they need the outcome as evidence, and the EIO aims to gather evidence. Italy confirmed that in that case its authorities could evaluate the content of the EIO and execute it, even though for that measure an MLA request was supposed to be sent in compliance with their national law implementing CISA. This also applies to physical cross-border surveillance, when the police surveillance unit is physically following the subject of surveillance.

In this matter, it is clear that EIO DIR is inconsistent if it does not solve the question of cross-border surveillance measure. Every Member State interprets this form of cooperation differently. Some States consider it solely police cooperation, but the majority consider it as gathering evidence in real-time and therefore use EIO. This causes a lot of obstacles, mainly in real-time cooperation, since very often there is not enough time to send the EIO in advance before the measure takes place, and it can be sent only afterwards, requesting the authorization of the executing State (that is to say, actually, the State in which the "target" moved) retrospectively.

The evaluation team proposes the Commission to revise the EIO DIR regarding the measures that gather evidence in real-time, primarily cross-border surveillance conducted by technical means, since there is no regulation of urgent cross-border investigative measures with subsequent authorization in the EIO DIR.

During the on-site visit, at least one practitioner answered that in their office, as executing authorities, =the national order from the issuing State requested in addition to the EIO.

The evaluation team recommends Italy proceed with the execution of an EIO with the object of interception of telecommunications or with the object of a house search without asking for additional documents, such as the warrant for interception or the house search, as long as there are no elements which may indicate that the national law in the issuing State was infringed.

Indeed, whenever the content of the EIO shows that the measure was lawfully authorized at national level by the issuing State or whenever there is no indication that the issuing authority failed to observe legal requirements, the executing State should not have laws or practices that makes European cooperation with the EIO instrument slower and more cumbersome.

This conclusion is even more vital when taking into account that the issuing authority must first obtain authorization at the national level, which is usually valid for a strict period (in Romania, e.g., 30 days for interception of telecommunications, with the possibility of extension by filling a new request to the judge) and after that they can issue the EIO, translate it and send it to the executing State. The lastly mentioned necessary activities take time, so from the moment when the authorization is issued at the national level by the judge to the moment when the measure is, in fact, put in place in the executing State, there are several days or even weeks in which the warrant authorizing the investigative measure is not valued.

If the executing State has laws or a practice by which they must initiate dialogue and request additionally to the EIO the national order from the issuing State, and perhaps its translation too, even more time is lost, to the detriment of the investigation in which the EIO was issued, contrary to the EIO DIR, which aims at making cooperation swift and effective.

21.7. The other investigative measures

During the on-site visit, the evaluation team was provided with written answers to additional questions, inclusively related to Italian legislation concerning the EIO that covers investigative measures implying the gathering of evidence in real-time and over a certain period, such as monitoring banking or other financial operations, controlled deliveries , computer-related or electronic flows, house searches and video surveillance.

As far as **controlled deliveries** are concerned, it was responded in writing that this measure is regulated by Article 22 (1) of the Legislative Decree, stating that '*In the cases and by the modalities set forth in Article 9 of Law no. 146 of 16 March 2006, the public prosecutor attached to the court of the main city of the district as per Article 4, after having reached an agreement with the issuing authority, may omit or postpone executing the arrest, search or seizure of evidence'*. It was also mentioned that lex loci – as for covert investigations - always apply.

While not putting at doubt that Article 22 (1) can be the basis for controlled deliveries, the evaluation team is not convinced that the wording of this text properly notifies practitioners about the possibility of using this investigative measure of high importance as it would if it were explicitly mentioned in the Legislative Decree, similarly to the EIO DIR.

In this respect, Article 22 (1) refers to omission and postponement, which suggest the absence of action. The controlled delivery is an investigative measure that in fact implies multiple actions: organising logistical and human resources, physical observation of the persons involved in the criminal activity and producing documents and other materials describing the unfolding of the controlled delivery that are to be used as pieces of evidence in trial.

Moreover, having the controlled delivery expressly mentioned in the national legislation, practitioners may be encouraged to use this investigation measure more often and thus be more successful in combating severe transnational criminality. For clarity, as all other measures are specifically mentioned in the Legislative Decree, it should be the case with the controlled delivery too.

Against this background, the evaluation team recommends Italy consider amendments to mirror the EIO DIR expressly and adequately provide the possibility to conduct controlled deliveries using the EIO instrument because practitioners shall have more clarity on the availability of this investigative measure and thus be more successful in combating severe transnational criminality.

