MEIOR GUIDELINES

These guidelines are the product—and the result of the findings—of the MEIOR project. The MEIOR project investigates the concepts and structures of judicial scrutiny in the context of the European Investigation Order (EIO) to identify common minimum denominators and to address existing and potential future problems. The project combines systematic research on the law and practice of judicial scrutiny of investigative measures in EIO proceedings at both national and European level with the production of practice-oriented training materials and tools that offer a comparative view on the coordinates of the relevant forms of such scrutiny. It thus responds to the demand for increased knowledge on the instrument but also for improved, more uniform and more inclusive training for all legal professionals, mindful that this can only be achieved where there is sufficient understanding of procedural structures in other Member States.

The guidelines proffered herein are meant to improve the working of the EIO instrument in light of the findings of the legal and empirical study conducted and further consultation with relevant stakeholders. These guidelines are also intended as basis for training modules, where the suggestions here made are combined with case scenarios and discussed with the stakeholders. The MEIOR research shows that stakeholders seem on certain points to have different views depending on their role: while this circumstance is *per se* normal, it is important to make sure that the different views are shared and the different perspectives (and sensitivities) find moments of confrontation. This would suggest that some common moments of trainings are organized with stakeholders covering different functions (judges, prosecutors, lawyers, police officers).

The legal and empirical studies in the different countries show that the European investigation order experience is overall positive, in that the instrument has undoubtedly improved the level of cooperation, particularly when compared against the earlier cooperation frameworks. Nonetheless the study has brought to light a number of problematic issues, that should be addressed in order to improve even further the working of the instrument.

The choice was made to focus on a restricted number of guidelines, hence selecting the issues that have appeared to be most relevant in light of the practical working of the EIO instrument. It seems appropriate to focalize the attention on some more pressing issues, instead than tackling all possible small problems and improvements concerning the instrument. So that the attention is properly prioritized over some most relevant issues.

Moreover, it should be considered that a number of valuable suggestions over further points have already been made in earlier studies and in parallel evaluations, and it seems appropriate to avoid unnecessary overlapping with those reports and documents.

LIST OF GUIDELINES

- **G1: IMPROVE INDICATIONS AND MECHANISMS IN ORDER TO IDENTIFY COMPETENT AUTHORITIES IN OTHER MEMBER STATES.**

The EIO is a judicial order which can be issued by a judicial authority. The concept of judicial authority is different from that of the European Arrest Warrant (EAW), in that the request for cooperation is considered to be less sensitive for rights. For the EAW the European Court of Justice made clear that the issuing of the EAW requires a double layer system – internal decision and European warrant (ECJ, 1 June 2016, C-2421/15, N.A. Bob-Dogi, ECLI:EU:C:2016:385) – and that also the European warrant must be issued and forwarded by an authority that possesses a minimum degree of independence from the executive (ECJ, 27 May 2019, C-508/18 e C-82/19 PPU, OG and PI). The same level of independence is not required for the issuing of an EIO, as the same European Court has clarified that the concepts of 'judicial authority' and 'issuing authority', "include the public prosecutor of a Member State or, more generally, the public prosecutor's office of a Member State, regardless of any relationship of legal subordination that might exist between that public prosecutor or public prosecutor's office and the executive of that Member State and of the exposure of that public prosecutor or public prosecutor's office to the risk of being directly or indirectly subject to orders or individual instructions from the executive when adopting a European investigation order" (ECJ, 8 December 2020, C-584/19, A and Others, Staatsanwaltschaft Wien).

