



**Briefing on the European Investigation Order
For Council and Parliament
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Introduction and Summary

1. JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is also the British section of the International Commission of Jurists.
2. Belgium, with the support of a number of member states, has presented a proposal for a European Investigation Order (the Initiative).¹ The proposal follows the commencement of a European Commission consultation process, in light of a new mandate in Article 82(2) Treaty on the Functioning of the European Union (TFEU) to establish minimum rules to facilitate mutual recognition concerning the mutual admissibility of evidence between Member States. The Commission issued a Green Paper in November 2009 in relation to streamlining the mechanisms of obtaining evidence and the obstacles to admissibility of that evidence in cross border criminal cases in the European Union.²
3. There are a number of instruments currently in force which attempt to provide a framework for evidence gathering.³ These are fragmentary and repetitive. They slow the investigatory and prosecution process in confusing procedural rules. JUSTICE published an article⁴ at the end of 2009 examining the different mutual legal assistance and mutual recognition instruments, and concluded that it was necessary to produce a comprehensive, legally binding instrument which could provide the

¹ The Kingdom of Belgium, the Republic of Bulgaria, 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*, Council of the European Union (hereafter Council), 9145/10 (Brussels, 29 April 2010)

² COM(2009) 624 final (Brussels, 11 November 2009)

³ Council of Europe Convention on mutual assistance in criminal matters 1959 ETS No. 030, supplemented by its additional protocol of 1978, ETS No. 099, the second additional protocol of 2001, ETS No. 182; the Benelux Treaty of 1962; the Schengen Implementing Convention of 1990 OJ L 239 of 22.9.2000; and the Convention on mutual assistance between the Member States of the EU 29.05.2000, OJ C 197 of 12.7.2000. Many provisions of the convention are similar to those included in the second additional protocol of 2001 to the 1959 convention, ETS No. 182, which some of the Member States also ratified, and the additional protocol from 2001 OJ C 326 of 21.11.2001, Council Framework Decision 2008/978/JHA of 18th December 2008, on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350 of 30.12.2008, p. 72. Bilateral treaties also exist.

⁴ J Blackstock, 'Mutual legal assistance vs mutual recognition?' *JUSTICE Journal* [2009] 2, 41

definitive framework to criminal investigation in cross border matters in the European Union.

4. We welcomed the Commission consultation on this issue in our response to the Green Paper. However, we also expressed caution that there is a real and serious risk of any new instrument simply continuing the trend of previous mutual recognition and legal assistance instruments of inadequately considering the position of the suspect, in an effort to improve efficiency. The rights of the suspect are more important than ever if comprehensive, streamlined cross border evidence collection and usage is to be embarked upon. We continue to consider it imperative that the procedural safeguards under consideration in the Swedish Presidency's Roadmap⁵ should be adopted before any further integration of prosecution mechanisms. Equally, the impact upon complainants and witnesses of cross border law enforcement agencies must not be underestimated and the continuing work in relation to victims and witnesses⁶ must have progressed to a satisfactory stage before witness evidence is requested through mutual recognition arrangements. The Belgian Initiative does nothing to allay these concerns.

5. This briefing is intended to highlight JUSTICE's main concerns regarding the initial draft of the Initiative. Where we have not commented upon a certain provision that should not be taken as an endorsement of its contents. In particular we consider that:
 - **The submissions to the Commission's consultation process should not be ignored in the negotiations on the member state initiative;**
 - **Legal basis should be grounded in article 82(1)(a) TFEU;**
 - **Since the instrument is intended to cover wide ranging evidence requests on a mutual recognition basis, judicial scrutiny at both the issuing and executing stage is imperative;**
 - **A necessity and proportionality test is required, as in the EEW;**
 - **Grounds for non-recognition should encompass those set out in the EEW and fundamental rights;**

⁵ *Resolution of the Council on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings*, Council of the European Union, 15434/09 (Brussels, 24 November 2009).

⁶ See Commission report pursuant to Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA), COM(2009) 166 final of 20 April 2009, concluding that the instrument is disappointingly still not implemented in many member states, and current consultation process.

- **Legal remedies cannot be effective unless a structure is provided in which representations can be made;**
- **Data must be protected in accordance with article 8 ECHR and article 7 EU Charter, and the data protection framework decision should be referred to in the Directive;**
- **Additional safeguards are required for particular special provisions**

Mandate

6. The Stockholm Programme identified the need for action in this area:

Para 3.1.1 “criminal law”: The European Council considers that the setting up of a comprehensive system for obtaining evidence in cases with a cross-border dimension, based on the principle of mutual recognition, should be further pursued. The existing instruments in this area constitute a fragmentary regime. A new approach is needed, based on the principle of mutual recognition but also taking into account the flexibility of the traditional system of mutual legal assistance. This new model could have a broader scope and should cover as many types of evidence as possible, taking account of the measures concerned.