As far as **video surveillance** is concerned, the provided written response reveals that this investigative measure falls within the general power of investigation of the public prosecutor. Therefore, there is no doubt that an EIO can be issued (in outgoing cases) or recognised and executed (in incoming cases) to carry out video surveillance. However, in cases in which the measure also implies audio surveillance, legal provisions related to interceptions of communications and telecommunications entirely apply.

Lastly, the answer clarifies that footage from private video surveillance systems – such as, for example, those of banks and supermarkets – are to be considered as documents; therefore, their gathering can undoubtedly be carried out with an EIO, either in outgoing or incoming procedures.

House and non-house searches fall under the public prosecutor's general investigative power without any difference in the discipline. Therefore, there is no doubt that Italian public prosecutors can issue an EIO (in outgoing cases) or recognise and execute an EIO (in incoming cases) to carry out such searches.

Italian authorities mentioned a case where they faced difficulties. It related to the transmission of an EIO that was accompanied by a reiterated and pressing request for execution as a matter of utmost urgency sent through EUROJUST, while, subsequently, Polish police officers were sent to Italy. The EIO was then recognised and executed as a matter of urgency. However, during the execution, the Italian authority was informed that the suspect was a well-known Polish lawyer and politician. It was also revealed that the searched house was also used by the suspect's wife, who was a lawyer too, and that until a few days before the search she had formally defended her husband in the criminal proceedings concerning the search that had been ordered. Finally, it became known that these proceedings also concerned other individuals, one of whom was defended by the suspect's wife, although the appointment had not been formally included in the case file. All these circumstances were confirmed in response to a specific request for additional information.

Hence, the procedure was concluded with the revocation of the decision on recognition and execution of the EIO, while the seized documents were returned to the persons who had been subjected to search. The ground for refusal was that the requested investigative measure was not "compatible with the executing State's obligations following Article 6 of the Treaty on European Union and the Charter of Fundamental Rights of the European Union" (Article 10 (1e) of the Legislative Decree, corresponding to Article 11 (1f) of the EIO DIR). More specifically, the EIO had been recognised and executed; however, the information obtained at the time of execution (confirmed by the issuing authority in reply to a specific request for additional information) showed that the measure was contrary to the safeguards provided by Italian law for searches and seizures against persons acting as defence lawyers.

A different discipline, however, is provided for searches in law firms. Regarding this particular kind of search, Article 103 of the CPC stipulates that the preliminary investigation judge must authorise the measure with a reasoned decree. Therefore, in outgoing cases, the public prosecutor can issue an EIO only based on a reasoned decree of the judge for preliminary investigations. While, in incoming cases, the public prosecutor can recognize the EIO but must request its execution from the judge for preliminary investigations.

The evaluation team recommends Member States provide in the EIO all available information, whether the person or his/her family members / close ones are lawyers, to avoid a situation where the execution would be unlawful and the evidence inadmissible.

22. STATISTICS

Italian authorities provided the evaluation team with the statistical data on received EIOs from 2018 up to 30.11.2022 (see the table below).

State	2018	2019	2020	2021	2022	Total
Austria	25	146	194	127	148	**640**
Belgium	31	37	46	42	55	**211**
Bulgaria	20	56	68	57	69	**270**
Cyprus	0	2	1	0	8	**11**
Croatia	25	28	24	22	24	**123**
Estonia	2	7	2	9	4	**24**
Finland	3	4	12	3	7	**29**
France	65	59	94	69	117	**404**
Germany	396	394	414	261	331	**1799**
Greece	6	18	12	13	18	**67**
Latvia	0	0	0	0	0	**0**
Lithuania	8	8	20	25	21	**82**
Luxemburg	0	3	8	4	9	**24**
Malta	1	3	3	4	4	**15**
Netherlands	30	29	27	11	22	**119**
Poland	94	225	339	188	435	**1281**
Portugal	48	94	81	69	72	**364**
UK	12	9	7	5	3	**36**
Czech Republic	9	56	49	36	41	**191**
Romania	0	146	180	141	216	**683**
Slovakia	52	39	45	33	36	**205**
Slovenia	15	51	98	59	105	**328**
Spain	0	95	147	139	228	**609**
Sweden	3	17	16	7	14	**57**
Hungary	46	47	64	41	79	**277**
TOTAL	**900**	**1580**	**1980**	**1378**	**2106**	**7944**

The Italian authorities specified that the data are extracted from the computer system used by the Ministry of Justice, to which the Italian executing authorities are obliged by law to transmit a copy of all the EIOs received from abroad to enable it to perform its function of central authority (Article 4 paragraph 1 of the Legislative Decree).

