

EUROPEAN INVESTIGATION ORDER

The Legislative Decree (the "**Law**") of 21 June 2017 no. 108 "*Rules on the implementation of Directive 2014/41/EU of the European Parliament and Council of 3 April 2014* (the "**Directive**"), relating to the European Investigation Order in criminal matters was published in the *Gazzetta Ufficiale* no. 162 on 13 July 2017.

The Law, which has been in force since 28 July 2017, introduces into Italy a new instrument for the crossborder acquisition of investigation files and evidence (search and seizure; wiretaps; witness interviews; information from banks and financial institutions) and allows their transfer through a single and unified order across Europe and the direct and immediate correspondence between the competent authorities of the various states. This replaces the old system of letters rogatory which, however, will remain in force between Italy and the member states that opted out of the Directive (Denmark and Ireland) and in the relations between Italy and non-member states (such as Iceland and Norway).

In this transnational context, having lawyers highly specialised in cross border litigation mirroring the European Judicial Network and other pre-existing cooperation networks (e.g. Eurojust) – is now, more than ever, essential for the purposes of the legal advice required by law.

WHAT IT IS

- The European Investigation Order is a judicial decision issued by the competent authority of a member state (so-called issuing state) in order to acquire evidence or information in another member state (state of execution) or to obtain information or evidence already in the possession of the Authorities of the state of execution.
- The EIO reforms and simplifies the letters rogatory system – which will continue to govern the relations between Italy and the member states that opted out of the Directive (Denmark and Ireland) and the relations between Italy and non-member states (such as Iceland and Norway) – and previous statutory instruments set out under European legislation, such as the European Arrest Warrant. In particular:
 - it has a **more rapid and leaner procedure**: it provides for direct dialogue between judicial authorities and excludes any "political" filter;

THE TIMEFRAME:

- On 2 April 2014 Directive 2014/41/EU of 3 April 2014 relating to the European Investigation Order in criminal matters was approved
- On 21 June 2017 the legislative decree implementing the Directive was published in the *Gazzetta Ufficiale*
- On 28 July 2017 the new European Investigation Order in criminal matters came into force

- **it extends to all types of evidence:** the judicial authority of the issuing state may request the competent authority of another member state not only to obtain and send documents (acquisition of evidence already in the possession of the authority of execution) but also to obtain evidence such as, for example, the identification of a witness, wiretaps, eavesdropping, seizures and monitoring flows in and out of a specific account;
- The EIO cannot, however, be used to carry out cross-border surveillance for the transfer of criminal proceedings in order to request the service of procedural documents and activate the spontaneous exchange of information between judicial authorities;
- may be required **in the proceedings relating to tax offences:** no refusal may be made in relation to tax, customs and currency breaches because of the simple fact that Italian law does not provide for the same type of taxes or duties or differs, including in significant ways, from the laws of the applicant state;
- **guidelines for evidence gathering are set forth by the applicant Authority**, which may also ask to take part itself in evidence gathering operations: the Authority of execution adheres to the formalities and procedures required, unless they harm the "fundamental principles" of the legal system of the state of execution.

THE IMPLEMENTATION OF THE EIO BY THE MEMBER STATES

- The EIO has already been implemented by twelve member states including (in addition to Italy) the Netherlands, France and Spain.
- The United Kingdom has also adopted legislation regarding the EIO and, until other agreements within the framework of Brexit have been reached, it is included within the operational perimeter.
- The state of progress of the implementation of the various member states can be monitored at the following address:
<https://www.ejn-crimjust.europa.eu/ejn/libcat/egories.aspx?Id=120>

THE PROCEDURE AND RIGHTS OF DEFENCE

The Law governs both the case of EIOs issued by foreign authorities ("**Passive Procedure**") and the case of EIOs issued by Italian authorities ("**Active Procedure**");

- In relation to the **passive procedure** (i.e. brought by the foreign judicial authority):
 - the holder of the power of recognition is the Public Prosecutor. The involvement of the Judge for the Preliminary Investigation in the recognition and execution is merely a possibility: it can occur either at the explicit request of the foreign applicant authority or when, as regards the specific measure requested and enforced, it is Italian law which requires the intervention of the Judge for the Preliminary Investigations (such as, for example in case of authorisation to conduct wiretaps);
 - the Law provides for **time frames for recognition and execution which are very rapid:**
 - the Public Prosecutor provides for the **recognition** of the EIO by way of a court order within the time limit of **thirty days** from receipt or within the different time limit which it lays down or in any case not exceeding **sixty days** from receipt;
 - the **execution** of the EIO must be carried out within **ninety days**.

However, non-compliance with these time limits does not entail the application of any sanction: the time frame for recognition and execution will, accordingly, be left to the discretion of the Public Prosecutor;

- **The judicial authority may refuse to recognise a certain EIO in a limited number of cases:**
 - o the act in respect of which the EIO was issued is not punished under Italian law as an offence (so-called scrutiny of double criminality);
 - o the person against whom action is taken enjoys immunity from the Italian state or the execution of the EIO could cause damage to national security;
 - o the EIO sent is incomplete and provided by information manifestly erroneous and inconsistent;
 - o the investigative measure sought is not provided for by Italian law and cannot be carried out either through several different measures suitable for achieving the same purpose;
 - o there are grounded reasons to take the view that the execution of the measure requested in the EIO would infringe the rights, liberties and principles enshrined in the European Charter of Human Rights and the European Convention on Human Rights; the EIO is not proportionate, in other words its execution may lead to the sacrifice of the rights and liberties of the defendant and other persons involved in the performance of the measures requested

