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**THE INTERROGATION OF WITNESSES ABROAD IN
EXECUTION OF A EUROPEAN INVESTIGATION ORDER
AN EXAMINATION FROM THE EYES OF THE DEFENCE**

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Abstract

The objective of this study is to examine the position of the defence in a criminal case under the *Initiative for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters* of 29 April 2010. This proposal is under ongoing discussion at the European Union level and aims to increase efficiency in cross-border cooperation on obtaining evidence in criminal matters. Mutual recognition is the key word on which this cooperation is based. Any new evidence-gathering instrument must safeguard human rights, including the rights of the defence. This work concentrates particularly on the investigation measure of hearing a witness. In this regard, the relevant specific defence rights and their interpretation by the European Court of Human Rights and the European Court of Justice are revealed. Subsequently, the potential execution of the new instrument of a European Investigation Order is scrutinised in light of these observations. The results suggest concerns regarding the form and content of the current provisions of the Initiative from a defence perspective. Moreover, general counterbalancing measures are absent, rendering the new Proposal non-proportional to the aim it is willing to achieve. The principal conclusion is that alternative scenarios should be established in order to balance all the interests involved.

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List of abbreviations

CCP – Code of Criminal Procedure

EAW – European Arrest Warrant

ECHR – European Convention on Human Rights

ECJ – European Court of Justice

ECMA – European Convention on Mutual Assistance in Criminal Matters of the Council of Europe of 20 April 1959

ECtHR – European Court of Human Rights

EEW – European Evidence Warrant

EIO – European Investigation Order

EU – European Union

EU-Charter – Charter of Fundamental Rights of the European Union

EU MLA – European Union Convention on Mutual Assistance in Criminal Matters of 29 May 2000

EU MLA Protocol – Protocol to the European Union Convention on Mutual Assistance in Criminal Matters of 16 October 2001

MLA – mutual legal assistance

MR – mutual recognition

TFEU – Treaty of the Functioning of the European Union

INTRODUCTION

The abolition of internal borders in the European Union (EU) has gone hand in hand with an increased level of cross-border crime and a higher mobility of criminals. Against this background, eight EU Member States launched an *Initiative for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters*¹ (hereafter the ‘EIO Proposal’ or the ‘Initiative regarding the EIO’) on 29 April 2010. The objective of this proposal is to make the EU an area of freedom, security and justice and, more in particular, to create an efficient and effective response to criminal cases with cross-border aspects, by offering a complete system for obtaining and transferring evidence located abroad.

The underlying philosophy of this system corresponds to the general trend of mutually recognising national decisions within EU cross-border cooperation on combating criminal activity (see Chapter I). If the Initiative regarding the EIO gains the necessary support throughout the legislative procedures and the EIO becomes a new evidence gathering instrument in day-to-day practice, this would reflect a major evolution in light of pre-trial investigations with cross-border aspects.

As several human rights are engaged by the pre-trial evidence-gathering proceedings, the questions arise whether these rights might become affected by the proposed instrument and if so, how its legal provisions respond to possible concerns in this regard.² Bearing in mind the limited space to address these questions as well as the detailed analysis aimed for, this thesis will focus on the right to a fair trial and, specifically on the particular minimum aspects this right offers to the defence. In this regard and in line with the EU context in which the EIO would operate, the relevant provisions of both the Charter of Fundamental Rights of the European Union (EU

¹¹ Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Grand Duchy of Luxembourg, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters, OJ No. C 165/02 of 24.06.2010.

² Other human rights and freedoms that might be at stake are: the right to liberty and security, the right to respect for private and family life, the freedom of expression, the rights of the child, and the protection against torture and inhuman or degrading treatment or punishment. These rights might not only be engaged from the perspective of the defence, but also, for instance, from the perspective of victims and witnesses. This thesis only focuses on the defence perspective.

Charter)³ and the European Convention on Human Rights (ECHR)⁴ will be taken into account.

However, since articles 47 and 48 of the EU Charter focus on the defence rights in a more limited way than the ECHR, and since the latter instrument overlaps the first in this regard, the main attention will go to the minimum defence rights foreseen in article 6 § 3 ECHR and their interpretation by the European Court of Human Rights (ECtHR). Only scarce reference will be made to the case law of the European Court of Justice (ECJ). Firstly, because cases of this Court relevant for the topic are rather limited and secondly, because it must be borne in mind that insofar as the rights of the EU Charter are derived from the rights set out in the ECHR, a Charter right will have the same scope and meaning as the ECHR right in question.⁵

Following from the aforementioned considerations, Chapter II of this thesis will thus examine the specific minimum defence rights engaged by the pre-trial evidence-gathering proceedings and the European case law surrounding them. Nonetheless, not all these minimum rights will be scrutinised. Once again, considerations of space limits urge on focusing on those defence rights that are relevant against the background of one particular investigative measure, namely the interrogation of witnesses abroad. Obviously, other measures of an investigative nature would also fall under the scope of the EIO, such as intercepting and monitoring telephone or e-mail communications, monitoring activity in bank accounts, collecting DNA samples or fingerprints and many more. Despite the fact that the majority of the other investigative measures are far more intrusive than the interrogation of a witness, it seems nevertheless interesting to focus on the latter.

Indeed, if concerns already arise from a defence perspective when executing *this* investigative measure abroad, problems can be expected *a fortiori* in light of other, more intrusive, measures. Furthermore, the hearing and challenging of witnesses is of great importance to protect the charged person by ensuring the adversarial character of the proceedings, the equality of arms and an active defence role.⁶

The analysis of the content and judicial interpretation of all relevant specific defence rights regarding the interrogation of witnesses abroad will, subsequently, serve as a

³ Charter of Fundamental Rights of the European Union, OJ No. C 364/1 of 18.12.2000.

⁴ Council of Europe, European Convention on Human Rights, Rome, 4 November 1950, T.S. 71 (1953); Cmd. 8969.

⁵ Art. 52(3) of the EU Charter.

⁶ Trechsel, 2005, pp. 292-293.

frame of minimum rules and standards in the light of which the EIO Proposal will be critically examined. Such an examination will be developed as a last step in the discussion of each defence right under Chapter II and will include specific recommendations in case defence protection gaps are revealed.

Aspects of defence protection that might be affected by the application of the EIO in light of a witness interrogation abroad, might derive from diverging rules and practices among the European Member States. To be able to examine the latter presumption and illustrate it with examples, the rules and practices of three particular countries, representing the three major legal traditions in Europe, will be scrutinised. These countries are: the United Kingdom (common law tradition), the Netherlands (inquisitorial tradition) and Poland (*post* state-socialist tradition). Reference is made to ‘traditions’, rather than to ‘systems’, because, while the broad traditional contours are still reflected in the several systems, each of them has developed over the years.⁷ The Dutch system, for example, situated in the inquisitorial tradition, is also attributed with common law elements.

The observation of protection gaps in the course of Chapter II, leads us to the third Chapter in which a potential justification for such gaps will be sought. Indeed, the launch of the Initiative regarding the EIO might, for instance, be justified by a highly urgent and pressing aim. Moreover, further research will be done about whether the EIO Proposal foresees some general measures to counterbalance (or prevent) the lowering of the defence protection. Such measures might indeed create an equilibrium between the risks the defence is faced with and the aim the new instrument intends to achieve. However, also regarding this proportionality, no rosy picture will be reflected. Therefore, in the course of the final conclusion, several concrete alternative scenarios will be elaborated that ought to bring the protection of the rights of the defence back in the picture.

⁷ This classification has been equally made in the following study: Cape, Hodgson, Prakken & Spronken, 2007, p. 7. See also there for more detailed information about these legal traditions.

I. CROSS-BORDER COOPERATION ON OBTAINING EVIDENCE: AN EVOLUTION FROM MUTUAL LEGAL ASSISTANCE TOWARDS MUTUAL RECOGNITION

1. The traditional approach of mutual legal assistance

Today's cross-border cooperation in police and judicial matters in the EU, including cooperation on obtaining evidence in criminal cases, is still largely based on the principle of mutual legal assistance (MLA).⁸ The latter principle is indeed well-established if authorities of one Member State are unable to proceed with a criminal investigation and need the assistance of the authorities of another EU country. As such, through the application of the MLA regime, a state can obtain the execution of a witness interrogation abroad.⁹ Under the MLA approach, the requested state has a rather broad discretion to refuse to execute a request for assistance.¹⁰ On the other hand, since the obtained evidence needs to be used in the proceedings of the requesting country, the executing authorities take, to some extent, the formalities and procedural requirements of the requesting Member State into account.¹¹ The latter method is characteristic of the theory of '*forum regit actum*' in which the requesting Member State is considered as the central and leading state throughout the cooperation procedures.¹²

Current MLA-instruments that are particularly focusing on cooperation in obtaining evidence include, for instance, the *European Convention on Mutual Assistance in Criminal Matters* of the Council of Europe (ECMA)¹³, the *European Union Convention on Mutual Assistance in Criminal Matters* (EU MLA)¹⁴ and the Protocol to the latter (EU MLA Protocol)¹⁵. Some investigative measures to obtain witness evidence, such as the hearing by video – or telephone conference, are explicitly regulated by these legal

⁸ Vermeulen, De Bondt & Van Damme, 2010, p. 47.

⁹ *Ibidem*, p. 50.

¹⁰ Spencer, 2010, p. 1.

¹¹ Vermeulen, De Bondt & Van Damme, 2010, p. 105.

¹² *Ibidem*, p. 40 and p. 105.

¹³ Council of Europe, European Convention on mutual assistance in criminal matters, ETS n°30, Strasbourg, 20 April 1959.

¹⁴ Council of the European Union, Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on the European Union the Convention on mutual assistance in criminal matters between the Member States of the European Union, OJ No. C 197/01 of 12.07.2000.

¹⁵ Council of the European Union, Council Act of 16 October 2001 establishing, in accordance with Article 34 of the Treaty on European Union, the Protocol to the Convention on mutual assistance in criminal matters between the Member States of the European Union, OJ No. C 326/01 of 21.11.2001.

instruments.¹⁶ Others, including some intrusive measures, are not regulated at all. This does not imply, however, that such measures cannot be executed. Indeed, the MLA-regime is characterised by large flexibility and as such, states should afford each other “*the widest possible measure of assistance*”.¹⁷

2. The evolution towards mutual recognition and the European Investigation Order to crown it all

Recent EU developments have demonstrated that the principle of MLA no longer serves as the cornerstone in cross-border cooperation in the EU. Instead, it is the philosophy of mutual recognition (MR) that gained importance in this field.¹⁸ The latter principle is, contrary to the MLA regime, characterised by a mandatory execution of issued ‘warrants’ or ‘orders’.¹⁹ Grounds allowing to refuse the execution of a warrant or order are therefore largely abandoned.²⁰ MR is indeed inseparably bound with the mutual trust Member States give to each other’s criminal justice systems.²¹ Furthermore, under a MR approach, the ‘*forum regit actum*’ rule is replaced by the ‘*locus regit actum*’ theory. This implies that the authorities of the executing Member State should execute the order as if it was their own decision, in line with their own national rules.²²

The European Arrest Warrant (EAW)²³ which applies in the context of extradition since 2002, serves as an example to illustrate the growing importance of the philosophy of MR. Building on the success of the EAW, also in the area of cooperation on the

¹⁶ See art. 10 and 11 of the EU MLA.

¹⁷ Art. 1(1) of the ECMA.

¹⁸ MR is since the Tampere European Council commonly referred to as a cornerstone of judicial cooperation in criminal matters within the European Union, see paras. 33 *et seq.* of the Presidency Conclusions of the Tampere Council of 15 and 16 October 1999, available at http://www.europarl.europa.eu/summits/tam_en.htm (consulted on 05/07/2011). Art. 82(1) of the Treaty of the Functioning of the European Union (TFEU) states that “*judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions*”. See Consolidated version of the Treaty of the Functioning of the European Union, OJ No. C 115/47 of 09.05.2008.

¹⁹ For this reason, this work will in the context of MR no longer speak in terms of ‘requesting’ and ‘requested’ authorities or states, but in terms ‘issuing’ and ‘executing’ authorities or states. The latter terms are also used throughout the Initiative regarding the EIO.

²⁰ Vermeulen, De Bondt & Van Damme, 2010, p. 38.

²¹ Ondrejova, 2009, p. 2.

²² Vermeulen, De Bondt & Van Damme, 2010, pp. 39-40 and p. 105.

²³ Council of the European Union, Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the Surrender Procedures between Member States, OJ No. L 190/1 of 18.07.02.

obtainment of evidence, important steps have been taken to replace MLA with MR.²⁴ Indeed, in 2003, the freezing order²⁵ has been introduced and subsequently, in 2008, the European Evidence Warrant (EEW)²⁶. The latter instrument intends to offer a single, fast and effective mechanism for obtaining objects, documents and data for use in criminal proceedings (without the issuing of a prior freezing order).²⁷ As it only applies to evidence that already exists, this instrument covers a limited spectrum of cross-border cooperation on obtaining evidence in criminal proceedings. For all evidence that falls outside the scope of the EEW mechanism, the MLA approach still applies.²⁸

The instrument of a EIO, which is central in this study, forms part of the aforementioned developments. The EIO Proposal has been issued in line with the Stockholm Program.²⁹ The latter identified the needs for action in the context of cross-border cooperation in the following words:

*“The European Council considers that the setting up of a comprehensive system for obtaining evidence in cases with a cross-border dimension, based on the principle of mutual recognition, should be further pursued. The existing instruments in this area constitute a fragmentary regime. A new approach is needed, based on the principle of mutual recognition but also taking into account the flexibility of the traditional system of mutual legal assistance. This new model could have a broader scope and should cover as many types of evidence as possible, taking account of the measures concerned”.*³⁰

The entering into force of the EIO would result in major progress in the movement towards MR in cross-border cooperation on obtaining evidence.³¹ Indeed, the EIO

²⁴ Spencer, 2010, p. 1.