7. The European Council went on to invite the Commission to:

- propose a comprehensive system, after an impact assessment, to replace all the existing instruments in this area, including Council Framework Decision 2008/978/JHA of 18 December 2008 on the European Evidence Warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, covering as far as possible all types of evidence and containing deadlines for enforcement and limiting as far as possible the grounds for refusal,
- explore whether there are other means to facilitate admissibility of evidence in this area

8. The Commission embarked with expediency upon this consultation exercise, receiving many responses⁷ and is progressing towards an impact assessment on the effect of widening the scope of EU mutual recognition in this area. Whilst the mandate is available for member states to present initiatives in this area, the Belgian Initiative appears to have ignored the Commission process. However, perhaps in recognition of the importance of the impact assessment, a detailed statement was published on the 23rd June⁸ detailing the basis for the Initiative.
9. We urge the member states to refer to the consultations posted upon the Commission website during their working party deliberations. There are many eminent authorities represented here, with sensible and cautionary legal analysis which ought not to be wasted by the interjection of the Initiative. The Commission has helpfully summarised the responses received in a four page document, also available on the website.⁹

Preamble - Legal Base

10. The instrument is based in Article 82(1)(a) TFEU which provides that measures shall be adopted to '*lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions*'. We consider that article 82(1)(a) is the appropriate basis for the instrument since a judicial decision should be taken in order for an EIO to be issued. Whilst the request is to facilitate the investigation of an offence, the specific request is for a particular type of evidence to be obtained. The decision to seek that particular evidence should be made by a judicial authority. For example, in the UK, a search order and many other types of evidence gathering must be authorised by a magistrates' court. We would expect the same authorisation for an EIO, in order for the request to be verified.
12. However, some of the measures envisaged in the Initiative will engage cooperation between police forces rather than judicial authorities and it is not clear how they can fit within the same legal basis, such as controlled deliveries, interception and surveillance. The circumstances in which these measures will be appropriate do not

⁷ All, including JUSTICE's submission, are accessible on the Commission website,

http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_0004_en.htm

⁸ Council, *Detailed Statement*, 9288/10 ADD 2 (Brussels, 23 June 2010).

⁹ *Summary of the Replies to the Green Paper on Obtaining Evidence in Criminal Matters from one Member State to another and Securing its Admissibility*, http://ec.europa.eu/justice_home/news/consulting_public/0004/summary_of_replies_en.pdf

easily lend themselves to the construct of recognising a judicial decision because they are part of police operations when an offence is *being committed*, not the gathering of evidence to prove an offence committed in the past. Article 87(2) refers to police cooperation in relation to the prevention, detection and investigation of criminal offences where measures may be established concerning '*the collection, storage, processing, analysis and exchange of relevant information*'. Surveillance and controlled deliveries fall squarely within the collection of information, which at the time it is collected will not be evidence of anything because no offence will have been committed. These types of investigation lend themselves far more appropriately to the MLA regime. In our view, an instrument that seeks to advance rules in this area must be decided under article 82(1)(d), for which the special legislative procedure will apply.

Article 3 - Scope

13. The Initiative proposes the replacement of all existing instruments within the EU which seek to deal with gathering evidence. This would resolve the fragmentary set of laws currently in operation, which would be compounded were the framework decision on the European evidence warrant (EEW) to come into force in January 2011 as currently required.
14. However, since the instrument will encompass all evidence gathering requests save for those identified in article 3(2), the measure is extremely broad. We agree that this is sensible to avoid the continued fragmentation of evidence exchange instruments. As explained above, we do not consider that clear police cooperation measures should be included in this instrument – intercept, surveillance, controlled deliveries. Moreover, it is not clearly explained where the instrument should apply and where it should not. Some intercept measures are excluded, some are not. For example, recital 9 asserts that the instrument will not apply to cross border surveillance, but the Initiative is envisaged to apply to in-country surveillance without clear explanation for the difference approaches. This issue must be addressed.
15. Legal certainty requires that the investigative measures included be clearly described and the investigative measures excluded be clearly specified in the body of the text. The Presidency's suggestion that an additional sentence be added to article 1(1) providing: '*The EIO may also be issued for obtaining evidence that is already*

*available to the competent authorities of the executing State*¹⁰ goes some way to grappling with this issue. In our view the explanation should be inserted in article 3(1) rather than article 1(1) in any event, but we consider there needs to be an indicative paragraph so that member states and practitioners can attempt to use the instrument in a uniform manner.

Judicial Scrutiny

16. The Detailed Statement suggests that the main aim of the objective is to search for the truth in criminal proceedings. It would '*strengthen the trust of the citizen in their national system and in the EU framework: this includes trust in the ability of the system to prevent crime and to sanction offenders as well as trust in the fact that persons wrongly accused will be cleared.*'¹¹ The statement further asserts that a high level of protection of fundamental rights, especially procedural rights must be maintained: evidence gathered in another member state must not affect the right to a fair trial. The Detailed Statement has referred to the *Analysis of Mutual Recognition* report. The study also found that member states thought that mutual trust is still not spontaneously felt and is not always evident in practice. All interviewees thought that it was an evolving process which requires the engagement of both the requesting and receiving countries.¹² In our view it will not be possible to harbour the trust of other member states or citizens, or ensure a fair trial unless judicial scrutiny is ensured. Removal of judicial oversight can lead to arbitrary police action and police officers acting with impunity. The Initiative currently does not secure judicial scrutiny at either the issue or execution stages.

