Mutual Recognition and its Implications for the Gathering of Evidence in Criminal Proceedings: A Critical Analysis of the Initiative for a European Investigation Order

I. Introduction

This paper aims to discuss the development of EU legislation concerning cooperation in criminal matters by the example of the proposed directive for the European Investigation Order in criminal matters. This proposal was issued by seven member States on 29 April 2010. If successful, it would be another step towards closer cooperation of the EU member States in criminal matters. According to Article 82 (1) of the Treaty on the Functioning of the European Union (TFEU) this cooperation is based on the principle of mutual recognition. Mutual recognition is seen as the potential ‘cornerstone’ for the development of the cooperation in criminal matters in the EU. The opportunities and problems that go along with this principle can be exemplified by reference to the proposed Investigation Order.

II. Origins and Theory of the Principle of Mutual Recognition

Closer cooperation in criminal matters in the EU has been an issue since the 1970s. It has been of great importance since the founding of the internal market in 1992 and the following opening up of the national borders in accordance with the Schengen Conventions. This opening up gives organised crime the chance to operate throughout the EU without interference and beyond the control of the authorities of any single member State. Thus national authorities need to cooperate in order to be on a level playing field with international crime. At the same time, it has become necessary to approximate national provisions of substantive criminal law. This has led to the creation of the ‘third pillar’ of the EU by the Maastricht Treaty in 1993, giving the EU authority to legislate in certain criminal matters. The following efforts to harmonise criminal law in the EU brought rather minor results, though.

Important reasons for this slow development were the need to ratify conventions based on Art. K.6 (2) (d) / Art. 34 (2) (d) TEU, the member States’ reluctance to give

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1 Note from the Kingdom of Belgium, the Republic of Estonia, the Kingdom of Spain, the Grand Duchy of Luxembourg, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden, Initiative for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters, 2010/0917 (COD), Brussels, 29 April 2010.
2 Tampere European Council 15th and 16th October 1999 Presidency Conclusions, no. 33.
3 In 1975 the Trevi Group was created by the Rome European Council in order to co-ordinate the fight against terrorism.
4 See the consideration of this reason for closer cooperation in criminal matters by Craig/de Burca, EU LAW (4th ed., Oxford: Oxford University Press), at p. 234 et seq. According to the authors the internal market and the opening of the national borders was one reason for closer cooperation in the 1990s. Another reason was to provide the EU with a ‘new’ banner to enhance its legitimacy.
up national sovereignty in the field of criminal law, the requirement for unanimous decisions for legislation based on the ‘third pillar’, and the lack of means for the commission to enforce the transformation of EU legislation into national laws. Because of the substantial differences in national procedural and substantive criminal law still existing today, it has proven very difficult to converge the national criminal law systems.

1. The Traditional System of Mutual legal Assistance

Under these circumstances the traditional instruments of mutual legal assistance do not offer an adequate means of cooperation any longer. They are characterised by what can be called the ‘request-principle’: One State submits a request to another State, which is free to determine whether it will comply with it or not. Therefore the outcome of a request under the traditional system would be rather uncertain. Additionally, practical problems such as deficient language skills and missing contact between the national authorities would frequently occur. As a result, the traditional system of cooperation has been criticised as slow and ineffective. To illustrate the impact of the principle of mutual recognition, the two most important European conventions on cooperation with regard to evidence in criminal proceedings shall be presented in further detail:

a) The European Convention on Mutual Assistance in Criminal Matters of 1959

One of the first pieces of legislation dealing with mutual assistance in criminal matters in Europe is the Council of Europe’s European Convention on Mutual Assistance in Criminal Matters of 20 April 1959. It was designed to provide basic rules for successful cooperation in criminal matters. As obtaining evidence is an important part of that, the Convention addresses some evidence related problems. However, mutual assistance was minimal compared to today. Its Art. 3 provides that the requested Party shall execute in the manner provided by its law so called ‘letters rogatory’ relating to a criminal matter for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents. The Parties were allowed, however, to let the execution of letters rogatory for search and seizure depend on different preconditions like that the offence is punishable under the law of both States (requirement of double criminality), that the offence is an extraditable offence in the requested State or that the execution of the letters rogatory

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6 The Infringement Procedure under Article 258 TFEU (ex Article 226 TEC) didn’t apply to the ‘third pillar’.
9 For example, the convention addresses, amongst others, experts and witnesses (Art. 7 et seq.). However, these provisions only deal with serving writs and securing witnesses’ and experts’ rights. States could not ask the other states to conduct an interrogation.
is consistent with the law of the requested party (Art. 5). Furthermore, assistance could be refused for many other reasons that were mainly based on political considerations – for instance if the request concerned an offence which the requested party considered a military, political or fiscal offence or if the requested Party considered the execution of the request likely to prejudice the sovereignty, security, ordre public or other essential interests of its country (Art. 2).

While this Convention was a start, it took Europe’s States another 40 years to take mutual assistance a step further.

b) The EU Convention on Mutual Assistance in Criminal Matters of 2000

On 29 May 2000, the European Council passed the Convention on Mutual Assistance in Criminal Matters between the member States of the European Union\(^\text{10}\) to provide mutual assistance in a fast and efficient manner compatible with the basic principles of the member States’ national laws. The Convention was intended to supplement (amongst others) the provisions and facilitate the application of the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, Art. 1 (1) (a). Art. 1 (2) further provides that other (more favourable) agreements between the signing States shall not be affected.

The Convention concentrates on two main parts: The first part (Art. 1-7) addresses formalities and procedural aspects of mutual assistance. The member States shall execute the requests for assistance as soon as possible (Art. 4 (2)) and shall comply with the formalities and procedures expressly indicated by the requesting member State (Art. 4 (1)), so called *forum regit actum* principle. Art. 8 et seq. deal with specific forms of mutual assistance like the restitution of articles obtained by criminal means to their rightful owner (Art. 8), temporary transfer of persons held in custody for purpose of investigation (Art. 9) and hearing of witnesses or experts by videoconference (Art. 10) or telephone conference (Art. 11). Detailed provisions for the interception of telecommunications can be found in Art. 17-22.