²⁵ Council of the European Union, Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ No. L 196/45 of 02.08.2003.

²⁶ Council of the European Union, Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ No. L 350/72 of 30.12.2008.

²⁷ Vermeulen, De Bondt & Van Damme, 2010, p. 47.

²⁸ Recital no. 4 of the Initiative regarding the EIO.

²⁹ *Ibidem*, recital no. 6.

³⁰ Para. 3.1.1 of European Council, The Stockholm Programme - an open and secure Europe serving and protecting citizens, OJ No. C 115/01 of 04.05.2010.

³¹ Fair Trials International, Fair Trials International’s submission to the Joint Committee on Human Rights. The human rights implications of the European Arrest Warrant and the European Investigation Order, January 2010, available at http://www.fairtrials.net/publications/article/submission_to_the_joint_committee_on_human_rights (consulted on 09/06/2011), p. 7.

Proposal, building on the MR philosophy, intends to replace the freezing order, the EEW, and the various instruments of MLA (in so far as they are dealing with the obtaining of evidence for the use of proceedings in criminal matters).³² In line with the Stockholm Programme, the EIO is characterised by a large scope. In comparison with the EEW, the field of application is extended by including the gathering of evidence not yet in the possession of the executing authority.³³ Hence, the investigation measure of interrogating a witness falls under the scope of the new instrument. Since the EIO is drawn upon MR, it allows the execution of this investigative measure with little flexibility because of the EIO's standardised form and because of the limited grounds for refusal and the fixed deadlines for execution.³⁴ Additional specific rules are only provided in relation to some types of investigative measures, such as the hearing by telephone – or videoconference and the obtainment of information related to bank accounts or banking transactions.³⁵

Following from the aforementioned considerations, the entering into force of the EIO will result in major changes in the gathering and sharing of evidence in EU cross-border criminal cases. On the other hand, and rather in accordance with a MLA philosophy, the EIO Proposal still stresses that:

“the execution of an EIO should, to the widest extent possible, [...], be carried out in accordance with the formalities and procedures expressly indicated by the issuing state”.³⁶

The latter provision is important in light of increasing the admissibility of evidence in the country of the trial.

Before the EIO had been proposed, the European Commission already issued a Green Paper which covered generally the same objectives as the Initiative regarding the EIO. This *Green Paper on cooperation between the Member States in the area of the obtaining of evidence in criminal matters and securing its admissibility*³⁷ started a consultation process concerning the manner in which this should be achieved. It indeed

³² Recital no. 15 of the Initiative regarding the EIO.

³³ *Ibidem*, recital no. 7.

³⁴ Concerning the grounds of refusal, see *ibidem*, art. 10 and recital no. 12. Concerning the deadlines, see *ibidem*, art. 11. and recital no. 13.

³⁵ Specific provisions for certain investigative measures, see *ibidem*, Chapter IV (art. 19-27).

³⁶ *Ibidem*, Recital no. 11.

³⁷ European Commission, Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, Brussels, 11 November 2009, COM(2009) 624 final.

prompted multiple reactions.³⁸ On 29 April 2010, a few months after the deadline for replying to the Commission had been expired, the EIO Proposal was suddenly released, without any prior consultation. Furthermore, in spite of the similarity of the latter instrument regarding the type of MR envisaged in the Green Paper, no explanation of the relation of the EIO Proposal with the earlier work of the Commission had been provided.³⁹

Currently, the Initiative regarding the EIO is still being negotiated at the EU level.⁴⁰ The Proposal is based on Article 82 (1) of the Treaty on the Functioning of the European Union (TFEU), prescribing the ordinary legislative procedure with co-decision powers of the European Parliament.

³⁸ In the course of this study, reference will often be made to the comments of organisations (and governments) on the Green Paper. Comments regarding this document are indeed more widespread than comments regarding the EIO. Since both the EIO Proposal and the Commission's Green Paper cover similar issues, it seems useful to examine the concerns that were expressed in relation to the latter document, also in the context of the EIO instrument.

³⁹ Fair Trials International, Fair Trials International's response to a European Member States' legislative initiative for a Directive on a European Investigation Order, 26 October 2010, available at <http://www.fairtrials.net/publications/article/fair-trials-internationals-submission-on-the-european-investigation-order> (consulted on 06/07/2011), p. 3.

⁴⁰ See, for instance, the following EU Council Presidency papers: Council of the European Union, 12 October 2010, 14641/10 COPEN 207, available at <http://www.statewatch.org/news/2011/may/eu-council-eio-14641-10.pdf> (consulted on 06/07/2011); Council of the European Union, Brussels, 21 October 2010, 15329/10 COPEN 230, available at <http://www.statewatch.org/news/2011/feb/eu-council-eio-outstanding-issues-15329-10.pdf> (consulted on 06/07/2011); Council of the European Union, Brussels, 19 November 2010, 16643/10 COPEN 260, available at <http://www.statewatch.org/news/2011/feb/eu-council-eio-draft-16643-10.pdf> (consulted on 06/07/2011); Council of the European Union, Brussels, 31 January 2011, 5591/11 COPEN 10, available at <http://www.statewatch.org/news/2011/feb/eu-council-eio-5591-11.pdf> (consulted on 06/07/2011); Council of the European Union, Brussels, 5 April 2011, 8369/11 COPEN 57, available at <http://www.statewatch.org/news/2011/apr/eu-council-eio-state-of-play-8369-11.pdf> (consulted on 06/07/2011); Council of the European Union, Brussels, 8 June 2011, 10749/2/11 COPEN 130, available at <http://www.statewatch.org/news/2011/jun/eu-jha-council-9-6-11-b-points.pdf> (consulted on 06/07/2011); Council of the European Union, Brussels, 17 June 2011, 11735/11 COPEN 158, available at <http://register.consilium.europa.eu/pdf/en/11/st11/st11735.en11.pdf> (consulted on 06/07/2011).

II. THE INTERROGATION OF WITNESSES ABROAD IN EXECUTION OF A EUROPEAN INVESTIGATION ORDER IN LIGHT OF THE RELEVANT DEFENCE RIGHTS

The right to a fair trial is foreseen by article 47 of the EU Charter and covers, among others, the right to be advised, defended and represented. It is however article 48 of the EU Charter which specifically refers to the respect of the rights of the defence of a charged person. Unlike the ECHR, the EU Charter does not specify the minimum defence rights. Indeed, article 6 ECHR mentions five specific minimum rights of a charged person in its third paragraph. They are to be seen as particular aspects of the right to a fair trial.⁴¹ Three among them are specifically relevant against the background of the interrogation of witnesses abroad, namely the right to summon and examine witnesses, the right to legal representation and legal aid, and the right to have adequate time and facilities to prepare the defence. The latter two ensure that the right to summon and examine witnesses can be exercised in an effective way.

The application of a new EU instrument on evidence gathering abroad, like the EIO, should respect the rights of the charged person. A fair trial “*holds a prominent place in a democratic society*”⁴² and applies to all types of criminal offence, including the most complex, like cross-border cases might be. In ensuring human rights in a EU context, article 6 of the Treaty on the European Union (TEU)⁴³ is of particular importance since it includes the respect of the EU for fundamental rights, as guaranteed by the ECHR. The EU institutions are subject to review by the ECJ of the conformity of their acts with the rights foreseen in the ECHR.⁴⁴ EU measures incompatible with respect for human rights are thus not acceptable in the Community.⁴⁵ According to settled ECJ case law, fundamental rights form an integral part of the general principles of law which the ECJ observes. The ECJ stresses explicitly that the ECHR has special significance in this

⁴¹ ECtHR, *Shulepov v. Russia*, Application No. 15435/03, 26 June 2008, para. 31.

⁴² ECtHR, *Nechiporuk and Yonkalo v. Ukraine*, Application No. 42310/04, 21 April 2011, para. 253; ECtHR, *Kaba v. Turkey*, Application No. 1236/05, 1 March 2011, para. 19; ECtHR, *De Cubber v. Belgium*, Application No. 9186/80, 26 October 1984, para. 30.

⁴³ European Union, Consolidated Versions of the Treaty on European Union and of the Treaty establishing the European Community, OJ No. C 321 E/1 of 19.12.2006.

⁴⁴ See ECJ, Case C-303/05, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, judgment of 3 May 2007, para. 45.

⁴⁵ ECJ, Case T-390/08, *Bank Melli Iran v. Council of the European Union*, judgment of 14 October 2009, para. 70; ECJ, Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union*, judgment of 3 September 2008, para. 284.

regard.⁴⁶ Following from the latter Convention as interpreted by the ECtHR, the ECJ further considers that the rights of the defence “*require specific protection intended to guarantee effective exercise of the defendant’s rights*”.⁴⁷ Against the background of cross-border cooperation, it is important to bear in mind that the ECJ, in the context of civil and commercial matters, considers that the objective of simplifying cooperation “*cannot be attained by undermining in any way the right to a fair hearing*”, including the rights of the defence.⁴⁸

Furthermore, one should be reminded of the Stockholm Programme arguing that EU institutions and Member States need to

“ensure that legal initiatives are and remain consistent with fundamental rights throughout the legislative process by way of strengthening the application of the methodology for a systematic and rigorous monitoring of compliance with the European Convention [on Human Rights] and the rights set out in the Charter of Fundamental Rights [EU Charter]”.⁴⁹

The importance of the respect of EU legal initiatives for fundamental rights, gains even more weight given the future accession of the EU to the ECHR, as foreseen by the Treaty of Lisbon.⁵⁰

In view of examining the EIO in light of the defence rights that are relevant to the situation in which a witness is located abroad, an analysis of the relevant defence rights will follow. Given the more detailed nature of the ECHR provisions, as compared to the EU Charter, and given the extensive case law of the Strasbourg Court in this regard, the main focus will lie on the minimum rights under the ECHR and the standards elaborated by the ECtHR.

According to the Strasbourg Court, the minimum defence rights are equally relevant in the investigatory phase that precedes the trial. Because, as follows from article 6 ECHR,

⁴⁶ ECJ, Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union*, judgment of 3 September 2008, para. 283; ECJ, Case C-283/05, *ASML Netherlands BV v. Semiconductor Industry Services GmbH (SEMIS)*, judgment of 14 December 2006, para. 26. See also ECJ, Case C-276/01, *Joachim Steffensen*, judgment of 10 April 2003, paras. 69-70.

⁴⁷ ECJ, Case C-283/05, *ASML Netherlands BV v. Semiconductor Industry Services GmbH (SEMIS)*, judgment of 14 December 2006, para. 27.

⁴⁸ *Ibidem*, paras. 23-24. See also ECJ, Case C-14/07, *Ingenieurbüro Michael Weiss und Partner GbR v. Industrie – und Handelskammer Berlin*, judgment of 8 May 2008, paras. 47-48.

⁴⁹ Para. 2.1 of European Council, The Stockholm Programme - an open and secure Europe serving and protecting citizens, OJ No. C 115/01 of 04.05.2010.

⁵⁰ See amendments to art. 6 TEU by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community of 13 December 2007, OJ No. C 306/01 of 17.12.2007. Article 6(2) TEU now mentions that the EU shall accede to the ECHR.

they apply as soon as a person is ‘charged’. In line with the autonomous interpretation of this term by the Strasbourg organs, a ‘charge’ should be understood as

“the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence”.⁵¹

This occurs

“on a date prior to the case coming before the trial court, such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when preliminary investigations were opened”.⁵²

Whether the infringement of the minimum defence rights during the pre-trial phase will lead to a condemnation by the ECtHR in a particular case, is difficult to predict since the Strasbourg Court considers the fairness of the proceedings *as a whole*.⁵³ Also the ECJ adopts this reasoning (referring to the Strasbourg case law).⁵⁴ Obligations under article 6 ECHR may therefore be considered as a duty to achieve a given result: as long as the end result of the proceedings has been fair to the defendant, the national courts are allowed to act upon their own rules.⁵⁵ The outcome of each case will therefore depend on its own specificities. However, the latter observation does not imply that no defence standards can be derived from the case law. And, if such specific standards are disregarded, this increases at least the risk of affecting the fairness of the entire proceedings.

The case law analysis that follows, will, to the fullest extent possible, rely on cases from the most recent years. The ECHR is indeed a ‘living instrument’ that must be

⁵¹ ECtHR, *Aleksandr Zaichenko v. Russia*, Application No. 39660/02, 18 February 2010, para. 42. See also ECtHR, *Shabelnik v. Ukraine*, Application No. 16404/03, 19 February 2009, para. 57; ECtHR, *Deweer v. Belgium*, Application No. 6903/75, 27 February 1980, para. 46.

⁵² ECtHR *Aleksandr Zaichenko v. Russia*, Application No. 39660/02, 18 February 2010, para. 42. See also ECtHR, *Eckle v. Germany*, Application No. 8130/78, 15 July 1982, para. 73.

⁵³ ECtHR, *Zhukovskiy v. Ukraine*, Application No. 31240/03, 3 March 2011, para. 40; ECtHR, *Kononenko v. Russia*, Application No. 33780/04, 17 February 2011, para. 61; ECtHR, *Krivoshapkin v. Russia*, Application No. 42224/02, 27 January 2011, para. 52; ECtHR, *Sevastyanov v. Russia*, Application No. 37024/02, 22 April 2010, para. 67; ECtHR, *Mamikonyan v. Armenia*, Application No. 25083/05, 16 March 2010, para. 41; ECtHR, *Khametsin v. Russia*, Application No. 18487/03, 4 March 2010, para. 30; ECtHR, *Ebanks v. The United Kingdom*, Application No. 36822/06, 26 January 2010, para. 74; ECtHR, *A.L. v. Finland*, Application No. 23220/04, 27 January 2009, para. 35; ECtHR, *Trofimov v. Russia*, Application No. 1111/02, 4 December 2008, para. 32; ECtHR, *Doorson v. the Netherlands*, 26 March 1996, Application No. 20524/92, para. 67; ECtHR, *Windisch v. Austria*, Application No. 12489/86, 27 September 1990, para. 25.

