

The European Investigation Order in Portugal – Legal Analysis and Practical Dilemmas

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I. Introduction

This Chapter seeks to analyse the Portuguese legislative act that transposed Directive 2014/41/EU regarding the European Investigation Order (EIO) as well as the practical dilemmas associated with this novel mechanism. Thus, it is divided into two parts. The first part will consider Law no. 88/2017 that transposed the EIO-Directive into Portugal's legal order, while the second part will analyse the practical dilemmas associated with the implementing legislation from the perspective of the practitioners (judges, prosecutors, and police forces), as well as the Portuguese Bar Association and criminal attorneys.

II. Transposition

Law no. 88/2017 which transposes the EIO-Directive was adopted by the Portuguese Legislative Assembly – *Assembleia da República* – and published in the official journal – *Diário da República* – on 21 Aug. 2017, in accordance with Art. 119¹ and 161² of the Portuguese Constitution. The Directive was not implemented on time. On the contrary, the implementing legislation entered into force three months after the deadline established by Art. 36(1) EIO-Directive (i. e., 22 May 2017). However, no official reason was given for the delay.

The law that was adopted by the Portuguese national Legislative Assembly contains 50 Articles. In structural terms, it is divided into eight chapters that cover the following matters: a) general dispositions; b) procedure and guarantees relating to the issuing of an EIO; c) procedures and guarantees relating to execution of an EIO; d) dispositions relative to certain investigative measures; e) telecommunication

¹ Art. 119 Portuguese Constitution regulates the publication of all acts and states in section a) that all laws approved must be published in the official journal: *Diário da República*.

² Art. 161 Portuguese Constitution disciplines the legislative function of the Portuguese Parliament.

interception; f) temporary measures; g) legal remedies; h) transitional and final provisions.³

However, this analysis will not follow this specific structure. On the contrary, our analysis of the law that implemented the Directive will cover the various stages associated with the life cycle of an EIO that were identified by the EIO-LAPD Project consortium: drafting; transmission; recognition; execution; transfer.⁴

1. Drafting an EIO

The first stage in the life cycle of an EIO refers to the act of drafting the order. In other words, this section will consider problems associated with who can and in what circumstances can an EIO be issued.

According to Art. 5 of Law no. 88/2017 an EIO may be issued in certain types of proceedings/cases. The law states that an EIO can be issued in penal procedures that are initiated by a judicial authority or that can be initiated by that authority according to the internal legal order of the issuing State; procedures that can be initiated by judicial authorities relative to facts that are punishable under the law of the issuing State so long as the decisions can be appealed to a judicial body; proceedings that are initiated by administrative entities relative to facts that are punishable under the law of the issuing State; d) proceedings relative to crimes or other punishable acts involving the responsibility or punishment of non-human legal persons according to the laws of the issuing State.

An EIO can only be issued or validated if two conditions are met. These conditions are regulated by lines a) and b) of para. 1 of Art. 11 of Law no. 88/2017. The first one relates to the necessity, adequacy, and proportionality while the second one states that the investigative measure or measures requested must be capable of being ordered, in the same conditions, within the scope of similar national proceedings. Furthermore, section two states that these conditions are evaluated on a case-by-case basis.

The first condition leads the issuing authority to consider the principle of proportionality in an ample sense. Therefore, the flagrant denial of proportionality could be considered as a fundamental rights non-recognition ground in the sense that the national issuing authority must observe the law and the Portuguese Constitution. Proportionality is a principle that may be found in various norms of the Portuguese Constitution. Firstly, it is included in the principle of the rule of law, which is a fundamental principle of the Portuguese Constitution (see Art. 2 Portuguese Constitution). Secondly, fundamental rights restrictions must be necessary, adequate, and propor-

³ An analysis of the Portuguese law that transposed the EIO-Directive can be found in *Triunfante, L. L., Manual de Cooperação Judiciária Internacional em Matéria Penal* (Coimbra: Almedina, 2019), pp. 175 ff.

⁴ The EIO-LAPD Project is constituted by a group of seven institution based in six countries that were given a grant by the EU Commission.

tional (see Art. 18(2) Portuguese Constitution). Thirdly, administrative action is limited by the principle of proportionality (see Art. 266(2) Portuguese Constitution). Finally, police measures must be strictly necessary (i. e., they must be necessary, adequate, and proportional) (see Art. 272(2) Portuguese Constitution).

The question regarding the competent issuing authority is regulated by Art. 12 of Law no. 88/2017. According to this legal precept, an EIO can be issued by the national judicial authority that has the competence to steer the specific phase of the procedure. Secondly, an EIO can be issued by the national EUROJUST member. Thirdly, an EIO can be issued by the competent administrative entity regarding the violation of administrative rules. For example, the Portuguese Tax Authority – *Autoridade Tributária* – could issue an EIO. However, it would have to be validated by the State Prosecutor’s Office. In Portugal, the *Ministério Público* is the State Prosecution Office according to Articles 219 and 220 of the Constitution.