An important point concerns the need to increase the reciprocal knowledge of the authorities involved, starting from competent authorities and national contact points. Still today judicial authorities have sometimes difficulties in finding the right counterpart. Also, it is not infrequent that communicating authorities have doubts as to what kind of authority has contacted them (public prosecutor or judge). It appears therefore important to increase the reciprocal knowledge and the transparency on this point. This could be done, for instance, by increasing even more the visibility of the website of the European Judicial Network (EJN), particularly of the judicial Atlas (https://www.ejn-crimjust.europa.eu/ejn2021/AtlasChooseCountry/EN) and of the *fiches belges* (https://www.ejn-crimjust.europa.eu/ejn2021/FichesBelges/EN) there included. To this end, a simple reference in the Annex A to the EJN website (maybe even in a footnote) might help the issuing authorities find their way, particularly when the issuing of the EIO is not in the hands of centralized and specialized units, but left to the individual prosecutors within the country. At the same time, it is necessary that those digital instruments – particularly the *fiches belges* – be filled out and be kept regularly updated (as it was not always the case in the past).

Also, it would be useful if the forms A and B contained direct reference to the EJN – or other relevant institutional – website, where both authorities can find more information on their RESPECTIVE counterpart. An example of how the new form A could look like can be found here annexed (see annexed Form A). This guideline must then be tied with the following guideline G4.

Lastly, the receiving authorities should normally be required to redirect the EIO to the competent authority of the country, if they happen to receive an EIO for which they are not competent. Ideally, however, when they do so they should inform the issuing authorities of the internal retransmission of the instrument.

- **G2: PROPORTIONALITY CHECKS SHOULD BE STREAMLINED.**
- **G.2.1 Clear indications of the different types of proportionality**
- **G.2.2. Indications of the parameter to assess proportionality**

One of the issues that has arisen is the control on the proportionality. This control is to be done by the issuing authority (article 6 Dir. 2014/41) and it should not be second-guessed by executing authorities. During the empirical study a number of executing authorities have stated that they are not totally indifferent to the control carried out by the issuing state, meaning the following: although they would not refuse to execute an EIO on lack of proportionality, they would still consider if it is truly proportionate, and in some cases they might contact the issuing authorities to ask for clarifications.

While proportionality does not seem to pose any problems with regard to the execution phase, it remains nonetheless a concept quite difficult to interpret. The empirical research shows that issuing authorities have different ways to understand proportionality and how it should be assessed, and this even within the same jurisdiction. This leads to a certain level of inconsistency in the practical application, which is ultimately often lamented by defence lawyers.

In particular, what surfaced as uncertain and controversial are: a) the concept of proportionality; b) the variables to assess proportionality.

As to the first, it appears that there is at times confusion on whether proportionality of the EIO is the same as the proportionality for investigative measures to be ordered at national level. The question is whether proportionality should be measured only against the investigative/evidence-gathering measure that the authority wants to order, or whether it should also be measured against the issuing of the EIO, that is in light of the fact that judicial cooperation is triggered. In this respect it appears useful to distinguish between an internal proportionality and a cross-border proportionality.

Internal proportionality is the proportionality referred to the adoption of an investigative measure within the national domestic case. It is in other words the assessment of whether a certain investigative measure is truly necessary/useful considering the inherent features of that measure and the investigative needs. Cross-border proportionality refers instead to the need/opportunity to file a request for cooperation to another country, that is the need to have recourse to EIO.

It is suggested here to clarify the difference between internal proportionality (adoption of measure in domestic case) and cross-border proportionality (recourse to EIO). This could be done certainly at European level, although this would require a change in the European

instrument. However, this could also be done by means of a spontaneous harmonization at national level, following a soft-law guideline of the European Union.

Also, the clarification of the difference between the different types of proportionality should be accompanied by a clarification - at national and European Union level – of the elements of both, that is of the parameters to take into account when assessing each type of proportionality.

With regard to "internal proportionality" the suggestion is made to take into account the intrusiveness of the measure in light of fundamental rights, measured against the investigative needs, but also against the probability of obtaining a useful investigative result (that is, the probability of collecting useful/relevant information for the investigations) and the seriousness of the crime. It is acknowledged that in most cases the national rules of issuing States address these elements of proportionality with regard to specific measures. Indeed nothing prevents that the legislature introduces more specific forms of regulation with regard to some measures (where for instance the measure is allowed only for some specific crimes, or upon existence of some more stringent conditions). The intrusiveness of the investigations should clearly be pondered by considering the rights that are at stake (not losing sight of each of them, and also of the right to protection of personal data). It is however suggested that national legislatures also provide for a general rule on internal proportionality, if they have not done so.