⁵⁴ ECJ, Case C-404/07, *György Katz v. István Roland Sós*, judgment of 9 October 2008; ECJ, Case C-276/01, *Joachim Steffensen*, judgment of 10 April 2003, para. 76.

⁵⁵ Maffei, 2006, p. 71.

interpreted in the light of present-day conditions.⁵⁶ As a consequence, the Strasbourg Court adopts an evolving and dynamic approach to interpret the ECHR, rendering recent case law the most reliable guide.⁵⁷ However, to stress the continuation and the stability of the principles, also older, yet authoritative, cases will be mentioned.

Against the background of the standards deriving from the case law, the EIO Proposal will be critically examined under each relevant minimum defence right. Given the combination of diverging national criminal justice systems in cross-border cases, concerns might indeed arise. In case the mechanisms of the new instrument fall short in ensuring the defence rights, specific recommendations in order to prevent protection gaps, will be elaborated.

1. The right to summon and examine witnesses

Article 6 § 3 (d) ECHR provides that everyone charged with a criminal offence has the right

“to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”.

After expressing some general preliminary remarks, this study will elaborate on the case law regarding the witnesses on behalf of the defence and examine the EIO against this background. The same method will subsequently be applied regarding the witnesses against the defence. Finally, some specific situations will be scrutinised from a defence perspective, namely the case of a hearing by video – or telephone conference, the case of anonymous witnesses and the case in which the defence does not understand the language the witness speaks.

⁵⁶ ECtHR, *Tyrer v. the United Kingdom*, Application No. 5856/72, 25 April 1978, para. 31.

⁵⁷ Maffei, 2006, p. 62.

A. Preliminary remarks

Two rights are brought under the umbrella of article 6 § 3 (d) ECHR: the right to summon witnesses (on his behalf), and the right to examine witnesses (against him).⁵⁸ Both rights touch upon the main principles that are related to a fair trial: the principle of equality of arms, a fair argumentation and immediacy.⁵⁹

Although article 6 § 3 (d) ECHR does not particularly addresses witnesses abroad, the latter category does not fall outside the scope of this article. Whether a witness is located in the country where the trial takes place or in another country, does thus not affect the application of the requirements that are contained in article 6 § 3 (d) ECHR.⁶⁰

The term ‘witness’ has been given an autonomous meaning by the ECtHR. According to its case law, every person whose statements are produced as evidence before a court, even if that person was not present at a public hearing or before a judge, is considered as a witness.⁶¹ The ECtHR thus assigns a broad meaning to the concept, including persons giving statements in the pre-trial stage as well as, for example, experts⁶² and anonymous persons. Overall, it suffices that the court takes the statements of a person into account as evidence, to consider him or her as a witness.⁶³

A further remark, relevant for a complete understanding of article 6 § 3 (d) ECHR, is that the right to call and question witnesses is not considered in an absolute way by the Strasbourg Court. In case of well-founded arguments, the national law may impose conditions to and restrict the rights under article 6 § 3 (d) ECHR, as long as they, in

⁵⁸ Before interrogation, however, it will not always be clear whether the witness is ‘for the prosecution’ or ‘for the defence’. As a consequence, the term ‘on his behalf’ refers basically to the fact that the witness is called by the defence (rather than being in favour for him or her). See Trechsel, 2005, p. 301 and p. 323.

⁵⁹ Van Den Wyngaert, 2004, pp. 582-583.

⁶⁰ Klip, 1994, p. 335.

⁶¹ Maffei, 2006, p. 73.

⁶² The ECtHR, however, has never been completely clear about whether an expert witness falls under the definition of a ‘witness’ in all circumstances. What is certain under the Court’s case law, is that an expert will be considered as a witness in case doubts arise on his or her neutrality. For more information, see Trechsel, 2005, pp. 303-304.

⁶³ For examples, see ECtHR, *Mirilashvili v. Russia*, Application No. 6293/04, 11 December 2008, para. 158; ECtHR, *A.H. v. Finland*, Application No. 46602/99, 10 May 2007, para. 41; ECtHR, *Lüdi v. Switzerland*, Application No. 12433/86, 15 June 1992, para. 44; ECtHR, *Windisch v. Austria*, Application No. 12489/86, 27 September 1990, para. 28.

light of the equality of arms, apply in the same way to both parties.⁶⁴ A departure from the right to summon and examine witnesses, however, will raise questions about its legitimacy. It may be allowed, but, on the other hand, it must be compensated for by counterbalances favourable to the accused.⁶⁵ To assess the compatibility of restrictions or conditions with article 6 § 3 (d) ECHR, it is important to involve article 6 § 1 ECHR. As such, one must always consider the question if the proceedings *as a whole* had a fair character.⁶⁶ Answering the latter question, requires attention to whether the rights of the defence were respected.⁶⁷

B. Witnesses on behalf of the defence

a. Case law

One of the rights under article 6 § 3 (d) ECHR, is the right to call witnesses in favour of the defence, or to propose that they are summoned.⁶⁸ The fundamental aim of the attendance (and examination) of witnesses on behalf of the defence, is to fulfil the requirement of equality of arms.⁶⁹ It allows to keep pace with the prosecutor.⁷⁰ On the one hand, the Strasbourg Court considers that “*article 6 ECHR does not go so far as requiring that the defence be given the same rights as the prosecution in taking evidence*”.⁷¹ On the other hand, and in line with the equality of arms principle, each party must have a reasonable opportunity to present his or her case – including the

⁶⁴ ECtHR, *Vidal v. Belgium*, Application No. 12351/86, 22 April 1992; ECtHR, *Bricmont v. Belgium*, Application No. 10857/84, 7 July 1989, para. 89.

⁶⁵ Maffei, 2006, p. 32.

⁶⁶ ECtHR, *Zhukovskiy v. Ukraine*, Application No. 31240/03, 3 March 2011, para. 40; ECtHR, *Kononenko v. Russia*, Application No. 33780/04, 17 February 2011, para. 61; ECtHR, *Krivoshapkin v. Russia*, Application No. 42224/02, 27 January 2011, para. 52; ECtHR, *Sevastyanov v. Russia*, Application No. 37024/02, 22 April 2010, para. 67; ECtHR, *Mamikonyan v. Armenia*, Application No. 25083/05, 16 March 2010, para. 41; ECtHR, *Ebanks v. The United Kingdom*, Application No. 36822/06, 26 January 2010, para. 74; ECtHR, *A.L. v. Finland*, Application No. 23220/04, 27 January 2009, para. 35; ECtHR, *Trofimov v. Russia*, Application No. 1111/02, 4 December 2008, para. 32; ECtHR, *Doorson v. the Netherlands*, 26 March 1996, Application No. 20524/92, para. 67; ECtHR, *Windisch v. Austria*, Application No. 12489/86, 27 September 1990, para. 25.

⁶⁷ ECtHR, *Welke and Bialek v. Poland*, Application No. 15924/05, 1 March 2011, para. 59; ECtHR, *A.S. v. Finland*, Application No. 40156/07, 28 September 2010, para. 52.

⁶⁸ Trechsel, 2005, p. 300.

⁶⁹ The principle of equality of arms is developed by the ECtHR beyond the letter of the ECHR. See Maffei, 2006, pp. 67-68.

⁷⁰ *Ibidem*, p. 75.

⁷¹ ECtHR, *Mirilashvili v. Russia*, Application No. 6293/04, 11 December 2008, para. 225.

search, production and presentation of evidence – under conditions that do not place him or her at a substantial disadvantage *vis-à-vis* the opponent.⁷² Therefore, both parties must be allowed, at all stages of the proceedings, an opportunity to call witnesses and experts.⁷³ Especially in common-law proceedings, in which the evidence is principally gathered by the defence itself, this is of particular importance.⁷⁴ Nevertheless, in continental proceedings (in which witnesses can be summoned on the initiative of the court as well), the defence's right to call a witness is equally essential since he or she may propose witnesses to the judge.⁷⁵ The latter will subsequently evaluate the opportunity to call the witness requested for, and has in fact a very broad margin of appreciation in this regard.⁷⁶ This opportunity assessment is, given the non-absolute character of this provision (see above), not contrary to article 6 § 3 (d) ECHR. The defendant has thus no unlimited right to call witnesses.⁷⁷ This is somewhat comprehensible as the opposite might, for instance, lead to abuses and sabotage of the proceedings.⁷⁸ Nevertheless, no unlimited freedom of assessment comes to the judge, as the principle of equality of arms needs to be respected and some procedural guarantees need to be taken into account. Such procedural guarantees ensure that, despite some restrictions to article 6 § 3 (d) ECHR, no violation of the general guarantee of a fair trial occurs. One of these guarantees is that a judge may refuse a witness only in so far as he or she is not 'necessary or opportune' to elucidate the truth.⁷⁹ With regard to this, the judge must moreover develop a motivation.⁸⁰

⁷² *Ibidem*, paras. 225-226. See, *mutatis mutandis*, ECtHR, *Dombo Beheer B.V. v. the Netherlands*, Application No. 144481/88, 27 October 1993, para. 33.

⁷³ ECtHR, *Bönisch v. Austria*, Application No. 8658/79, 6 May 1985.

⁷⁴ Maffei, 2006, pp. 28-29.

⁷⁵ Trechsel, 2005, p. 250 and p. 323.

⁷⁶ *Ibidem*, p. 323.

⁷⁷ ECtHR, *Khametshin v. Russia*, Application No. 18487/03, 4 March 2010, para. 33; ECtHR, *Ebanks v. the United Kingdom*, Application No. 36822/06, 26 January 2010, para. 74; ECtHR, *A.L. v. Finland*, Application No. 23220/04, 27 January 2009, para. 37; ECtHR, *Trofimov v. Russia*, Application No. 1111/02, 4 December 2008, para. 33; ECtHR, *Vidal v. Belgium*, Application No. 12352/86, 22 April 1992, para. 33; ECtHR, *Bricmont v. Belgium*, Application No. 10857/84, 7 July 1989, para. 89.

⁷⁸ Trechsel, 2005, p. 294.

⁷⁹ ECtHR, *Popov v. Russia*, Application No. 26853/04, 13 July 2006; ECtHR, *Pena v. Italy*, Application No. 48898/99, 25 July 2001; ECtHR, *Kamasinski v. Austria*, Application No. 9783/82, 19 December 1989.

⁸⁰ ECtHR, *Vidal v. Belgium*, Application No. 12351/86, 22 April 1992, para. 34; ECtHR, *Bricmont v. Belgium*, Application No. 10857/84, 7 July 1989, para. 89.

b. Examination of the Proposal regarding the European Investigation Order

In the Initiative regarding the EIO, the defence is not explicitly enabled to issue an order on its own behalf. Indeed, article 1, paragraph 1 of the Proposal states: “*The European Investigation Order shall be a judicial decision issued by a competent authority of a Member State (the issuing state) [...]*”.⁸¹ Despite the fact that the Strasbourg Court does not require explicitly that the defence should have the right to elaborate orders, some concerns might however arise in light of the equality of arms principle.

The impracticability of the defence to issue a EIO is of particular concern in England and Wales. Here, a common law system applies in which the evidence on behalf of the defence is principally gathered on the initiative of the defence itself, playing a rather independent role. The equality between the parties may thus become undermined by a scenario in which the defence is excluded from issuing a EIO regarding the questioning of witnesses abroad.

In continental systems, in which the defence is more dependent on the judge, this inability seems less worrisome.⁸² However, in systems of the latter kind, some alarming practices regarding the interrogation of witnesses abroad seem to exist, which might affect the rights of the defence. In the Netherlands, for example, the defence has very little opportunity to influence the investigations. It can ask the investigation judge to carry out the interrogation of a witness, but the judge has wide discretion to deny such a request.⁸³ Moreover, the judge seems to establish heavier demands in case the defence requests to call a witness who is located in another country, as compared to requests concerning a witness who can be found on Dutch territory.⁸⁴

The foregoing observations have demonstrated that, as well in common law countries as in continental law systems, the equality of arms principle might be affected in light of the procedures surrounding the EIO. This leads us to the conclusion that the power of the defence to issue a EIO on its own behalf, or to propose this to a judicial authority, has not been given enough consideration in the Proposal for a EIO-instrument on

⁸¹ Art. 1 of the Initiative regarding the EIO.

⁸² Klip, 1994, pp. 156-157.

⁸³ Prakken & Spronken, 2007, p. 157 and p. 169.

⁸⁴ Klip, 1994, p. 155.

evidence-gathering. The EIO should thus also apply to defence requests for a witness interrogation if the latter is located abroad.⁸⁵

Furthermore, specific attention should be given to the active role of a judge in continental criminal systems. According to the Strasbourg case law, an opportunity assessment by a judge is allowed. However, a request from the defence, possibly resulting in the issuing of a EIO by a judge, may only be refused if the witness is not considered ‘necessary or opportune’ to establish the truth, and if this decision has been motivated. Explicit reference to the latter procedural safeguards in the EIO Proposal therefore seems recommendable. This counts even more given the extra ‘handicaps’ the defence has in demonstrating the relevance of the witness for the fact finding, in case the witness is located in another country.⁸⁶

C. Witnesses against the defence

a. The confrontational paradigm

Under article 6 § 3 (d) ECHR, the charged person is offered the right “*to examine or have examined witnesses against him*”. As this right is closely linked with the so called ‘confrontational paradigm’, this right is also referred to as the ‘confrontation clause’ or the ‘right to confrontation’.⁸⁷ A testimony is considered to be collected in accordance with the confrontational paradigm when

“the declarant, whose real identity is known to the defence, gives evidence in open court, facing the accused and the trier of fact, under the obligation of truth-telling, and the defence has a chance to challenge the statements through contemporaneous adverse-questioning”.⁸⁸

⁸⁵ In the same sense: Fair Trials International, Fair Trials International’s response to a European Member States’ legislative initiative for a Directive on a European Investigation Order, 26 October 2010, available at http://www.fairtrials.net/publications/article/fair_trials_internationals_submission_on_the_european_investigation_order (consulted on 06/07/2011), p. 9.