- **The scrutiny of double criminality is eliminated in relation to certain offences or certain measures:**
 - o for the execution of any investigative measure or the taking of evidence in the event that the applicant state takes action in relation to one of the **thirty two types of offences provided for by the Directive** including corruption, fraud (including against the European Union), laundering of the proceeds of crime, cybercrime, pollution, fraud, extortion and harmonised types of offences at European level such as those relating to market abuse;
 - o regardless of the offence in respect of which action is brought, in the event that the application concerns **documentary evidence or that it does not entail any "coercion"** in accordance with the law of the state of execution: obtaining evidence contained in databases of the investigating bodies; interviews with persons of interest, witnesses, advisors, experts, victim of the crime and person under investigation or a defendant in the territory of the state; execution of measures which do not impact on the personal freedom or, finally, the identification of persons holding a specific telephone number, an email address or an IP address

- **defence counsel has the right to be present and receive prior notification of the order of recognition in accordance with Italian law** for the execution of the same measure: for example, defence counsel will have the right to be notified in advance in the event that an Italian authority wishes to proceed with interviews and inspections where it will only have the right to be present without prior notice in case of searches and seizures;

INTERVENTION BY DEFENCE COUNSEL

The defence counsel of the person under investigation, the defendant or the person against whom the preventive measure is brought **may ask the Public Prosecutor or the Judge to issue an EIO**

In respect of domestic law, the right of the defence counsel to be present and, where provided for, the right to notification of the order of recognition in advance of the execution of the measure is **unchanged**

The person under investigation and their defence counsel **can bring an appeal against the order recognising an EIO from a foreign authority** before the Judge for the Preliminary Investigation who will reach a decision after hearing the Public Prosecutor

The person under investigation or the defendant, their defence counsel, the person from whom evidence or assets were seized and the person who has a right to **their return may bring an appeal (so-called *riesame*) against an EOI issued by an Italian authority relating to the seizure**

- within **five days** of communication by the Public Prosecutor of the EIO **the person under investigation and his own defence counsel may bring an appeal against the order of recognition** before the Judge for the Preliminary Investigations after hearing the Public Prosecutor. Greater guarantees are provided in the case of EIOs concerning seizure for the purposes of evidence: the court will decide in chambers, in the presence of the parties and an appeal may be brought before the Supreme Court. Further, in this case the appeal may also be brought by the person from whom the evidence and the asset have been seized and who has a right to its restitution:

- in relation to the **active procedure** (i.e. brought by Italian judicial authorities):
 - within a criminal procedure or a procedure for the application of an asset protection measure the Public Prosecutor or the court taking action (within the scope of the respective powers), can issue an EIO and send it to the authority of execution;
 - the EIO contains the following information:
 - the data relating to the issuing authority;
 - the subject matter and the reason for the EIO;
 - the necessary information available on the person(s) concerned;
 - the summary description of the facts in relation which action is brought;
 - an indication of the laws allegedly breached;
 - a concise description of the investigative measure requested and the evidence to be obtained;
 - the defence counsel of the person under investigation, the defendant or the person in respect of whom the application for an asset protection measure is brought may ask the Public Prosecutor to issue an EIO, indicating, under penalty of inadmissibility, the investigative measure or evidence and the reasons why they should be granted. However, there is no remedy if the application is refused. The investigations by the defence counsel are, however, excluded given that they fall completely outside the scope of the EIO;
 - the person under investigation or the defendant, their defence counsel, the person from whom the evidence or the assets were seized and the person who has a right to their restitution – in addition to any means of objection and/or review provided for by the EIO execution order - **may bring an appeal against an EIO issued by an Italian authority relating to the seizure of evidence.**

- In light of the comprehensive nature of the rules of the EIOs and with a view to the increasing harmonisation of the provisions of the member states, the Law implementing the Directive sets forth specific provisions in relation to standard investigative measures such as, for example, seizure measures, interviews via conference call or video link, obtaining information from banks and financial institutions and wire taps.

THE IMPORTANCE OF A TEAM ENGAGED IN CROSS-BORDER DEFENCE

- Given the increasingly obvious crisis of the concept of territoriality in the search for and acquisition of evidence, the EIO appears to be a decisive step forward in the creation of a common European area. It is a journey that seems to be just at the beginning: through the provision in the Treaty of Lisbon for the possibility to introduce through the ordinary legislative procedure directives aimed at establishing "minimum norms", including in relation to the mutual admissibility of the evidence between states (art. 82, paragraph. 2, TFEU), we have now entered a new era in cross border investigations. And this is even more the case in light of the approval on 12 October of the European Regulation which creates the **European Public Prosecutor's Office** (EPPO) which will have jurisdiction to identify, pursue and indict the perpetrators of offences which damage the financial interests of the Union.

- In this transnational context it is clear that a team of professionals specialised in cross border defence is becoming essential in order to provide precise and immediate answers to problems which, as a result of the new laws, we will increasingly be forced to address:
 - in the stage of the **preparation of an application** for the purpose of issuing an EIO in order to identify, within the scope of the various instruments provided for by the issuing state and the state of execution, the act or the series of acts which better meet the needs of the investigation in compliance with the principle of proportionality;
 - in the stage of the **execution** of an EIO so that within its scope compliance with the guarantees provided for in the issue and "the fundamental principles" of the legal system of the state of execution are ensured;
 - in the stage of **appeal** against an EIO issued by a foreign state or which must be executed by a foreign state, given the need to understand exactly the prerequisites of the application, the limits of the methods of application of the measure sought and the act (or acts) deemed appropriate by the state of execution.

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