Articles 2 and 5 – Issue

17. Because of the wide scope of the instrument it is crucial to ensure that any request is subject to judicial scrutiny and a review mechanism.

¹⁰ Council, *Follow-up document of the meeting on 12-13 July 2010*, 12201/10 (Brussels, 20 July 2010), EN, p 7.

¹¹ Detailed Statement page 21.

¹² G. Vernimmen-Van Tiggelen and L. Surano, *Analysis of the future of mutual recognition in criminal matters in the European Union: Final Report*, (IEE/ULB/ECLAN: Brussels, 20 November 2008), p 20.

18. The issuing authority is defined widely in article 2(a)(i) as ‘a judge, court, investigating magistrate, competent public prosecutor for the case concerned *then alternatively* (ii) ‘any other judicial authority as defined by the issuing state and in the specific case action *in its capacity as an investigating authority* in criminal proceedings with competence to order the gathering of evidence in accordance with national law.’
19. This definition is intended, according to the explanatory memorandum,¹³ to encompass a police decision to gather evidence which is not subject to judicial approval. The Discussion Paper says as a matter of principle, the issuing authority is a judicial authority. It then qualifies this principle by affirming that the authority can also come from a body acting in its capacity as an investigating authority, such as the police, in case they would have the authority to order an investigation at national level.¹⁴ We do not consider it appropriate for the issuing authority to be as widely defined as article 2(1) allows, notwithstanding in some member states a police authority could order gathering of material. Given the breadth of the instrument and the basis in mutual recognition, we consider that a police authority is not sufficiently objective, independent or legally qualified to decide whether issue of a request for evidence to be gathered by another member state is appropriate. It has long been a general principle of the European Convention on Human Rights that the rule of law implies, inter alia, that an interference by executive authorities with an individual’s rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort; judicial control offering the best guarantees of independence, impartiality and a proper procedure.¹⁵ It would not in our view accord with the basis of the instrument in article 82(1)(a) ‘judicial decision’, and it would not foster mutual trust in the decision making process if the same authority requiring the evidence could issue the request. The instrument should make it clear that this will not be a possibility.
20. Furthermore, in order to decide whether issue is appropriate, a ‘judicial decision’ must entail a scrutiny process. In our view this must verify that requests are only sought (1) when there are reasonable grounds to suggest an offence has been committed and (2) that obtaining the evidence is both necessary and proportionate. Article 7 EEW does provide that the issuing authority may only issue an EEW when:

¹³ Council, *Explanatory Memorandum*, 9288/10 ADD 1 (Brussels, 3 June 2010)

¹⁴ Council, *Discussion Paper*, 11842/12 (Brussels, 8 July 2010), EN, p 6.

¹⁵ *Klass v Germany*, App. no. 5029/71 (judgment 6th September 1978), para 55.

- (a) obtaining the objects, documents or data is necessary and proportionate for the purpose of proceedings referred to in Article 5

21. The Presidency has suggested in the Follow Up document to the Working Party on 12th and 13th July that consideration be given to the insertion of an obligation upon the issuing authority to apply a proportionality test.¹⁶ We consider that the test in article 7 EEW must be included in the EIO. However, the ‘purpose of proceedings’ set out in article 5 EEW (replicated in article 4 of the Initiative) does not require the issuing judicial authority to verify that there are *reasonable grounds* for believing that an offence has been committed in the first place. This is a mandatory threshold in England and Wales for an evidence warrant to be issued,¹⁷ and a similar test must be required in most member states, in order to comply with the article 8 ECHR right to privacy.
22. Article 7 of the EU Charter on Fundamental Rights (the Charter), which provides for respect for private and family life, must equally be satisfied by the Initiative, with any limitation pursuing a legitimate aim. Whilst the investigation of crime is such an aim, it must be carried out in a way that is proportionate: In *Kadi*,¹⁸ the European Court of Justice considered whether freezing measures imposed on the appellants were a disproportionate and intolerable infringement of their fundamental right to property. The Court was assisted by the jurisprudence of the ECtHR in Strasbourg which establishes the requirement of proportionality and is applicable to the EU through the Charter:

In this respect, according to the case-law of the European Court of Human Rights, there must also exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Court must determine whether a fair balance has been struck between the demands of the public interest and the interest of the individuals concerned. In so doing, the Court recognises that the legislature enjoys a wide margin of appreciation, with regard both to choosing the means of enforcement and to

¹⁶ *Supra*, page 11.

¹⁷ Police and Criminal Evidence Act 1984, s8.

¹⁸ *Kadi v Council and Commission*, Joined cases C-402/05 P and C-415/05 P, ECR 2008 p 00000, para 360.

ascertaining whether the consequences of enforcement are justified in the public interest for the purpose of achieving the object of the law in question.