The national implementing law states that it is the national judicial authority that issues an EIO. This concept refers to the court, investigating judge or State prosecution Office and the competence to issue an EIO varies according to the specific phase of the criminal proceeding (i. e., inquiry/investigation, instruction; trial).⁵ Therefore, the police cannot issue an EIO relative to a criminal proceeding. The law also uses the concept referring to administrative agencies. These agencies can issue an EIO within the context of a proceeding relative to the violation of administrative rules. However, this emission/issue is only valid when the decision is susceptible of being appealed to a court of law and it must be validated by the State Prosecution Office.

The Portuguese legislator established a central authority in Art. 10 of Law no. 88/2017. The central authority in Portugal is the *Procuradoria Geral da República (PGR)*, a body/office within the State Prosecution Office (i. e., *Ministério Público*) which runs and oversees the magistrates (i. e., state prosecutors) that represent the interests of the State and any other interests defined by law according to Arts. 219 and 220 Portuguese Constitution.⁶ This Office is designated as the central authority to assist the competent judicial authorities in matters relating to the issuing and execution of an EIO. In addition, all EIOs issued and received by the competent national authorities must be communicated to the central authority. The State Prosecution Office is a body that administers justice and part of the judicial branch of power in Portugal.⁷ The Prosecutor or Attorney General is the highest-ranking magistrate and his/her Office is at the top/apex of the State Prosecution.

⁵ These constitute specific and separate phases in a criminal proceeding in Portugal. See *Antunes, M. J., Direito Processual Penal* (Coimbra: Almedina, 2017) and *Silva, G. M., Direito Processual Penal Português: Do Procedimento (Marcha do Processo)* (Lisboa: Universidade Católica Editora, 2018).

⁶ See Art. 18(5) of Law no. 88/2017.

⁷ On the constitutional provisions regarding the State Prosecution Office, see *Gomes Carnilho, J. J., Direito Constitucional* (Coimbra: Almedina, 7th edition 2003), pp. 684 ff.

However, there is a certain aspect of the State Prosecution Office that causes some concern. This aspect is tied to the appointment process regarding the Attorney/ Prosecutor General. According to lines m) of Art. 133 of the Portuguese Constitution, the Attorney General is proposed by the Government and then appointed/exonerated by the President.⁸ This designation process presupposes the trust and impartiality in the person appointed and that he/she is not susceptible to any type of pressure or political influence (i. e., instructions from the Minister of Justice).⁹ However, there are certain sectors of the legal doctrine that consider, especially in contexts of political harmony between the President of the Republic and the Government, that the precariousness of the position is notorious, as well as the risk of governmentalization, given the existence of real guarantees of stability. The political power appoints whoever it wants, renews the mandate if it wants and dismisses whenever it wants.¹⁰

2. Transmission

The channels of communication for the transmission of an EIO are regulated by Art. 13 of Law no. 88/2017. The general rule is found in para. 1 of Art. 13. It states that an EIO is directly transmitted by the issuing authority to the executing authority. The transmitting authority can resort to any means that allows for the conservation of a written document and in conditions that permit the scrutiny of its authenticity. The law also allows for the transmission of an EIO through the telecommunication system of the European Judicial Network.

3. Recognition

The question of recognition is disciplined in Art. 18 of Law no. 88/2017 relative to the recognition and execution of an EIO by the national authorities. The first section states that the executing authority recognizes without any additional formalities the EIO issued and transmitted by the competent authority of another Member State and guarantees its execution based on the principle of mutual recognition in the conditions that are applicable to the investigative measure if it would have been ordered by a national authority. Section two establishes that the executing authority respects

⁸ The President cannot appoint or exonerate without a proposal from the Government. However, he may refuse to appoint the candidate proposed. See *Miranda, J./Medeiros, R., Constituição Portuguesa Anotada: Tomo II Organização Económica, Organização Política, Artigos 80° a 201°* (Coimbra: Coimbra Editora, 2006), p. 385.

⁹ The designation process and other questions regarding the State Prosecution's autonomy and independence are examined in *Guimarães, A. P./Castilhos, D. S./Barata, M. S., 'O conceito de "autoridade judiciária de emissão" a partir dos Processos apensos C-508/18 e C-82/19 PPU (Caso Parquet de Lübeck) e eventuais ecos na Decisão Europeia de Investigação em Portugal', Revista Jurídica Portuguesa 28 (2020), 4–29, available at <<https://revistas.rcaap.pt/juridica/article/view/21638>>, accessed 6 January 2021.*

¹⁰ See *Fábrica, L. S., Autonomia e Hierarquia no Estatuto do Ministério Público* (Lisbon: SMMP – Sindicato dos Magistrados do Ministério Público, 2020), p. 61.

the formalities and the procedures expressly indicated by the issuing authority, except in the cases foreseen in the law that transposed the EIO-Directive, and as long as they comply with the preconditions and criterions in domestic law in matters relating to evidence within the context of similar national proceedings. To facilitate the recognition and execution of an EIO, section three states that the issuing authority may consult the executing authority by whatever means.