⁸⁶ Klip, 1994, p. 362.

⁸⁷ Maffei, 2006, p. 72. For several reasons, Maffei prefers the term ‘right to confrontation’ to ‘right to cross-examine’, see *ibidem*, pp. 10-11.

⁸⁸ *Ibidem*, p. 23.

On the one hand, this challenge can be conducted by the opposing side itself. In this case, one speaks about the method of cross-examining a witness.⁸⁹ On the other hand, article 6 § 3 (d) ECHR also refers to another adverse-questioning method, namely to *have* witnesses examined. The distinction is related to the different judicial systems. In common-law systems, the method of cross-examining witnesses by the parties themselves occurs.⁹⁰ They will be examined by the party that calls them and subsequently, they will be cross-examined directly by the other side.⁹¹ In an inquisitorial system, the judge him or herself may call a witness and as such, one *has* witnesses examined. The inquisitorial continental criminal procedure model has however been successively adapted to more adversarial models. As a consequence, also the defence has gained the opportunity to ask questions to witnesses (directly or through the judge).⁹²

b. Immediacy as the preferable principle

(i) *Importance of immediacy*

In its most ideal form, the right to a fair trial must respond to the ‘principle of immediacy’, requiring that all evidence is brought on the trial.⁹³ The appearance and questioning of a witness in open court, holding a contradictory debate about his or her testimonies in presence of the accused, forms an intrinsic part of the right to defend oneself. The high value attached to the immediacy principle, is not without reason. Procedures in line with the latter principle, have shown to be very beneficial for the quality of the evidence.⁹⁴ They allow an effective control on the reliability and the credibility of the witness, which is crucial given the errors that might occur at the moment the witness memorises the observations about the facts, or at a later stage.⁹⁵ The great advantage the examination of a witness in open court offers, is the ability to

⁸⁹ For further information about the method of cross-examination, see Uglow, 2002, pp. 315-318.

⁹⁰ Maffei, 2006, pp. 28-29.

⁹¹ Trechsel, 2005, p. 301.

⁹² For further information, see *ibidem*, p. 311.

⁹³ De Smet, 2001, p. 242; Trechsel, 2005, p. 305; Van Den Wyngaert, 2004, pp. 584-585. For the importance of the orality of proceedings in the common law trial in particular, see Doak & Huxley-Binns, 2009, p. 509.

⁹⁴ De Smet, 2001, p. 241; Klip, 1994, p. 341.

⁹⁵ Trechsel, 2005, p. 305.

pay attention to the nonverbal aspects of his or her communication, as for example intonation and facial expressions. These signs resulting from the body language of a witness, will help to indicate his or her trustworthiness.⁹⁶ Proceedings in accordance with the immediacy principle, will furthermore enable the judge to dig further into the written reflections of the earlier statements of a witness. Indeed, the risk exists that the written version of the statements made in front of a police officer or investigation judge are affected by imperfections, are not precise, are not placed into the correct context, etc.⁹⁷ Examination of the witness at the trial, will also offer the possibility to confront the witness with data that were not introduced before the trial stage.⁹⁸ In accordance with these advantages, determining the case solely on the basis of statements written in the file, is considered as a ‘very risky matter’.⁹⁹

(ii) *Case law*

The Strasbourg Court considers proceedings that respect the immediacy principle as the most preferable situation, as it has repeatedly stated that “[...] *all the evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument*”.¹⁰⁰ In particular, the Strasbourg Court considers it of great importance that a judge can, in person, form an image of the reliability of the witness. A declaration of the police regarding the reliability is not seen as an adequate alternative for the direct observation by a judge.¹⁰¹ In line with the significance the ECtHR attaches to the immediacy principle, states have been given a responsibility in realising the appearance (and questioning) of witnesses. Thereto, the state must undertake ‘positive

⁹⁶ De Smet, 2001, p. 241; Maffei, 2006, p. 25. However, some studies criticise the ability to link body language and one’s veracity or sincerity. For an overview of research in this sense, see Maffei, 2006, p. 26.

⁹⁷ De Smet, 2001, p. 241; Trechsel, 2005, p. 305.

⁹⁸ De Smet, 2001, p. 242.

⁹⁹ Trechsel, 2005, p. 305.

¹⁰⁰ ECtHR, *Zhukovskiy v. Ukraine*, Application No. 31240/03, 3 March 2011, para. 40; ECtHR, *Kononenko v. Russia*, Application No. 33780/04, 17 February 2011, para. 62; ECtHR, *A.S. v. Finland*, Application No. 40156/07, 28 September 2010, para. 53; ECtHR, *Novikas v. Lithuania*, Application No. 45756/05, 20 April 2010, para. 32; ECtHR, *Khametsin v. Russia*, Application No. 18487/03, 4 March 2010, para. 30; ECtHR, *Musa Karatas v. Turkey*, Application No. 63315/00, 5 January 2010, para. 94; ECtHR, *A.L. v. Finland*, Application No. 23220/04, 27 January 2009, para. 36; ECtHR, *Trofimov v. Russia*, Application No. 1111/02, 4 December 2008, para. 33; ECtHR, *Balsyte-Lideikiene v. Lithuania*, Application No. 72596/01, 4 November 2008, para. 62.

¹⁰¹ ECtHR, *Windisch v. Austria*, Application No. 12489/86, 27 September 1990, para. 29.

steps'¹⁰² and make 'every reasonable effort'.¹⁰³ Such efforts form part of the diligence which the state must exercise to ensure the rights under article 6 ECHR in an effective manner.¹⁰⁴ But, as stressed by the Strasbourg Court, '*impossibilium nulla est obligatio*'.¹⁰⁵ The recent case of *Krivoshapkin v. Russia* has however shown that the Strasbourg Court is not lax regarding the efforts required from the states. The ECtHR argued that:

*"While the Court understands difficulties encountered by the authorities in terms of resources, it does not consider that calling at the trial Mr P. who lived in a neighbouring country, reimbursing travelling costs and expenses to Mr R., tracking down of Mr M.Kh. and awaiting Mr M.M.'s return from his travel would have constituted an insuperable obstacle".*¹⁰⁶

The ECtHR, furthermore, cannot accept that time-consuming efforts to ensure the attendance of witnesses could be abandoned for reasons of a speedy determination of criminal charges. Indeed, it is for the states to organise their judicial system in such a way as to enable its courts to comply with the requirements of article 6 ECHR.¹⁰⁷

(iii) *Examination of the Proposal regarding a European Investigation Order*

Bearing the Strasbourg case law in mind, linked to the positive effects the immediacy principle has on the quality of evidence, the importance of the appearance of a witness at trial has been made clear. Also regarding witnesses located abroad, even when their appearance might be difficult to achieve, the immediacy principle applies. On the other

¹⁰² ECtHR, *Zhukovskiy v. Ukraine*, Application No. 31240/03, 3 March 2011, para. 43; ECtHR *Kononenko v. Russia*, Application No. 33780/04, 17 February 2011, para. 64; ECtHR, *Bielaj v. Poland*, Application No. 43643/04, 27 April 2010, para. 56; ECtHR *Khametsin v. Russia*, Application No. 18487/03, 4 March 2010, para. 31; ECtHR *Trofimov v. Russia*, Application No. 1111/02, 4 December 2008, para. 33; ECtHR, *Balsyte-Lideikiene v. Lithuania*, Application No. 72596/01, 4 November 2008, para. 62.

¹⁰³ ECtHR, *Zhukovskiy v. Ukraine*, Application No. 31240/03, 3 March 2011, para. 42; ECtHR, *Krivoshapkin v. Russia*, Application No. 42224/02, 27 January 2011, para. 53; ECtHR, *Mirilashvili v. Russia*, Application No. 6293/04, 11 December 2008, para. 163.

¹⁰⁴ ECtHR, *Zhukovskiy v. Ukraine*, Application No. 31240/03, 3 March 2011, para. 43; ECtHR, *Kononenko v. Russia*, Application No. 33780/04, 17 February 2011, para. 64; ECtHR, *Khametsin v. Russia*, Application No. 18487/03, 4 March 2010, para. 31; ECtHR, *Trofimov v. Russia*, Application No. 1111/02, 4 December 2008, para. 33.

¹⁰⁵ ECtHR, *Bielaj v. Poland*, Application No. 43643/04, 27 April 2010, para. 56.

¹⁰⁶ ECtHR, *Krivoshapkin v. Russia*, Application No. 42224/02, 27 January 2011, para. 60.

¹⁰⁷ *Ibidem*, para. 62.

hand, it is not forbidden to subject a witness to an examination abroad. As will be clarified further in this work, it is even allowed to use his or her pre-trial statements as evidence, also when he or she never appeared at trial. The latter observations, however, do not alter the fact that proceedings in accordance with the immediacy principle, remain the preferable aim. Unfortunately, the achievement of this aim does not seem to be encouraged by the Initiative regarding the EIO, nor by its provisions.

Indeed, the existence itself of an easy to apply instrument to organise witness interrogations abroad, in combination with the allowance of pre-trial statements as evidence (to a certain extent at least), already entails the risk of lowering subsequent efforts to ensure the presence of the witness at the trial.

Moreover, no provision in the EIO Proposal appears which requires the issuing state to confirm that it cannot obtain the needed information itself. As a consequence, the country of the trial will rather be encouraged to issue a EIO, instead of doing the necessary efforts to ensure the presence of the witness on its own territory and question him or her by its authorities. A risk of so called ‘forum-shopping’ thus exists, as the issuing state could save costs and resources of the investigation if it offloads the burden of gathering the evidence to another country.¹⁰⁸ This scenario which possibly follows from the use of the EIO, does not seem to be in accordance with the ECtHR case law. Because, only after the state did all the necessary efforts to secure the appearance of the witness in its country, it could suffice to hear the witness abroad by application of the EIO. The fact that a witness is located abroad, that travel expenses need to be paid or that efforts might be time-consuming, does not, in line with the Strasbourg case law, alter the latter observations.

Furthermore, the importance of the immediacy principle is linked to the intrinsic advantage of allowing a trial judge to form a personal image of the witness and to put questions directly to him or her. As shown above, the Strasbourg Court also considers it of great importance that a judge could, *in person*, form an image of the reliability of the witness.¹⁰⁹ This observation brings us to the following remark regarding the immediacy principle. From my point of view, it seems that, even if immediacy is not achieved at trial, all the necessary efforts should be done to approach the advantages of

¹⁰⁸ Fair Trials International, Fair Trials International’s response to a European Member States’ legislative initiative for a Directive on a European Investigation Order, 26 October 2010, available at http://www.fairtrials.net/publications/article/fair_trials_international_submission_on_the_european_investigation_order (consulted on 06/07/2011), p. 6.

¹⁰⁹ ECtHR, *Windisch v. Austria*, Application No. 12489/86, 27 September 1990, para. 29.

this principle to the largest extent possible. The latter implies that it is preferable to conduct the hearing of the witness abroad by the trial judge, or at least by another judicial authority of the state where the trial takes place.¹¹⁰ Notwithstanding, such a manner of procedural organisation, is not explicitly foreseen by the EIO Proposal. Article 8 paragraph 3 could however be useful in this regard, as it provides that

“the issuing authority may request that one or several authorities of the issuing state assist in the execution of the EIO in support to the competent authorities of the executing state”.¹¹¹

A possibility is offered, rather than an obligation imposed. As such, it remains to be seen to what extent the issuing state will make use of this provision to ensure the presence of the trial judge (or another judicial authority) during the interrogation of the witnesses abroad.

Furthermore, the EIO Proposal somehow misses an opportunity to increase the presence of witnesses at trial, as it does not encourage the witness to appear at a later stage. The moment the authorities question the witness in execution of a EIO, could however offer a welcome opportunity to inform the witness about the importance of his or her presence at trial and to elaborate some incentives in this regard. The witness could, for example, be informed about the compensation of travel expenses and could even be offered an advance thereto. The EIO Proposal is however silent on incentives of this kind.

c. Immediacy is not absolute, yet challenging the witness is required

(i) *Case law*

In line with the non-absolute character of article 6 § 3 (d) ECHR, the Strasbourg Court interprets the immediacy principle in a supple manner. Therefore, even though the latter principle will always reflect the most preferable method, the use of statements from absent witnesses is not necessarily in violation with article 6 § 3 (d) ECHR. The rights

¹¹⁰ Klip, 1994, p. 353.

¹¹¹ Art. 8(3) of the Initiative regarding the EIO.

of the defence must however be respected.¹¹² A witness can be considered absent “*if his or her out-of-court statements may be employed as evidence of the matter stated, despite the fact that he or she has not taken the stand at trial*”.¹¹³ As a general principle, control on the reliability of a witness is thus allowed to take place outside the public trial. The ECtHR reasons as follows:

*“All the evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. This does not mean, however, that the statements of a witness must always be made in court and in public if it is to be admitted in evidence [...]”*¹¹⁴

What matters is that the proceedings as a whole had a fair character, taking all the stadia into account, including the pre-trial stage. As a consequence, confrontation may also take place during pre-trial investigations.