23. In applying this reasoning, it would be disproportionate to request an EIO for all suspected criminal offences (or administrative acts with criminal penalties pursuant to article 4), given the impact upon the individuals concerned and the amount of resources that would be incurred. It should be remembered, in accordance with the subsidiarity principle and the development of EU activity in freedom, security and justice, that the involvement of the EU in this area is justified for serious, not petty crime. Despite the assertion of the Presidency in the Discussion Paper that it is 'self-evident that a realistic approach towards a rational use of available resources for investigations demands that a certain threshold of seriousness of the offence to be investigated via the EIO be respected by the issuing authorities',¹⁹ the numbers of EAW requests have continued to increase.²⁰ The EIO is equally likely to require significant additional resources.²¹ Given the financial crisis, member states will want to ensure that the EIO is only used to assist in investigations in serious cases.
24. Article 5 of the Initiative only requires the issuing authority to certify as accurate the content of the form in Annex A. In order for the EIO to be used in a proportionate manner, it is appropriate for the Directive to include a scrutiny test, so that member states know the issuing authority is required to verify the request is proportionate to the circumstances being investigated. The ECtHR has long since held that the law *must indicate the scope* of any discretion conferred on competent authorities, and the manner of its exercise, with sufficient clarity, having regard to the legitimate aim of the measure in question, in order to give the individual adequate protection against arbitrary interference with their article 8 ECHR rights.²²

¹⁹ Page 11.

²⁰ For a helpful review of the Commission and Council figures, see *Implementation of the European Arrest Warrant and Joint Investigation Teams at EU and National Level*, European Parliament, DG Internal Policies of the Union, Policy Dept C, Citizen's Rights and Constitutional Affairs, PE 410.67 (January 2009) and for the most up to date figures see Council, *Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2009*, 7551/3/10, REV 3 (Brussels, 12 July 2010)

²¹ The UK produced a helpful estimate of possible costs to our system when considering whether to opt in to the instrument: UK Home Office, *Explanatory Memorandum on European Union Legislation in Justice and Home Affairs Matters: Initiative for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters*, 9145/10 (25th May 2010), pp 24 – 28.

²² *Malone v UK*, App. no. 8691/79 (judgment 2nd August 1984), paras 66 to 68

Article 4 – Types of procedure

25. Article 4 provides that an EIO may be issued in respect of certain proceedings that have been or may be brought before a judicial authority under the national law of the issuing state. It does not, however, assert that the *investigating measure* must also be available under national law. We are concerned that the lack of qualification here would enable forum shopping. For example, England and Wales is the only Council of Europe contracting party to permit systematic and indefinite retention of DNA samples. Most member states require specific circumstances to exist and/or a serious offence to be suspected.²³ If a member state had received information from the UK that their suspect had been convicted of an offence in England,²⁴ under the Initiative they could choose to request a sample from England, despite having no other evidence against their suspect and despite the suspected offence being too minor for a sample to be taken domestically, knowing that under England's current law²⁵ a sample would have been retained.
26. In *Klass* the ECtHR were considering the surveillance of correspondence, to which the collection and review of material would take place without the suspect's knowledge. The Court held that since the individual will necessarily be prevented from seeking an effective remedy of his own accord or from taking a direct part in any review proceedings, it is essential that the procedures established should themselves provide adequate and equivalent guarantees safeguarding the individual's rights.²⁶ As written, because the Initiative covers surveillance material for which review may be limited, it opens up the possibility of use of evidence through forum shopping without the suspect ever knowing this information had been used. Article 7 EEW again provided against this possibility:

(b) the objects, documents or data can be obtained under the law of the issuing State in a comparable case if they were available on

²³ *S and Marper v UK*, Application nos. 30562/04 and 30566/04 (judgment of 4 December 2008), paragraphs 46 and 47.

²⁴ A requirement to become usual practice by April 2012 under Council Framework Decision 2009/315/JHA, *on the organisation and content of the exchange of information extracted from the criminal record between Member States*, OJ L 93, 7.04.2009, p 23.

²⁵ Though this is subject to review and imminent amendment.

²⁶ *Supra*.

the territory of the issuing State, even though different procedural measures might be used.

We consider that the same test is required for the EIO.

Article 8 – Execution

27. Article 8 of the Initiative states that the executing authority shall recognise the EIO without any further formality being required. An executing authority is defined in article 2(b) as an authority competent to *undertake* the investigative measure. The Explanatory Memorandum goes further,

[I]t is required that the executing authority be an authority competent to undertake the investigative measure mentioned in the EIO in a similar national case. If the EIO is issued to search a house in a specific location in Member State A, the executing authority must be an authority which would be competent, in a similar national case, to decide to search a house in the location concerned.

