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MODULE IV

UNIT 11

European Order Freezing Property or Evidence: Confiscation and European Evidence Warrant

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LEVEL 1: SUBJECT

CONTENTS

1.- Relegation of the material or real elements of the crime in favour of personal elements within the initial cooperation instruments.

As we have seen in preceding modules, the current foundations of European international judicial assistance in criminal matters date from the second half of the last century, after the second World War, in an enlarged Europe, within the Council of Europe, where the initial instrument, basically the *1959 European Convention*, was the reference instrument in force throughout the 20th century, although in the last decade, through interaction with European Union legislation, dimensions have developed that were difficult to foresee. However, the multiple instruments that regulate this area within the European Union, even those that emerge in accordance with mutual recognition, have been enacted in profusion, like flood material, as they generally arise with a view to co-existence with the original treaties and, without repealing these, are superimposed with the mere desire to improve particular sections.

It was also the case that the 1959 Convention was originally an auxiliary instrument of the 1957 Extradition Convention and this encouraged preferential attention to measures of investigation or pre-trial examination and precautionary measures of a personal nature, as opposed to real and material elements. Thus, despite the fact that amongst letters rogatory (article 3) those that that were contemplated were requests that had as their objective conducting pre-trial proceedings or transmitting evidence, case files and documents, if it was necessary to carry out a search, statements that conditioned or restricted its performance were in turn amply provided for, as a result of its article 5[1]. All the States party to the Convention, except France, Greece, Israel, Italy and Latvia voluntarily chose to restrict cooperation in requests for seizure[2], whereby the real possibility of an international request for seizure prospering was slight; this is particularly true given that, although no

[1] 1. Any Contracting Party may, by a declaration addressed to the Secretary General of the Council of Europe, when signing this Convention or depositing its instrument of ratification or accession, reserve the right to make the execution of international requests for search or seizure of property dependent on one or more of the following conditions:
a) That the offence motivating the letter rogatory be subject to sanction under both the law of the requesting Party and the law of the Party addressed.
b) That the offence motivating the letter rogatory be an extraditable offence in the country addressed.
c) That execution of the letter rogatory be compatible with the law of the Party addressed.
2. Where a Contracting Party makes a declaration in accordance with paragraph 1 of this article, any other Party may apply reciprocity.

[2] Moreover, Bosnia-Herzegovina, the former Yugoslav Republic of Macedonia and Serbia-Montenegro did not formulate any statement or express any reservations when signing and ratifying the Convention.

reservations had been expressed, a lack of reciprocity could be levelled against the States that had expressed reservations. Furthermore, even in the absence of reservations, conduct that was in opposition to cooperation was frequent. Hence, in the mutual evaluation report produced by the European Union[3], although with a differentiated regime depending on whether the ultimate purpose was confiscation or the freezing of evidence, even when no reservations had been expressed, in practice, double criminality and adaptation to national legislation were also required.

Even in the *1978 Additional Protocol to the 1959 Convention* (STC no. 99), issued with the aim of abolishing the possibility of refusing judicial assistance in the investigation of tax offences, apart from the fact that it was not ratified by Andorra, Bosnia-Herzegovina, Liechtenstein, Monaco, Israel, San Marino and Switzerland, important statements were made and reservations expressed by Germany, Armenia, Austria, Azerbaijan, Spain, Georgia and Luxembourg, for the most part specifically related to the requirement of double criminality or reserving the possibility of refusing assistance with regards to seizures requested as a result of tax offences.

The first attempt to redress this deficit, again within the Council of Europe, was the *Convention on laundering, search, seizure and confiscation of the proceeds from crime*, issued in Strasbourg on the 8th of November 1990 (CETS no. 141), with the express intention of facilitating judicial cooperation in these matters, with awareness of the diversity of European legislations in these matters and even awareness of the lack of and need for a comprehensive legislation in this respect.

A Convention designed to effectively achieve judicial assistance in the deprivation of illicit gains, with different instruments, staggered according to the different procedural stages: identification, tracing and seizure as measures designed either for the precautionary freezing of assets susceptible to subsequent seizure or confiscation; confiscation at the time of sentencing and failing that, in a second stage as secondary criminalisation, the deprivation of assets gained as profits derived from the offence by means of the criminalisation of money laundering. It is a Convention of enormous importance that cannot be defined as "European", as the ad hoc committee charged with drafting it was not made up exclusively by European participants, but rather, they were joined by experts from Australia, Canada and the United States, and also from different organisations, ranging from the European Community itself to the United Nations, and including Interpol and the International Association of Penal Law.

[3] Doc. 7254/00 CRIMORG 52 serves as an example.

Ratified by the 47 European States and even by Australia, its scope goes beyond a single continent. In fact, it is one of the models indicated in the FATF 40 Recommendations in matters of judicial cooperation to combat money laundering.

The second step, in the assessment of the real elements of the offence, comes with the *Convention implementing the Schengen Agreement* (CISA), which also facilitates judicial assistance in general, especially by enabling direct contact between judicial authorities. It also facilitates the tracking and tracing of objects, but above all it increases the possibilities of complying with an international request for seizure, by restricting the possibilities of refusing requests for judicial assistance that have the purpose of seizure (article 51)[4], as well as avoiding the reservations that were expressed in the 1959 Convention.

With regard to the tracing of objects sought *for the purposes of seizure or use as evidence in criminal proceedings*, the Schengen Information System, in accordance with Article100.3 of the CISA, contains different categories of objects that have been stolen, misappropriated or lost: a) motor vehicles with a cylinder capacity exceeding 50 cc; b) trailers and caravans with an unladen weight exceeding 750 kg; c) firearms; d) blank official documents; e) issued identity papers (passports, identity cards, driving licences); and f) banknotes (registered notes); subsequently gradually incorporating travel documents, vehicle registration certificates and vehicle number plates, securities and means of payment (such as cheques and credit cards), bonds, stocks and shares. Access to this database is restricted in Article 101 of the CISA to the authorities responsible for border checks, customs (including police involved in such activities) and visas and residence permits; however, Council Decision 2005/211/JHA, of the 24th of February 2005, in accordance with its intended purpose of criminal investigation, explicitly establishes the right for national judicial authorities to consult this information directly, especially those responsible for initiating criminal proceedings and judicial investigation prior to indictment, in the performance of their tasks, as set out in national legislation.of the CISA

Subsequently, now under the third pillar, a series of legislative instruments

[4] To have the request attended to, only the following requisites must be met:

a) That the act giving rise to the letters rogatory be subject to sanction under the law of both Contracting Parties entailing a custodial sentence or a detention order of a maximum period of at least six months, or be subject to sanction under the law of one of the two Contracting Parties by an equivalent sentence, constituting an infringement of regulations that will be pursued by administrative authorities under the law of the other Contracting Party, wherein the decision may give rise to an appeal before the court with jurisdiction, particularly in criminal matters.

b) That execution of the letters rogatory be compatible with the law of the addressed Contracting Party.

followed, intended to make progress in this area, such as Council FRAMEWORK DECISION 2001/500/JHA, *on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime*, of the 26th of June 2001, which replaces the common action of 1998 of the same title; or FRAMEWORK DECISION 2005/212/JHA, of the 24th of February, *on confiscation of crime-related proceeds, instrumentalities and property,* basically designed to deal with the inoperability between Member States of statements and reservations made in relation to the aforementioned instruments of the Council of Europe.

Even at intergovernmental level, with the 2000 Convention the EU attempted to incorporate new technologies and new procedural institutions in the area of judicial assistance, but little progress was made with respect to material elements or material relating to the offence. Even though the Protocol to the 2000 Convention on Mutual Assistance, signed on the 16th of October 2001[5], represented an important advance in terms of obtaining bank information and documentation, States were allowed to subject their compliance to the same conditions as those that apply to requests for search and seizure (that is, they condition their compliance to the existence of the double criminality requirement and compatibility with their national law - Austria formulated an express statement in this sense); furthermore, its application is restricted to certain offences, specified by a triple alternative that includes a broad and extensive catalogue: a) offences sanctioned with four years in the requesting Member State and two years in the addressed Member State; b) offences outlined in the Europol Convention; and c) offences contemplated in the instruments relating to the protection of the European Communities' financial interests[6]. Requests in this area should be reasoned as regards their relevance and will indicate the information available and the circumstantial evidence or elements that justify the assumption of the existence of the bank account in question, facilitating, insofar as possible, the execution of the request, whilst preventing "phishing" procedures.