However, since a similar communication duty is not provided for the EIOs transmitted abroad by the Italian issuing authorities, it is impossible to extract from that same system the data related to the outgoing EIOs. The responses provided by the Italian authorities to which the questionnaire was sent were not particularly helpful. In the first place, because not all the authorities concerned have answered. Secondly, because in the offices of the competent judicial authorities (basically the Public Prosecutor's Offices attached to the Courts of the first instance located in the cities where Courts of Appeal are located), there is not a specific register for EIOs since records of the register concerned are devoted more generally to the activities of judicial cooperation, including those related to non-EU MSs and regarding, consequently, the rogatory letters.

As to the outgoing EIOs, thus, the overall result does not make it possible to provide, not even approximately, quite reliable statistical data.

Italian authorities added that for the reasons above, it would not be possible to provide the evaluation team with statistical data related to the cases of refusal or postponement of the execution of EIOs, both outgoing and incoming. Moreover, in light of the above, they want to encourage the establishment of an ad hoc computer register of all outgoing and incoming EIOs and the outcomes of the relevant proceedings.

As the table shows, the number of received EIOs has an increasing tendency by each year, from 1580 received EIOs in 2019 to 2106 in 2022. The most requested EIOs are from Germany (1799) and Poland (1281), followed by Romania (683), Austria (640) and Spain (609).

However, the statistic does not state to which investigative measures the EIOs relate, since such statistics are not kept.

The lack of ability to produce statistical data is a problem for also other Member States. Hopefully, the e-EDES platform will solve this for all.

23. TRAINING

The Scuola Superiore della Magistratura (the High School for the Judiciary) is the institution in charge of providing initial and permanent training to members of the judiciary (judges and public prosecutors). It is an independent institution, and its Steering Board is composed of judiciary members, two law professors and two practising lawyers. Training courses occur at the national and local levels (different instances of Court of Appeal). The Steering Board assesses the quality of training based on the feedback given by the participants, who, at the end of each exercise, are requested to fill in a questionnaire providing their opinion on the quality of training in terms of topics covered and concerning the expertise and skills of trainers.

The Scuola Superiore della Magistratura organises yearly more or less 150 training attended by 7000 practitioners. It organises at least one three-days training course on international legal cooperation each year, and most of the sessions are assigned to EU mutual recognition instruments, EIO included. Each training course is for more or less 100 members of the judiciary. In 2021 the Scuola Superiore della Magistratura organised two three-days training courses on international legal cooperation: the first was held in April, and the second was held in September 2021. Training courses included sessions assigned to EU mutual recognition instruments, EIO included. In addition, the Scuola Superiore della Magistratura has organised a three-days training course on international legal cooperation brought forward on the EPPO, including sessions devoted to the EIO and others EU instruments. This course was held in June 2022.

In all these training courses, the recent case law of the CJEU that has an impact on the functioning of judicial cooperation instruments has been analysed and discussed in detail, among them the CJEU in the cases Gavanozov I and II.

Training is partly mandatory. The judiciary shall take part in at least one training each year. Courses can be attended live or online. The system offers the possibility to pick the relevant training sessions at the time that suits them best.

Trainers of the courses are usually professors in law or experienced judges and prosecutors, also sometimes lawyers outside the judiciary. Lawyers are not the target group of the training given by the School but can sometimes be invited to participate.

The School also distributes a newsletter once a month to practitioners.

Italian practitioners take part in courses organised by EJTN, e.g. simulations where several Member States deal with the offences committed in various States by the same criminal group.

The School has a website with a wide range of information in general but also about international judicial cooperation and EIO.

24. FINAL REMARKS, RECOMMENDATIONS AND BEST PRACTICES

24.1. Suggestions by Italy

A) In general, Italy does not have problems filling in Annex A of the EIO form. However, the practitioners think there is room for improvement. Therefore, they made the following suggestions to EU institutions:

- instead of first describing the measures requested, the form should start with a description of the act/offence, after that summary of the investigation already carried out and only after that the requested measures;
- adding a place for indicating whether the suspect is known or unknown and making it possible to put all details of each subject under investigation. Also, in the beginning, a part should be added where to place information on all suspects in the case;
- including more measures (such as search, handing over of items and collection of scientific evidence) instead of having to explain those in open spaces. As it is now, there might be primarily a risk of incomplete, but also unclear or incorrect compilation/translation;
- entering a box indicating the number and description of the content of documents annexed to the EIO;
- provide, in the event of a request for the taking of statements of a witness, suspect or accused person, an obligation for the issuing authority to include the list of questions to be asked the person to be heard, to be included in Section C or in a separate Annex;
- making box F more understandable, especially highlighting the relationship between (a) and (c);
- providing in section H4 a single field for the indication of both the subject of requests for information on financial transactions and their relevance and necessity to overcome the current fragmentation of the information to be provided in support of requests for information on financial transactions and the reasons for their relevance and necessity.