28. This is problematic as a separate authority has not been provided to verify that there are no grounds for postponement or refusal. For the same reasons that the issuing authority must be judicial, we consider that the authority carrying out the request cannot be tasked with the assessment of whether the request should be recognised or not. This is a judicial decision requiring a judicial authority to consider whether the grounds for refusal are made out. The police authority which carries out the investigation is not sufficiently distanced from the activity to make this sort of assessment, nor are they likely to be sufficiently legally trained to do so. Article 13(2) EEW requires a decision on refusal to be taken by a judge, court, investigating magistrate or public prosecutor. Article 16(2) requires the same types of authority to consider postponement. In order to be Charter compliant, the same test must be incorporated into this instrument.

Article 10 - Grounds for non-recognition

29. The grounds upon which an EIO can be refused are much more limited than those under mutual legal assistance, or the EEW. There are only four grounds provided in the Initiative at article 10:
- a) there is an immunity or a privilege under the law of the executing State which makes it impossible to execute the EIO;
 - b) in a specific case, its execution would harm essential national security interests, jeopardise the source of the information or involve the use of classified information relating to specific intelligence activities;
 - c) in the cases referred to in Article 9(1)(a) and (b), there is no other investigative measure available which will make it possible to achieve a similar result, or
 - d) the EIO has been issued in proceedings referred to in Article 4(b) and (c) and the measure would not be authorised in a similar national case.
30. The Explanatory Memorandum makes clear that this limitation was intentional. The Discussion Paper suggests that the field of obtaining evidence does not necessarily require the same rules as the execution of penalties or decisions to arrest people and it is not therefore appropriate to consider grounds for refusal set out in other mutual recognition instruments.²⁷ However, the Initiative omits previously agreed absolute grounds for refusal: *ne bis in idem*, territoriality, and double criminality (unless one of the framework offences is engaged). Article 13 EEW recognises these absolute grounds.
31. These principles are equally applicable and important in the field of gathering evidence as in any other aspect of mutual recognition because the consequence of evidence gathering can be prosecution; if the prosecution of an offence has been finally concluded in one member state, *ne bis in idem* prevents the investigation of the same offence by another member state. The European Court of Justice has confirmed this in application of the Schengen Convention²⁸ and article 50 of the Charter guarantees its protection. Territoriality is a necessary principle in order to comply with a number of member states' constitutions and goes to the issue of necessity and proportionality. In the Discussion Paper, the Presidency suggests that

²⁷ Page 8.

²⁸ Joined Cases C-187/01 and C-385/01, *Gözütok and Brügge*, judgement of 11 February 2003, at paragraph 33.

inclusion of double criminality would be a step backwards. We consider it important to recognise that we have not yet moved forwards. Double criminality is still an important measure in judicial cooperation because procedural safeguards are yet to be realised and mutual trust is not yet sufficiently established within the European Union.²⁹

32. Furthermore, article 10 does not confirm that a request can be refused on fundamental rights grounds. We consider that for legal clarity, certainty and uniformity across the member states, it is necessary for the directive to specify fundamental rights under this head as a ground of refusal, notwithstanding that article 1(3) says the directive will not have the effect of modifying the obligation in article 6 TEU.

Article 12 - Data protection

33. A request for evidence will necessitate consideration of data protection, storage and retention. Article 12(2) allows the executing state to specify whether the evidence should be returned to it once it is no longer required by the issuing state. This is a very vague provision. No mention is made of whether the issuing state may be entitled to make copies of the evidence, and therefore be entitled to retain and store such copies, or what the issuing state should do with the evidence where the executing state does not make representations as to its return.
34. Council of Europe and EU instruments in relation to the collection of personal and automated data are extensive.³⁰ In the particular area of police and judicial cooperation, rules covering all aspects of data protection that govern the functioning of Europol, Eurojust, the Schengen Information System, the Customs Information System, and the European Criminal Records Information System (once it is effective), will have to be considered when those organisations and data systems are engaged.

²⁹ See para 16 above.

³⁰ Council of Europe Convention of 1981 for the protection of individuals with regard to automatic processing of personal data, ETS No. 108; Council of Europe Recommendation to the Committee of Ministers Recommendation No. R(87)15 regulating the use of personal data in the police sector (adopted on 17 September 1987); The Prüm Convention, Brussels, 6 December 2006, now included in the *aquis* by way of Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, OJ L 210, 6.8.2008, p. 1 (the Prüm Council Decision); Council framework decision of 24 June 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, OJ L 350, 30.12.2008, p. 60–71, Council of Europe Convention of 2001 on cybercrime, ETS No. 185.