The Council of Europe also considered it necessary to improve the assistance

[5] OJ C 326, of 21.11.2001. There is also an explanatory report approved on the 14/10/2002 by the Council (OJC 257, of 24/10/2002).

[6] Fraud affecting the European Communities' financial interests; the use or presentation of false, incorrect or incomplete statements or documents or statements or documents having the same effect (if they are not already subject to sanction as a main offence, for participation in, instigation of, or attempt to commit fraud); passive corruption that occasions detriment to or is likely to cause detriment to the European Communities' financial interests; active corruption that occasions detriment to or is likely to cause detriment to the European Communities' financial interests; and money laundering related to the proceeds of fraud asreferred to, at least in serious cases, and to the aforementioned active andpassive corruption.

mechanisms envisaged in the 1990 Convention, whereby, at the end of 2003 the drafting of an additional Protocol to this Convention was initiated, which contained the advances expressed in instruments and actions of the United Nations and the European Union, as well as in the FATF or the Egmont Group, particularly to incorporate provisions relating to the prevention of money laundering (customer identification and verification, identification of the beneficial owners, reports on suspicious transactions, regulation of financial intelligence centres or the transparency of legal entities) and to the financing of terrorism. As the resulting text entailed substantial amendments to the Convention, it was concluded that an autonomous instrument was preferable: this gave rise to the *Convention on laundering, search, seizure and confiscation of the proceeds from crime and on the financing of terrorism* (CETS no. 198), open for signing in Warsaw on the 16th May 2005.

The interaction between the instruments of the Council of Europe and those of the European Union, are revealed here in a privileged fashion: whereas the 2000 European Union Convention refines and develops the Council of Europe's 1959 Convention on assistance, the 2005 Convention on laundering, search, seizure and confiscation of the proceeds from crime and on the financing of terrorism, in Articles 17, 18 and 19, reproduces the measures for investigating bank accounts outlined in the 2001 Protocol to the 2000 Convention. However, the 2005 Convention broadens the scope of application of these investigations, enabling the parties to apply them to non-bank financial institutions without limiting the crimes to which they are applicable.

Thus was the situation up until the arrival of the *mutual recognition* instruments. The origin and concept of these instruments has been extensively addressed in preceding subjects and, as an overview, the expression mutual recognition means that once a ruling issued by a judge in the exercise of his or her official powers in a Member State has been adopted, insofar as it has extra-national implications, it will automatically be accepted in all other Member States and have the same or at least similar effects there as in the State of its adoption; and always without undermining the fundamental rights afforded to individuals, as its explicit purpose is both to facilitate cooperation between authorities and to ensure the judicial protection of individual rights. As a result, the rulings issued in a Member State under this regime will be enforced in all other Member States, directly and immediately, as if they had been issued by a judicial authority within the addressed State.

It is, in any case, worth recalling that Art 82 of the Consolidated version of the Treaty on the Functioning of the European Union stipulates that judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial rulings, and includes the approximation of the laws and regulations of the Member States in the areas referred to in its paragraph two. These are the mutual admissibility of evidence between Member States, the rights of individuals in criminal procedures, the rights of victims of crime or any other specific aspects of criminal procedure identified in advance via a Council decision.

2.- Execution of orders freezing property or evidence.

When it was decided to instigate the process that would lead to the mutual recognition of judicial decisions, it was decided to start with the matter of freezing property[7]; and for its planning the General Secretariat of the Council prepared a study[8] grounded on mutual evaluation reports on judicial assistance and in relation to the so-called "Belgian files". It warned that unlike the usual cooperation procedures wherein the requesting State makes a request and the addressed State grants or rejects the request, mutual recognition would imply that it corresponds to the addressed State to implement the request submitted to it without analysing it from the point of view of its national law; the decision delivered would be enforceable throughout the European Union. Starting from the assumption of this basic consequence of the application of the principle of mutual recognition, which generates a more binding judicial assistance than that initiated by the 1959 Convention, it details the strands of work that clear the way to achieving its legislative form: a) the nature of the instrument, insofar as it entails legislative approximation - if there is to be minimum common regulation, it should take the form of a framework decision; b) the need to abolish double criminality; c) to avoid, insofar as possible, linguistic differences, the adoption of a single model of the order to freeze property (with pre-printed instructions) in all EU languages; d) necessary simplification and expedition of the validation procedure; e) types of appeals; f) identification of the property to which the freezing request relates; g) types of offences where its application is possible; and h) grounds for refusal.

This scheme indicates the basic lines of preparatory work such as the Framework Decisions approved, when adopting this principle of mutual recognition.

[7] Meeting of the Article 36 Committee held on the 14th of January 2000.
[8] Doc. 6522/00 CATS 16 CRIMORG 34 COPEN 14, of the 2nd of March 2000.

The formalisation of the adoption process emerges with the Initiative by the Governments of the French Republic, the Kingdom of Sweden and the Kingdom of Belgium for the adoption by the Council of a Framework Decision on the execution in the European Union of orders freezing assets or evidence[9], which led to Council Framework Decision 2003/577/JHA, of the 22nd of July, *on the execution in the European Union of orders freezing property or evidence*[10], although the 9/11 attacks determined that Framework Decision 2002/584/JHA, on the European arrest warrant[11], was passed first.

It expresses as its *objective*, the establishing of the rules under which a Member State shall recognise and execute in its territory a freezing order issued by a judicial authority of another Member State within the framework of criminal proceedings.

It *defines* the orders freezing assets or evidence as any measure taken by a competent judicial authority in the issuing State in order to provisionally prevent the destruction, transformation, movement, transfer or disposal of property that could: a) be confiscated by the issuing State; or b) constitute evidence.

Therefore, the following fall outside its scope: precautionary measures aimed at ensuring pecuniary liabilities in criminal proceedings; or guaranteeing the civil liability resulting from the offence; or ensuring payment of financial sanctions; or guaranteeing payment of the costs and expenses of the case. Whilst some Member States within the European Union hear civil liabilities within criminal proceedings, the enforcement of this civil aspect must be processed in accordance with the mutual recognition instruments applicable to civil matters. However, within the scope of the Convention implementing the Schengen Agreement, Article 49 establishes that judicial assistance will be provided in civil actions joined to criminal proceedings, providing the criminal court has not yet made a definitive pronouncement in relation to criminal prosecution (paragraph d).

Ultimately, as the doctrine indicates, the requisites that must be observed to refrain from extending beyond the *scope* of application of the order freezing property or evidence, are as follows:

a) It must entail judicial measures, adopted by a judicial authority in criminal proceedings.

[9] OJC 75, of 07.03.2001.
[10] OJ L 196, of 02.08.2003, pp 45-55.
[11] OJ L 190, of 18.07.2002.

b) They must be of a provisional, precautionary nature, prior to the final judgment.

c) They must have a specific purpose, to provisionally prevent the destruction, transformation, movement, transfer or disposal of assets.

d) The assets, objects, data or documents that are the objective of the measure must be susceptible to subsequent confiscation or use as elements of evidence.

Its *justification* is therefore both the inadequacy of the classic instruments of judicial assistance that we have examined and the specialities that it presents compared with other criminal judgments, as it is required that the request for assistance in this area, in order to be at least minimally effective, be rapidly carried out, almost immediately. Based on relationships of trust, it determines recognition of the judicial decision ordering the request without any further steps, whereby its implementation becomes direct and immediate, as though it had been issued by a judicial authority within the addressed State, with the sole requisite of being accompanied by a certificate signed by the competent authority in the issuing State that has ordered the measure, thereby certifying the contents as accurate and, in any event, enabling subsequent correction where necessary.

Thus, in terms of *procedure*, the first consideration is that, in contrast to the arrest warrant, where the actual issue of the order, through completion of the form that accompanied the Framework Decision, constituted the judicial ruling and therefore signified a single European instrument, in the order freezing property or evidence, the judicial instrument is incorporated into the judicial ruling issued by the judicial authority in accordance with its national law, which must then be sent accompanied by the model certificate included in the Framework Decision.

Direct *transmission* between judicial authorities of a request for freezing is envisaged as an ordinary measure[12]; the transmission must be accompanied by a subsequent request for the transfer of evidence or of confiscation, depending on the purpose of the precautionary measure adopted; or an instruction to ensure that the assets remain immobilised, in either of the two cases, until the subsequent request is specified.