Art. 19 of Law no. 88/2017 answers the question regarding who the national executing authorities are in matters relating to recognition of an EIO. Section one establishes the general rule and states that the competence to recognize an EIO lies with the national judiciary authority that is competent to order the investigative measure in national territory in accordance with the law that regulates penal procedure, the laws relative to the organization of the judicial system, and the law that disciplines the status of the State Prosecution.

Under Law no. 88/2017 an EIO must be translated into the Portuguese language or any other official language of the European Union (EU) that Portugal has declared that it will accept. However, the law in question does not state what official languages of the European Union Portugal accepts. Consequently, English would not be accepted in urgent cases.¹¹ Furthermore, the lack of the necessary translation impedes the executing national authority to decide upon the recognition of the EIO and, consequently, the order must be sent back to the issuing State (Art. 20(3) of Law no. 88/2017).

The Portuguese legislator introduced time-limits for the recognition and execution of an EIO. Those time-limits are laid down in Art. 26 of Law no. 88/2017. According to section one of the legal precept in question, a decision on the recognition of an EIO cannot surpass 30 days. These are counted from the date of its reception. It also contemplates the possibility of a 30-day extension for the decision of recognition when the initial time-limit cannot be met. Section two adds that an EIO must be executed within 90 days. The law also imposes an obligation to inform the issuing authority regarding the reasons for the delay and consult about the time needed to render a decision. The law does not establish specific consequences if these time-limits are not respected. However, if the non-observation of the deadline/time limits is intentional and seeks to benefit or cause harm to someone, that action will generate criminal and civil liability. Furthermore, any intentional action can also generate disciplinary liability.

Art. 24 of Law no. 88/2017 regulates the motives or reasons for a delay. Section one states that the recognition or the execution of an EIO can be delayed for two reasons: a) during a reasonable time when the execution of an EIO can harm an ongoing investigation or penal action for a period that the executing State deems reasonable; b) when the objects, documents or data in question are being used in another case

¹¹ However, a Portuguese judge signalled a willingness to accept a legislative alteration that would accept an EIO in the English language in urgent cases so long as a translation would follow.

until they are no longer necessary. Section two establishes that the executing State shall immediately execute the EIO once the motive for delay no longer exists and informs the issuing State in whatever manner that permits the conservation of a written record.

4. Execution

Art. 19 of Law no. 88/2017 regulates the question regarding the national executing authority. The general rule can be found in para. 1 of Art. 19 that states that an EIO is executed by the national judicial authority that has the competence to order the investigative measure in Portuguese territory, in accordance with the laws that govern penal procedure (i. e., Portuguese Code of Penal Procedure), the laws relative to the organization of the judicial system, and the law that regulates the legal status of the State Prosecution Office. Therefore, the competence to execute depends upon the specific phase of the criminal proceeding (i. e., inquiry; instruction; trial). Under certain circumstances (i. e., the violation of administrative rules), an administrative entity may also execute an EIO after it has been recognized by the State Prosecution Office (Art. 19(8) of Law no. 88/2017). Lastly, the national EUROJUST member may also execute an EIO in certain circumstances (Art. 19(10) of Law no. 88/2017).

The Portuguese legislator applied all the non-recognition or non-execution grounds that are stated in Art. 11 EIO-Directive. The grounds can be found in lines/points a) to h) of para 1 of Art. 22 of Law no. 88/2017. These refer to:

- a) behaviour that is not classified as a crime in the executing State;
- b) immunity, privilege or legal norms that reduce the criminal responsibility in the area of the freedom of the press;
- c) a request that may harm essential interests relating to national security;
- d) the investigative measure is not allowed in national proceedings of a similar nature;
- e) *ne bis in idem* principle;
- f) extraterritoriality of the infraction;
- g) incompatibility with duties stemming from the observation of fundamental rights;
- h) the investigate measure is only admissible in the executing state for certain crimes or punishments with certain thresholds.

Furthermore, the Portuguese legislator applied the additional non-recognition or non-execution grounds provided for specific sensitive measures regulated in Art. 22–31 of Directive 2014/41/EU. These can be found in Art. 32 to 43 of Law no. 88/2017.

5. Transfer

The transfer of evidence is regulated by Art. 23 of Law no. 88/2017. Section one establishes that the executing authority transfers the evidence collected or in its possession to the competent authorities of the issuing State after it has been obtained. In addition, section two states that whenever it is requested in the EIO and if possible, according to the law of the executing State, the evidence is immediately transferred to the competent authorities of the issuing State that assist in the execution of an EIO according to Art. 27 of Law no. 88/2017. Section three establishes an exception. The transfer of evidence might be suspended until a decision is rendered on an appeal filed unless the issuing authorities indicate in the EIO that the immediate transfer of the evidence is essential for the progress of the investigation or the preservation of individual rights. The transfer can also be suspended if it causes serious and unreparable damage to the person in question. Finally, the executing authority may indicate if it wants the evidence back once it is no longer necessary for the issuing authority to keep.