35. The Commission has recently received responses to its consultation on the legal framework for the fundamental right to protection of personal data.³¹ It is clear from this consultation process that the current collection of data protection instruments in the EU is inadequate. The Article 29 Data Protection Working Party responded to the consultation with an extensive document setting out the current framework and proposals for the future.³² Investigative techniques have evolved considerably with advances in technology, and authorities without a crime detection purpose now have access to interoperable data stores. It is possible to obtain large amounts of information about a suspect without their knowledge. How member states obtain and retain that information in the course of a domestic investigation varies widely, yet the EIO will rely heavily upon the national law of the requested member state to obtain requested information.
36. The ECtHR in *Marper* recalled that the right to private life enshrined in Article 8 of the Convention is a broad term not susceptible to exhaustive definition. As such, storing of data relating to the private life of an individual, including retention of cellular samples, DNA and fingerprinting, amounts to interference within the meaning of Article 8. Due regard must be given to the specific context in which the information at issue has been recorded and retained, the nature of the records, the way in which these records are used and processed and the results that may be obtained. There is a legitimate aim in the prevention of crime, but retention must be proportionate with the purpose of the collection and for limited periods. The potential benefit of such evidence must therefore be carefully balanced against important private life interests.
37. Data protection provides another example of why judicial scrutiny is so important. The framework decision on protection of personal data processed in the framework of police and judicial cooperation in criminal matters³³ must be implemented domestically by the 27 November 2010. The Directive should specify in article 12 that the framework decision and other relevant data protection legislation apply.

³¹ The consultation and responses are available at

http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_0003_en.htm, accessed on 19.01.2010

³² Article 29 Data Protection Working Party, Working Party on Police and Justice, 'The Future of Privacy: Joint contribution to the Consultation of the European Commission on the legal framework for the fundamental right to protection of personal data', 02356/09/EN WP168, 1.12.09, available at

http://ec.europa.eu/justice_home/news/consulting_public/0003/contributions/public_authorities/art29_wp_and_wppi_en.pdf

³³ See note 30 above.

Article 13 - Legal remedies

38. Article 13 states that legal remedies '*shall be available for the interested parties in accordance with national law. The substantive reasons for issuing the EIO can be challenged only in an action brought before a court of the issuing state.*' The article is very limited.
39. In the Follow Up document, the Presidency states that legal remedies should reflect what is available under MLA requests and national law. This cannot be correct because the Initiative presents an alternative regime, with far less discretion than under MLA for the executing authority to scrutinise the instrument. The national system is also not entirely satisfactory because the representations of the interested parties have heightened importance; Personal information relating to them is to be used in proceedings in another jurisdiction where their ability to challenge its use is limited by geographical distance, and language, cultural, procedural and legal ignorance. The creation of the mutual recognition regime must not compromise equality of arms.
40. As much was recognised in article 18 EEW. It provides a much clearer structure for the effective challenge to evidence requests in the issuing state and recognition in the executing state:
1. Member States shall put in place the necessary arrangements to ensure that any interested party, including bona fide third parties, have legal remedies against the recognition and execution of an EEW pursuant to Article 11, in order to preserve their legitimate interests. Member States may limit the legal remedies provided for in this paragraph to cases in which the EEW is executed using coercive measures. The action shall be brought before a court in the executing State in accordance with the law of that State.
 2. The substantive reasons for issuing the EEW, including whether the conditions established in Article 7 have been met, may be challenged only in an action brought before a court in the issuing State. The issuing State shall ensure the applicability of legal remedies which are available in a comparable domestic case.
 3. Member States shall ensure that any time limits for bringing an action mentioned in paragraphs 1 and 2 are applied in a way that guarantees the possibility of an effective legal remedy for interested parties.

4. If the action is brought in the executing State, the judicial authority of the issuing State shall be informed thereof and of the grounds of the action, so that it can submit the arguments that it deems necessary. It shall be informed of the outcome of the action.
5. The issuing and executing authorities shall take the necessary measures to facilitate the exercise of the right to bring actions mentioned in paragraphs 1 and 2, in particular by providing interested parties with relevant and adequate information.
6. The executing State may suspend the transfer of objects, documents and data pending the outcome of a legal remedy.

41. In *Kadi*,³⁴ the ECJ noted that the applicable procedures giving effect to legislation must also afford the person concerned a reasonable opportunity of putting his case to the competent authorities: in order to ascertain whether this opportunity has been provided, a comprehensive view must be taken of the procedures provided. This opportunity of putting one's case is now a binding requirement of article 47 of the Charter. The Charter, read in conjunction with the minimum standards of the ECtHR's jurisprudence, also requires the 'practical and effective' guarantee of the rights enshrined.³⁵
42. In our view, to comply with the Charter and to effectively guarantee the legal remedies suggested in article 13, the EIO must provide for a hearing before a judicial authority in the requested state, to decide whether the request will be granted. This hearing will allow the suspect to make representations as to whether the grounds for refusal are made out and whether he has any fundamental rights which ought to prevent the gathering or return of evidence. Whilst the judicial authority may be able to decide whether there are grounds for refusal in most circumstances without representations being made, there will be many more circumstances where the fundamental rights of the suspect are engaged without the executing authority being aware.
43. As indicated in article 18(6) EEW, there might be circumstances, where the executing authority sees no *prima facie* grounds for non-execution, in which it is appropriate to seize materials to ensure that the investigation is not jeopardised by an advance hearing. However, the material seized must be held pending the notification of and possible representations by interested parties before a judicial hearing in the

³⁴ *Supra*, para 368.