However, it is especially important that the *certificate* accompanies the request. Its absence or incomplete incorporation are grounds for refusing the request for

[12] Exceptions could be formulated for Ireland and the United Kingdom, specifying a central authority or other specific authorities.

freezing. Nevertheless, even in these cases, a period of time must be afforded for amendment, or an equivalent document will be accepted, indeed, where it is considered that sufficient information has been provided, the obligation to present the certificate can be dispensed with. The translation of this certificate into the official language of the addressed State is envisaged, or into one of the languages that this State declares admissible.

Other *grounds for refusal* are the existence of immunity or privilege, violation of *non bis in idem*, or a lack of double criminality, excluding the list of thirty-two exempted offences included in the usual list[13] of these instruments, provided that they are sanctioned by custodial sentences of a maximum length of at least three years. Where the execution might damage an ongoing criminal investigation, or the freezing measure has already been ordered in another criminal case, grounds for suspension exist.

The order freezing property and evidence shall be *recognised* by the competent authority of the executing State without the need for any further steps and shall be executed forthwith in the same manner as a national freezing order. The execution of the freezing order shall be immediately made known to the competent authority in the issuing State by any method which leaves a written record (if possible the decision will be communicated within the 24 hours following receipt). Where required by the issuing State, the *execution* may be adapted to the criterion of *forum regit actum*; but where it proves necessary to adopt any additional coercive measures, such action will be taken in accordance with the applicable procedure in the executing State. Given that we are dealing with precautionary measures, the possibility of setting a time limit is envisaged.

Furthermore, the possibility of non-suspensive *appeals* lodged by the defendant, the victim or any natural or legal person claiming to be a bona fide third party is contemplated, to be brought before the competent authority in the issuing State or in the executing State, in accordance with the respective national law; although the appeal in the executing State may not be formulated for substantive reasons.

Finally, the liability of the issuing State is regulated, euphemistically included under the heading of *reimbursements*, where the information contained in the certificate proves inaccurate at the time of transmission and has resulted in the

[13] The French version of the list of offences exempt from double criminality specifies those related to trafficking (of narcotics, weapons, hormonal substances and nuclear material), whilst in the Framework Decision on the European arrest warrant it was specified that it must be *illicit* trafficking. This adjective had been removed from this framework decision (except for cultural goods). A stylistic omission entirely attributable to the translator, which nevertheless caused misgivings given the doctrinal criticism of such listing by categories, which proves so imprecise.

enforcement of a freezing order that has occasioned detriment to an individual and the executing State consequently finds itself obliged to pay compensation.

The deadline for *transposition* into national law was the 2nd of August 2005; although it has still not been fulfilled by all Member States, as indicated by the General Secretariat of the Council, doc. 16921/10[14], of the 7th of December 2010, on the basis of the communications of the States themselves, although the process is well advanced. On the basis of the same, although with slight nuances, the European Judicial Network drew up the following table:

Member State	Implementation date	Member State	Implementation date
Austria	✓ 2 August 2005	Latvia	✓ 1 January 2008
Belgium	✓ 16 September 2006	Lithuania	✓
Bulgaria	✓	Luxembourg	✗
Cyprus	✓	Malta	✓
Czech Republic	✓ 1 July 2006	Netherlands, The	✓ 2 August 2005
Denmark	✓ 22 December 2004	Poland	✓ 2 August 2005
Estonia	✓	Portugal	✓
Finland	✓ 2 August 2005	Romania	✓ 13 November 2008
France	✓ 4 July 2005	Slovakia	✓ 1 January 2006
Germany	✓ 30 June 2008	Slovenia	✓ 25 November 2007
Greece	✗ *process ongoing*	Spain	✓ 7 June 2006
Hungary	✓	Sweden	✓ 1 July 2005
Ireland	✓ 1 September 2008	United Kingdom	✗ *process ongoing*
Italy	✗ *process ongoing*		

The communications of the Member States on the *competent authorities and the language* in which the certificate and, where applicable, the adjoined documents must be drawn up, can be consulted on the website of the European Judicial Network: http://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=24

3.- Consequences of envisaging cooperation in two stages

As has been indicated, in Framework Decision 2003/577/JHA, of the 22nd of July, on the execution of orders freezing property or evidence, the transmission should be accompanied by:

[14] http://register.consilium.europa.eu/pdf/en/10/st16/st16921-re01.en10.pdf

a) a request for the evidence to be transferred to the issuing State, or

b) a request for confiscation, or

c) an instruction that the property shall remain in the executing State pending a request for one of the two aforementioned measures by the issuing State.

SEIZURE FOR THE PURPOSES OF CONFISCATION OR OBTAINING EVIDENCE subsequent to FD 2003/577		
1. Identification of assets		**Conventional request for mutual assistance**
2. Tracing and detection or tracking of assets		**Conventional request for mutual assistance**
3. Seizure or provisional "confiscation"		**Mutual Recognition of Framework Decision 2003/577/JHA**
4. Purpose	**a) Confiscation**	**Conventional request for mutual assistance**
	b) Transfer of evidence	**Conventional request for mutual assistance**

Therefore, the freezing formalised in accordance with the criteria of mutual recognition could become futile, as the subsequent handing over of the evidence seized or the subsequent confiscation was necessarily resolved by classic criteria of judicial assistance, which, as the channel is narrower, may have resulted in the request proving unsuccessful.

Hence it was necessary to adopt both instruments, where this final stage was also resolved in accordance with the criteria of mutual recognition: the criterion relating to the execution of confiscation orders and the criterion relating to the evidence warrant, which would make this scheme possible:

SEIZURE FOR THE PURPOSES OF CONFISCATION OR OBTAINING EVIDENCE subsequent to FD 2003/577	
1. Identification of assets	**Conventional request for mutual assistance**
2. Tracing and detection or tracking of assets	**Conventional request for mutual assistance**
3. Seizure or provisional	**Mutual Recognition -**

"confiscation"		**Framework Decision 2003/577/JHA**
4. Purpose	**a) Confiscation**	**Mutual Recognition - Framework Decision 2006/783/JHA**
	b) Transfer of evidence	**Mutual Recognition - Framework Decision 2008/978/JHA**

In the next two sections we contemplate these two concatenated instruments of mutual recognition.

4.- Execution of confiscation orders.

The European Union, fundamentally within the context of combating organized crime, boasts various instruments, some already mentioned, that regulate confiscation, aimed at depriving these organizations of the proceeds of their illicit activity, with diverse regulatory links between them. Thus:

4.1.- Framework Decision 2001/500/JHA, *of the 26th of June, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime*,

designed to enable judicial assistance in relation to requests for confiscation. It also regulates value confiscation, where seizing the object acquired as a result of an offence is impossible, and obliges the requested State to give all the requests submitted by other Member States the same priority as national proceedings;

4.2 Framework Decision 2005/212/JHA, of the 24th of February, *on confiscation of crime-related proceeds, instrumentalities and property*,

which harmonises confiscation laws. It should be made clear that this instrument does not incorporate the mutual recognition assistance model. It maintains the same definitions as the 1990 European Convention with respect to laundering, search, seizure and confiscation of the proceeds of crime; and, like Framework Decision 2001/500/JHA, it reiterates the obligation to adopt measures to confiscate the

instruments and products of offences that may be sanctioned with custodial sanctions of over one year or confiscate property of a value that coincides with such products; but it also includes the assets from tax offences, with respect to which non-criminal proceedings may be applied in order to ensure the deprivation of the proceeds of the offence.

It also obliges Member States to have *extended confiscation powers* for a list of certain offences likely to generate great economic benefit, committed in the fields of organized crime or terrorism, provided that they are sanctioned by sentences of a maximum length of between 5 and 10 years' imprisonment (only four in the case of laundering): i) where a national court, grounding its actions on specific facts, is fully convinced that the property in question has been derived from criminal activities of the convicted individual during a prior period (reasonable in view of the circumstances of the particular case); ii) where a national court is fully convinced that the property in question has been derivedfrom similar criminal activities of the convicted individual during a period prior to conviction for the offence; or iii) alternatively, where it is established that the value of the property is disproportionate to the lawful income of the convicted individual and a national court, grounding its actions on specific facts, is fully convinced that the property in question has been derived from the criminal activity of the convicted individual[15].