6. Other Questions

The final section of this initial part of the article will deal with the role of the attorneys in the law that transposed the EIO-Directive and the consecration of specific legal remedies. In relation to attorneys, the Portuguese legislation that transposed Directive 2014/41/EU provides for the possibility of an EIO to be applied/requested by the defence. This possibility can be found in para. 4 of Art. 12 of Law no. 88/2017. An EIO can be issued at the request of a procedural subject, under the terms in which they may request the obtaining or production of evidence, in accordance with the law regulating criminal procedure. Therefore, the defendant can request an EIO for the purpose of his/her defence or the assistant (i. e., victim) for the purpose of supporting his/her position in the criminal proceeding as a procedural subject collaborating with the public prosecutor.

Once this request has been made in the investigation phase, depending on the type of measure that is requested, it may be granted or rejected by the prosecutor or will have to be authorized by the criminal investigating judge. For investigative measures that conflict with the fundamental rights of citizens, it is the criminal investigating judge who is competent, in the context of an investigation, to authorize them (Art. 17 of the Portuguese Code of Penal Procedure (CPP): the investigating judge is responsible for exercising all the jurisdictional functions until the referral to the trial, including Art. 268 of the CPP, which regulates the acts that are performed by the investigating judge and Art. 269 of the CPP, which disciplines the acts that must be ordered or authorized by the investigating judge during the investigation).

III. Practical Dilemmas: Data from the Issuing and Executing Authorities

Although the questionnaire was sent to judges, prosecutors, and police this section will consider the practical dilemmas from the point of view of the prosecution in Portugal since the research team received an extraordinary number of replies to its questionnaire (i. e., more than forty) from this specific category of practitioners.

The Public Prosecution Office answered that they have already resorted to an EIO in all of the phases mentioned in the questionnaire (i. e., preliminary investigative police phase; court/prosecutor investigation phase; in the trial phase; in the post-trial phase). However, most of the replies indicated that the EIO is especially used in the court/prosecutor investigation phase.

The Public Prosecution also replied that they are familiar with Council Framework Decision 2006/960/JHA on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union (EU). The replies received from the State Prosecution Office indicate that this mechanism has been used by a minority of magistrates. The answers also suggest that the exchange of information can be useful to confirm information that might be useful to issue an EIO (for example: suspect's location) and then determine a person's formal status and official questioning. It is not an alternative to an EIO, since the information obtained through this mechanism cannot be used as evidence in the case. It (i. e., evidence) can only be used within the context of an international judicial cooperation through an EIO or mutual legal assistance.

1. Issuing an EIO

As we have already stated this article will analyse the replies obtained from the Public Prosecution Office from the perspective of the life cycle of an EIO. The first phase deals with the issuing of an EIO, and the next paragraphs will consider questions related to the following issues: EIO form, formalities, confidentiality, assistance in another Member State, double criminality, and court orders.

The Public Prosecution Office replied that they had never encountered problems with the EIO form as an issuing authority nor experienced a refusal of their EIOs due to difficulties with the form. Furthermore, the Office noted that the form is quite simple to fill out in most cases.

The next question that was asked was related to the request for additional formalities to be executed within the context of an EIO. The replies received from the State Prosecution Office are varied. Some magistrates have never requested specific formalities to be fulfilled by the executing authority while others replied in the affirmative. These relate to the formalities consecrated in the Portuguese Code of Penal Procedure in the following situations: formal status of the person accused (Art. 58 CPP); declaration relative to identification and residence (Art. 196 CPP); warning connect-

ed to victims of domestic violence that have the right not to make any formal statements (Art. 134 CPP); wiretap formalities (Art. 188 CPP); the questioning of the accused by a magistrate from the State Prosecution Office and its use during the trial phase (Art. 143 CPP); the right of a witness to remain silent (Art. 132 CPP); presence of an attorney during the interrogation of a defendant that is less than 21 years of age (Art. 64 CPP).

One of the replies indicated that two EIOs had been requested to be executed in synchronicity for tactical reasons. The reply also indicated that the Portuguese central authority was asked to articulate the matter with the executing authority of the other Member State.