The "European proportionality" is instead the proportionality of recourse to judicial cooperation. Such proportionality could be considered in light of the following questions-, is it warranted to request cooperation help from a foreign authority? Should first investigations at domestic level be exhausted?

It could be argued that in a fully developed area of freedom, security and justice, any analysis of European proportionality should be abandoned, in that investigations should freely take place across Europe. However, this is not the current state of the situation in Europe, as even the establishment of the European Public prosecutor has shown. In this respect it is suggested that European proportionality should still be considered when issuing the EIO.

It is acknowledged that in several countries such aspect of "European proportionality" is not expressly present in the rules, although stakeholders acknowledge that during training moments it is sometimes suggested to use the EIO instrument "sparingly". In some countries, it is questionable whether elements of the assessment of European proportionality (such as costs, or the time related to judicial cooperation) could not be taken into account. This leads to a confusing picture, not always conducive to the best use and working of the instrument. It is therefore proposed that an assessment of European proportionality be made, particularly when the collection of evidence abroad could have a viable alternative at domestic level, or when the costs and complexity of judicial cooperation mechanisms would be particularly high in light of the probability to gather some useful information for the case. The variables for the assessment of European proportionality should be clarified either in law (at European or national level), either in guidelines for the authority.

- **G3: STRENGTHEN RULES ON EIO REQUESTED BY THE DEFENCE.**

In many countries it was observed that the defence is put at a disadvantage when requesting to file an EIO compared to the position of prosecution authorities.

In this respect, a possible suggestion could be to establish a defensive right to request an EIO. Such an option might however be perceived as too far reaching in countries, such as Belgium, where the private parties do not have a right to obtain the collection of evidence during the investigations. Moreover, the introduction of a right for the defence to have an EIO issued would lead to bypassing the same assessment of proportionality (see *supra*, G2), at least insofar as the cross-border proportionality is concerned.

Overall it would seem more appropriate to pursue a less far-reaching approach, whereby the position of the defence is strengthened without introducing a full-fledged right to have an EIO is issued.

It is therefore advisable that clear duties are established for judicial authorities to refuse request coming from lawyers and clarify for what reasons in light of the proportionality analysis (see also above, G2).

- **G4: ISSUING AUTHORITIES SHOULD AFFIRM UNDER THEIR RESPONSIBILITY THAT THAT DOMESTIC REMEDIES AGAINST MEASURES EXISTENT AND EFFECTIVE.**

It is largely known that the *Gavanozov* judgments of the European Court of Justice have sparked large debate and created significant uncertainty over the issue related to the existence of adequate remedies against the measures requested with an EIO.

The logic of the EIO instrument follows the general division labor typical of mutual recognition instruments, whereby the challenges for substantive reasons must be brought before the issuing State, whereas the challenges concerning the execution of the measure can be taken before the authorities of the executing authorities. The latter picture makes clear how important is the existence of adequate remedies in the issuing State and it is therefore not surprising that the issue has come to the attention of the Court of justice.

In *Gavanzov I* (C-324/17) the Court held that "*Article 5(1) of the EIO Directive, read in conjunction with Section J of the form set out in Annex A must be interpreted as meaning that the judicial authority of a Member State does not—when issuing an EIO—have to include (within s.J) a description of the legal remedies available against the issuing of a European Investigation Order.*"

In *Gavanzov II* (C-852/19) the Court held that "*(a) Article 14 of the EIO Directive (as read in conjunction with Article 24(7) of the Directive and Article 47 of the CFREU) must be interpreted as precluding legislation of an issuing Member State which does not provide for any legal remedy against the issuing of an EIO, the purpose of which is the carrying out of searches and seizures and/or the hearing of a witness by videoconference; and (b) Article 6 of the EIO Directive (read in conjunction with Article 47, CFREU and Article 4(3), TEU) must be interpreted*

as precluding the issuing (by a component authority of a Member State) of an EIO (the purpose of which is the carrying out of searches and seizures and/or the hearing of a witness by videoconference) where the legislation of that Member State does not provide any legal remedy against the issuing of such an order."