Following from the latter observation, it is clear that the Strasbourg Court focuses on confrontation and adversarial argument, rather than on a strict application of the immediacy principle by calling all witnesses to trial. In a way, considering the large amount of criminal cases (often involving cross-border dimensions) and the reasonable time in which judgments must be delivered, this is an understandable method. A strict application of the immediacy principle would indeed lead to costly and lengthy trials.¹¹⁵ Although statements of an absent witness are allowed as evidence under the Strasbourg case law, a restriction applies regarding its significance: a trial becomes unfair if the conviction is based ‘solely or to a decisive degree’ on depositions of a witness whom the defence has not been able to examine or have examined, whether during the pre-trial stage or at the trial.¹¹⁶ Furthermore, the rights of the defence need to be respected and

¹¹² ECtHR, *Zhukovskiy v. Ukraine*, Application No. 31240/03, 3 March 2011, paras. 41-42; ECtHR, *Kononenko v. Russia*, Application No. 33780/04, 17 February 2011, para. 62; ECtHR, *Bielaj v. Poland*, Application No. 43643/04, 27 April 2010, para. 54; ECtHR, *Sevastyanov v. Russia*, Application No. 37024/02, 22 April 2010, para. 67; ECtHR, *Novikas v. Lithuania*, Application No. 45756/05, 20 April 2010, para. 32; ECtHR, *Khametsin v. Russia*, Application No. 18487/03, 4 March 2010, para. 32; ECtHR, *Windisch v. Austria*, Application No. 12489/86, 27 September 1990, para. 26; ECtHR, *Kostovski v. the Netherlands*, Application No. 11454/85, 20 November 1989, para. 41, ECtHR, *Unterpertinger v. Austria*, Application No. 9120/80, 24 November 1986, para. 31.

¹¹³ Maffei, 2006, p. 43.

¹¹⁴ ECtHR, *Asch v. Austria*, Application No. 12398/86, 26 April 1991, para. 27. See also ECtHR, *SN v. Sweden*, Application No. 34209/96, 2 June 2002, para. 44; ECtHR, *Isgrò v. Italy*, Application No. 11339/85, 19 February 1991, para. 34; ECtHR, *Windisch v. Austria*, Application No. 12489/86, 27 September 1990, para. 26; ECtHR, *Kostovski v. the Netherlands*, Application No. 11454/85, 20 November 1989, para. 41.

¹¹⁵ Trechsel, 2005, p. 305.

¹¹⁶ ECtHR, *Zhukovskiy v. Ukraine*, Application No. 31240/03, 3 March 2011, para. 40; ECtHR, *Kononenko v. Russia*, Application No. 33780/04, 17 February 2011, para. 63; ECtHR, *Krivoshapkin v.*

the latter can only be achieved if departures from the rights under the ECHR are sufficiently compensated by the government. This consideration also applies in the particular case of a geographic obstacle.¹¹⁷ The Strasbourg Court takes account of these compensations by requiring that the defendant has been given an ‘adequate and proper opportunity’ to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings.¹¹⁸ What ultimately counts is that the charged person, at any moment of the criminal proceedings, has been able to challenge the liability of the witness against him.

This gives rise to the question of what such an ‘adequate and sufficient opportunity’ requires *in concreto*. It is clear that the ECtHR prefers a visual confrontation between the defence and the witness with the possibility to ask questions in a direct and unrestricted way.¹¹⁹ Only in a very limited number of (older) cases, when highly exceptional circumstances occurred, statements of witnesses were allowed as evidence in case the defence had been given no opportunity at all to question the witness.¹²⁰ Whether indirect questioning, through written questions, can stand the test under article 6 § 3 (d) ECHR, cannot be said with absolutely certainty in light of the current case

Russia, Application No. 42224/02, 27 January 2011, para. 55; ECtHR, *Bielaj v. Poland*, Application No. 43643/04, 27 April 2010, para. 55; ECtHR, *Novikas v. Lithuania*, Application No. 45756/05, 20 April 2010, para. 33; ECtHR, *Khametsin v. Russia*, Application No. 18487/03, 4 March 2010, para. 32; ECtHR, *Muta Karatas v. Turkey*, Application No. 63315/00, 5 January 2010, para. 94; ECtHR, *A.L. v. Finland*, Application No. 23220/04, 27 January 2009, para. 37; ECtHR, *Balsyte-Lideikiene v. Lithuania*, Application No. 72596/01, 4 November 2008, para. 62; ECtHR, *Saïdi v. France*, Application No. 14647/89, 20 September 1993, paras. 43-44; ECtHR *Isgrò v. Italy*, Application No. 11339/85, 19 February 1991, para. 35; ECtHR, *Unterpertinger v. Austria*, Application No. 9120/80, 24 November 1986, paras. 31-33. About the difficulty to assess the weight attached to evidence, see Trechsel, 2005, pp. 297-298; Stavros, 1993, p. 236.

¹¹⁷ ECtHR, *Zhukovskiy v. Ukraine*, Application No. 31240/03, 3 March 2011, para. 43.

¹¹⁸ *Ibidem*, para. 42; ECtHR, *Kononenko v. Russia*, Application No. 33780/04, 17 February 2011, para. 63; ECtHR, *Krivoshapkin v. Russia*, Application No. 42224/02, 27 January 2011, paras. 53-54; ECtHR, *A.S. v. Finland*, Application No. 40156/07, 28 September 2010, para. 53; ECtHR, *Bielaj v. Poland*, Application No. 43643/04, 27 April 2010, paras. 54-55; ECtHR, *Novikas v. Lithuania*, Application No. 45756/05, 20 April 2010, paras. 32-33; ECtHR, *Mamikonyan v. Armenia*, Application No. 25083/05, 16 March 2010, para. 42; ECtHR, *Khametsin v. Russia*, Application No. 18487/03, 4 March 2010, para. 30; ECtHR, *Musa Karatas v. Turkey*, Application No. 63315/00, 5 January 2010, para. 94; ECtHR, *A.L. v. Finland*, Application No. 23220/04, 27 January 2009, para. 36; ECtHR *Trofimov v. Russia*, Application No. 1111/02, 4 December 2008, para. 33; ECtHR, *Balsyte-Lideikiene v. Lithuania*, Application No. 72596/01, 4 November 2008, para. 62; ECtHR, *Lüdi v. Switzerland*, Application No. 12433/86, 15 June 1992, para. 47; ECtHR, *Isgrò v. Italy*, Application No. 11339/85, 19 February 1991, para. 34; ECtHR, *Windisch v. Austria*, Application No. 12489/86, 27 September 1990, para. 26; ECtHR, *Kostovski v. the Netherlands*, Application No. 11454/85, 20 November 1989, para. 41; ECtHR, *Unterpertinger v. Austria*, Application No. 9120/80, 24 November 1986, para. 31.

¹¹⁹ See for example ECtHR, *Van Mechelen and Others v. the Netherlands*, Application Nos. 21363/93, 21364/93, 21427/93 and 22056/93, 23 April 1997, para. 62; ECtHR, *Kostovski v. the Netherlands*, Application No. 11454/85, 20 November 1989.

¹²⁰ See for example ECtHR, *Asch v. Austria*, Application No. 12398/86, 26 April 1991, para. 28; ECtHR, *Artner v. Austria*, Application No. 13161/87, 28 augustus 1992, para. 22.

law.¹²¹ In several cases, however, the ECtHR did not consider it as a sufficient counterbalance.¹²² A very recent Strasbourg case, particularly related to the questioning of witnesses abroad, has further clarified the meaning of a ‘reasonable opportunity’. Indeed, even when the applicant and his lawyer did not take steps to be actively involved in the questioning of the witnesses, the Strasbourg Court considered that:

“[...] *the domestic authorities on their part had at least to ensure that they were informed in advance about the date and place of hearing and about questions formulated by the domestic authorities in the present case. Such information would give the applicant and his lawyer reasonable opportunity to request for clarifying or complementing certain questions that would deem important*”.¹²³

(ii) *Examination of the Proposal regarding the European Investigation Order*

In sum, the ECtHR allows the use of pre-trial witness statements as evidence as long as the defence had an adequate and proper opportunity to challenge and question the witness, preferably in a direct way. The possibility of such an examination during the investigative stage of the proceedings, is of crucial importance in the course of the execution of a EIO. Firstly, because a witness located abroad is less likely to appear at trial and because, as a consequence, there will mostly be only one chance to question him or her, namely during the pre-trial investigations.¹²⁴ Secondly, because of the foreign rules that might apply to the interrogation of the witness.

The first observation can be illustrated by the practices in some EU countries. In the Netherlands, for example, witnesses are generally not called to testify for reasons of expediency and financial economy (even when the defence has not questioned the witness during pre-trial investigations). Such practices are condemned several times by the ECtHR but still seem to occur.¹²⁵ As such, especially in the case of foreign

¹²¹ Marique, 1998, p. 555.

¹²² See for example ECtHR, *Zhukovskiy v. Ukraine*, Application No. 31240/03, 3 March 2011, para. 45; ECtHR, *Kostovski v. the Netherlands*, Application No. 11454/85, 20 November 1989; ECtHR, *Windisch v. Austria*, Application No. 12489/86, 27 September 1990.

¹²³ ECtHR, *Zhukovskiy v. Ukraine*, Application No. 31240/03, 3 March 2011, para. 46.

¹²⁴ Klip, 1994, pp. 346-347.

¹²⁵ Prakken & Spronken, 2007, p. 172.

witnesses whose appearance may be costly in terms of money and time, only little efforts are done to bring a witness at trial. In the Netherlands, therefore, there is a great chance that a witness located abroad will not appear.¹²⁶ The same conclusion can be drawn with regard to Poland. The Code of Criminal Procedure of this country allows exceptions to the direct examination of witnesses at trial. One of these exceptions being the fact that the witness is not located in the Polish territory...¹²⁷

Secondly, in line with the *'locus regit actum'* theory which underlies MR, foreign rules will apply to the interrogation of witnesses in the wake of the execution of a EIO. As such, the adequate and proper opportunity for the defence to challenge the witness and to be present during the witness interrogation, becomes even more crucial. Firstly, because the defence will probably be unfamiliar with these rules. Furthermore, because there is a risk that the foreign rules will offer the defence less protective standards, in comparison with the rules which would apply to a witness interrogation in its own jurisdiction. In England and Wales for example, interviewing witnesses, which is a responsibility of the police, is still largely unregulated and therefore, a matter of continued concern.¹²⁸ In the Netherlands, a marginalisation of the position of the defence has been observed in the investigative stage in general.¹²⁹

The presence of the defence during the interrogation of the witness abroad, and at least the possibility to ask (direct or indirect) questions, is shown to be very important and moreover required by the ECtHR case law. Notwithstanding, the EIO Proposal is largely silent on the matter. The latter observation is related to the fact that the Initiative regarding the EIO does not regulate the questioning of witnesses in a specific (detailed) way. In case the executing state does not allow the presence of the defence during witness interrogation, article 8 paragraph 2 of the Proposal could however offer a solution. It provides that *"the executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority [...]"*.¹³⁰ It remains to be seen whether the issuing country will make use of this provision to encourage the presence of the defence during the interrogation of a witness in another EU country.

A further worrisome deficiency in guaranteeing an adequate and sufficient opportunity to challenge the witness (in the pre-trial phase), is that none of the provisions of the EIO

¹²⁶ Klip, 1994, pp. 160-161.

¹²⁷ Art. 333(2) of the Polish Code of Criminal Procedure, Dz.U.97.89.555, Act of 6 June 1997.

¹²⁸ Cape & Hodgson, 2007, p. 66.

¹²⁹ For further information, see Prakken & Spronken, 2007, pp. 156-157.

¹³⁰ Art. 8(2) of the Initiative regarding the EIO.

Proposal requires the authorities to notify the defence about the issuing of a EIO. Therefore, the defence might be unaware of the event of a witness interrogation and, *a fortiori*, of the date and place of the hearing, as well as of the questions that will be formulated by the authorities. As such, the defence cannot be offered an opportunity to challenge the witness in an effective way. Indeed, it is not without reason that the ECtHR stresses the importance of informing the defence in advance (see above). Therefore, it seems preferable to insert a specific provision in the EIO instrument that obliges the authorities to notify the defence about all the aforementioned informative elements.

D. Examination of some specific cases

a. The specific case of a hearing by video – or telephone conference

(i) Case law

The Strasbourg Court has encouraged the use of a video link as an alternative mean for interrogating witnesses when the personal presence of the witness is difficult to achieve.¹³¹ In the case of *Zhukovskiy v. Ukraine*, the ECtHR stated that the video link is a modern technology “that could offer a more interactive type of questioning of witnesses abroad”.¹³² Its use is therefore considered as preferable to the recordings of the interrogation of a witness on video tape.¹³³ However, also regarding the use of a videoconference, the enthusiasm of the ECtHR has shown to be damped. For example, in the case of *Viola v. Italy*, concerning the use of a video link to ensure the participation of a defendant in custody at his trial, the Strasbourg Court stated the following:

“[...] it is incumbent on the Court to ensure that recourse to this measure in any given case serves a legitimate aim and that the arrangements for the giving of evidence are compatible with the requirements of respect for due process, as laid down in Article 6 of the Convention [...]. Admittedly, it is

¹³¹ ECtHR, *Zhukovskiy v. Ukraine*, Application No. 31240/03, 3 March 2011, para. 45.

¹³² *Ibidem*.

¹³³ *Ibidem*.

*possible that, on account of technical problems, the link between the hearing room and the place of detention will not be ideal, and thus result in difficulties in transmission of the voice or images”.*¹³⁴

Despite the fact that the latter observations are not expressed against the background of a witness interrogation abroad, it is interesting to observe that the ECtHR points at worrisome technical difficulties that might occur when using a video link. Obviously, such concerns might equally arise in case this method is applied in the context of a witness interrogation abroad.

(ii) *Examination of the Proposal regarding the European Investigation Order*

The hearing by telephone – and videoconference is one of the measures that the EIO Proposal regulates separately and more detailed, namely in articles 21 and 22.