Furthermore, it urges consideration of the possibility of applying this extended confiscation to property acquired by the closest relations of the individual concerned and property transferred to a legal person in respect of which the individual concerned, acting either alone or in conjunction with his closest relations, has a controlling influence*;* and the same shall apply if the individual concerned receives a significant part of the legal person's income, and it even permits using procedures other than criminal procedures[16] to deprive the perpetrator of the property in question.It also

[15] Thus, the European Court of Human Rights, {*Welch* (S. 9.II.1995) and *Phillips* (S. 5.VII.2001) cases versus the United Kingdom} has stated that the British legislation on drug trafficking in the United Kingdom (subsequently increased in scope by the *Proceeds of crime Act 2002* on the basis of the concept of "criminal lifestyle"), which authorises a court to assume as hypothesis that all the assets of an individual convicted for drug trafficking during the six previous years are the proceeds of this trafficking, does not entail violation of the right to a fair trial, as this hypothesis could have been rejected if the accused had credibly demonstrated that he or she had acquired the assets by other means than drug trafficking; and the Court even had the option to not apply the hypothesis if it considered that its application ran the risk of committing an injustice.

[16] American examples can be found in *Colombia with Law 333 of 1996 on "Extinction of Ownership of Property*" or in the *United States with the Civil Asset Forfeiture Reform Act , of 2000,* where, in contrast to what occurs in the field of criminal law, which requires proving beyond all reasonable doubt the unlawful origin of the property subject to confiscation, it is sufficient to overcome the comparative preponderance of evidence that must be practised with respect to evidence submitted by the accused. In Europe, Ireland

regulates the right of appeal of interested parties affected by the ordered confiscation and expressly reiterates the obligation to observe the presumption of innocence.

4.3.- Framework Decision 2003/577/JHA, ***regulating the mutual recognition of freezing orders***, for the purpose of confiscation, previously developed in section 2.

4.4.- Framework Decision 2006/783/JHA, of the 6th of October.

We were recalling that freezing orders obtained in accordance with Framework Decision 2002/577/JHA required a subsequent request for confiscation which, in order to maximise its effectiveness, needed a new instrument that responded to the same principles of mutual recognition. This was the intended purpose of Framework Decision 2006/783/JHA, ***on the application of the principle of mutual recognition to confiscation orders***, where the rules are established in virtue of which a Member State should recognise and execute in its territory confiscation orders issued by a court competent in criminal matters within another Member State.

Transmission.- The confiscation order must be accompanied by a certificate, the standard form for which is included in the Framework Decision, signed by the competent authority of the issuing State, which in turn will certify its contents as accurate. It must be translated into the official language of the executing country or into another official language of the Union indicated by this country, and sent directly to the competent authority of the EU country where the person (natural or legal) has property or income if it is a case of confiscating money, or where property covered by the confiscation order is located; and if there are no reasonable grounds to determine a specific Member State, the order may be transmitted to the State where the natural person is normally resident or, if applicable, where the legal person has its registered offices.

The transmission of a confiscation order does not restrict the right of the issuing State to execute the confiscation order itself. However, in this case, it must inform the

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envisages seizure for assets valued at more than 10,000 Irish pounds, whilst Italy, in its anti-Mafia legislation, envisages seizure with respect to assets that are not proportionate to legitimate income of the owner. The French Court of Cassation has validated an Italian civil confiscation order (*Crisafulli* case) even though only criminal confiscation existed in France. In Spain, the Draft Bill for the Penal Code Reform of October 2012, in its Art. 127 ter, establishes some cases of "confiscation without conviction".

executing State.

Execution.- The executing State shall recognise and execute the order without delay and without requiring the completion of any other formalities. The enforcement proceedings will be in accordance with the Law of the executing country and according to the formalities decided by its authorities. Confiscation orders issued against a legal person shall be executed even where the executing State does not recognise the criminal liability of the legal person.

If various requests for execution refer to the same individual, the executing country must decide the order of execution, bearing in mind the gravity of the offences and any other relevant circumstances.

The amounts confiscated correspond to the executing State if the amount confiscated is less than 10,000 euros; if the amount collected is greater, half of this amount should be transferred to the issuing State.

Both the executing State and the issuing State may grant pardon or amnesty, but only the issuing State is competent to determine any application for review of the substance of the confiscation order.

Grounds for non-recognition.- In line with other mutual recognition instruments, various cases are included where recognition may be refused:

- The absence of a certificate, incomplete incorporation of the certificate or where it manifestly does not correspond to the judgment.
- Violation of *ne bis in idem*.
- A lack of double criminality, apart from the list of 32 exempted offences, where they are sanctioned by custodial sentences of a maximum length of at least three years.
- Provision in the executing country of immunities or privileges that prevent execution.
- Where the rights of interested parties or third parties acting in good faith make enforcement of the order impossible in accordance with the legislation of the executing country.
- If the judgment was delivered *in absentia*, under the terms set out in Council Framework Decision 2009/299/JHA, of the 26th of February, amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA,

2008/909/JHA and 2008/947/JHA, *thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial.*

- Where the offences that gave rise to the confiscation have been committed wholly or partly within the territory of the executing state or outside the territory of the issuing state and the law of the executing country does not envisage legal proceedings against the offence in question.
- If the confiscation order is barred by the statute of limitations under the national law of the executing country, provided that the acts fall within the jurisdiction of that country in accordance with its penal code.

Postponement: this is provided for when execution of the confiscation order may damage an on-going criminal investigation or proceedings in the executing country; or where it is deemed necessary to have the confiscation order translated.

Appeals: Member States are required to make the necessary arrangements to ensure that any interested party and third parties acting in good faith can lodge an appeal before a court in the executing country. If the national law of the executing State so provides, the appeal may have suspensive effect in respect of the confiscation order. However, only the issuing State is competent to hear an appeal calling for review of the substance elements of the confiscation order.

Implementation: the date to comply with the Framework Decision was the 24th of November 2008 but, in spite of the time elapsed, a number of States have still not transposed the Framework Decision.

The Commission, on the 23rd of August 2010, drew up a report on its implementation, incorporated into document COM(2010) 428 final[17]; the General Secretariat of the Council did so on the 24th of April 2012, in its document 9006/12[18]. For its part, the European Judicial Network prepared the following table:

Member State	Implementation date	Member State	Implementation date
Austria	✓ 1 July 2007	Latvia	✓ 14 July 2009
Belgium	✓ 14 April 2012	Lithuania	✗

[17] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0428:FIN:EN:PDF
[18] http://register.consilium.europa.eu/pdf/en/12/st09/st09006.en12.pdf

Bulgaria	✓ 27 February 2010	Luxembourg	✗ -
Cyprus	✓ 25 June 2010	Malta	✓ 22 October 2010
Czech Republic	✓ 1 January 2009	Netherlands, The	✓ 1 June 2009
Denmark	✓ 1 January 2005	Poland	✓ 5 February 2009
Estonia	✗ *process ongoing*	Portugal	✓ 31 August 2009
Finland	✓ 24 November 2008	Romania	✓ 13 November 2008
France	✓ 9 July 2010	Slovakia	✗ -
Germany	✓ 22 October 2009	Slovenia	✓ 25 October 2007
Greece	✗ -	Spain	✓ 10 March 2010
Hungary	✓ 8 January 2009	Sweden	✓ 1 July 2011
Ireland	✗ -	United Kingdom	✗ -
Italy	✗ -		

The notifications, declarations and communications of the Member States, arising from the implementation process, concerning the authorities designated competent and the languages accepted, can be consulted on the following page of the European Judicial Network website:

http://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=34

4.5.- Decision 2007/845/JHA, of the 6th of December 2007, *concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime*.

The idea that the best way to combat organised crime is the deprivation of the corresponding economic benefits is omnipresent. With this in mind, plans are in place to organise the rapid exchange of all information that may lead to the tracing and seizure of the proceeds of crime and facilitate their subsequent confiscation where applicable. To this end, in connection with the provisions of the Hague Programme, on the establishment of criminal asset intelligence units in Member States of the EU, the Austrian, Belgian and Finnish Initiative[19] emerges, obliging Member States to organise Asset Recovery Offices charged with facilitating the tracing and identification of proceeds of crime with a view to subsequent freezing, seizure or confiscation by the

[19] Doc. 15628/05 CRIMORG 156, of 14.12.2005.

competent judicial authority.