These judgements have raised significant problems, particularly with regard to the type of control that the executing authority should exercise on the justice system of the issuing authority (see also *infra* G8).

First, it appears complicated to list legal remedies available in the issuing State in section J, as the description of available remedies is a complicated endeavor, which is connected to the general structures and coordinates of each system. In this respect section J should more clearly left to the indication of the sole case when remedies have already been filed in the issuing State (and to this extent a clarification should be done both in the text of the EIO as well as in annex A).

While it is indeed essential that issuing countries provide for adequate remedies against investigative measures, and that they check the existence of these remedies, it seems inappropriate for executing authorities to check adequacy of internal systems of redress of another country (the issuing State), also given that the concept of adequate remedy remains unclear in its connotations, and that there is no autonomous concept of remedy yet.

To simplify the above picture, the proposal is made to clarify in more explicit terms the duty of the issuing State to check the existence of adequate internal remedies. The proposal is therefore made that the issuing authority should state under its own responsibility in annex A that there are adequate remedies against the measure in the issuing country. Such a formal declaration could help relieve the executing State from an in depth control which would be highly impracticable (just like every control where a judge is required to control the validity and correctness of the foreign law).

The formal declaration of the issuing State as to the existence of adequate internal remedies would then allow to maintain a residual responsibility of the executing State as to the control on this issue, for cases where the executing authority happens to find out that there is a clear failure in the systems of controls of the issuing State.

- **G4.1 Clarify the concept of adequate domestic remedy against the investigative measure in the issuing State.**

As it will be clarified (*infra*, guideline G8), it should be the duty of the issuing authority to check that the internal system provides for a system of redress (that is, remedies) that is adequate and sufficient (on this, see point above). Nonetheless, such a scrutiny requires that clarity is made on what it entails to have an adequate domestic remedy against the investigative measure.

An important point is that a remedy should be a form of control by a judicial independent authority, which normally is to be understood a judge or a court (although it is not excluded

that other authorities are tasked with the control, as long as they possess equivalent features of independence). The ECJ has clarified the concept of independence "entails that the authority entrusted with the prior review, first, must not be involved in the conduct of the criminal investigations in question and, second, has a neutral stance *vis-à-vis* the parties to the criminal proceedings."(ECJ, 2 March 2021, C-746/18, H.K.).

A more controversial point is whether the adequate remedy should be a form of ex post scrutiny of the measure taken, or whether an adequate remedy could also be a control *ex ante*, as in cases where a judicial authorization is given before the taking of the act.

Literally speaking, remedy means "to cure" and it refers therefore to a control *ex post*. However, it is not to be excluded that an own stipulation is made, whereby the concept is extended to other forms of control (including forms of control *ex ante*).

Remedy and *ex ante authorization* – although they might possibly be functionally equivalent – should not be considered as synonyms, also to avoid confusions. Nonetheless, it is clear that the existence of a prior judicial authorization can have a significant influence on the need (and feature) of a subsequent remedy (for instance, in the sense of allowing a lighter/less tight control on the measure).

As a minimum approach, the legislature should clarify whether a proper judicial remedy is only *ex post* or also *ex ante*.

It is here however suggested that, despite the terminological difference, both controls (judicial authorization *ex ante*, or judicial remedy *ex post*) could be considered sufficient to ensure an adequate form of judicial review, as long as such judicial review is effective and carried out by an effectively independent authority.