A third question that was raised in connection to issuing an EIO related to confidentiality. Most of the replies received from the Public Prosecution Office indicate that the magistrates do not provide a justification for not revealing a measure to the suspect. Furthermore, the Office noted that Art. 30 of Law no. 88/2017 disciplines confidentiality and establishes that the national executing authority guarantees, in accordance to the law, the confidentiality of the facts and the content of the EIO, except for what is necessary to carry out the investigative measure. Furthermore, the provision states that the national executing authority shall inform, without delay, the issuing authority, if it is not possible to assure the confidentiality of the facts and content of the EIO. However, the Office added that the most relevant question, in the absence of any reference to the concept of confidentiality regulated in the Portuguese Code of Penal Procedure, is whether the confidentiality referred to in the law that transposed the EIO-Directive is equivalent to the national/domestic procedural concept of secrecy of justice, and whether the State Prosecution Office must therefore always obey these internal rules. Assuming it is, because it makes sense in the context of criminal investigation, the State Prosecution Office, as executing authority cannot violate the confidentiality of an EIO, and should always consider that the EIO is covered by secrecy, applying, consequently, the rules consecrated in Art. 86 and subsequent provisions of the Portuguese Code of Penal Procedure.¹² This will be the case, unless such a system of confidentiality is expressly dispensed by the issuing authority, or if the case is in a procedural stage that does not admit secrecy/confidentiality, as in the case of the trial phase. In the latter case (i. e., a phase that isn't secret/confidential), Portugal, as the executing authority, should, according to the State Prosecution Office, mention this internal legal circumstance to the issuing authority. Similarly, Portugal, as the issuing authority, should also state its position relative to the evidence to be obtained and issued via an EIO (i. e., if it is to be covered by the secrecy of justice or not). Furthermore, the Office added that the confidentiality/secrecy rules do not apply to information relative to any appeal that must be given and the options available to the defence to challenge the investigative measures or challenge the material justifications underlying the issuing of an EIO to guarantee fundamental rights (see Art. 45 of Law no. 88/2017 and Art. 14 EIO-Directive).

¹² Art. 86 CPP regulates the publicity of the criminal proceeding and the secrecy of justice.

A fourth question relates to the possibility of issuing an EIO for an investigative measure to be conducted in another Member State without its assistance. The replies received from the Public Prosecution Office indicate conflicting positions. Some magistrates stated that they would issue an EIO for an investigative measure conducted in the executing State where no assistance of the executing State is necessary while others answered negatively. However, there is little or no experience with such EIOs. The Office also stated that this is a way it can conduct wiretaps and it has the advantage of applying Portuguese wiretapping rules/formalities. The application of the rigorous formalities consecrated in the Portuguese Code of Penal Procedure are a source of some problems for the executing authorities.

A fifth question related to the problem of double criminality. All the magistrates from the Public Prosecution Office answered that they never had an issue regarding double criminality as the issuing/executing authority.

A final question related to the possibility of issuing an EIO without a court order. The vast majorities of the replies received from the State Prosecution Office answered that it would always request authorisation/court order before it would send an EIO if a court order is necessary for a certain measure in Portugal. However, a few magistrates replied that they would send the EIO without the court order.

2. Transmission

The Public Prosecution Office replied that they use the electronic forms and consult the EJM webpage. In most cases, EIOs are sent through e-mail.

3. Recognition

The third phase of the life cycle of an EIO refers to recognition. This specific section of the article will consider two problems. The first relates to the time frame or time limits regarding recognition and the second will analyse the grounds for non-recognition of an EIO.

Most of the replies received from the Public Prosecution Office answered that the timeframe for the recognition and execution of an EIO is adequate and does not constitute a problem. However, the Office also referred that some Member States do not comply with the deadlines (i.e., slow in their response).

In addition, three questions covered the grounds for non-recognition. The first one involved fundamental rights. All the replies received from Public Prosecution Office indicate that as an issuing/executing authority it had never experienced the use of fundamental rights as a non-recognition ground.

The second one referred to the application of the principle of *ne bis in idem*. The answers received from the Public Prosecution Office indicate a varied approach to *ne bis in idem* as a non-recognition ground. Some replies indicate an unwillingness to

invoke this ground while others clearly indicate that the magistrate will invoke the *ne bis in idem* non-recognition ground if the legal criteria are met. However, in the opinion of one magistrate the principle exists regarding judicial decisions that are definitive on the guilt of the accused and not in the investigative phase. Furthermore, it might not be easy to determine that the cases are the same.

The principle of proportionality was also the object of a question regarding the recognition of an EIO. The answers obtained indicate a varied response to this question from the State Prosecution Office. Some magistrates answered that they would not use proportionality as a non-recognition ground while others replied in the affirmative and tied their position to the observation of fundamental rights.

One magistrate noted that this principle (i. e., proportionality) does not constitute a ground for the non-recognition of an EIO according to the EIO-Directive¹³ and the national implementing legislation.¹⁴ Concretely, proportionality considerations pertain to the first phase of the life cycle of an EIO: issuing. Therefore, proportionality should not be considered in the recognition phase and alerts to the risks associated with the double assessment of this principle since this might constitute a step backwards in international cooperation in criminal matters which is contrary to the objectives of the EIO-Directive.

4. Execution

The execution of an EIO also generates specific problems. This section will analyse the replies referring to the EIO form, alternatives to the investigative measure requested, use of an EIO for non-evidentiary purposes, and the verification of the issuing authority.

The overwhelming majority of the replies received from the Public Prosecution Office indicate that they have not encountered difficulties with the EIO form in the execution phase. However, a small number of replies mention the following situations: lack of clarity; fields that are repetitious; problems with the quality of the translations; absence of essential information or necessary documents. In most of these cases, these difficulties have been resolved easily through direct consultation with the colleague. If necessary, magistrates can also resort to the European Judicial Network and/or Eurojust. In addition, one reply stated that an EIO was not executed since there were doubts in relation to the alleged criminal act.