2. The Principle of Mutual Recognition Pursuant to Articles 67 (3), 82 (1) TFEU

In 1998 during its EU Presidency the UK Government came up with a new approach to solve the problems concerning cooperation in criminal matters – the principle of mutual recognition. This approach originates in the internal market where it aims at the free movement of products and persons. For example, if a certain good is admitted to the market of one member State, the principle of mutual recognition ensures that it can be traded in the entire Union. This way every member State has to recognise the regulatory standards of all the other member States, even if they are lower.

\(^{10}\) OJ No. C 197, 12 July 2000, p. 1.
than its own ones. This leads to free trade within the European Union without the necessity to harmonise regulatory laws.

At the beginning, the application of the principle of mutual recognition within the field of cooperation in penal matters was based on political will. An important step in this process was the Communication from the Commission to the Council and the European Parliament on ‘Mutual Recognition of Final Decisions in Criminal Matters’. This Communication made detailed proposals for the application of the principle of mutual recognition in criminal matters. Those political efforts led to a consensus agreeing on the application of the principle of mutual recognition on criminal matters. Since the entry into force of the Lisbon Treaty in 2009 the principle of mutual recognition is codified in Articles 67 (3), 82 (1) TFEU. The new competence to adjust national procedural laws in Article 82 (2) TFEU shall explicitly serve to facilitate mutual recognition. This emphasis on the principle of mutual recognition in the new TFEU shows that this concept has become paramount for closer cooperation in criminal matters in the EU.

a) The Functioning of Mutual Recognition in Criminal Matters

Applied to criminal matters, mutual recognition works the following way: if one State (issuing State) requests another State (executing State) to assist in an operation concerning criminal matters, the executing State is obliged to act, no matter if the requested action would be allowed under his own criminal provisions. Only under very limited circumstances the executing State has the duty or the right to refuse the request. Normally there is a narrowly confined numerus clausus of reasons for refusal. In the great majority of cases the executing State has no discretion on whether it complies with the request or not. Depending on the instrument involved it may only have some discretion to implement the issuing State’s request in order to act in accordance with its domestic provisions.

b) General Criticism of Mutual Recognition in Criminal Matters

As a consequence, the issuing State’s law of criminal procedure takes effect in the executing State’s territory. One could even say that the executing State loses the control of the enforcement of judicial decisions in criminal proceedings in its own territory. Hence, traditional concepts of national sovereignty are being challenged. Therefore the application of the principle of mutual

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11 Supra note 8.
12 Mitsilegas, supra note 5, at p. 1279 et. seq.
13 Under the proposed European Investigation Order, the executing State also has the right to convert the request into its own national laws, see supra note 1, paras. 10.
15 Peers, supra note 14, at p. 10.
16 Mitsilegas, supra note 5, at p. 1282.
recognition requires mutual trust: the extraterritorial effects of the principle of mutual recognition are only acceptable to the member States and their citizens if they have confidence in the reasonableness of the other member States’ laws and their application.\footnote{Communication from the Commission to the Council and the European Parliament, \textit{supra} note 5, at paras. 3.1.} That an extraterritorial effect of laws of criminal procedure is a very sensitive issue can be inferred from the following:

(1) Criminal proceedings usually entail serious interferences with the individual’s basic rights. Apart from intrusions into privacy caused by investigative measures, the fact of being prosecuted itself can have severe stigmatizing effects. At this point, a crucial aspect comes into play – legal certainty. The severe interventions that go along with criminal proceedings are only acceptable if the citizens have at least the chance to foresee which procedural rights they have. But according to the mutual recognition approach, a citizen can potentially be confronted with the procedural rules of 26 foreign States, all of which can theoretically take effect on the territory of his home country – a circumstance which Mitsilegas calls a ‘\textit{journey into the unknown}’.\footnote{Mitsilegas, \textit{supra} note 5, at p. 1281.}

(2) An automatic execution of judicial decisions issued in another member State can also be problematic due to differences between the national provisions of substantive criminal law.\footnote{Extraterritoriality of substantive criminal laws is nothing new. The states substantive criminal laws often apply to behaviour outside the States’ territories. For example § 4 et. seq. of the German Criminal Code provide for numerous cases where German criminal law applies to behaviour outside German territory. New is that under the principle of mutual recognition a State could be obliged to carry out an investigative measure concerning behaviour that is not punishable under its own criminal law. This could lead to a serious conflict between the obligation to execute a request for assistance and deeply enrooted social and ethical values of a society.}\footnote{Judgement of 30 June 2009, 2 BvE 2/08 et al., paras. 355. The text of the judgment can be found at www.bundesverfassungsgericht.de.} Criminalisation of social behaviour is one of the strongest interventions of government into people’s lives. As the German Bundesverfassungsgericht (Constitutional Court) has recently put it in its decision on the constitutionality of the Lisbon Treaty: ‘It is a fundamental decision to which extent and in which areas a political community uses the means of criminal law as an instrument of social control.’\footnote{Judgement of 30 June 2009, 2 BvE 2/08 et al., paras. 355. The text of the judgment can be found at www.bundesverfassungsgericht.de.} This linkage between fundamental values and criminal law can be illustrated by provisions concerning abortion or euthanasia – substantial differences between the national laws can be found in those fields, resulting from diverging concepts of fundamental values. Under the ‘pure’ principle of mutual recognition a State could be obliged to carry out an investigative measure concerning behaviour that is not punishable under its own criminal law. This could lead to a serious conflict between the obligation to execute a request for assistance and deeply enrooted social and ethical values of a society.