The effectiveness of these institutions was made clear in the report dealing with mutual evaluation in relation to legal assistance, drawn up in Ireland[20], where a "Criminal Assets Bureau" was in operation. This was created on the 15th of October 1996, comprising officials from various sources[21] who work anonymously, and where the main objectives are detecting those assets, wherever they are to be found, that proceed or are suspected of proceeding, directly or indirectly, from criminal activity, subsequently taking the appropriate measures to deprive the criminals of these assets. The District Court Judge, after hearing a statement from an official assigned to this Bureau, may, if he or she considers that there are reasonable grounds for suspicion that evidence relating to goods or products resulting from criminal activity may be found in a particular place, issue a search warrant for the aforementioned place or any individual found therein. If, as a result of this or any other measure, assets are found, the Criminal Assets Bureau first requests from the High Court, in accordance with the Law on the Proceeds of Crime, a provisional order to freeze or seize property and then a preventive ruling with a term of validity of seven years. If, during these seven years, it is not proven to the Court's satisfaction that the assets detected are not the proceeds of crime, these assets are put at the State's disposal. While the order to freeze or seize property or a preventive ruling are in force, the individual against whom the order was issued may be required to declare all of his or her income and the origin of the same during the previous ten years. The report states that Irish courts consider that this provision does not infringe the principle of self-incrimination, as it is a civil procedure and not a criminal procedure. Thus, it is likewise not necessary to demonstrate that an individual has been convicted for an offence in order to deprive him or her of assets, even if the individual has been acquitted. It is sufficient to demonstrate that the individual has benefited from the criminal activity. On the other hand, there are provisions with detailed rules on the compensation that an individual may claim if it is proven that he or she has suffered losses as the result of one of the orders described when the assets were not in fact the proceeds of crime.

There are other offices of confiscation or seizure in the Netherlands (BOOM) or Belgium (COSC), on whose initiative CARIN (the Camden Asset Recovery Inter-Agency Network) was constituted, in September 2004, in cooperation with Ireland, the

[20] Doc. 9079/99 CRIMORG 70, of 19.08.1999.
[21] Officers of An Garda Síochána, officials of the Tax Authorities and the Ministry for Social, Community and Family Affairs.

United Kingdom, Austria, Eurojust and, later, Germany, with the support of the European Commission. This is an informal network of professionals and experts aimed at enhancing shared knowledge on methods and techniques in the area of identification, freezing, seizure and the confiscation of the proceeds of crime. The presidency is shared between the Netherlands and Belgium; the permanent secretary is maintained by Europol; two operational contact points are envisaged per country (one police and one judicial); and it comprises experts from more than 50 countries and jurisdictions, including 26 Member States of the EU.

Decision 2007/845/JHA obliges member States to set up or designate national Asset Recovery Offices ("AROs") as national central contact points that facilitate, through enhanced cooperation, the fastest possible EU-wide tracing of assets derived from crime.

The Decision allows the AROs to exchange information and best practices, both upon request and spontaneously, regardless of their status (administrative, law enforcement or judicial authority). It also calls on AROs to exchange information under the conditions laid down in Framework Decision 2006/960/JHA[22] ("the Swedish Initiative") and in compliance with the applicable data protection provisions.

The Decision also aims to support CARIN (the Camden Assets Recovery Inter-Agency Network), which, as mentioned above, is a worldwide network of professionals and experts intended to enhance shared knowledge on methods and techniques in the area of cross-border freezing, seizure and confiscation of illicitly acquired assets.

As the Commission indicates in doc. COM(2011) 176 final, of the 12th of April, within the designation of AROs, the majority have been established in police services; the remainder being divided almost equally between those comprised of judicial authorities and AROs with a multidisciplinary structure; moreover, seven States, as provided for in Art. 1.2, have designated two AROs; and as the Decision is also intended to establish formal structures to support the activities of the CARIN network, almost all the AROs designated include the point or points of contact within the CARIN network.

Specifically, those designated are as follows:

STATE	DESIGNATED AROs
AUSTRIA	Federal Criminal Police (Bundeskriminalamt – Referat «Vermögensabhöpfung»)

[22] See the specifications of the principle of availability in Module III.

BELGIUM	Organe Central pour la Saisie et la Confiscation (Central Office for Seizure and Confiscation – COSC)
BULGARIA	Commission for Establishing Property from Criminal Activity (CEPACA, which subsequently changed its name to CEPAIA) and the Supreme Prosecutor's Office.
CYPRUS	Unit for Combating Money Laundering (MOKAS-FIU Cyprus).
CZECH REPUBLIC	Unit Combating Corruption and Financial Crimes (UOKFK), International Cooperation Department.
DENMARK	State Prosecutor for Serious Economic Crime (Statsadvokaten for Særlig Økonomisk Kriminalitet).
ESTONIA	V Division, Investigation Department, Central Judicial Police.
FINLAND	National Bureau of Investigation, Criminal Intelligence Division/Communications Centre
FRANCE	Central Directorate for Criminal Investigations (Plateforme d'Identification des Avoirs Criminels - PIAC); and The Agency for the management and recovery of the assets seized and confiscated (AGRASC).
GERMANY	Federal Criminal Police (Bundeskriminalamt Referat SO 35 "Vermögensabschöpfung") and the Ministry of Justice (Bundesamt für Justiz).
GREECE	Financial and Economic Crime Unit within the Ministry of Finance.
HUNGARY	National Investigation Office (Nemzeti Nyomozó Iroda).
IRELAND	Criminal Assets Bureau
LATVIA	Economic Police Department within the Central Criminal Police Department of the State Police.
LITHUANIA	Criminal Police (Lietuvos kriminalines policijos biuras) and the General Prosecutor Office (Lietuvos Respublikos generaline prokuratura).
LUXEMBOURG	Parquet du Tribunal d'Arrondissement de Luxembourg, Section éco-fin.
THE NETHERLANDS	Criminal Assets Deprivation Bureau Public Prosecution Service (Bureau Ontnemingswetgeving Openbaar Ministerie - BOOM).
POLAND	Assets Recovery Unit, Criminal Bureau, General Headquarters of Police.
SLOVAKIA	Financial Intelligence Unit of the Bureau for Combating Organised Crime of the Presidium of the Police Force.
SPAIN	Intelligence Centre against Organised Crime (CICO) and the Anti-drugs Special Prosecution Office (Fiscalia Especial Antidrogas) within the Ministry Of Justice.
SWEDEN	The National Criminal Intelligence Police Service and the National Economic Crimes Bureau (Ekobrottsmyndigheten).
UNITED KINGDOM	The Serious Organised Crime Agency (SOCA) for England, Wales and Northern Ireland, and The Scottish Crime and Drug Enforcement Agency (SCDEA) for Scotland.

The existence of the Asset Recovery Offices - AROs - determines, in turn, the consequence of the forecast of the Assets Management Offices - AMOs -(bodies

responsible for the custody and administration of assets confiscated or seized in favour of the State), with competence for advance temporary or permanent deprivation of these assets and even, where necessary, the recourse to *outsourcing*.

4.6.- Proposal for a Directive *on the freezing and confiscation of proceeds of crime in the European Union*, COM(2012) 85 final, of the 12th of March.

In practice and in scope, the aforementioned instruments were still not held to be satisfactory. Consequently, there has been an attempt to design an instrument that facilitates the possibility of confiscation, in its widest form, with a view, basically, to combating transnational organized crime, but with a wide-ranging intention to tackle a broad spectrum of crimes. The decision was taken to have it focus on a certain, specific *list of offences*, with reference to the Framework Decisions and Directives that regulate it for definition[23].