Most of the replies from the State Prosecution Office indicate that the magistrates would probably refuse the EIO and that an alternative investigative measure would have to be found. Furthermore, the Office resorted to section one of Art. 21 of the law that implemented the EIO-Directive that refers to alternative investigation measures. The provision states that if the investigative measure does not exist in the law of the

¹³ See Art. 11 EIO-Directive.

¹⁴ See Art. 22 of Law no. 88/2017 that transposed the EIO-Directive.

executing State, or if it is not admissible in a similar national case, the executing authority shall resort, whenever possible, to a different investigative measure than the one indicated in the EIO.

A third question was related to the use of an EIO. Most of the answers received from the Public Prosecution Office state an EIO would be refused if it is obviously intended for non-evidentiary purposes. However, a magistrate noted that this position depends upon what is requested and if it comes in an isolated form. In addition, he added that he would adopt a pragmatic and practical approach and provided the following example: if an EIO is issued for the interrogation of a suspect and the notification of a certain document (formal charge), he did not see any problem in executing the two even though the notification is not an investigative measure.

The concept of issuing authority and its verification in the execution phase was the object of a specific question. The State Prosecution Office replied that one should verify the issuing authority to confirm that it emanates from a magistrate, and this also applies for the validation of an EIO. The Office also sustains that one should accept an EIO when issued by a magistrate from the State Prosecution. This position is in line with the Advocate General's opinion – Manuel Campos Sánchez-Bordona – in the conclusions relative to the preliminary reference procedure in Case C-584/19.¹⁵

Finally, a specific question regarding the request of a court order was also raised. Most of the magistrates from the State Prosecution Office answered that they would request authorization/court order before they would execute an EIO if a court order is necessary for a certain measure in Portugal.

5. Transfer

The last phase in the life cycle of an EIO refers to the transfer of evidence and a specific question was posed relative to the use of the evidence obtained through an EIO in other cases/proceedings.

The answers received from the Public Prosecution Office are varied. Some magistrates replied in the negative while others stated that evidenced obtained under an EIO can be used for other purposes and invoked Art. 23 of the law that transposed the EIO-Directive in Portugal. One answer indicated that the only prohibitions that exist in relation to the transfer of evidence in Portugal relate to wiretapping. This is probably because this type of investigative measure must be authorized because of its coercive nature and constitutes a significant restriction of fundamental rights, namely the right to privacy (Art. 26 Portuguese Constitution) and the inviolability of communications (Art. 34 Portuguese Constitution). Furthermore, it can only be used when no other investigative measure can prove the criminal conduct. Consequently, author-

¹⁵ ECJ, Opinion of Advocate General of 16 July 2020, C-584/19 (*Staatsanwaltschaft Wien*), ECLI:EU:C:2020:587.

ization is granted on a case-by-case basis and the evidence obtained cannot be used in other proceedings.

6. Other Question: Evidence And Legal Remedies

This last section will consider questions referring to evidence and legal remedies.

The Public Prosecution Office replied that they did have experience with the video conference as a tool for cross-border gathering of evidence. In addition, the Office stated that video conference is used in the trial phase to hear witnesses and that the equipment is adequate. However, this cannot be used for the accused outside of Portugal because this is prohibited by the Portuguese Code of Penal Procedure, which according to the Office is outdated and conflicts with the content of the Directive.

The overwhelming majority of the replies received from the State Prosecution Office indicate that the magistrates have not encountered any problems specific to digital evidence. Furthermore, the answers provided indicate that they would not use an EIO to order the disclosure of traffic telecommunication data of a suspect in an executing State if their own national system did not provide for a data retention system. In addition, the Office offered the following observation: the answer to this question may vary depending upon if the investigative measure exists in Portugal or if we are dealing with an inefficiency of the system or if the system prohibits a certain type of evidence. The Prosecution cannot circumvent a national prohibition by asking for it in another Member State that admits it.

A final question referred to legal remedies. The State Prosecution Office never encountered a case in which the suspect/accused made use of the legal remedies against the EIO.

IV. Practical Dilemmas: Attorneys

This section will cover issues relating to certain phases of the life cycle of an EIO from the perspective of the attorneys¹⁶ in Portugal who practise criminal law and answered a specific questionnaire regarding practical dilemmas. Concretely, the following phases of an EIO were considered: issuing, recognizing, executing, and the transferal of evidence. In addition, it analyses specific problems relating to the additional costs that will be incurred by the accused because of an EIO and issues relating to the EIO form.

¹⁶ A definition of an attorney is not provided in the Directive 2014/41/EU regarding the EIO in criminal matters. For the purpose of this questionnaire, an attorney is a legal professional who is legally qualified and licensed, according to national law, to represent a suspect/defendant in any types of proceedings for which an EIO can be issued according to Art. 4 Directive 2014/41/EU.