(3) Last, not least, the principle of mutual recognition can also lead to a deficiency of democratic
legitimacy. The citizens of one member State have no democratic means to influence the procedural criminal laws of the other member States. Nevertheless they can be subject to those laws even if they act entirely in their home country.

c) Intermediate Result

The sensitiveness of criminal proceedings as described above makes an important difference compared to the laws framing the internal market: market regulation does not touch basic values in the way criminal proceedings do. Its main purpose is to balance the interests of coequal market participants, whereas criminal proceedings are characterised by the subordination of an individual to prosecution authorities. Likewise, a lack of legal certainty concerning market regulation is easier to accept because of the slight effect those regulations have for people’s lives compared to the effects of criminal prosecution.

Furthermore, the effect of mutual recognition in the field of market regulation differs from the one in criminal matters. Regarding the internal market, the principle of mutual recognition has a liberalising effect. It strengthens the basic freedoms as enshrined in the Union’s primary law by creating an area where persons and goods can flow freely without interferences by national boarders or different national regulations. However, the application of the principle of mutual recognition to criminal matters mainly has the opposite effect – since it serves to recognise and enforce decisions of national courts and authorities which intervene with personal freedoms it restricts the individual’s personal freedom instead of supporting it.

This allows for a first (tentative) conclusion: since cooperation in criminal matters is an area quite different from the original field of application of the principle of mutual recognition, this approach certainly cannot be transferred ‘one to one’.

3. The Interdependence of Mutual Recognition and Harmonisation of National Laws

Curiously proponents and opponents of further harmonisation of national criminal laws both infer their arguments from the principle of mutual recognition. In 1998, the UK Government promoted this approach as an alternative to further harmonisation. The German Bundesverfassungsgericht, too, sees limited mutual recognition as a means to preserve national identity and sovereignty.

According to the Commission, however, mutual recognition often ‘goes hand in hand with a certain

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21 Peers, supra note 14, at p. 24 et seq.; Mitsilegas, supra note 5, at p. 1287 et seq.
22 The mere recognition of court decisions can also promote personal freedom. The protection of the defendants right of ne bis in idem requires mutual recognition of court decisions. See Mitsilegas, supra note 5, at p. 1299 et seq.
23 See Mitsilegas, supra note 5, at p. 1281.
25 Judgment of 18 July 2005, 2 BvR 2236/04, paras. 75. The text of the judgment can be found at www.bundesverfassungsgericht.de.
degree of standardisation’. On the other hand the Commission states that mutual recognition can to some extent make harmonisation unnecessary.\(^{26}\)

As seen above, mutual trust is a prerogative for mutual recognition. However, mutual trust can only exist if there is a certain common basis in all member States’ systems of criminal justice. In this regard, two aspects can be divided. First, a minimum approximation of the member States’ substantive criminal laws is necessary because the certainty that the behaviour would also constitute a criminal offence in its domestic law would make it easier for the requested State to execute a request for assistance. Second, the approximation of national procedural laws is a prerequisite for the development of mutual trust in transnational criminal proceedings within the EU. In particular, such harmonisation efforts could strengthen legal certainty and guarantee the EU-citizens a minimum of procedural standards. Without such a minimum synchronisation the conflicts going along with the principle of mutual recognition would be intractable. If the member States’ systems of criminal justice were completely independent and incoherent, there would be no basis to justify the extraterritoriality being produced by the obligation to recognise foreign judicial decisions. In other words: the application of the principle of mutual recognition is only legitimate if a certain level of harmonisation has been achieved in advance.\(^{27}\) Therefore the new competence to adjust the member states’ law of criminal procedure, based on Art. 82 (2) TFEU, is a welcome development.

A creation of minimum standards could also strengthen the democratic legitimacy of the application of the principle of mutual recognition. Regardless of whether there still is a democratic deficit in the legislation of the EU,\(^{28}\) harmonisation would give the European citizens power to influence the creation of minimum standards, which would apply to every national act in the field of criminal law. This influence would be exercised through the election of the European Parliament and the election of the national governments which control the Council and the European Council. Therefore the principle of mutual recognition cannot be seen as an alternative to the approximation of national laws (as in the internal market) – on the contrary it requires a minimum amount of previous harmonisation. Only under this condition it is acceptable at all.

### III. EU-Legislation on Gathering Evidence Based on the Mutual Recognition Approach

#### 1. Framework Decision on the execution of orders freezing property or evidence

The first instrument which implemented the principle of mutual recognition in the field of obtaining evidence was the framework decision on the execution in the European Union of orders freezing

\(^{26}\) Communication from the Commission to the Council and the European Parliament, supra note 8, at paras. 3.1.

\(^{27}\) See Zimmermann, supra note 7, at p. 308.

\(^{28}\) The German Bundesverfassungsgericht still sees a fundamental difference between the democratic legitimacy of the legislation of the national parliaments and EU legislation. See the decision on the constitutionality of the Lisbon treaty, supra note 20, paras. 271 et seq.
property and evidence of 22 July 2003.\textsuperscript{29} It addresses the need for immediate mutual recognition of orders to prevent the destruction, transformation, moving, transfer or disposal of evidence.\textsuperscript{30} To reach that objective, the member States can issue so called freezing orders to secure evidence or subsequent confiscation of property, Art. 3.

The framework decision aims to maintain pieces of evidence which are already available in one State so that they may be available to other States as well. It does not, however, provide ways for the member States to exchange the secured pieces of evidence. For the exchange the States still had to revert to the provisions laid down in the conventions on mutual assistance of 1959 and (from when it came into effect) of 2000.

If the freezing order is transmitted in the way provided by Art. 4, the judicial authority of the executing State\textsuperscript{31} is obliged to comply with the request without any formality and legal scrutiny (see Art. 5). A provision of particular relevance is Art. 3 (2): it abolishes the requirement of double criminality for a catalogue of 32 roughly defined categories of offences such as ‘terrorism’, ‘sabotage’, or ‘computer-related crime’. As a consequence, member States cannot deny requests on the ground that the offence for which assistance is sought is not punishable under their national law as long as it falls within one of the categories contained in this so called ‘positive list’.