The *background* to its scope and purpose, expressly mentioned in the Proposal, is comprised of three elements:

[23] Criminal offence is understood to apply to the offence regulated in:
(a) the Convention established on the basis of the letter c) of section 2 of Article K.3 of the European Union Treaty, relating to the fight against acts of corruption involving officials of European Communities or Member States of the European Union;
(b) Council Framework Decision 2000/383/JHA, of the 29th of May 2000, on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro;
(c) Council Framework Decision 2001/413/JHA, of the 28th of May 2001, on combating fraud and counterfeiting on non-cash means of payment;
(d) Council Framework Decision 2002/475/JHA, of the 13th of June 2002, on Combating Terrorism [amended by Council Framework Decision 2008/919/JHA, of the 9th of December 2008;
(e) Council Framework Decision 2001/500/JHA, of the 26th of June 2001, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime;
(f) Council Framework Decision 2003/568/JHA, on combating corruption in the private sector;
(g) Council Framework Decision 2004/757/JHA, of the 25th of October 2004, laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking;
(h) Council Framework Decision 2005/222/JHA, of the 24th of February 2005, on attacks against information systems;
(h) Council Framework Decision 2008/841/JHA, of the 24th of October 2008, on the fight against organised crime;
(j) Directive 2011/36/EU, of the 5th of April 2011, on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA;
(k) Directive 2011/92/EU, of the 13th of December 2011, on combating the sexual abuse and sexual exploitation of children and child pornography and replacing Council Framework Decision 2004/68/JHA.

a) The Justice and Home Affairs Council Conclusions on confiscation and asset recovery adopted in June 2010[24], calling for a more coordinated approach between Member States, with a view to the possibility of strengthening the legal framework in order to achieve more effective regimes for third party confiscation and extended confiscation, stressing the importance of all phases of the confiscation and asset recovery process, without ignoring the preventative measures to preserve the value of assets during that process.

b) The Parliament's report on organised crime[25] of 2011, calls on the Commission to propose new legislation on confiscation as soon as possible that will regulate, in particular, the effective use of extended and non-conviction based confiscation, the confiscation of assets transferred to third parties and rules concerning the mitigation of the burden of proof, following the conviction of an offender for a serious offence, with regards to the origin of assets held by the offender.

c) The Commission Communication "An Internal Security Strategy in Action"[26] where there is already the intention of proposing legislation to strengthen the EU legal framework on confiscation, in particular to allow more third-party confiscation and extended confiscation and to facilitate mutual recognition of non-conviction-based confiscation orders between Member States.

Subject matter.- Minimum rules on the freezing of property with a view to possible subsequent confiscation and on the confiscation of property in criminal matters.

Categories.- Along with conviction-based confiscation, it regulates extended confiscation, non-conviction-based confiscation and third party confiscation.

Furthermore, it indicates its respect for recognised human rights and freedoms, specifying in the detailed reasoning of the proposal that: a) the introduction of harmonised non-conviction based confiscation provisions is foreseen only for very limited circumstances, i.e. where the defendant cannot be prosecuted due to death, illness or flight; b) extended confiscation is allowed only to the extent that a court finds, grounding its decision on specific facts, that a person convicted of an offence is in possession of assets that are substantially more likely to be derived from other similar criminal activities than from other activities; in any event, the convicted person is given

[24] Document no. 7769/3/10.
[25] 2010/2309(INI)
[26] COM(2010) 673 final, of 22.11.2010

an effective possibility of rebutting such specific facts; and by no means may the extended powers of confiscation be applied to the alleged proceeds of criminal activities for which the affected person has been acquitted in a previous trial, or in other cases where the *ne bis in idem* principle applies; and c) third party confiscation is allowed only under specific conditions, i.e. where the acquiring third party paid an amount lower than market value and should have suspected that the assets are proceeds of crime, subsequent to an assessment showing that confiscation of assets directly from the person who transferred them is unlikely to prove fruitful; as is the case with the accused or suspect, the third party must be informed of the proceedings, has the right to be represented by a lawyer, must be informed of any decision affecting property as soon as possible and must be able to effectively appeal against such decisions.

Repeals: it will replace Framework Decisions 2001/500/JHA and 2005/212/JHA.

5.- European Evidence Warrant.

The *origin and purpose* of supplementing Council Framework Decision 2003/577/JHA, of the 22nd of July, *on the execution of orders freezing property or evidence*, determines the current fragmented content of the European warrant, regulated by **FRAMEWORK DECISION 2008/978/JHA of the 18th of December 2008**, ***on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters***. Its purpose is expressly acknowledged in recitals 5 and 6 of the Preamble.

It is merely *a first step, providing for the obtaining of evidence that already exists and that is directly available*; the next stage would be to provide for the mutual recognition of orders for the obtaining of other types of evidence. These, which remain outside the scope of this instrument, can be divided into two categories:

a) Evidence that does not already exist but that is directly available. This includes the taking of evidence in the form of statements from suspects, witnesses or experts, and the taking of evidence through the monitoring of telephone calls or bank transactions.

b) Elements of evidence that, whilst already existing, are not directly available without further investigation or analysis. This includes the taking of evidence from the

body of a person (such as DNA samples). This category also includes situations wherein further inquiries need to be made, in particular by compiling or analysing existing objects, documents or data. An example is the commissioning of an expert's report.

In particular, the following shall **not** be the object of a request via this instrument:

a) requests to have interviews conducted with or statements taken from suspects, witnesses, experts or any other party, including requests to initiate other forms of interrogation;

b) requests for the carrying out of bodily examinations and the gathering of organic material or biometric data directly from the body of any person, including DNA samples or fingerprints;

c) requests to obtain information in real time via the interception of communications, covert surveillance or the monitoring of bank accounts;

d) requests to have existing objects, documents or data analysed;

e) requests to obtain communications data retained by providers of a publicly available electronic communications service or a public communications network;

f) requests for the exchange of information on criminal convictions extracted from the criminal record registry shall be carried out in accordance with Council Decision 2005/876/JHA of the 21st of November 2005.[27]

However, a final regulatory stage was announced, wherein these separate instruments could be brought together into a single consolidated instrument that would include a general section containing provisions applicable to all cooperation.

In spite of everything, achieving this has not proved easy and the original wording of the 2003 initiative has changed considerably, to the extent that it has even been subject to three referrals for a Parliamentary report.

The European warrant, under consideration here, may be *defined* as a judicial decision issued by a competent authority of a Member State with a view to obtaining objects, documents and data from another Member State for use in "criminal"

[27] This Decision is repealed by COUNCIL Framework Decision 2008/315/JAI, of the 26th of February 2009, *on the organisation and content of the exchange of information extracted from criminal records between Member States*, for which the deadline of transposition expired on the 26th of March 2012 (OJ L 93, of 7.04.2009).

proceedings[28].

It should only be issued only when the objects, documents or data gathered are necessary and proportionate for the purpose of the proceedings listed; and provided that they could be obtained under the law of the issuing State, if they were *available* in its territory. It is sufficient, however, that there be reasonable grounds for believing that they are located in the executing State. In the case of electronic data, it is sufficient that they be directly accessible under the law of the executing State[29].

In order to better determine its field of application, *its scope is defined in terms of the elements to which it does apply*: objects, documents or data that are already in the possession of the executing authority before the warrant is issued. It also applies to incidental evidence: any other object, document or data that the executing authority discovers during the execution of the warrant and, in the absence of complementary investigations, it holds to be relevant to the proceedings for the purpose of which the warrant was issued. It even applies, where requested, to statements from individuals present during the execution of the search, directly related to the case.

Its *scope is also defined in terms of the elements to which it does not apply*, whereby it may not be used to request:

a) requests to have interviews conducted with or statements taken from suspects, witnesses, experts or any other party, including requests to initiate other forms of interrogation;

b) requests for the carrying out of bodily examinations and the gathering of organic material or biometric data directly from the body of any person, including DNA samples or fingerprints;

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[28] It is thus defined in Article 5:

a) with respect to criminal proceedings brought by, or to be brought before, a judicial authority in respect of a criminal offence under the national law of the issuing State;

b) in proceedings brought by administrative authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters;

c) in proceedings brought by administrative authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters;

d) in connection with proceedings referred to in points a), b) and c) which relate to offences or infringements for which a legal person may be held liable or sanctioned in the issuing State.

[29] This provision traces its origin to the Convention on Cybercrime, as it made it possible for the executing State to obtain evidence in the form of computer data that is lawfully accessible within its territory via an electronic communications network, on the condition that it relate to services afforded to its territory, even where such data is stored in the territory of another Member State, provided that its domestic law does not prohibit the executing Member State from accessing the data.

c) requests to obtain information in real time via the interception of communications, covert surveillance or the monitoring of bank accounts;

d) requests to have existing objects, documents or data analysed;

e) requests to obtain communications data retained by providers of a publicly available electronic communications service or a public communications network.

f) requests for the exchange of information on criminal convictions extracted from the criminal record registry shall be carried out in accordance with Council Decision 2005/876/JHA of the 21st of November 2005.[30]

This warrant is to *coexist* with current mutual assistance procedures[31], but such coexistence should be considered transitional until such time as, in accordance with the Hague Programme, the types of evidence-gathering excluded from the scope of this Framework Decision are also the subject of a mutual recognition instrument, the adoption of which would provide a comprehensive mutual recognition system to replace current mutual assistance procedures.