1. Issuing an EIO

The first question that was posed to the participating attorneys related to the legal norm foreseen in the EIO-Directive and the national implementing legislation that regulates a request for an EIO made by the defence (Art. 12(4) of Law no. 88/2017). This question received different answers. On the one hand, the President of the Portuguese Bar Association replied that, as an attorney, he has never requested the issuing of an EIO because it has never been necessary. However, other attorneys replied that they have requested an EIO and that it was issued. In Portugal, an attorney cannot issue an EIO. It must be requested and there is no specific procedure. The request is made to the person/entity that has the competence to steer the criminal proceeding in a particular phase: judge; investigating judge, and the prosecuting magistrate. The issuing authority can only issue an EIO if it complies with the following conditions: the EIO is necessary and proportional considering the type of case and bearing in mind the rights of the suspect or the accused; the investigative measures indicated in the EIO can be ordered in the same conditions in a similar domestic/national case.

According to the answers received, the problems associated with these requests lie with the slow response from the executing authorities, translation, and the impossibility of participating in the collection of evidence in the executing State due to financial constraints. Another relevant problem is tied to the understanding adopted by several courts which sustains that there is no legal basis to support the hearing of the accused via video conference in the trial phase. A final issue that was mentioned is tied to the difficulty connected with an appeal relative to the decision that does not authorize the issuing of an EIO.

A second question regarding this specific phase of the life cycle of an EIO pertains to the potential challenge of the decision to issue. The President of the Bar Association indicated that as an attorney he has never challenged an EIO in the issuing State (i. e., other Member State of the European Union). A similar response was given by other attorneys. In respect to possible problems connected to the legal challenge in the issuing State, the attorneys mentioned the speed of the procedure and the enormous costs.

A third question considered the possibility of challenging the decision to issue an EIO in Portugal. The President of the Portuguese Bar Association indicated that as an attorney he would resort to a written request or an appeal in accordance with the Code of Penal Procedure to challenge the procedures and or decision to issue an EIO. Another attorney indicated that the violation of the principle of proportionality and the non-observation of specific formalities would constitute grounds for a challenge in the Portuguese legal system. Furthermore, a violation of fundamental rights would also substantiate a challenge relative to the issuing of an EIO.

2. Recognition

Recognition is the third phase in the life cycle of an EIO. The decisions made in this specific phase are also susceptible of being challenged. In Portugal, attorneys can challenge an EIO in the recognition and execution phase through a complaint, an appeal or solicit a hierarchical intervention combined with the suspension of the execution of the investigative measure in accordance with the Code of Penal Procedure. Appeals filed in accordance with Art. 407 and 408 of the Code of Penal Procedure have a suspensive effect. The formal validity of an EIO and its conformity to EU law and the concrete application of the grounds relative to non-recognition or non-execution of an EIO referred in the Directive and transposed by the national law can substantiate the challenge against the EIO in this particular phase. A violation of fundamental rights also constitutes a ground for challenging an EIO in both the recognition and execution phases.

3. Execution

Execution comes after recognition and constitutes the fourth phase in the life cycle of an EIO. The attorneys that replied to the questionnaire never challenged an EIO in the executing State (i. e., another Member State of the EU). A specific reply stated that as an attorney she would never interfere in an EIO in an Executing State without the collaboration of a local attorney to avoid any question relating to ‘malpractice’. The answers from the Portuguese attorneys also pointed out to the potential problems related to this type of challenge: speed of the proceeding and the lack of legal requirements in the Portuguese legal system that are not foreseen in the executing State.

A specific question relating to the grounds for a potential challenge related to the principle of proportionality. The President of the Bar Association stated that he would challenge an EIO in the executing State based on proportionality. Another attorney who answered the questionnaire stated that proportionality could be used to challenge the grounds for issuing an EIO if the principle was not considered or the concrete application/consideration of the principle in the context of issuing an EIO. The attorney in question also pointed out to the fact that there is no harmonized concept of proportionality in the EU.¹⁷ In addition, the President of the Bar Association also stated that he could question the reasons/motives behind the issuing of the EIO. As an attorney he could consult with the executing authorities (national) and the issuing authority (foreign) to obtain additional data if the information provided in the EIO form was not enough to make that evaluation. In Portugal, an attorney can challenge an EIO through a written request or appeal in accordance with the Code of Penal Procedure.

¹⁷ See Ramos, V. C., ‘Meios Processuais de Impugnação da Directiva Europeia de Investigação – Subsídios par a Interpretação do Artigo 14º da Directiva com uma Perspectiva Portuguesa’, *Revista Anatomia do Crime* 7 (2018), 113, 127 ff.

Another specific question relating to the grounds for a potential challenge related fundamental rights. The President of the Portuguese Bar Association as well as other attorneys indicated that they would challenge an EIO in the executing State based on a fundamental rights violation. Furthermore, an attorney can consult the executing authority (national) and the issuing authority (foreign) to obtain additional data if the information provided in the EIO form is insufficient to make the assessment. An attorney can resort to a written request or an appeal to challenge the EIO in accordance with the rules established in the Code of Penal Procedure.