B) Italian authorities are, in general, satisfied with Annex B. They have, however, two suggestions for improvements to EU institutions:

- as the form contains a space reserved for further information that is considered helpful for the issuing authority for the successful outcome of the cooperation procedure, it is believed that this space can be used to alert the issuing authority to the incomplete or incorrect completion of the form set out in Annex A, inviting the issuing authority to make all necessary or appropriate additions and/or corrections. At a later stage, on the other hand, the information requirements laid down in EIO DIR are to be fulfilled by any means capable of producing a written record;

- provide a space for the contact person to resolve any problems that may arise in the execution of the EIO, specifying both their telephone and e-mail contact details and the language to be used.

C) Italy proposes to EU institutions a minor amendment of the EIO DIR, that is the replacement of both in Chapter V and the title and text of Articles 30 and 31 – of the reference to "interception of telecommunications" with the reference to "interception of conversations or communications" or, more simply, "interception of communications".

D) Italy suggests to other MSs specialising EIO executing authorities.

E) Italy suggests to other MSs to provide their judicial authorities on a permanent basis with training courses specifically dedicated to judicial cooperation instruments, including EIO.

F) In order to strengthen cooperation, Italy suggests to the other Member States to ensure that their judicial authorities have, as much as possible, a flexible and goal-oriented approach where receiving requests for carrying out investigative measures or evidence not provided for by their domestic law or not exactly corresponding to those provided for by the aforementioned law.

24.2. Recommendations

Regarding the practical implementation and operation of the evaluated EIO DIR, the team of experts involved in assessing Italy was able to review the system in Italy satisfactorily.

Italy should conduct an 18-month follow-up to the recommendations referred to below after this report has been adopted by the Working Party concerned.

The evaluation team saw fit to make several suggestions for the attention of Italian's authorities. Furthermore, based on the various good practices, related recommendations are being put forward to the EU institutions and agencies, in particular Eurojust, as well as to the EJN.

24.2.1. Recommendations to Italy

Recommendation 1: Consider also accepting other languages following the EIO DIR, preferably at least English in addition to Italian, when receiving and executing EIOs (point 6.2.)

Recommendation 2: Invite all judiciary to request the passwords for the section where are all contact information of contact points in the EJN website to enhance swift and easy cooperation in international matters (point 8)

Recommendation 3: Not to refuse the execution of EIOs with flaws that the issuing authority could easily correct, e.g. stamps, signature or date etc. (point 9)

Recommendation 4: Make sure that all practitioners are aware that they may not refuse to recognize EIOs if the offence in the issuing State is not an offence in Italy regarding measures where double criminality may not be demanded according to the EIO DIR (point 13.1).

Recommendation 5: Consider to set up one common national database comprising ongoing and finalized criminal cases and received EIOs, which automatically delivers a warning message when a new EIO is registered and it is related to an already existing case that is or was on the docket of the national authorities. This system would enable on the one hand prevention of ne bis in idem situations and on the other hand an improved and efficient execution of such new EIOs (point 13.2.)

Recommendation 6: To amend the Legislative Decree to make all the grounds for refusal optional, as regulated by the EIO DIR. (points 21.1 and 21.2.)

Recommendation 7: To execute an EIO with the object of interception of telecommunications or with the object of house search without asking for additional documents, such as the national warrant for interception or the national warrant for the house search, as long as there are no elements which may indicate that the national law in the issuing state was infringed (point 21.6.)

24.2.2. Recommendations to the other Member States

Recommendation 1: As issuing States not to use simultaneously more than one instrument with the same purpose (EAW and EIO) (point 5)

Recommendation 2: Fill in the EIO form diligently by providing a sufficient description of the offence and the status of the persons concerned (points 6.1.)

Recommendation 3: Ensure that the executing Member States receive necessary information of previous or simultaneous orders or requests in the matter, not only about other EIOs but also any other instruments used in the same case (points 6.3. and 5)

Recommendation 4: To always attach the list of questions to be posed to the person to be interrogated (points 6.1. and 21.2.)

Recommendation 5: Assess the proportionality carefully when issuing an EIO and especially to avoid asking for search and seizure in institutions if it relates only to providing with information or documents (points 7 and 21.4.)

24.2.3. Recommendations to the Commission.

Recommendation 1: To consider amending Annex A as proposed in point 6.1. by Italian authorities (point 6.1)

Recommendation 2: To consider issuing guidelines about whether and how to apply the Rule of Speciality (point 11).