In close preconditions, Art. 7 and 8 allow the executing State not to recognise and execute a freezing order or to postpone its execution. That is for example if it is instantly clear that rendering judicial assistance would infringe the ne bis in idem principle, Art. 7 (1) (c).\textsuperscript{32}

\subsection*{2. Framework Decision on the European evidence warrant (EEW)}

As has already been pointed out before, the framework decision on freezing orders left the subsequent transfer of the secured evidence to the traditional, time-consuming and barely efficient system of mutual assistance.\textsuperscript{33} To further enhance mutual assistance in the field of evidence, the Council passed a framework decision on the EEW for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.\textsuperscript{34} Its main objective was to replace the system of mutual assistance in criminal matters for obtaining objects, documents or data.\textsuperscript{35} However, the EEW

\begin{itemize}
\item \textsuperscript{29} OJ No. L 196, 2 August 2003, p. 45.
\item \textsuperscript{30} Reason no. 5 for the Council Framework Decision 2008/978/JHA of 18 December 2008.
\item \textsuperscript{31} The State making the request is called issuing State, the requested State is called executi
\item \textsuperscript{32} Other grounds for non-recognition exist, if the issuing state did not use the form attached to the framework decision, Art. 7 (1) (a), or if there is an immunity or privilege under the law of the executing state that makes it impossible to execute the freezing order, Art. 7 (1) (b). The executing state can postpone the execution, if the execution might damage an ongoing criminal investigation or if the evidence concerned has already been subjected to a freezing order in criminal proceedings, Art. 8 (1) (a), (b).
\item \textsuperscript{33} Reason no. 5 for the Council Framework Decision 2008/978/JHA of 18 December 2008.
\item \textsuperscript{34} OJ No. L 350, 30.12.2008, p. 72.
\item \textsuperscript{35} See reason no. 23.
\end{itemize}
can only be issued to obtain pieces of evidence which another State has already collected, Art. 4 (3).

It is not possible for the issuing State to require the executing State to conduct interviews or other types of hearings, carry out bodily examinations or obtain information by interception of telecommunication or covert surveillance.

Art. 11 provides that the executing authority shall recognise a EEW without any further formality and execute it. The executing State takes the measures in accordance with its domestic procedural rules (Art. 11 (2)), but the issuing State can request that some formalities important for its proceedings are taken into account (forum regit actum principle, see Art. 12). The EEW can be issued if the obtaining of the objects, documents or data is necessary and proportionate for the purpose of criminal proceedings, Art. 7 (a), and if the issuing State could obtain the pieces of evidence in a comparable case in its territory, Art. 7 (b). It is the issuing State’s duty to ensure that those requirements are met.

Similar to the framework decision on freezing orders, there is an exhaustive enumeration of grounds for refusal. One of them applies, for instance, where the execution of the warrant would infringe the ne bis in idem principle, Art. 13 (1) (a). A member State may also refuse to recognise an evidence warrant, if it relates to criminal offences which under the law of the executing State are regarded as having been committed wholly or for a major part within its territory, Art. 13 (1) (f) (i).

The executing State shall not be allowed to deny the warrant on terms of double criminality, unless it is necessary to carry out a search or seizure, Art. 14 (1). Even in the latter case, Art. 14 (2) abolishes the requirement of double criminality for 32 categories of offences. This technique, well known from the framework decision on the mutual recognition of freezing orders, has caused specific problems in the case of the European evidence warrant: In 2005 the German Constitutional Court had declared a national law implementing the European arrest warrant void. 37 In an obiter dictum it had also mentioned doubts as regarded the constitutionality of such positive lists due to their vagueness. After this court decision, the German delegation feared an analogous ruling against the implementation of the framework decision on the EEW and achieved an opt-out-clause for Germany in Art. 23 (4). Pursuant to this provision, Germany is authorised to define six especially vague categories (terrorism, computer-related crime, racism and xenophobia, sabotage, racketeering and swindling) in a separate declaration and refuse the execution of a EEW unless the issuing authority declares that the respective offence falls within the scope of the definition.

36 For more grounds for non-recognition see Art. 13, for grounds for postponement see Art. 16. In addition to the reasons for non-recognition of the freezing order, assistance can be denied for example if the execution would harm essential national security interests or involve the use of classified information relating to specific intelligence activities, Art. 13 (1) (g).

37 BVerfGE (Reports of judgments and decisions of the German Federal Constitutional Court) 113, 273.
The member States have to make sure that the parties involved have legal remedies against the recognition and execution of the EEW, Art. 18.

3. The Initiative for a European Investigation Order (EIO)

Mutual assistance in criminal matters will be taken a step further if the initiative of seven member States for a EIO is successful. If this directive comes into effect, it will (between the member States) replace the European Convention on mutual legal assistance in criminal matters of 20 April 1959 as well as the EU Convention regarding mutual legal assistance in criminal matters of 29 May 2000, Art. 29 (1), and the corresponding provisions of the framework decision on the execution of freezing orders of 22 July 2003, Art. 29 (2). The framework decision on the EEW will be repealed, Art. 29 (2).

a) General Idea and Scope of Application

According to Art. 1 of the initiative, the EIO shall be a judicial decision issued by a competent authority of a member State in order to have one or several specific investigative measures carried out in another member State with a view to gathering evidence. Issuing authorities can be judges, courts, investigating magistrates or public prosecutors competent in the case concerned, Art. 2 (a) (i), as well as other judicial authorities as defined by the issuing State acting in their capacity as an investigating authority in criminal proceedings, Art. 2 (a) (ii).

So far, member States were only obliged to freeze and later on hand over pieces of evidence they had already obtained. The investigation order shall henceforth cover all measures except setting up a joint investigation team and intercepting telecommunication, see Art. 2 of the initiative.

Art. 4 (b) and (c) will allow issuing an investigation order also for obtaining pieces of evidence for proceedings brought by judicial or administrative authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the law.

b) Procedural Questions

Like the EEW and the freezing order, the EIO has to be recognised and executed without formalities, Art. 8 (1). According to Art. 8 (2), the executing State has to comply with the formalities and procedures expressly indicated by the issuing authority, unless this would be contrary to fundamental principles of law of the executing State. Under these circumstances the issuing State can also request that some of its authorities assist during the execution, Art. 8 (3).