³⁵ *Airey v Ireland*, App. no. 6289/73 (judgment of 9th October 1979), para 24.

requested state, prior to the transmittance of the material to the issuing state. This codified process will allow the affected parties to make representations about the release of the material where it might affect their fundamental rights. By setting out this structure, the right is given effect to at the most crucial stage; it may not be possible to raise arguments of this nature before the issuing court since they might accept the evidence without enquiring as to how it is gathered, or the suspect's concern might relate to how the evidence will be used in the issuing state.

44. In this regard, we do not accept that the right must be limited so that the substantive reason for issuing can only be challenged in the issuing state. This is because such a limitation could place a fetter on the right to challenge the interference with a fundamental right under the Charter; inherent in the reason for issue might be an exercise of a freedom of expression, assembly, religion or other Charter right which constitutes an offence in the issuing state, but does not in the executing state.
45. An example of where this structure will be imperative is where a request comes for the seizure of computer files belonging to a person suspected of fraud, committed on a particular date and evidence for which the requesting state believes to be stored on a personal laptop. The requesting state has no details other than the first and second name of the suspect and does not ask for specific files. The suspect's name registers on the records of the requested state, with an address. A search warrant is requested from the local court, which finds no applicable grounds for refusal to execute and agrees that the evidence might be destroyed if advance notice is given. A decision is taken to search the premises during which a laptop is found and seized. The suspect, who was not present during the search, is informed by the executing authority that they have the right to make representations about the copying and sending of files to the requesting state. The suspect asserts that whilst he conducts business transactions with the requesting state, he is innocent of the crime. He produces a photograph of himself and the image is checked with the requesting state. It is confirmed that this is not the person they have been looking for. Had the mechanism not been provided for making representations at this stage, his personal computer files would have been sent to the requesting state. Given the nature of the enquiry, the requesting state may have decided that it was necessary to seek an EAW to interview and charge the suspect with the offence. The suspect would then have been subject to arrest, detention and surrender proceedings before he could assert that he was not the correct person.

46. Equally, the instrument must allow for legal representation, with legal aid where appropriate, and include reference to the application of the directive on interpretation and translation.³⁶
47. In the Follow Up document, the Presidency has stated that legal remedies should be exercised within the time limits provided for in Articles 11 and 12, as they do not constitute a ground for postponement of recognition or execution according to Article 14. We do not think this is accurate; Article 11(5) of the Initiative provides for extension of time where it is not practicable to comply within the 30 day deadline. The reasons set out in this article have not been limited by the grounds for postponement, and in any event must encompass the need to provide an effective right to make representations.

Specific Provisions for certain measures

48. Working Party deliberations have not yet considered the specific provisions in the Initiative. We are encouraged that the Initiative recognises the need for particular obligations for certain types of evidence. The mutual recognition regime does not lend itself to a process of dialogue, however, so it is important to ensure that all appropriate safeguards are asserted in the body of the Directive.

Articles 19 and 20 - Transfer of persons held in custody

49. Articles 19(2) and 20(2) provide additional grounds for refusal of a request in circumstances of transfer. We consider it prudent to include here a ground for the person being unfit to travel. This may not always be encompassed in the article 19(2)(a) ground allowing the person to refuse consent.
50. It is also important to state in the article that persons should, as far as possible, be kept in the same prison conditions in the other state, irrespective of the length of their transfer; If the prisoner has been in category A secure conditions they ought not to be held in an open prison, and vice versa, to maintain both their sentencing requirements, and any degree of liberty that may have been granted. This safeguard would also aim to protect the suspect from the prison population where they are a

³⁶ When it is formally adopted.

minor offender/remand prisoner, and conversely, the prison population where the suspect is a serious offender.

Article 21 - Hearing by video conference

51. We welcome the safeguards and structure envisaged for hearings by videoconference set out in article 21, which largely replicate existing mutual legal assistance requirements. Where a witness cannot attend a trial in the requesting member state, provision for video or audio transmission of evidence will no doubt enable important evidence to be used in the trial, for both prosecution and defence. However, video and audio evidence is not an adequate substitute for the examination of a witness in the courtroom. The European Court of Human Rights (ECtHR) considered the use of videoconference in *Viola v Italy*³⁷ where it held that:

67. Although the participation of the defendant at his trial by videoconference is not as such contrary to the Convention, it is incumbent on the Court to ensure that recourse to this measure in any given case serves a legitimate aim and that the arrangements for the giving of evidence are compatible with the requirements of respect for due process, as laid down in Article 6 of the Convention...

74. Admittedly, it is possible that, on account of technical problems, the link between the hearing room and the place of detention will not be ideal, and thus result in difficulties in transmission of the voice or images.

52. As such, we do not consider that article 21(5) imposes a high enough threshold simply by stating that '*the EIO...shall contain the reason why it is not desirable or possible for the witness or expert to attend in person*'. We think that the provision should only be used as a last resort where the witness is unable to travel through illness or fear, having been satisfactorily established on evidence. This is how an equivalent special measure would be applied to witness evidence in England and Wales.³⁸

³⁷ (*Application no. 45106/04*) judgment delivered on 5th January 2007.

³⁸ Pursuant to sections 16 and 17 of the Youth Justice and Criminal Evidence Act 1999.