Concerning the hearing by videoconference, article 21 contains several provisions that might increase the protection of the rights of the defence. For instance, a judicial authority of the executing state needs to be present during the hearing and shall be responsible to ensure respect for the fundamental principles of the law of the executing Member State.¹³⁵ The hearing shall also be conducted directly by, or under the direction of, the issuing authority in accordance with its own laws.¹³⁶ Furthermore, if the use of a videoconference is contrary to fundamental principles of the law of the executing State, the execution of the conference *may* be refused.¹³⁷ Although the presence of the latter provision is more than welcome from a defence perspective, just because of its importance, the use of the term ‘must’ (instead of ‘may’) seems preferable. The same can be said about article 21, paragraph 2 (b) of the EIO Proposal. The latter article states that the execution of the EIO *may* be refused if the executing Member State does not have the technical means for videoconference.¹³⁸ This is highly relevant as a recent study has demonstrated that the technical means are not always available in the EU Member States. When asked about the availability of technical means for video or

¹³⁴ ECtHR, *Marcello Viola v. Italy*, Application No. 45106/04, 5 October 2006, paras. 67 and 74.

¹³⁵ Art. 21(6)(a) of the Initiative regarding the EIO.

¹³⁶ *Ibidem*, art. 21(6)(c).

¹³⁷ *Ibidem*, art. 21(2)(a).

¹³⁸ *Ibidem*, art. 21(2)(b).

telephone conferences, including available measures for protection in such a context (such as video distortion), 40 percent of the EU countries claimed only a low availability thereof.¹³⁹ Regarding the technical aspect of the hearing by videoconference, further concerns arise in light of the quality of the technical means available. According to the Strasbourg Court, difficulties in the transmission of the voice or the images might occur (see above). As such, it is highly unfortunate that the EIO Proposal does not foresee specific provisions on the area of the quality of the technical means.¹⁴⁰ This might lead to the execution of videoconferences of an inferior technical quality, and, as a consequence, to departures from the rights of the defence under article 6 § 3 (d) ECHR.

Regarding the hearing by telephone conference, regulated by article 22 of the EIO Proposal, no provisions appear regarding the presence of a judicial authority of the executing state nor about the application of the laws of the issuing country. From the perspective of the defence, it would however be preferable to insert such provisions also in this section. Furthermore, the EIO Proposal is silent on the technical capacity of the Member States to conduct a telephone conference. The explanation for this might be that the EU countries are of course technically able to execute such type of conference.¹⁴¹ Besides the latter observations, similar comments as were made in connection with the video conference, apply here.

Furthermore, concerns occur that relate to the conditions to issue a EIO to hear a witness by videoconference. The authorities are already allowed to issue a EIO from the moment it is not desirable or possible for the witness to appear in the country of the trial.¹⁴² The wording ‘not desirable or possible’, however, does not seem to be in accordance with the importance the ECtHR attaches to organising criminal proceedings in line with the immediacy principle and the efforts the state should do in this regard (see above). Of course, when attendance of the witness is very difficult to achieve, the use of a videoconference, may form a valuable alternative to question the witness. However, considering the possible shortcomings to the technical quality of the link and

¹³⁹ Vermeulen, De Bondt & Van Damme, 2010, pp. 123-124.

¹⁴⁰ In the same sense: Fair Trials International, Fair Trials International’s response to a European Member States’ legislative initiative for a Directive on a European Investigation Order, 26 October 2010, available at http://www.fairtrials.net/publications/article/fair_trials_internationals_submission_on_the_european_investigation_order (consulted on 06/07/2011), p. 7.

¹⁴¹ Vermeulen, De Bondt & Van Damme, 2010, p. 124.

¹⁴² See art. 21(1) of the Initiative regarding the EIO.

the absence of direct personal interaction, interrogations by these means should not be placed on the same level with a face-to-face interview. As such, the use of a videoconference does not always offer an adequate substitute for a normal witness interrogation in presence of the accused. Therefore, it should only be used as a last resort, for example when the witness is unable to travel through illness or fear, having been established on evidence.¹⁴³ From the eyes of the defence, it would thus be preferable to omit the term ‘desirable’ and only refer to the term ‘possible’ in the article of the EIO Proposal. Indeed, as also the Strasbourg Courts has stressed: ‘*impossibilium nulla est obligatio*’.¹⁴⁴

The part of the EIO Proposal concerning the hearing by telephone conference, in contrast with the part concerning the hearing by videoconference, does not specify when the issuing authority may issue a EIO. This is regrettable as this technique, even more than the technique of a video link, hardly offers an adequate and proper opportunity for the defence to challenge the witness. Indeed, body language cannot be observed and, as a consequence, no adequately control on the credibility of the witness can be achieved.¹⁴⁵ The hearing by telephone conference, on the other hand, could be an economic and quick manner of interrogation. For this reason, and at the same time taking into account the difficulties in assessing the credibility of the witness through a telephone conversation, the use of this link should preferably be restricted to interrogation of expert witnesses whose veracity is beyond doubt and who agree to such proceedings.¹⁴⁶

Finally, in light with the ECtHR case law that requires an adequate and sufficient opportunity for the defence to challenge the witness, it is worrisome that the EIO Proposal does not refer to the presence of the defence at the time the conferences are

¹⁴³ Justice, Briefing for the UK on the European Investigation Order, July 2010, available at <http://www.justice.org.uk/images/pdfs/Briefing%20on%20the%20European%20Investigation%20Order.pdf> (consulted on 18/02/2011), p. 13; Justice, Response to the Commission Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, January 2010, available at http://ec.europa.eu/justice/news/consulting_public/0004/civil_society/justice_en.pdf (consulted on 08/06/2011), p. 6.

¹⁴⁴ ECtHR, *Bielaj v. Poland*, Application No. 43643/04, 27 April 2010, para. 56.

¹⁴⁵ Justice, Response to the Commission Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, January 2010, available at http://ec.europa.eu/justice/news/consulting_public/0004/civil_society/justice_en.pdf (consulted on 08/06/2011), p. 6.

¹⁴⁶ In the same sense: *Ibidem*, p. 6; Justice, Briefing for the UK on the European Investigation Order, July 2010, available at <http://www.justice.org.uk/images/pdfs/Briefing%20on%20the%20European%20Investigation%20Order.pdf> (consulted on 18/02/2011), pp. 14-15.

undertaken. Even the notification of the charged person (or its lawyer) about the time and the venue of the hearing is not mentioned. As the concept of adverse-questioning is described as “*an oral challenge to unfavourable testimonial evidence at the time of its collection [...]*”¹⁴⁷, it is regrettable that the EIO Proposal does not encourage the defence’s participation at the moment the conferences take place.

b. The specific case of anonymous witnesses

An anonymous witness is defined as

“any person, irrespective of his status under national criminal procedural law, who provides or is willing to provide information relevant to criminal proceedings and whose identity is concealed from the parties during the pre-trial investigation or the trial proceedings through the use of procedural protective measures”.¹⁴⁸

The use of anonymous witnesses is not under all circumstances incompatible with the ECHR.¹⁴⁹ Indeed, the protection of the witness’s life, liberty or security of person may be at stake as well as the protection of his or her private or family life, and serve as a justification for concealing his or her identity.¹⁵⁰ Witness anonymity, however, is not inclined to serve the charged person’s interests. Indeed, there is a high value for the defence of knowing the identity of the witness, which the Strasbourg Court expresses in the following words:

“If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculcating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it

¹⁴⁷ Maffei, 2006, p. 28.

¹⁴⁸ Vermeulen, De Bondt, Van Damme, 2010, p. 141.

¹⁴⁹ ECtHR, *Van Mechelen and Others v. the Netherlands*, Application Nos. 21363/93, 21364/93, 21427/93 and 22056/93, 23 April 1997, para. 52; ECtHR, *Doorson v. Netherlands*, Application No. 20524/92, 26 March 1996, para. 69.

¹⁵⁰ ECtHR, *Van Mechelen and Others v. the Netherlands*, Application Nos. 21363/93, 21364/93, 21427/93 and 22056/93, 23 April 1997, para. 53; ECtHR, *Doorson v. Netherlands*, Application No. 20524/92, 26 March 1996, para. 70.

lacks the information permitting it to test the author's reliability or cast doubt on his credibility. The dangers inherent in such a situation are obvious".¹⁵¹

Given the significance of the disclosure of a witness identity, the Strasbourg Court argues that the handicaps under which the defence labours, must be counterbalanced in a sufficient way by the procedures followed by the judicial authorities.¹⁵² This requires, on the one hand, a need for supportive evidence: "*a conviction should not be based either solely or to a decisive extent on anonymous statements*".¹⁵³ On the other hand, there is a need to establish procedural guarantees. Such guarantees can be distilled from the ECtHR case law and should be taken into account when assessing the overall fairness of the proceedings. As a first guarantee, comparable to the requirements in the case of an absent witness, the defence should be able "*to challenge the evidence of the anonymous witnesses [...]*".¹⁵⁴ The importance of challenging a witness and whether this is reflected throughout the EIO, has been discussed above. A relevant additional remark, related to the case of anonymous witnesses in particular, is that the possibility to challenge anonymous witnesses is even more crucial than when it concerns identified witnesses. Indeed, when a witness is absent at the trial (which, as has been stressed above, often occurs in the case of witnesses abroad) and is granted anonymity at the same time, the restrictions on the right under article 6 § 3 (d) ECHR, reach their peak.¹⁵⁵ Another procedural guarantee is that a judicial authority, who knows the identity of the witness, should be able to hear the witness during pre-trial investigations and examine his or her reliability.¹⁵⁶ The presence of a judge from the country of the trial is however not explicitly foreseen by the EIO Proposal. However, article 8 paragraph 3 could be useful in this regard, as it allows the assistance of an authority of the issuing state. Since the latter provision does not imply a real obligation, it remains to be seen if the issuing state will make use of this provision to ensure the hearing of the anonymous witness by a judicial authority. Whether a judicial authority of the executing state will be involved

¹⁵¹ ECtHR, *Kostovski v. the Netherlands*, Application No. 11454/85, 20 November 1989, para. 42. About the value for the charged person of knowing the witness's identity, see further Trechsel, 2005, p. 318.

¹⁵² ECtHR, *Visser v. the Netherlands*, Application No. 26668/95, 14 February 2002, para. 46; ECtHR, *Van Mechelen and Others v. the Netherlands*, Application Nos. 21363/93, 21364/93, 21427/93 and 22056/93, 23 April 1997, para. 54; ECtHR, *Doorson v. the Netherlands*, Application No. 20524/92, 26 March 1996, para. 72.

¹⁵³ ECtHR, *Van Mechelen and Others v. the Netherlands*, Application Nos. 21363/93, 21364/93, 21427/93 and 22056/93, 23 April 1997, para. 55; ECtHR, *Doorson v. the Netherlands*, Application No. 20524/92, 26 March 1996, para. 75.

¹⁵⁴ ECtHR, *Doorson v. the Netherlands*, Application No. 20524/92, 26 March 1996, para. 75.

¹⁵⁵ Maffei, 2006, p. 51.

¹⁵⁶ ECtHR, *Doorson v. the Netherlands*, Application No. 20524/92, 26 March 1996, para. 73.

in the hearing, will depend on the national rules of that country. Indeed, according to the EIO Proposal, the executing authority shall be “*an authority competent to undertake the investigative measure mentioned in the EIO in a similar national case*”.¹⁵⁷ The latter article does not specify that the authority needs to be of a *judicial* nature. This would however be preferable. Of course, the national law may require that the hearing is conducted by such an authority. The latter is for example foreseen by the Polish and the Dutch law.¹⁵⁸ The regulation in England and Wales, on the other hand, is silent on this matter.

Furthermore, the Strasbourg Court specifies that the status of anonymity can only be granted if this is ‘strictly necessary’ to protect the witness.¹⁵⁹ Actual threats are not required¹⁶⁰, but yet, the ECtHR places a particular emphasis upon the veracity of the witness’s fear and whether there are reasonable grounds to believe that he or she would be subject to some form of intimidation or reprisal.¹⁶¹ Only in this case, protection may be (strictly) necessary and anonymity may be granted thereto. As such, it can be derived from the Strasbourg case law that anonymity may only be used as a special measure of last resort.¹⁶² Against this background, further problems might arise in light of the cooperation on obtaining evidence in criminal matters between the EU Member States. Indeed, it seems that rules about the required conditions for witness anonymity, differ among these countries. Recent law in England and Wales, for example, allows an order for anonymity if this is *necessary* for the protection of the witness.¹⁶³ Although the term ‘*strictly necessary*’ is not used, this legislation can be considered as largely in line with the ECtHR case law. The Polish law, on the other hand, seems a lot more lenient towards the application of the measure of witness anonymity since article 184 paragraph 1 of the Code of Criminal Procedure (CCP), which establishes the conditions for this measure, does not refer to any form of necessity.¹⁶⁴ The same can be said about the Dutch CCP.¹⁶⁵ Furthermore, and in line with the latter observations, only the legislation

¹⁵⁷ Art. 2(b) of the Initiative regarding the EIO.

¹⁵⁸ Art. 184(3) of the Polish Code of Criminal Procedure, Dz.U.97.89.555, Act of 6 June 1997; Art. 226e of the Dutch Code of Criminal Procedure, Act of 15 January 1921.

¹⁵⁹ ECtHR, *Van Mechelen and Others v. the Netherlands*, Application Nos. 21363/93, 21364/93, 21427/93 and 22056/93, 23 April 1997, para. 58.

¹⁶⁰ ECtHR, *Doorson v. the Netherlands*, Application No. 20524/92, 26 March 1996, para. 71.