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39 However, this will only be possible if the decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters.
40 This shall not imply any law enforcement powers, see recital 11 of the initiative.
However, the executing State may have recourse to a different investigative measure than the one indicated in the EIO if the latter does not exist under its national law, Art. 9 (1) (a), or if its use is restricted to a list or category of offences which does not include the one covered by the EIO, Art. 9 (1) (b). A particularly interesting provision can be found in Art. 9 (1) (c). It allows the executing State to choose a different investigative measure if it will have the same result as the one provided for in the EIO by less coercive means. This means that – in this point – the initiative departs from the basic idea of the mutual recognition approach that the issuing authority has to determine whether the requirements of a warrant are met in a specific case. However, there are good reasons for this modification of the principle because the executing authority, for which the effects of a particular measure in a specific case are better visible than for the issuing authority, is in a better position to judge the act’s proportionality.

c) Grounds for Refusal and Postponement

The executing State is allowed not to recognise nor execute an investigation order if there is an immunity or a privilege under its law rendering it impossible to execute the EIO or if its execution would harm essential national security interests, Art. 10 (1) (a) and (b). At least with the latter provision the initiative reintroduces a ground for refusal of more or less political character – a rather surprising step as the mutual recognition approach originally was intended to avoid the shortcomings of traditional mutual assistance. The execution of a EIO cannot be denied, however, because a similar decision would require judicial authorisation in the executing State. Neither does the initiative contain a ‘positive list’ like the framework decisions on freezing orders and the EEW. The executing State can postpone the recognition and execution if otherwise an ongoing criminal investigation or prosecution might be prejudiced or if the pieces of evidence are needed in other proceedings, Art. 14 (1).

d) Specific Provisions for Selected Types of Assistance

Art. 19-27 contain specific provisions for certain investigative measures, for example temporary transfer of persons held in custody (Art. 19, 20), hearing of witnesses or experts by video or telephone conference (Art. 21, 22), information on bank accounts and banking transitions as well as monitoring them (Art. 23, 24, 25) and controlled deliveries (Art. 26).

IV. A Critical Analysis of the Initiative for a EIO

In the following paragraph, the initiative for an EU directive introducing the EIO shall be evaluated with a special view to its consequences for the position of suspects in criminal proceedings. The general idea behind this proposal is to set up a single legal regime for the transfer of evidence
within the EU. This is not a new plan, however, but the Commission has already defined the elaboration of one comprehensive instrument for all forms of cooperation with regard to evidence in criminal proceedings as its long-term goal in 2003.\footnote{COM (2003) 688 final, p. 11.} In a recently presented working programme it re-scheduled the issue for 2011\footnote{COM (2010) 171 final, p. 19.} – and has now been overtaken by a group of seven member States. Since there are currently two framework decisions dealing with the cooperation in evidence matters, both of which are limited to specific aspects and measures and thus fragmentary, and since investigative measures not covered by these instruments still follow the complicated traditional system of mutual legal assistance, this initiative is certainly a reasonable step. It needs to be criticised, however, that it comes too early – the implementation deadline of the framework decision on the EEW has not even expired and it would have made sense to gain some experience with the functioning of this (already groundbreaking) instrument before substituting it. Apart from these general observations, a closer analysis reveals further shortcomings and inconsistencies of the proposal which ought to be addressed during the ongoing legislative procedure.

### 1. Scope of Application

A first aspect that appears at least questionable is the new instrument’s envisaged scope of application. It shall not only be possible to issue a EIO in criminal proceedings in the narrow sense, but also in proceedings brought by administrative and judicial authorities in respect of acts other than criminal offences. The only condition shall be that these acts constitute infringements of the law and can entail sanctions. For instance, even minor wrongdoings such as banal road traffic offences could then give rise to transnational investigative measures – even such that seriously interfere with the individual’s rights. Obviously this is problematic from the point of view of proportionality.

That a EIO can only be issued if the respective measure could also be taken by the authorities of the issuing State in an entirely national proceeding is not a convincing argument in this respect: First, member States will not always agree on what is proportionate – carefully put, some member States are certainly rather ‘generous’ when it comes to investigating a breach of the law while others follow a more liberal approach. For the second group, the execution of a EIO issued for a negligible infringement may even cause constitutional problems. Second, even if a measure is proportionate in a purely national context this does not automatically mean that it is also a legitimate tool for cross-border investigations. They burden the suspect with organising his or her defence in at least two States (issuing and executing State) with different languages and different procedural laws.
Therefore, even a measure that may be adequate in a national proceeding can seem disproportionate in a transnational case.

Finally, Art. 9 (1) (c) is not a sufficient remedy for this problem either. This provision allows the executing authority to choose a less coercive measure in order to produce the evidence required in the EIO. But if a EIO is issued in a non-criminal proceeding pursuant to Art. 4 (b) and (c), there is a certain probability that no coercive measures would be at the executing authority’s disposal at all. However, the discussions and negotiations in the council have not come to an end yet. Recently the presidency sent a questionnaire to the delegations in order to find out which types of investigative measures are admissible in the various types of proceedings. Therefore it does not appear entirely unlikely that Art. 4 (b) and (c) will be modified during the further negotiations of the initiative.

2. The Risk of ‘Patchwork Systems’

Generally speaking, the principle of mutual recognition tends to combine different systems of criminal procedure because the required measure is ordered according to the law of the issuing member State and executed under the law of another one. Due to the variety of procedural rules in Europe, such a ‘patchwork system’ can weaken the suspect’s position considerably: if the production of evidence in the pre-trial stage is not subject to strict control in the executing State, the latter’s procedural concept may nevertheless be well-balanced and fair if it guarantees essential defence rights in the trial stage. By contrast, the legal conditions for obtaining evidence in the issuing State may be much lower in the trial stage than in the pre-trial stage. If evidence gathered according to the rules of the executing State was introduced in a trial in the issuing State, procedural safeguards during the pre-trial stage (e.g. concerning the participation of the defence during the hearing of a witness) would be bypassed. In such a constellation, there are basically two possibilities: either the piece of evidence gathered in the executing State is declared inadmissible – then the issuing of the EIO would finally have been in vain. Or it is admitted – then the suspect would lose essential guarantees in the pre-trial phase.