With regard to a control *ex post*, it should be clarified whether this control – for it to be in line with the supranational case-law) should take place after the ordering of the measure, or whether it should be after the execution of the measure. In principle, when considering the case-law of the ECtHR, the latter option would be preferable. However, in the context of the EIO, where the execution of the measure takes place in a different country, the control on the execution is preferably carried out in the executing State (for a confirmation of a similar approach, but in the context of proceedings conducted by the European Public Prosecutor: ECJ, 21 December 2023, C-281/22, G.K. and others). Consequently, it could be a sufficient form of control if the measure in the issuing State is controlled only with regard to the existence of conditions necessary for the taking/ordering of the measure – regardless of whether this control takes place before or after the execution).

Next, there are two further issues that deserve clarification.

First, a crucial issue is establishing which investigative measures require a full judicial control. It is debatable in fact whether all investigative measures should necessarily undergo judicial authorization/control. Arguably only measure with a sufficiently high degree of intrusiveness/coerciveness should require a form of judicial control. It should however be

made clear that the interference of the measure against fundamental rights should be relevant only if it takes place at the moment of the taking of the measure (hence, with exclusion of cases in which the interference with fundamental rights would materialize only at the moment in which evidence is used during trial for the decision on the merits).

The second issue is whether "judicial control" – where required – could also consist in a delayed form of control towards the end of the investigative phase. In the Gavanozov II judgement the Court did not consider the exclusion of evidence at trial as a proper form of control. It is to be wondered whether a control on the investigations would be sufficient, that is a form of control which allows the judge to scrutinize investigative activities and take the necessary remedial action in case of violations. In order to avoid unnecessary stiffness it would appear that an overall investigative control on the lawfulness of the investigations could be considered a sufficient "judicial remedy".

- **G5: ESTABLISH THAT THE EXPIRY OF DEADLINES OF DIRECTIVES FOR RECEPTION OF ORDER AND FOR SENDING MATERIALS IS EQUIVALENT TO REFUSAL (UNLESS EXECUTING AUTHORITY HAS REQUESTED EXTENSION, OR AT LEAST INFORMED OF DIFFICULTIES)**
    - **G5.1: Establish mechanisms to provide for communication to Eurojust in cases of repeated inertia of one country.**

Very often it so happens that problems in cooperation within the EIO simply lead to the order not being issued or the follow-up not being pursued.

In this respect it would be very useful to engage the role of a body such as Eurojust. In order to improve efficiency and allow to map bilateral/multilateral problems of cooperation, it is suggested that the failure to respond within deadlines (without any communications being sent/received) should be treated as a refusal. This should be coupled with mechanisms investing Eurojust of the possibility to intervene in order to smoothen the problems.

It is clearly to be avoided that Eurojust national desks are overloaded with communications. At the same time, however, it is important for Member States to be able to map the cases of repeated inertia and to allow Eurojust to intervene. Moreover establishing mechanisms to communicate repeated refusals/delayed/missed reply to a central body such as Eurojust would allow to have a better understanding of the cases and reasons of failed cooperation at European level.

- **G6: CLARIFY SITUATION WITH REGARD TO SECRECY OF PROCEEDINGS**
    - **G6.1: Amend Annex A to include section on confidentiality of proceedings**

In the almost totality of cases EIOs are filled out during the investigations. Although in all countries investigations are secrets, the regime of secrecy of the investigations differs significantly. Moreover, the differences are even greater when investigative measures are taken during the investigations, which could interfere with the fundamental rights of individuals.

These differences can raise complications at the moment of the request and recognition of EIOs. In particular, the requested authority might be uncertain as to whether it must/can notify concerned people, and maybe even the suspect. In some countries it is the case that the recognition of the EIO entails that the suspect and their lawyer be informed, at least in some instances. This can raise significant problem with regard to the protection of confidentiality.

It is therefore here proposed that the issuing authority indicates in the request whether the ongoing proceedings are secret and to what extent they expect the secrecy to be protected. This could also be done by amending the current form A and clarifying the point over confidentiality.