Recommendation 3: To revise Articles 30 and 31 of the EIO DIR since the current wording concerns only the interception of telecommunications but not other forms of communications, such as face to face *conversation in the inner space of the car, which is in the territory of a foreign country (point 21.6.).*

Recommendation 4: To revise the EIO DIR regarding the measures that gather evidence in real-time, primarily cross-border surveillance conducted by technical means, because there is no regulation of urgent cross-border investigative measures with the subsequent authorization in EIO DIR (point 21.6.).

24.2.4. Recommendations to EJN

Recommendation 1: To encourage all practitioners of all Member States to request the passwords for the section with contact information of contact points in the EJN website to enhance a swift and easy cooperation in international matters (point 8).

24.3. Best practices

1) Comprehensive training to practitioners including issuance of a monthly newsletter (point 23)
2) Specialisation in the largest districts that ensures swift and correct execution (point 4)
3) Using of videoconference through the courtroom sessions to avoid surrender procedures, when the proceedings do not demand the person to be in the issuing State but can be present in the proceedings via video (point 21.2.)
4) Not refusing the execution of an investigative measure merely because the instrument used is different from the one that should be used according to Italian law if the necessary information can be found in the form used and the content of the request is clear (point 21.6.)

ANNEX A: PROGRAMME FOR THE ON-SITE VISIT

Monday 23 January 2023

Arrival of the evaluators in Rome

Internal meeting of the Evaluation Team *(Meeting Room of the Hotel Ponte Sisto)*

Tuesday 24 January 2023 *(Hall Manzo in the morning and Hall Falcone in the afternoon)*

9:30-9:45	Arrival to the Ministry of Justice. Welcoming speeches**;**
9:45-10:00	Presentations - The structure and role of the Ministry of Justice as Central Authority; The main tasks of the General Directorate of International Affairs and Judicial Cooperation;
10:00-10:20	Presentation - The Italian legal system – The Italian judicial system with reference to substantive and procedural criminal law;
10:20-10:40	Presentation - Italian legal framework for international judicial cooperation in criminal matters
10:40-11:00	Coffee break
11:00–11:20	Presentation - Vocational training for Italian judges and prosecutors
11:20-12:00	Presentation - The implementation of the EIO DIR in Italy: criticalities and the case-law of the Supreme Court of Cassation
12:00-13:00	Lunch break
13:00-16:30	Meeting with practitioners on the implementation of the EIO DIR, Q&A; discussion;
18:00-19:30	Internal meeting of the Evaluation Team *(Meeting Room of the Hotel Ponte Sisto)*

Wednesday 25 January 2023 (*Hall Falcone*)

9:30-11:00	Meeting with practitioners on the implementation of the EIO DIR, Q&A; discussion;
11:00-11:15	Coffee break
11:15-13:00	Meeting with practitioners on the implementation of the EIO DIR, Q&A; discussion;
13:00-14:00	Lunch break
14:00-16:30	Meeting with practitioners on the implementation of the EIO DIR, Q&A; discussion;
18:00-19:30	Internal meeting of the Evaluation Team *(Meeting Room of the Hotel Ponte Sisto)*

Thursday 26 January 2023 *(Hall Falcone)*

10:00-11:00	Meeting with practitioners on the implementation of the EIO DIR, Q&A; discussion;
11:00-11:15	Coffee break
11:15-12:30	Wrap-up meeting
16:00–17:30	Internal meeting of the Evaluation Team *(Meeting Room of the Hotel Ponte Sisto)*

Friday 27 January 2023

9:00-10:30	Internal meeting of the Evaluation Team *(Meeting Room of the Hotel Ponte Sisto)*

ANNEX B: LIST OF ABBREVIATIONS/GLOSSARY OF TERMS

LIST OF ACRONYMS, ABBREVIATIONS AND TERMS	LANGUAGE OF X- LAND OR ACRONYM IN ORIGINAL LANGUAGE	ENGLISH
CPC		The Criminal Procedure Code
CJEU		The Court of Justice of European Union
DCSA		The Central Directorate of Anti-drug Services
DIA		The Anti-Mafia Investigative Directorate
EAW		The European Arrest Warrant
EIO DIR		The European Investigation Order Directive 2014/41/EU
EJN		The European Judicial Network
EU		The European Union
EPPO		The European Public Prosecutor's Office
e-EDES		The Electronic Evidence – Digital Exchange System
GICO		The Investigation Group on Organized Crime
GPS		The Global Positioning System
JIT		The Joint Investigation Team
MLA		The Mutual Legal Assistance
MS/s		The Member State/States
ROS		The Special Operation Unit
VDC		The Video-conference