This risk of ‘patchwork systems’, inherent to the mutual recognition approach, is largely avoided by the initiative on the EIO. First, it does not provide for an obligation of the issuing member State to admit the requested evidence in trial. This is not self-evident because several attempts to introduce such an obligation have been made in the past – most noteworthy the green book on the

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43 Council doc. 12213/10.
46 This was the reason for the inclusion of Art. 8 (2), see Council doc. 9288/10 ADD 1, p. 9.
establishment of a European Public Prosecutor from 2001\textsuperscript{47} – and some observers have also claimed that this could be a valuable model for the EIO.\textsuperscript{48} Since the initiative does not follow this approach, the courts of the issuing State will not be compelled to use the evidence obtained by virtue of a EIO in trial and it will remain their decision to what extent it shall be admissible. Consequently infringements of procedural rules during the pre-trial stage can still be remedied. Second, the already mentioned \textit{forum regit actum} principle, enshrined in Art. 8 (2) and (3) of the initiative, gives the issuing authority a certain influence on the manner in which the EIO is executed. Therefore it can make sure that procedural safeguards which are essential for the admissibility of evidence in the issuing State are respected during the execution of the EIO. In this way the proceeding basically follows the rules of the issuing State and all safeguards for a fair trial under its domestic law are maintained. Nevertheless a certain reservation needs to be made: The compliance with formalities and procedures indicated by the issuing authority is always subject to the condition that this is not contrary to the fundamental principles of law of the executing State. Hence it remains possible that evidence produced by virtue of a EIO suffers from procedural deficiencies so that its admissibility in trial is at least doubtable.

3. Irrelevance of Requirements and Restrictions in the Executing State

Although the initiative for a EIO seeks to avoid the creation of ‘patchwork systems’, it must nonetheless be stated that this instrument would make specific requirements and restrictions of coercive measures in the executing State irrelevant. Examples revealing the intricacies which may arise from that circumstance can easily be found and only a few of them can be discussed within the scope of this study.

\textit{a) Specific Requirements of Coercive Measures}

(1) Many procedural systems only allow certain coercive measures if the criminal offence which shall be investigated falls under a certain category or list of offences. This can be seen as a specification of the general proportionality requirement because it ensures that measures which particularly interfere with the suspect’s rights will only be used in the case of serious breaches of the law. But if the issuing State indicates a measure which is admissible for all kinds of offences under its law, the executing State would in principle (according to the general theory of the mutual recognition approach) have to carry it out, even though a comparable action is restricted by its law to a list of offences which does not include the offence in question. This problem has been tackled

\textsuperscript{47} COM (2001) 715 final.
in Art. 9 (1) (b) of the initiative, which allows the executing authority to have recourse to an investigative measure other than the one indicated in the EIO under these circumstances. If there is no other measure available which will make it possible to achieve the required or at least a similar result, the executing State may refuse to recognise and execute the EIO pursuant to Art. 10 (1) (c).

(2) Several legal orders stipulate that selected coercive measures may only be carried out upon a warrant issued by a judge or a court. This allows for a preliminary judicial control by an impartial institution and thus also helps to guarantee the proportionality of measures required by the prosecution authorities. Casting a look at Art. 1 (1) of the initiative, which defines the EIO as a judicial decision, one might think that problems with this requirement cannot occur. The German version – which like all versions existing in the other official languages must be taken into account\(^{49}\) – even uses the word ‘gerichtlich’. Consequently, the EIO seems to cover only measures which have been ordered by a judge. However, Art. 2 (1) (a) of the proposal also explicitly attributes to ‘investigating magistrate[s]’, ‘public prosecutor[s]’ (i) and some other ‘judicial authorit[ies]’ (ii) the competence to issue a EIO. Since Art. 1 (1) only gives the general definition of the EIO and Art. 2 (1) deals more specifically with the issuing authorities, the latter provision must probably be regarded as decisive; the clear German wording of Art. 1 (1) is obviously due to a bad translation. This means that a EIO issued by whatever investigating authority can oblige the executing authority to take measures which, pursuant to its domestic law, usually require a warrant by a judge. Considering that this requirement is meant to guarantee the legality, impartiality and proportionality of serious interferences with fundamental rights, this is a fairly problematic feature of the proposed instrument. Until now, the Council delegations do not seem to have entirely realised that this would significantly weaken the suspect’s position compared to a national proceeding in the executing State: during the discussions of the initiative they only expressed the wish that Art. 2 (1) (a) (ii) – allowing ‘other judicial authorities’ to issue a EIO – be further clarified\(^{50}\) and a questionnaire was distributed in order to collect additional information on the kind of authorities that might fall under Art. 2 (1) (a) (ii) and on the types of measures they could order. Therefore the assumption does not appear too pessimistic that the requirement of a warrant by a judge might lose a lot of its weight in the future.

\(b\) Restriction of Coercive Measures

Likewise, the domestic law of the executing State can provide for special restrictions of coercive measures which may prevent the execution of an EIO. The domestic law of the executing State may provide for special restrictions of coercive measures which may prevent the execution of an EIO.

\(^{49}\) See, for example, ECJ C-64/95, European Court Reports 1996, I-5105 (Konservenfabrik Lubella Friedrich Büker GmbH & Co KG v. Hauptzollamt Cottbus), margin no. 17 with further references.