At the same time there should be clearer rules as to when the EIO can be communicated to suspects/accused and their lawyers.

- **G7: ESTABLISH 'LIGHT' BUT CLEAR CONTROL AT THE MOMENT OF RECOGNITION**

Although executing authorities are aware that the controls on the proportionality of the EIO belong to the issuing authority, it should be further emphasized that executing authorities cannot control proportionality, but they can at best raise doubts as to possible manifest breaches of proportionality, and only with regard to the magnitude of interference with fundamental rights that the requested measure would cause in the executing measure.

Although the practice is already in the direction of a light control, it is suggested that the control on "equivalent measure" should be carried out lightly – meaning that notion of "equivalent case" should not be interpreted too strictly and it should not be measured considering all possible rules applicable in the executing country for the same facts. For instance a country could be satisfied that a measure is available in a similar domestic case if the measure would be available for a similar category of offence (and not necessarily for the same type of offence, or for the same facts).

- **G7.1. No remedies against recognition**

Only few countries provide for separate remedy against the decision of recognition. Nonetheless it should be clarified by the legislature that remedies against recognition are as such inappropriate, because they simply cause duplication and overlapping of controls without truly improving the safeguards.

- **G7.2: Improve transparency and controls on issuing authority**

One of the elements that the requested authority is supposed to control in the investigation order is whether the request comes from a competent foreign authority. Such control can at times be very simple (also in light of the larger concept of the EIO compared to the EAW), but it can nonetheless be problematic when the foreign issuing authority does not clarify its status in internal law (sometimes does not even translate its national name).

It is therefore suggested that steps are taken to allow the executing authority to control better whether request comes from a competent (and adequate) authority in light of ECJ case law. It is in particular that the issuing authority should briefly identify itself in form A. This could be done by simply amending form A, with a small addition, where the authority indicates if ti belongs to the judiciary, the prosecution or to other public offices. It could also be achieved by providing that the issuing authority mentions the internet resource where more information over its status can be found.

- **G8: CLARIFY CHECK OF EXECUTING AUTHORITY ON LEGAL REMEDIES IN THE ISSUING STATE**

It should be clarified that it is only the issuing authority that is competent for checking that adequate remedies are in place in the issuing State (see also guideline G4).

Executing state should not check existence of adequate domestic remedies in issuing State. Such a control is unworkable for the executing authorities, that do not have sufficient knowledge on the system. Also, a similar control would breach the very essence of mutual trust.

Similarly to the control on proportionality, the executing authorities should not be allowed to have a say on the existence of adequate remedies, once such existence is positively checked – and asserted – by the issuing authorities.

The only possibility for the executing authorities to cast doubts is in case of clear and evident doubts, which surface from objective external evidence. In these cases it should be possible for the executing authorities to contact the issuing authorities, raising some of the doubts surfaced from the objective evidence available. Such consultations should be conducive to either: a) dispel doubts on the effective existence of adequate and sufficient remedies at domestic level in the issuing State; or b) convince the issuing authority to withdraw the EIO; or c) induce the issuing authority to file a request for preliminary ruling before the European Court of Justice.

- **G9: RESPONSE OF THE EXECUTING AUTHORITY SHOULD BE STREAMLINED INTO A <u>STANDARDISED RESPONSE FORM</u> TO GIVE ISSUING AUTHORITY THE NECESSARY INFORMATION TO EVALUATE THE EVIDENCE TRANSMITTED**
  = <u>INTRODUCTION ANNEX E</u>

Although the functioning of the EIO seems apparently smooth also due to the reduced number of formalities, such relaxed approach can carry inherent and hidden dangers. One such danger is the lack of information on what has happened in the executing State at the moment of executing the request. Such lack of transparency is not entirely conducive to the best administration of justice. It is also not necessarily the best prerequisite for developing mutual trust, unless mutual trust is misconstrued as blind trust, or even worse indifference.