¹⁶¹ ECtHR, *Visser v. the Netherlands*, Application No. 26668/95, 14 February 2002, paras. 47 *et seq.*

¹⁶² Doak & Huxley-Binns, 2009, p. 512 and p. 518.

¹⁶³ Section 4(3) and 4(5) of the Criminal Evidence (Witness Anonymity) Act 2008.

¹⁶⁴ Art. 184(1) of the Polish Code of Criminal Procedure, Dz.U.97.89.555, Act of 6 June 1997.

¹⁶⁵ Article 226a of the Dutch Code of Criminal Procedure, Act of 15 January 1921.

applicable in England and Wales, contains a provision that responds to the use of witness anonymity as a measure of last resort. The provision in question argues that it should be considered “*whether it would be reasonably practicable to protect the witness’s identity by any means other than by making a witness anonymity order [...]*”.¹⁶⁶

In all the examined countries exist criminal procedural rules concerning the reasons for which anonymity may be granted. The English Act refers to the protection of safety of the witness or another person, serious damage to property and real harm to the public interest.¹⁶⁷ According to the Polish CCP, anonymity can be granted to a witness when there are justified concerns “*for safety of life, health, freedom or loss of property of considerable dimension regarding the witness or his next of kin*”.¹⁶⁸ Finally, the Dutch CCP refers to a reasonable fear for the witness or another person for life, health or safety, as well as for the breakdown of family life or social-economic existence.¹⁶⁹ As the ECtHR has mentioned life, liberty or security of person as grounds for anonymity, the justifications in all three examined countries, seem to be confined too broadly. Indeed, references to reasons as loss of property, social-economic existence or harms of public interest do not seem to be in accordance with the Strasbourg requirements. Not only concerns arise in light of the compatibility with ECtHR case law, also great differences exist between the rules of the examined countries (regardless of whether these rules are in accordance with the Strasbourg considerations). England and Wales, for example, in contrast with the other two countries, do not refer explicitly to ‘health’. On the other hand, this is the only country referring to the harm to the public interest. Furthermore, the Netherlands is the sole country that mentions social reasons, including a breakdown of family life. Finally, also the extent of the category of persons whose fear may justify witness anonymity, varies among the different countries. While in England and Wales, and in the Netherlands the protection of any other person besides the witness may be taken into account, in Poland only the witness’s next of kin has been considered.

What the fore-mentioned national legal rules indicate is firstly, that some inconsistencies with ECtHR case law exist, and secondly, that even when the rules

¹⁶⁶ Section 5(2)(f) of the Criminal Evidence (Witness Anonymity) Act 2008.

¹⁶⁷ *Ibidem*, Section 4(3).

¹⁶⁸ Art. 184(1) of the Polish Code of Criminal Procedure, Dz.U.97.89.555, Act of 6 June 1997.

¹⁶⁹ Article 226a, 1a of the Dutch Code of Criminal Procedure, Act of 15 January 1921.

comply with the Strasbourg interpretation, a charged person might be confronted with different standards in the course of the execution of a EIO. Such observations cause concerns regarding the rights of the defence. Consider for example the case in which the trial will take place in the Netherlands and the witness is located in England. Then, the Dutch authorities can issue a EIO that will be exercised in accordance with the English rules. As such, the defendant may become confronted with an anonymous witness for reasons of public interests (in accordance with the law in England and Wales), while such kind of justification would not count if the proceedings would occur in a purely national setting. In the opposite case, however, when a witness is located in the Netherlands and the trial will be held in England, problems regarding the necessity may arise. As showed before, England is more severe regarding this issue and furthermore obliges to seek for alternatives. As another example, one can imagine a trial that will take place in Poland and in which the latter country, in light of the pre-trial investigations, requests for the interrogation of a witness in the Netherlands. If the Dutch regulation applies, the witness may be granted anonymity even if a complete other person, who has no relations with the witness, needs protection. The latter would however not have been the case under the application of the Polish law. All examples mentioned are derived from a scenario in which the issuing country has, in comparison with the executing Member State, more severe rules on granting anonymity to witnesses. When, in such a scenario, the rules of the executing country would apply, this would, given the importance of the disclosure of witness identity for the charged person, not reflect an advantageous situation for the defence. International cooperation would then entail the risk of lowering its protective standards.

This concern gains even more weight bearing in mind the particular provisions of the EIO. Indeed, the initial EIO Proposal does not contain the requirement that it could only be issued if the evidence could also be obtained in the issuing state under its law. Such a provision was however foreseen in the EEW FD which the EIO instrument tends to replace.¹⁷⁰ The existence of a EIO, under its current conception, would thus allow for ‘forum-shopping’ by the prosecutors.¹⁷¹ Indeed, measures for obtaining evidence that are not allowed in a given jurisdiction, could be used to gather evidence present in

¹⁷⁰ Art. 7 of Council of the European Union, Council Framework decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ No. L 350/72 of 30.12.2008.

¹⁷¹ Peers, 2010, pp. 6-7.

another country. This is problematic considering that currently, still 20 percent of the EU Member States does not allow the domestic use of anonymous witnesses.¹⁷² In this regard, the partial general approach on the Initiative regarding the EIO, which has been reached at the recent Council meeting of 9 and 10 June 2011, contains a very welcome addition.¹⁷³ Indeed, it foresees in article 5a(1)(b) that the EIO may only be issued when “*the investigative measure(s) mentioned in the EIO could have been ordered under the same conditions in a similar national case*”. As this document will serve as a basis for further negotiations, the potential problem of ‘forum-shopping’ might hereby be solved. A second conceivable scenario is the one in which the rules of the issuing country are more lenient than the rules of the executing country. Suppose that, under such a scenario, the authorities of the issuing country specify in the EIO that the witness should be granted anonymity. Would the executing country subsequently be obliged to apply such a measure, even when it does not exist in that state, or when it would not be allowed under its own law in a similar case? The latter question is of particular importance given the different conditions that apply in the examined countries and, *a fortiori*, as already mentioned, given the fact that 20 percent of the EU Member States does not allow the domestic use of anonymous witnesses.¹⁷⁴

The EIO Proposal contains some provisions that could be useful to address the concerns under the latter scenario.

Firstly, article 8 paragraph 2 seems relevant, as it allows the executing country to refuse to comply with the formalities and procedures expressed by the issuing country, in case such formalities and procedures are contrary to the fundamental principles of law of the executing state. It is however not clear to what extent the national authorities will make use of such provisions, for example to refuse to grant witness anonymity.

Article 9 paragraph 1 (a) of the EIO Proposal further states that the executing authority *may* decide to execute an investigative measure other than provided for in the EIO when the measure indicated in the EIO does not exist under the law of the executing state. Furthermore, article 10 paragraph 1 (d) of the EIO Proposal provides that recognition or execution of the EIO *may* be refused by the executing state if the measure would not be

¹⁷² Vermeulen, De Bondt & Van Damme, 2010, p. 141.

¹⁷³ Council of the European Union, Brussels, 17 June 2011, 11735/11 COPEN 158, available at <http://register.consilium.europa.eu/pdf/en/11/st11/st11735.en11.pdf> (consulted on 06/07/2011).

¹⁷⁴ Vermeulen, De Bondt & Van Damme, 2010, p. 141.

authorised in a similar national case.¹⁷⁵ The latter two provisions only offer a possibility and not an obligation. Moreover, article 10 paragraph 1 (d) of the EIO Proposal only applies to two types of procedure.¹⁷⁶

The changes that have been proposed by the partial general approach on the Initiative following the Council meeting on 9 and 10 June 2011, are very interesting in this regard.¹⁷⁷ Article 9 paragraph 1 of this approach provides that the executing state *must* have recourse to another investigative measure than provided for in the EIO when the measure does not exist under its law or when it is not available in a similar national case. In general, this provision is very advantageous from the perspective of the defence. However, not in the case of the interrogation of witnesses abroad. Indeed, the next article foresees that article 9 paragraph 1 is not applicable in case of the hearing of a witness.

Finally, article 9 paragraph 1 (c) of the EIO Proposal foresees that the executing country *may* decide to have recourse to another investigative measure than the one ordered by the issuing country, if it will have the same result as the measure provided for in the EIO by less coercive means. This provision remains similar under the partial general approach reached at the Council meeting on 9 and 10 June 2011.¹⁷⁸ Again, from a defence perspective, it would be preferable to make such decision mandatory.

In sum, the provisions of the EIO Proposal do not seem to address the concerns that might arise regarding the measure of witness anonymity in a sufficient manner. As such, given the intrusive character of the measure of witness anonymity from the eyes of the defence and given the problems that might exist from its perspective, it is preferable to regulate this matter in a more detailed and imperative manner in the EIO-instrument.

c. The specific case in which the defence does not understand the language the witness speaks

The cross-border setting in which a EIO circulates, creates concerns regarding the multilingual aspect of the procedures. As the witness is located abroad, there will be a great chance that he or she will not be interrogated in the language of the country of the

¹⁷⁵ Art. 10(1)(d) of the Initiative regarding the EIO.

¹⁷⁶ The two types of procedure can be found in *idem*, art.4(b) and (c).

¹⁷⁷ Council of the European Union, Brussels, 17 June 2011, 11735/11 COPEN 158, available at <http://register.consilium.europa.eu/pdf/en/11/st11/st11735.en11.pdf> (consulted on 06/07/2011).

¹⁷⁸ *Ibidem*, art. 9(1bis).

trial. The question then arises whether and to what extent translation or interpretation services will be offered for the benefit of the defence, for instance, regarding the statements of the witness, or regarding the hearings through video – and telephone conference.

It may appear illogical to address this question under the right to call and examine witnesses and not under the right foreseen by article 6 § 3 (e) of the ECHR. The latter article provides that everyone charged with a criminal offence has the right to have the free assistance of an interpreter if he cannot understand or speak the language used in court. Although this article does apply to pre-trial proceedings, as well as to the translation of important documents, it is however not relevant regarding the specific case of interrogations of witnesses abroad.¹⁷⁹ Because, the protection offered in article 6 § 3 (e) ECHR plays when there is a linguistic deficiency of the charged person (who does not speak the language of the court of trial), and does concern the interpretation of witness evidence. In the latter case, absence of unsatisfactory translation or interpretation might however give rise to an issue under article 6 § 3 (d) ECHR.¹⁸⁰ The rights offered by the provisions of the ECHR indeed intend “*to guarantee rights that are not theoretical or illusory, but practical and effective*”.¹⁸¹ In light of the right to challenge witnesses, this seems however difficult to achieve in case the defence does not understand the statements of the witness, and no translation or interpretation is offered in a satisfactory manner.¹⁸²

Notwithstanding, the EIO Proposal does not refer explicitly to the rights of the defence in this context. In the article regarding the hearing by videoconference, it mentions the assistance of an interpreter only for the benefit of the judicial authority of the executing state or the witness.¹⁸³ As the hearings will be conducted by a judicial authority of the issuing state, this is indeed crucial. However, in case the witness responds in a language the defence does not understand, it is equally important to provide this assistance in

¹⁷⁹ ECtHR, *Hermi v. Italy*, Application No. 18114/02, 18 October 2006, para. 70; ECtHR, *Lagerblom v. Sweden*, Application No. 26891/95, 14 January 2003, para 61; ECtHR, *Kamasinski v. Austria*, Application No. 9783/82, 19 December 1989, paras. 74 and 83; ECtHR, *Leudicke, Belkacem and Koc v. Germany*, Application Nos. 6210/73, 6877/75, 7132/75, 28 November 1978, para. 48.

¹⁸⁰ EComHR, *P.S.V. v. Finland*, Application No. 23378/94, 18 October 1995. See also Trechsel, 2005, pp. 333-335.

¹⁸¹ ECtHR, *Andrejeva v. Latvia*, Application No. 55707/00, 18 February 2009, para. 98. See also ECtHR, *Artico v. Italy*, Application No. 6694/74, 13 May 1980, para. 33.

¹⁸² Access to translation services could also be regarded as a ‘facility’ to enable the preparation of the defence. About the right to adequate time and facilities, see further.

¹⁸³ See art. 21(6)(a) and art. 21(6)(d) of the Initiative regarding the EIO.

favour of the latter. Therefore, it seems recommendable to insert this explicitly in the EIO legal instrument, or to make reference to the application of the recent *Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings*.¹⁸⁴ The latter Directive is related to the proposed measures in the *Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings*¹⁸⁵ and lays down the common minimum rules to be applied in the fields of interpretation and translation with a view to enhance mutual trust among the EU Member States.¹⁸⁶ This instrument might be useful from the eyes of a defendant confronted with a witness located abroad because the relevant articles of the Directive, rather than referring to the situation in which the defence does not speak the language used in the *court*, refer to the situation in which the language of the *proceedings*, including investigative proceedings, is unknown to the defence.¹⁸⁷

Some problems might however remain. Firstly, no obligation under the EIO Proposal is provided to record the interrogation of a witness, not even regarding a hearing by means of a video – or telephone conference. Such recordings might however be the key factor to verify the accuracy of the interpretation.¹⁸⁸ Whether article 7 of the abovementioned Directive, foreseeing the obligation to make use of recordings under certain circumstances, might be useful in this regard, is doubtful, because it seems to apply only in the case the charged person him or herself is subject to questionings or hearings.¹⁸⁹

A second concern regarding the multilingual aspect of the proceedings, is that the EIO Proposal is silent on the retention of all original evidence, including the recordings (if any) of video – or telephone conferences. This may however be crucial to enable the

¹⁸⁴ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ No. L 280/1 of 26.10.2010.

¹⁸⁵ Council of the European Union, Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ No. C 295/01 of 4.12.2009.

¹⁸⁶ Recital no. 12 of the Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ No. L 280/1 of 26.10.2010.

¹⁸⁷ Particularly relevant articles: art. 2(1) (regarding interpretation) and art. 3(1) (regarding translation) of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ No. L 280/1 of 26.10.2010.