\(^{50}\) Council doc. 12201/10, p. 7.
measures. In Germany, for instance, a seizure is not permissible if the respective assets are kept by certain persons who have the right to refuse to testify in criminal proceedings, § 97 (1), read in conjunction with § 52 (1) StPO (German Code of Criminal Procedure). This is a field of criminal procedure which has not been harmonised at all and consequently, national rules differ considerably. A provision in the context of hearings by videoconference reveals that the drafters of the initiative for a EIO have been well aware of this circumstance. Art. 21 (9) obliges the member States to ensure that witnesses and experts who are on their territory and shall be interrogated by a foreign authority in a videoconference pursuant to Art. 21 (1) will have the same right to refuse to testify as if the hearing took place in a national procedure. In other words: these persons will enjoy a ‘double protection’ and can invoke rights not to testify according to both the issuing and the executing State’s law.

However, there is no equivalent to this important provision for seizure orders. This can lead to delicate conflicts for the executing authorities which can be illustrated by the following example: According to the German law of criminal procedure parents-in-law can refuse to give evidence in a criminal proceeding even after their child and the defendant have been divorced, § 52 (1) Nr. 3 StPO, read in conjunction with § 1590 (2) BGB (German Civil Code). Because of this, it is also inadmissible to seize evidence at their home. If another member State does not provide for a similar restriction of seizure orders and demands that German authorities seize evidence from the defendant’s ex-parents-in-law, they would have to comply with this investigation order. As a result, this instrument will make it easier to collect evidence against the suspect and his or her procedural position will be weakened. But even more striking cases can be constructed: same sex marriages and homosexual partnerships, for instance, are not recognised in all EU member States (e.g. not in Italy and Greece), and in some eastern European member States they are even prohibited (e.g. Poland, Bulgaria). If one of these States issues a EIO aiming at the seizure of evidence from the suspect’s homosexual partner, any other member State will be compelled to execute it – notwithstanding its own liberal legislation.

A solution could be seen in Art. 1 (3) – according to this provision, the (proposed) directive on the EIO ‘shall not have the effect of modifying the obligation to respect the fundamental rights and legal principles as enshrined in Art. 6 of the Treaty on European Union […]. This directive shall likewise not have the effect of requiring member States to take any measures which conflict with their constitutional rules relating to freedom of association, freedom of the press and freedom of expression in other media’. Yet every coercive measure interferes with the suspect’s fundamental rights. If this clause shall not undermine the entire idea of the EIO it must therefore be construed narrowly, so that only serious conflicts with constitutional rights can suspend the obligation to
execute a EIO. Therefore it is not very surprising that some delegations have expressed the wish to add an explicit ground for refusal where the ordered measure would conflict with fundamental rights guaranteed in the executing State.\(^{51}\) But would, for example, a seizure from the defendant’s ex-parents-in-law cause a serious conflict with the fundamental right to protection of the family? One might argue that there is no longer a family relation that needs to be protected. So even if a ground for refusal was added – what does not seem very realistic at the moment\(^{52}\) – the new instrument could still provoke serious incoherencies in the national systems of criminal procedure.

c) Intermediate Result

The preceding paragraphs have revealed that the initiative for a EIO risks undermining the suspect’s position in transnational criminal proceedings. Of course it is to a certain extent part of the rationale underlying the mutual recognition approach that only the prerequisites of the issuing State’s law need to be met in order to have a measure carried out in another member State.\(^{53}\) Nevertheless the fact that always the legal order with the less strict requirements for coercive measures will prevail is a worrying one.

4. The Double Criminality Requirement

a) Far-reaching Abolition

In the general part of the initiative, establishing rules for all types of evidence, only one provision could be interpreted in the sense of a double criminality requirement: the already mentioned ground for refusal in Art. 10 (1) (c), read in conjunction with Art. 9 (1) (b) allows to refuse the recognition and execution of a EIO when the use of the respective investigative measure ‘is restricted to a list or category of offences which does not include the offence covered by the EIO’. The idea behind this provision has already been pointed out; yet it could also be construed in a completely different sense. Investigative measures which fall under a member State’s law of criminal procedure always require a certain degree of suspicion that an act has been committed which is classified as criminal offence by this State’s law. In other words, these investigative measures are implicitly restricted to the category of ‘criminal offences under national law’. If the act for which assistance is sought by the issuing State is not punishable as a criminal offence in the executing State, the latter could therefore apparently invoke the ground for refusal in Art. 10 (1) (c). However, this is obviously not the meaning the drafters of the initiative wanted this provision to have – it rather refers to explicit enumerations of offences. On the contrary, the fact that the double criminality requirement is

\(^{51}\) Council doc. 12201/10, p. 12.
\(^{52}\) See the rather reluctant statement by the presidency in Council doc. 12201/10, p. 12.
\(^{53}\) See supra II.2.a).
explicitly\textsuperscript{54} maintained for investigation orders with regard to information on bank accounts in Art. 23 (5)\textsuperscript{55} illustrates that this prerequisite should be abolished for all other types of evidence. Thus the executing State will (according to the initiative) have to comply with a EIO even though the act for which assistance is sought is not a criminal offence under its national law.

\textit{b) Comparison with Previous International Instruments on Mutual Legal Assistance}

In the first part of this study it has already been pointed out that the abolition of the double criminality requirement is one of the most controversial facets of the principle of mutual recognition. It must be borne in mind, however, that double criminality used to be a prerequisite mainly in the field of extradition law. The European Convention on Mutual Legal Assistance from 1959, for instance, does not provide for a general double criminality requirement, but its Art. 5 (1) (a) merely allows the signatory States to make the execution of letters rogatory for search and seizure of property dependent on the double criminality of the respective act. Only a few States (e.g. Austria, Estonia and Hungary) have neglected this clause and made a reservation introducing a general requirement of double criminality.\textsuperscript{56} As has been shown before, the framework decision on the EEW went one step further and abolished the double criminality requirement even for warrants concerning the search and seizure of property as long as the offence was included in the so called ‘positive list’. It can be concluded that the abolishment of the double criminality requirement is an innovation mainly in the field of search and seizure. From this point of view it is understandable that the presidency would estimate its ‘reintroduction [...] a step backwards as regards to the current framework of mutual legal assistance as well as in the progressive implementation of the principle of mutual recognition.’\textsuperscript{57}

\textit{c) Implications for the Foreseeability of Investigative Measures}

At this point, the German position with respect to the positive list in the framework decision on the EEW must be recalled. Since Germany had, in the aftermath of a judgment of its Constitutional Court, declared an opt-out for six particularly vague categories of offences included in the positive

\textsuperscript{54} A further exception could be seen in Art. 27 (1) pursuant to which a EIO concerning the gathering of evidence in real time continuously and over a certain period of time can be rejected if the execution of the measure would not be authorised in a similar national case, Art. 27 (1).