However, the European warrant should be used when all of the objects, documents or data required from the executing State fall within the scope of this Framework Decision. Thus, where the request for assistance has a wider scope, the use of this Framework Decision to obtain objects, documents or data would be optional.

The *authorities that are competent* for the issue of the European warrant, are as follows:

i) a judge, a court, an investigating magistrate, a public prosecutor; or

ii) any other judicial authority as defined by the issuing State that, in the specific case, acts in its capacity as an investigating authority in criminal proceedings with

[30] This Decision is repealed by COUNCIL Framework Decision 2008/315/JAI, of the 26th of February 2009, *on the organisation and content of the exchange of information extracted from criminal records between Member States*, for which the deadline of transposition expired on the 26th Of March 2012 (OJ L 93, of 7.04.2009).

[31] In the wording of the initiative, the intention to replace the following conventions was highlighted, where the request for assistance was for obtaining evidence falling within their scope of application: a) European Convention on Mutual Assistance in Criminal Matters of the 20th of April 1959 and its Additional Protocols of the 17th of March 1978 and the 8th of November 2001; b) European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of the 8th of November 1990; c) Convention implementing the Schengen Agreement; d) European Convention of the 29th May 2000, on Mutual Assistance in Criminal Matters between the Member States of the European Union and its Protocol of the 16th of October 2001. And, moreover, it **repealed** Article 51 of the Convention implementing the Schengen Agreement and Article 2 of the 2001 Protocol to the 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union.

competence to order the gathering of evidence in cross-border cases in accordance with national law.

Execution will be undertaken by the authority designated under the national law upon incorporating this Framework Decision; with the possibility of designating a central authority (or authorities).

For its issuance, the *form* that accompanies the Framework Decision should be completed, signed, and its contents certified as "accurate" and it must be written in, or translated into one of the official languages or into one of the languages designated by the executing Member State. On completing the form, it where the warrant supplements a previous warrant, particularly where it is a follow-up to a freezing order issued in virtue of Framework Decision 2003/577/JHA, this must be indicated.

Its envisaged *transmission* is that typical of mutual recognition instruments: directly between authorities, via any means capable of producing a written record under conditions allowing the executing State to establish authenticity. It may also be sent via the secure telecommunications system of the European Judicial Network. This Network will help determine the executing authority in each case. In the event of receipt by a non-competent authority, it should be forwarded to the competent authority and the issuing authority notified.

Execution: the executing authority shall recognise the warrant without any further formality being required and shall forthwith take the necessary measures for its execution in the same way as an authority of the executing State would obtain the objects, documents or data.

The executing State shall be responsible for choosing the measures that, under its national law, will ensure the securing of the objects, documents or data sought by a warrant and for deciding whether it is necessary to use coercive measures to provide this assistance.

However, where it is necessary to carry out a *search*, if the issuing authority is not a judge, a court, an investigating magistrate, or a public prosecutor; or has not been validated by one of these authorities in the executing State, the executing authority may, in this specific case, refuse to execute the search or seizure. In any event, a statement may be issued requiring such validation. At the same time, however, in the event of the list of reiterated offences in mutual recognition instruments, the action will be carried out without the requirement of double criminality.

In its execution, the *formalities and procedures* expressly indicated by the issuing authority will be complied with, providing that they are not contrary to the fundamental principles of law of the executing State; although this does not create an obligation to adopt coercive measures and if they are adopted, they will be adopted in accordance with the applicable procedural rules of the executing State.

As regards the *grounds for refusal*, it is indicated that the request "may" be refused, in the following cases, in a communication in principle to be addressed to the judicial authority, rather than the legislator, in the following cases:

a) if its execution would infringe the *ne bis in idem* principle;

b) if, in specified cases of territorial jurisdiction, the warrant relates to acts that would not constitute an offence under the law of the executing State;

c) if it is not possible to execute the warrant by any of the measures available to the executing authority in the specific case of the absence of measures for a similar domestic case;

d) if there is an immunity or privilege under the law of the executing State that makes it impossible to execute the warrant;

e) if, having been issued by a non-judicial authority, the warrant has not been validated;

f) if the warrant relates to criminal offences that are regarded as having been committed within its territory; or where the offences are extraterritorial and the executing State does not permit criminal legal proceedings to be taken in respect of such offences when they are committed outside that State's territory.

g) if, 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; or

h) if the form provided for in the Annex is incomplete or manifestly incorrect and has not been completed or corrected within a reasonable deadline established for this purpose.

The grounds for refusal do not include the verification of *double criminality*, unless it is necessary to carry out a search or seizure, although not in this case either, as indicated above, in the event of the list of offences incorporated to this effect, which coincides with that typical of mutual recognition instruments, where, in the issuing

State, the offence is sanctioned with a custodial sentence of a maximum period of at least three years.

Expeditious *deadlines* are established for decision-making and enforcement: as soon as possible and within a maximum of 30 days. The deadline for taking possession of the objects, documents or data by the executing authority is within 60 days of receipt of the warrant. When it is not possible to meet the deadline, the executing authority shall indicate the estimated time needed for the action to be taken. The deadline for the transfer the objects, save where an appeal is lodged or there are grounds for postponement, is without delay.

These *grounds for postponement*, may take priority over recognition, with respect to a form that is incomplete or manifestly incorrect, or one that requires validation in the event of the need for a search; and over execution, if a criminal investigation or criminal proceedings may be adversely affected; or where the objects, documents or data are being used in other proceedings. As regards decisions to postpone, where the warrant has been issued or validated by a judicial authority, the decision to refuse must also be ordered by a judicial authority.

The obligatory nature of a system of *appeals* is established, by virtue of which, any interested party, including third parties acting in good faith, may appeal against the recognition and execution of a warrant, in order to preserve their legitimate interests. It does, however, authorise Member States to limit appeals in cases wherein the warrant is executed using coercive measures. The appeal must be lodged before a court in the executing State in accordance with the law of that State. Nevertheless, as is normally the case, the grounds underlying the issuance of the warrant may only be challenged in an action brought before a court in the issuing State.

An indemnifying clause is introduced, under the heading of *reimbursement*, in favour of the executing State, to be met by the issuing State, in the event of detriment that may arise as a result of the warrant and to which it must respond.

The conditions applicable to *personal data obtained* through the European warrant are expressly regulated and their use by the issuing State is permitted: a) proceedings for which the warrant may be issued; b) judicial and administrative proceedings directly related to the proceedings referred to above; and c) preventing an immediate and serious threat to public security. For any other purpose, either prior consent is required from the executing State, or the consent of the individual in question. These are excessively broad terms and their openness to interpretation is

criticised by the doctrine.

The *deadline for transposition* into national law ended on the 19th of January 2011.

As a new feature, in contrast to previous mutual recognition instruments, it is required that where grounds for refusal related to territoriality are to be incorporated into national legislation (offences committed within territory regarded as its own or that had their origin in extraterritorial competence that its legislation does not recognise) must be notified by submitting a *declaration* to the General Secretariat of the Council at the moment of adoption.

Furthermore, *Germany* is specifically allowed a declaration by means of which, when the execution of a European evidence warrant requires search or seizure, it reserve its right to makethe execution of the warrant subject to verification of double criminality in the case of crimes relating to terrorism, computer-related crime, racism and xenophobia, sabotage, blackmail and extortion or swindling, except wherethe issuing authority has stated that the offence in questioncomplies with the content and definition outlined in the declaration.

6.- Initiative for the adoption of a Directive on the European Investigation Order in criminal matters.

When the deadline had still not expired for the transposition into national law of the preceding Framework Decision, seven States, Belgium, Bulgaria, Estonia, Spain, Austria, Slovenia and Sweden proposed an initiative dated the 21st of May 2010[32], grounded on the mutual recognition of orders for the obtaining of any type of evidence and not only previously existing and available[33] evidence. The intention was to advance the implementation of this second stage, wherein the warrant is not limited or restricted on the basis of the type of evidence to be obtained, and thereby avoid the excessive fragmentation entailed with the continued existence of Framework Decisions 2003/577/JHA and 2008/978/JHA, wherein we could guarantee the evidence, but the next step of requesting dispatch or transfer, except in the case of existing and available evidence, was only possible on the basis of classic cooperation criteria.

[32] Document no. 9288/10. The final wording of the text approved by the Council for general guidance is contained in document no. 18918/11, of the 21st of December.
[33] Official Journal C 165 of 24/06/2010 pp. 0022 – 0039.