Moreover, the empirical findings show that there is significant disparity as to the way in which results are returned to the issuing State by the executing authorities.

Lastly, it sounds rather surprising that while the instrument contains a specific form for requesting a measure (annex A) and another for acknowledging receipt (annex B), nothing is foreseen for the moment of transmission of the evidence gathered, and this despite the fact that this represents a rather crucial moment, not only to guarantee the reliability of the evidence, but also to ensure that the request has been carried out fully and accordingly to what had been requested. It is in fact not infrequent that executing authorities simply send back the results without any accompanying information, indication, or explanation.

It seems conducive to a better working of the instrument that a form is introduced for this moment of transmission of the evidence gathered. The proposal is therefore made to introduce an "annex E" in order to provide for a standardised form of transmission of the evidence collected by the executing State.

Annex E should include a minimum of elements to ensure transparency on evidence collection process in executing State (eg. legal basis, brief description of activities) (see annex).

[…]

One of the options considered was whether annex E should have different versions, depending on the type of measure executed (eg. annex E for searches, annex E for seizures, etc.). For the time being it seems unnecessary to increase the possible complications by providing for multiple versions, also because the study shows that the categorization of investigative measures is significantly different from country to country. At European standardized level it is therefore suggested that only a general form be introduced. Nothing prevents the Member States to prepare however at internal level different forms for when they are requested of a search, a seizure, an interception, etc. (here keeping in account the internal categorization, which is the one relevant at the moment of execution of the measure, as the executing authority acts as if it was an equivalent internal case). Some standardized national forms in light of the different measures could be helpful to smoothen even more the working of th instrument in light of the suggestion here made.

[…]

- **G10: PROVIDE FOR A FORM OF CONTROL ON THE EVIDENCE RECEIVED TO ENSURE LAWFULNESS OF THE EVIDENCE AND GENERAL FAIRNESS OF THE TRIAL**
    - **G. 10.1 Avoid scrutiny of foreign evidence on the basis of foreign law**

A crucial element to improve the working of the instrument is to ensure that there is adequate control on the lawfulness of the evidence received. Unlike the EAW, the EIO entails three moments of control, the last being at the moment of receiving/using evidence on the part of the requesting State.

States however struggle with regard to the types of control that could be carried out. Part of these struggles refer to the lack of information on the entire process of evidence gathering, and particularly on how evidence was collected in the executing State (see in this respect G9). Other struggles have to do with the more general debate on the control of unlawful evidence, which does not end to spur controversy nationally and supranationally on the parameters that should be followed and on the rationales for excluding evidence that should be adopted.

It is known that even ECtHR leaves States mostly free to adopt their own evidentiary rules. Nonetheless some points ought however to be clarified.

The first is that the issuing (receiving) state should not (be allowed to) check the legality of the evidence on the basis of whether foreign law has been respected. Such an approach can be perceived as a significant interference in the sovereignty of another State. Moreover, it could contribute to weaken the level of mutual trust between States. Lastly, and most importantly – and similarly to what is noted about a possible control on adequate remedies in the issuing State – this control is largely unworkable as the national authorities lack the required knowledge and expertise to assess the respect of foreign law.

Second, some rationales should be excluded from the reasons on which basis foreign collected evidence should be excluded. This is in particular the case for the so called disciplinary rationales, whereby evidence is excluded in order to discipline the authorities that collected the evidence wrongfully. Such a logic and control should have no place in a system of interstate cooperation – there should be no discipline exercised on foreign bodies or authorities – even less when that system is based on mutual trust.

It is advisable to establish that the control on lawfulness of foreign evidence be carried out in light of general parameters of fairness of the procedure and respect of human rights (next to the inevitable control on the reliability of the evidence). It can therefore be suggested to ensure a control on fairness and legality of evidence on the basis of general standards of human rights protection, either grounded in national or supranational principles.