\textsuperscript{55} Requests for information on bank accounts can be denied if the offence is not punishable with a penalty involving deprivation of liberty or a detention order of a maximum period of at least four years in the issuing State and at least two years in the executing State, Art. 23 (5) (a) and if is not an offence referred to in Article 4 of Council Decision of 6 April 2009 establishing the European Police Office, Art. 23 (5) (b) nor in the 1995 Convention on the Protection of the European Communities’ Financial Interests, Art. 23 (5) (c).


\textsuperscript{57} Council doc. 12201/10, p.12.
list, the general abolition of the double criminality requirement now envisaged by the new initiative almost appears as a political affront. Much more regrettable, however, are the implications of this step in terms of legal certainty: no citizen of the Union can know all criminal laws of all member States. Consequently a situation can occur in which an act deemed legal by a citizen is a criminal offence in one of the member States. So far one might argue that this is not a characteristic of EU law but rather the ‘normal’ situation because the substantive criminal laws of all States in the world differ considerably. But what is special within the European Union is that its member States have the possibility to enforce their criminal laws outside their territory.\textsuperscript{58} Therefore citizens can be subjected to investigative measures although they have not been aware that their behaviour is punishable in at least one member State. What makes things even worse is that pursuant to Art. 4 (b) of the proposal it shall be possible to issue a EIO in certain administrative proceedings – if it is already difficult for a citizen to know the other member States’ criminal laws, it is impossible to be aware of all provisions whose infringements can entail administrative sanctions.

The most important constellation in which this problem of foreseeability arises is if the act which the State issuing a EIO seeks to prosecute has exclusively taken place on the territory of the executing State: then the suspect frequently does not have any reason to expect criminal liability. This is why many conventions in the field of legal assistance and even instruments implementing the principle of mutual recognition contain a ‘territoriality reservation’ allowing to refuse the execution of a request if the respective act has taken place within the territory of the executing State.\textsuperscript{59} Such a ground for refusal which would help to ensure the foreseeability of criminal prosecution\textsuperscript{60} is missing in Art. 10 of the initiative. In the long term, however, only additional harmonisation of national substantive criminal law appears as a satisfactory perspective.\textsuperscript{61}

5. Insufficient Solution for \textit{ne bis in idem} Cases

Finally, another ground for refusal should have been included in Art. 10 for cases where the execution of the EIO would conflict with the principle of \textit{ne bis in idem} as enshrined in Art. 50 of the Charter of Fundamental Rights and Art. 54 of the Convention Implementing the Schengen Agreement (CISA). The possibility to postpone the execution of a EIO if it prejudices an ongoing proceeding in the executing State is not sufficient: if the trial in the executing State concerned the

\textsuperscript{58} Supra II.2.b).
\textsuperscript{59} See, e.g., Art. 4 no. 7 (a) of the framework decision 2002/584/JHA on the European arrest warrant, OJ No. L 190, 18 July 2002, p.1, and Art. 13 (1) (f) (i) of the framework decision on the EEW (supra III.2).
\textsuperscript{60} Also the German Constitutional Court underlined that the territoriality reservation served the principle of legal certainty in the context of the European arrest warrant, see BVerfGE 113, 273 (at 302).
\textsuperscript{61} Yet, this harmonisation must respect several basic guidelines such as the principles of proportionality, legality, subsidiarity and coherence, see European Criminal Policy Initiative, ‘A Manifesto on European Criminal Policy’, ZIS 2009, 707.
same offence (i.e. the same material act\textsuperscript{62}) and has been finally disposed of, the defendant may in principle not be prosecuted again (Art. 54 CISA). But as soon as the proceeding in the executing State is no longer continued, the EIO must be executed, unless the issuing State decides to withdraw it. In order to avoid this needless formality and to clarify that the ne bis in idem rule applies, it would have been desirable to allow the executing State not to comply with the EIO.

V. Conclusion

The initiative for a EIO is intended to mark an important step towards the creation of an area of freedom, security and justice. Indeed the introduction of a comprehensive instrument for all types of evidence does make sense and the draft shows up some promising tendencies – especially the forum regit actum principle, the right to choose a less coercive measure than the one covered by the EIO, the ground for refusal if the respective measure is restricted to a list of offences and the ‘double protection clause’ for videoconferences. Nevertheless, this study has shown that it suffers from serious shortcomings. On the long run, the obligation to carry out investigative measures which are not available in a domestic criminal proceeding is likely to cause mistrust rather than to promote the creation of a single judicial area. As has been stated in the first part of this contribution, this dilemma can only be overcome by a far-reaching harmonisation in the field of criminal procedure. The measures taken so far, in particular the new proposal for a directive on the right to interpretation and translation in criminal proceedings\textsuperscript{63}, are certainly a first (though hesitant) step into the right direction, but they cannot be more than a starting point. Also the further instruments specified in the ‘Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings’\textsuperscript{64} would not solve most of the problems brought about by the EIO. Taking this into account, the European institutions are trying to put the cart before the horse if they seek to further implement the principle of mutual recognition instead of first approximating the member States’ procedural and substantive criminal laws.

\textsuperscript{62} ECJ C-436/06, European Court Reports 2006, I-2333 (van Esbroeck), margin no. 25 at seq., at 36.
\textsuperscript{63} COM (2010) 82 final.
\textsuperscript{64} OJ No. C 295, 4 December 2009, p.1