4. Evidence

Evidence was the object of several questions that made up the questionnaire. The first one related to challenging the legality of the evidence gathered with an EIO in a criminal procedure. The responses obtained indicate that the attorneys had never challenged the evidence collected with an EIO in a criminal procedure.

A second question pertained to the possibility of arguing for the automatic exclusion of evidence if the accused was successful with his legal remedy in the executing State. The President of the Bar Association stated that as an attorney he would be able to argue for the automatic exclusion of evidence from the criminal procedure in the issuing State if the accused would be successful with his legal remedy in the executing State (legal remedy in the executing State did not suspend the execution of the investigation measure). This position was also expressed by other lawyers. However, they noted that it depends upon the type of violation. Success is not guaranteed. In Portugal, an attorney would probably have to invoke Art. 32 of the Portuguese Constitution (guarantees in criminal proceedings) and Art. 126 of the Code of Penal Procedure (prohibited methods of gathering evidence) to exclude the evidence. Furthermore, an attorney from Lisbon pointed out that European rules are needed to regulate this question because the EIO-Directive leaves this question to the legal order of the Member States.¹⁸

A related question connected with the previous one and tied to the possibility of changing the preceding judge because he/she could be excluded at a later stage in the proceedings received contradictory responses. On the one hand, an attorney answered that he could request a change in the preceding judge because he could be able to access evidence which could be excluded at a later stage in the proceeding. On the other hand, other attorneys manifested some reservations with this course of action and stated that this was not possible in Portugal.

A third question related to evidence revolved around the destruction and return of evidence to the executing State by the issuing State. The President of the Bar Association indicated that as an attorney he was able to ensure that the evidence is destroyed or returned to the executing State by the issuing State if the accused is suc-

¹⁸ See *Ramos* (n. 17), p. 166.

cessful with his legal remedy in the executing State. Other attorneys indicated that they could not guarantee the destruction or return but were willing to try.

A fourth question related to the use of video conference and received mixed replies. The President of the Bar Association stated that he did not have any experience with video conferences as a tool for cross-border gathering of evidence. However, other attorneys indicated that they did have experience with a video conference as a tool for cross-border gathering of evidence. For example, an attorney in Lisbon requested an EIO to hear witnesses that resided in Germany during the trial phase and pointed out to various problems with the video conference such as: translation; scheduling; slow response from the authorities; no prior equipment tests and equipment incompatibility.

A fifth and final question referred to digital evidence and the replies received indicate that attorneys in Portugal did not report any problem regarding the EIO specific to digital evidence.

5. Other Questions

The last subsection of this specific part of the article will deal with two problems relating to the additional costs for the accused associated with an EIO and potential problems with the EIO form.

The President of the Bar Association stated that the decision made by the issuing authority to issue an EIO adds costs to the accused and these depend upon various factors such as the country and language. These costs can run up to several hundred euros and include the additional costs related to translation and knowledge of foreign legal systems. Other attorneys referred to other factors. These relate to the attorney that would defend the accused in the issuing State would have to have a knowledge of a foreign language (for example: English); knowledge of EU law; contacts with lawyers in other Member States; the accused would have to hire a lawyer in the executing State; travel costs for the lawyers involved; translation costs. These could run into several thousand euros.

Lastly, there was a question regarding the EIO form found in the annex of the Directive and the national implementing legislation. The President of the Bar Association stated that as an attorney he has not found any problem with the EIO form regarding the information provided by the issuing/executing State. A similar position was expressed by other attorneys.

V. Conclusion

Four years have passed since the adoption of Law no. 88/2017 that implemented Directive 2014/41/EU regarding the European Investigation Order (EIO) in Portugal.

The answers obtained from the State Prosecution Office relative to the the national/internal implementing legislation have led the authors of this article to conclude that the Portuguese law has not generated any significant/major legal controversy.

This conclusion is also supported by the position expressed by the Judicial Police ('Polícia Judiciária') in Portugal that replied to our questionnaire and stated that there have been no difficulties in the process of implementing the law that transposed the EIO-Directive within the context of their specific competences and responsibilities. In addition, this police entity stated that the communication with the competent judicial authorities and with Eurojust is splendid.

Similarly, the lawyers who replied to the questionnaire did not raise significant concerns relative to the national implementing legislation. However, some replies indicate that there is room for improvement in the process of issuing and executing an EIO. Furthermore, there is a need to adopt uniform definitions and rules regarding particular aspects of the EIO, namely the principle of proportionality and rules regarding the exclusion of evidence.

In conclusion, the judicial and police entities that have to deal with the various phases connected to the issuing/executing of an EIO in Portugal have not provided criticisms that call for any major/significant legislative alteration. However, some judges and attorneys have expressed a need for minor revisions and clarification of particular aspects of the EIO at the European level.