53. In relation to article 21(6)(e) on claiming the right not to testify and (9) on the consequences of refusal to testify, the witness must have the legal ramifications of their decision explained to them by the judicial authority of the executing state, and be notified of the right to legal advice prior to exercising their consent, in order to ensure that they are able to make a fully informed decision as to whether to participate.
54. A request to take evidence from a suspect in accordance with article 21(10) would mean conducting an interrogation. This would have to adhere to the requirements of article 48 of the Charter in conjunction with article 6 ECHR. Article 6(1) taken with 6(3)(c) (as to legal representation) and (e) (interpretation and translation) apply to pre-charge proceedings.³⁹ The ECtHR in *Viola*⁴⁰ placed significant emphasis on the fact that the suspect must have legal representation and be able to consult with their lawyer confidentially during videoconference proceedings. These rights must be protected by inclusion in the body of the measure.
55. Further assistance on videoconference can be found in Articles 11 and 12 of Council Regulation 1206/2001 on cooperation between the courts of the member states in the taking of evidence in civil or commercial matters,⁴¹ in which member states agreed that where the law of the requesting state allows, the parties and their representatives, or representatives of the requesting court, may be present for the questioning, who may also seek to participate in accordance with Article 10 of the Regulation.
56. We consider that the article should conclude with an additional sub article requiring the witness and suspect to be notified of their rights under the law of the executing state, and for reference to the application of the framework decision on the standing of victims in criminal proceedings, and the directive on interpretation and translation to be made.

³⁹ See recent cases of *Salduz v Turkey* (app. no. 36391/02), judgment of 27 November 2008; *Panovitz v Cyprus* (app. no. 4268/04), judgment of 11 December 2008; *Pishchalnikov v Russia* (app. no. 7025/04), judgment of 24 September 2009.

⁴⁰ See note 11 above.

⁴¹ OJ L 174 of 27.6.2001, p. 1

Article 22 - Hearing by telephone conference

57. The above considerations apply with respect to telephone hearings. However, teleconference evidence is particularly unreliable because it is very difficult to assess the credibility of the witness without seeing them.⁴² For this reason we consider that where its use is necessary, it should be limited to experts who are unable to use a video link, whose veracity is not in question, and who agree to such a process.

Article 27 - Intercept Evidence

58. This is a complex and somewhat controversial area. JUSTICE has long been concerned with these issues with respect to the refusal of the UK Government to allow the use of intercept evidence in criminal trials.⁴³ The use of intercept evidence raises a number of human rights issues, chiefly the right to a fair trial and the right to privacy, protected under Articles 6 and 8 ECHR respectively. The way in which interceptions are regulated, and the extent to which any unused intercept material is disclosable to defendants, both impact on fundamental rights. But the failure to allow intercept evidence also raises human rights issues. There is the public interest in ensuring that interception capabilities are not compromised, so that intercepted communications continue to be of value in detecting and preventing serious crime and acts of terrorism. Most of all, there is the public interest in the fair administration of justice: ensuring that the criminal process works effectively to protect fundamental rights, convict the guilty and acquit the innocent.
59. The ECtHR has noted that covert interception of communications by law enforcement or intelligence services can 'only be regarded as 'necessary in a democratic society' if the particular system of secret surveillance adopted contains adequate guarantees against abuse.'⁴⁴ Equally, 'the domestic law must provide some protection to the individual against arbitrary interference with Article 8 rights. Thus, the domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the

⁴² Dr. Arkadiusz Lach, Researcher in the Department of Criminal Procedure, Faculty of Law and Administration, Nicolas Copernicus University, Torun, Poland, 'Transnational Gathering of Evidence in Criminal Cases in the EU de lege lata and de lege ferenda', *Eucrim* 3/2009, 107 – 110 at 108.

⁴³ See *Under Surveillance: Covert policing and human rights standards* (JUSTICE, 1998) and *Intercept Evidence: Lifting the ban* (JUSTICE, 2006) as well as numerous briefings on legislative proposals.

⁴⁴ *Malone, supra*, para 81.

circumstances in and conditions on which public authorities are empowered to resort to any such secret measures.⁴⁵

60. However, decisions such as *Schenk v Switzerland*⁴⁶ are concerning when applied in cross border mutual recognition instruments. Here the ECtHR found that even though the interception was unlawful under Swiss law, the rules governing the admissibility of evidence were a matter for national law and that it could not therefore 'exclude as a matter of principle and in the abstract that unlawfully obtained evidence of this kind may be admissible.'⁴⁷ As stated above, the ramifications of forum shopping where a less regulated country could obtain such evidence through the Directive requires robust regulation as to how this evidence might be obtained and used.
61. Judicial scrutiny of requests in both the issuing and executing states is in our view all the more important to ensure that this type of evidence does not infringe fundamental rights.

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August 2010

⁴⁵ *Halford v United Kingdom* (1997) 24 EHRR 523, para. 49.

⁴⁶ (1988) 13 EHRR 242.

⁴⁷ *Ibid* at para. 46.