Thus emerged the proposal on the **European Investigation Order (EIO)**, wherein this instrument is *defined* as "a judicial decision issued or validated by a competent authority of a Member State ("the issuing State") in order to have one or several specific investigative measures carried out in another Member State ("the executing State") with a view to gathering evidence in accordance with the provisions of this Directive. An EIO may also be issued in order to obtain evidence already in the possession of the competent authorities of the executing State."

Thus, there are two fundamental issues for the progress of mutual recognition that this instrument proposes for the obtaining of cross-border evidence:

a) Its *intention to codify*, or at least unify; as, in addition to applying to the freezing of items of evidence in substitution of the corresponding provisions of Framework Decision 2003/577/JHA, it repeals Framework Decision 2008/978/JHA and, in relations between Member States, it replaces, at the least, the Convention on Mutual Assistance in Criminal Matters of the 20th of April 1959 and its two additional protocols; the Convention of the 19th of June 1990 Convention of the 19th of June 1990 on the implementing of the Schengen Agreement of the 14th of June 1985; and the Convention of the 29th of May 2000 regarding mutual legal assistance in criminal matters between the Member States of the EU and its protocol of the 16th of October 2001. However, in its introductory section it states that it does not apply to the cross-border observations referred to in Article 40 of the Convention implementing the Schengen Agreement, basically because these are seen fundamentally as police measures. In any event, an Annex is announced with the provisions affected by this Directive and it is already foreseen that the Naples II Convention will not be affected.

b) Its *broad horizontal scope*, as it applies to almost all investigative measures; the exception being the creation of a joint investigation team and the gathering of evidence within such a team, although, logically, where the joint investigation team requires assistance from a Member State that has not participated in the creation of the team or from a third country, the competent authorities of the State the team is operating in can also make the request for assistance to the competent authorities of the other affected State, in accordance with this instrument. In the successive drafts of this initiative, some restrictions that were envisaged in the initial content with respect to some form of interception of telecommunications and its immediate transmission have been removed. Moreover, it contains *specific regulation* of a number of the measures:

- Temporary transfer of detainees to the issuing State in order to carry out an investigative measure.

- Temporary transfer of detainees to the executing State in order to carry out an investigative measure.

- Hearing via videoconference or other means of audiovisual transmission.

- Hearing via telephone conference.

- Information related to bank accounts and other types of financial accounts.

- Information related to banking transactions and other types of financial transactions.

- Investigative measures entailing the gathering of evidence in real time, continuously and over a certain period of time, such as controlled deliveries and the control of banking transactions.

- Covert investigations.

- The interception of telecommunications, making a distinction between another Member State's need for technical assistance and the mere notification to the Member State in which the individual is located where technical assistance is not necessary.

- Precautionary measures.

As regards its *territorial scope*, the United Kingdom and Ireland have notified their wish to take part in the adoption of this Directive (Art. 3 of Protocol no. 21 annexed to the Treaties), whilst Denmark has decided not to participate (Arts. 1 and 2 of Protocol no. 22 annexed to the Treaties).

Potential fungibility of the investigative measure: whilst it is the issuing State that determines, within the criteria of proportionality and appropriateness, where the requested measure does not exist in accordance with the national law of the executing State or is not available in a given case, the executing authority must, wherever possible, employ another type of measure; except where the measure relates to:

a) the hearing of a witness, a victim, a suspect or a third party in the territory of the executing State;

b) any non-coercive investigative measure;

c) the obtaining of information or evidence already in the possession of the executing authority provided that, in accordance with the national law of the executing State, this information or evidence could have been obtained in the context of criminal proceedings or for the purposes of the EIO;

d) the obtaining of information contained in databases that are in the possession of the police or judicial authorities and are directly accessible to the executing authority in the context of criminal proceedings;

e) the identification of individuals who are holders of a particular telephone number or an IP address;

f) search and seizure, where these have been requested in relation to the 32 categories of customary crimes (traditionally exempt in other mutual recognition instruments from the requisite of the verification of double criminality), as indicated by the issuing authority of the EIO, if in the issuing State these are sanctionable with a custodial sentence or security measure of a maximum of at least three years.

Recourse is also allowed to another type of investigative measure where this achieves the same result as the measure envisaged in the EIO employing

methods that are less intrusive in terms of the fundamental rights of the individual concerned and less invasive of his or her privacy, although in this case, with the exception of the list of 32 offences, the verification of double criminality may be required.

With regards the *competent authorities* for the issue and execution of the warrant and the *types of procedure* for which the warrant may be issued, the wording of Framework Decision 2008/978/JHA is essentially retained.

The *content and form* of the EIO must be adjusted in keeping with the corresponding *form* that accompanies the Directive, which must also be signed and certified as "accurate" by the issuing authority and must be written in, or translated into, one of the official languages or a language designated by the executing Member State. Furthermore, it must be indicated whether or not the issued warrant is related to a previous warrant.

Procedure: insofar as possible and notwithstanding the fundamental principles of law of the executing State, in accordance with the formalities and procedures expressly indicated by the issuing State. It may be requested that several authorities of the issuing State participate, in which case the executing authority must comply with this request, establishing the conditions regarding the scope and the nature of the presence of these authorities of the issuing State where necessary. However, within investigative measures implying a *gathering of evidence in real time*, continuously and over a certain period of time, the executing authority is granted sufficient *flexibility*, in view of the differences that exist between the national laws of the Member States.

Grounds for refusing recognition and enforcement: in general, it contains the provisions typically found in such instruments such as the following: a) immunities and privileges; b) where it could prove detrimental to essential national security interests, jeopardise the source of the information or involve the use of classified information relating to specific intelligence activities; c) where it refers to procedures for infringements of the rules of law (not crimes) and its provisions did not envisage the measure in these cases; d) *ne bis in idem*; e) where within the extraterritoriality of the issuing State or its own territoriality, the EIO gives rise to a coercive measure and the act is not a crime under the legislation of the executing State.

It is highlighted in the introductory section that the cases of immunity and privilege include protection applicable to the professions of doctor and lawyer and the

legislation expressly assimilates the assumptions of immunity and inviolability and rules on determining and restricting criminal responsibility in relation to the freedom of the press and the freedom of expression of other elements of the media.

Furthermore, it includes specific grounds for refusal, in relation to certain investigative measures.

Deadlines: the EIO must be adopted and the investigative measure carried out with the same celerity and priority afforded to similar national cases and, in any event, within the deadlines established in the Directive. The decision on the recognition or execution shall be taken as soon as possible and no later than 30 days subsequent to the reception of the EIO and the investigative measure is likewise to be implemented without delay, no later than 90 days subsequent to the decision to recognise or execute. Furthermore, where the issuing authority has indicated in the EIO that, due to procedural deadlines, the seriousness of the offence or other particularly urgent circumstances, shorter deadlines are necessary, or where the issuing authority has stated in the EIO that the investigative measure must be carried out on a specific date, the executing authority will take due account of these requisites, insofar as this proves possible. The transfer of evidence must be immediate.

Appeals: the channels for appeal that must be guaranteed, including information on the possibility or existence of appeal, must be, at least, equivalent to those existing under national law against the investigative measure in question. Where the interested party presents objections against an EIO in the executing State, citing substantive grounds in relation to the issuance of the EIO, it is advisable that the information on this challenge be transmitted to the issuing authority and the interested party be informed.

Costs: in typical fashion, the expenses incurred in the territory of the executing Member State resulting from the execution of an EIO, must be borne exclusively by this Member State. Nevertheless, in the event of excessively high costs (for example, complex expert reports, or large-scale or protracted police operations or surveillance activities) the issue of costs may be the subject of consultation between the interested Member States. Indeed, as a last resort, the issuing authority may decide to withdraw the EIO or maintain it and assume the portion of the costs that the executing State considers exceptionally high, where the measures in question prove absolutely necessary.

The *grounds for postponement* are those commonly found in relation to such instruments: that a criminal investigation or proceedings may be adversely affected, or

that the objects, documents and data are being used in other proceedings.

The *officials from the issuing State* that have operated in the executing State in the implementation of the Directive will be afforded the consideration of officials of the executing State, in terms of civil and criminal liability.

Moreover, it establishes a general obligation of confidentiality in relation to the investigation, in addition to requiring measures in order to prevent banks from disclosing to the client in question, or to other third parties, that information has been transmitted to the issuing State or that an investigation is being carried out.