¹⁸⁸ Spronken, Vermeulen, de Vocht & van Puyenbroeck, 2009, p. 30.

¹⁸⁹ Art. 7 of the Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ No. L 280/1 of 26.10.2010.

defendant to point out errors in translation and to obtain more satisfactory translations afterwards.¹⁹⁰

Both concerns could be remedied by making an explicit reference in the EIO Proposal to the obligation for the authorities to record witness statements and to retain all original evidence, including the recordings.

2. The right to legal representation and legal aid

A. Case law and the importance of legal representation (and legal aid) when witnesses are located abroad

The right to legal representation and legal aid is foreseen by article 6 § 3 (c) ECHR. The latter article provides that a person charged with a criminal offence has the minimum right

“to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”.

Also article 47 of the EU Charter foresees the right to legal representation and legal aid. The right to legal representation and legal aid are not absolute.¹⁹¹ How they should be applied, depends on the special features of the proceedings and the circumstances of the case.¹⁹² Similar to article 6 § 3 (d) ECHR, the link must be made with the general aim of article 6 ECHR: a fair trial must be achieved. The focus must thus lie on the *“entirety of the domestic proceedings conducted in the case”*.¹⁹³ The right to legal-aid, however, seems to arise from the moment there is any room for effective assistance.¹⁹⁴

¹⁹⁰ Fair Trials International, Fair Trials International’s response to a European Member States’ legislative initiative for a Directive on a European Investigation Order, 26 October 2010, available at <http://www.fairtrials.net/publications/article/fair-trials-internationals-submission-on-the-european-investigation-order> (consulted on 06/07/2011), pp. 7-8.

¹⁹¹ ECtHR, *Shugayev v. Russia*, Application No. 11020/03, 14 January 2010, para. 51; ECtHR, *Quaranta v. Switzerland*, Application No. 12744/87, 24 May 1991, para. 35.

¹⁹² ECtHR, *Aleksandr Zaichenko v. Russia*, Application No. 39660/02, 18 February 2010, para. 36; ECtHR, *Imbrioscia v. Switzerland*, Application No. 13972/88, 24 November 1993, para. 38.

¹⁹³ *Ibidem*.

¹⁹⁴ Trechsel, 2005, p. 250.

The latter observations, together with the fact that article 6 § 3 (c) ECHR also applies during the preliminary investigations¹⁹⁵, imply that attention should be given to legal representation and legal aid during the pre-trial phase. In sum, the ECtHR considers that the absence of a counsel at the initial stages of the investigation, irretrievably affects the rights of the defence.¹⁹⁶ Therefore, as a matter of principle, there is a right to the presence of a counsel (possibly free of charge) during witness interrogation from the beginning of the proceedings. A counsel should further be able to question the witness.¹⁹⁷

The importance of this right during the investigation stage may not be underestimated. The ECtHR clarifies this in the following words:

*“[...] an accused often finds himself in a particularly vulnerable position at that stage [the pre-trial stage] of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence”.*¹⁹⁸

Furthermore, an important function of a counsel is to identify and present *“any means of evidence at an early stage where it is still possible to trace new relevant facts and where the witnesses have a fresh memory [...]”*.¹⁹⁹ He or she is also able to challenge witnesses and pay attention to their reliability and credibility. A counsel can moreover exercise a control of the lawfulness of the measures taken in the course of the pre-trial proceedings.²⁰⁰

In the particular case of proceedings involving witnesses abroad, which are more likely to deviate from the immediacy principle, the assistance of a counsel becomes even more crucial. Firstly, because cross-border cases are characterised by an increased complexity.²⁰¹ Furthermore, because witnesses abroad are more likely to be absent during the public trial, decreasing the subsequent opportunities to correct any

¹⁹⁵ ECtHR, *Aleksandr Zaichenko v. Russia*, Application No. 39660/02, 18 February 2010, para. 36; ECtHR, *Imbrioscia v. Switzerland*, Application No. 13972/88, 24 November 1993, para. 38. The case of *Salduz v. Turkey* was pioneering regarding the presence of a lawyer during the first interrogation of a suspect by the police. Although this case does not concern witness interrogation in particular, it stresses the importance of the application of article 6 § 3 (c) ECHR during preliminary investigations. See ECtHR, *Salduz v. Turkey*, Application No. 36391/02, 27 November 2008, para. 55.

¹⁹⁶ ECtHR, *Colakoglu v. Turkey*, Application No. 29503/03, 20 October 2009, para. 38.

¹⁹⁷ In the same sense, see Trechsel, 2005, pp. 308-309.

¹⁹⁸ ECtHR, *Shugayev v. Russia*, Application No. 11020/03, 14 January 2010, para. 54.

¹⁹⁹ EComHR, Report, *Elvan Can v. Austria*, Application No. 9300/81, 12 July 1984, para. 55.

²⁰⁰ *Ibidem*.

²⁰¹ Zappalà, 2008, p. 59.

shortcomings that might have occurred during the pre-trial witness interrogation. The defence is moreover faced with the additional disadvantage of unfamiliarity with the foreign law and the possible lower protection standards it might offer. Finally, because a counsel is considered as a substitute for the charged person in light of the right to confrontation under article 6 § 3 (d) ECHR. Indeed, although the ECtHR prefers a visual and personal confrontation between the defence and a witness (see above), in exceptional circumstances, it allows the identification of the charged person with his or her counsel.²⁰² The situation in which the defence lawyer is confronted with the witness and is able to question him or her, may thus be sufficient to comply with article 6 § 3 (d) ECHR. As the ECtHR states it: “*the Convention does not preclude identification - for the purposes of Article 6 para. 3 (d) ECHR of an accused with his counsel*”.²⁰³

B. Examination of the Proposal regarding the European Investigation Order

As follows naturally from the right to legal representation and its importance in case a witness is located abroad, a counsel must have the opportunity to attend the examinations of witnesses during the pre-trial phase, in respect of all states concerned. Also legal aid, if appropriate, should be foreseen. No other conclusion seems to apply in case of interrogations of witnesses by means of video – or telephone conference.²⁰⁴

Regarding legal aid, some problems might arise if the law of the executing state establishes more stringent requirements for granting legal assistance free of charge. It is further possible that this country provides free assistance of a lesser quality than the country of the trial. The defence then finds itself in a less advantageous position, in comparison with the situation in which the witness would be located in the country of the trial. Under such a scenario, cross-border cooperation on obtaining evidence thus risks to lower the protection of the defence. Such a concern is not without grounds since

²⁰² Schuermans, 2003, pp. 14-15; De Smet, 2001, pp. 252-254; Marique, 1998, p. 542.

²⁰³ ECtHR, *Doorson, v. the Netherlands*, Application No. 20524/92, 26 March 1996, para. 73; ECtHR *Kamasinski v. Austria*, Application No. 9783/82, 19 December 1989, para. 91.

²⁰⁴ This reasoning is in agreement with the case law regarding the situation in which the accused follows his or her criminal proceedings by videoconference, see ECtHR, *Marcello Viola v. Italy*, Application No. 45106/04, 5 October 2006.

it appears that rules and practices in this regard differ considerably between the EU countries.²⁰⁵

Legal representation during witness interrogation abroad requires the permission for a counsel to attend the questioning of the witness abroad.²⁰⁶ It has already been stressed that the EIO Proposal, since it does not regulate the interrogation of witnesses in a specific way, does not require the presence (or the permission thereto) of the charged person or a counsel. The absence of such a provision is a cause of concern from the perspective of the defence, given some national practices that exist in this regard. In the Netherlands, for example, counsels are kept out from the interrogation of the witnesses by the police. As such, mistakes and omissions that are made during the interrogation, will be difficult to repair at a later stage in the proceedings.²⁰⁷

Also the specific provisions of the EIO Proposal regarding the hearings by video – or telephone conference, do not foresee the presence of a counsel. The European Commission, in its comments on the Initiative regarding the EIO, expressed its concerns about this. To ensure the rights of the defence, the Commission argues that

*“defence lawyers must have the possibility to question witnesses and experts during the hearing by videoconference if the information gathered by these means is to be introduced into the criminal trial”.*²⁰⁸

Article 8 paragraph 2 of the Initiative regarding the EIO might provide a solution in case the executing state does not allow the presence of a counsel during witness interrogation. The latter provision argues that *“the executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority [...]”*. Whether the issuing country will use this provision to encourage the presence of a counsel during the interrogation of a witness abroad, is however difficult to predict.

The opportunity for the counsel to effectively attend the questioning of the witness abroad and ask questions him or herself, presupposes furthermore that he or she has been informed in time about whether, when and where witnesses will be interrogated

²⁰⁵ For more detailed information, see Spronken, Vermeulen, de Vocht & van Puyenbroeck, 2009, p. 13 and pp. 119-120; Spronken & Attinger, 2005, p. 80

²⁰⁶ Trechsel, 2005, p. 267.

²⁰⁷ Prakken & Spronken, 2007, p. 177.

²⁰⁸ European Commission, Comments on the Initiative regarding the European Investigation Order in criminal matters, D (2010) 6815, available at http://ec.europa.eu/justice/news/intro/doc/comment_2010_08_24_en.pdf (consulted on 04/07/2011), p. 29.

abroad.²⁰⁹ The fact that the EIO Proposal does not regulate the notification of the counsel about the issuing of an EIO and more in particular, about the date and place of the questioning of the witness, can therefore be considered as another shortcoming of this instrument. It seems therefore preferable to insert a specific provision in the EIO Proposal that requires that the counsel receives a communication about these matters. The importance of such a provision can be illustrated by the practice in Poland regarding the information available for the counsel. The situation in this country seems advantageous at first sight: the counsel can always ask about the stage of the investigation and the activities that will be performed in the presence of their client. However, no duty whatsoever exists on the part of the prosecutor to respond him or her.²¹⁰

As stressed earlier, the Strasbourg Court allows an identification between the charged person and his or her counsel. The situation in which only the defence lawyer is confronted with the witness, is however open to criticism as it may lead to a so called ‘knowledge gap’ between the counsel and his client and, as a consequence, to a breach in the relation of trust between both.²¹¹ Therefore, such a situation cannot be considered as reflecting the most ideal from the eyes of the defence. Notwithstanding the opinion of the ECtHR that the presence of the counsel suffices, the examination of the witness by the charged person him or herself should thus, from my point of view, be encouraged in the first place. The EIO Proposal is however silent on this matter.

The representation by a counsel should furthermore be effective. Indeed, the ECtHR is designed to “*guarantee not rights that are theoretical or illusory but rights that are practical and effective*”²¹². The assigning of a counsel does thus not in itself ensure the effectiveness of the assistance.²¹³ In this regard, a state is under the obligation to ensure that the counsel has duly access to the information necessary to conduct a proper defence. Thereto, a counsel should have access to the file, early enough to prepare the defence.²¹⁴ The question of whether, when, and to what extent, the defence has access

²⁰⁹ Trechsel, 2005, p. 267. This is in line with the case law in the context of legal representation during the interrogation of the suspect him or herself, see ECtHR, *Imbrioscia v. Switzerland*, Application No. 13972/88, 24 November 1993, para. 42.

²¹⁰ Kruszynski, 2007, p. 183.

²¹¹ Verbruggen, 2000, p. 94; De Nauw, 2002-2003, p. 928.

²¹² ECtHR, *Shugayev v. Russia*, Application No. 11020/03, 14 January 2010, para. 53; ECtHR, *Imbrioscia v. Switzerland*, Application No. 13972/88, 24 November 1993, para. 38.

²¹³ *Ibidem*.

²¹⁴ ECtHR, *Öcalan v. Turkey*, Application No. 46221/99, 12 May 2005, paras. 145 *et seq.*

to the file, will be examined further, in light of the discussion of the right of the defence to have adequate time and facilities to prepare its defence.

In the EIO Proposal, a possibility of a legal remedy against the recognition and execution of an EIO had been introduced. Article 13 provides:

“Legal remedies shall be available for the interested parties in accordance with national law. The substantive reasons for issuing the EIO can be challenged only in an action brought before the court of the issuing state”.

It is crucial that also during a hearing regarding the issuing of a EIO, legal representation and, if appropriate, legal aid, are foreseen.²¹⁵ Regrettably, the latter is not explicitly indicated in the Proposal. This is much the more worrisome in light of the national practices that occur in the context of other MR instruments, such as the EAW and the orders freezing property or evidence. Indeed, it has been demonstrated that, particularly regarding the right to legal aid, the defence faces fewer guarantees in the course of such proceedings. For example, some EU Member States that foresee legal assistance free of charge, apply this right only partly in the specific context of the EAW proceedings or the proceedings applicable to orders freezing property or evidence.²¹⁶

3. The right to have adequate time and facilities to prepare the defence

Article 6 §3 (b) ECHR provides everyone charged with a criminal offence the minimum right to have adequate time and facilities for the preparation of his defence. This work treats this specific right of the defence as the last in line because the right to call and question witnesses (including the services of an interpreter), and the right to legal representation and legal aid can also be regarded as ‘facilities’. As a consequence, the right under article 6 §3 (b) of the European Convention, is more of a ‘subsidiary’ nature, being invoked when none of the other specific guarantees apply. Therefore, the right to have adequate time and facilities is not sharply defined in the Strasbourg case law.²¹⁷ Also considerable less (recent) case law, in comparison with the case law related to the rights under sub-paragraph (d) of the same article of the ECHR, exists. Besides the

²¹⁵ Justice, Briefing for the UK on the European Investigation Order, July 2010, available at <http://www.justice.org.uk/images/pdfs/Briefing%20on%20the%20European%20Investigation%20Order.pdf> (consulted on 18/02/2011), p. 12.

²¹⁶ See, also for further information: Spronken, Vermeulen, de Vocht & van Puyenbroeck, 2009, p. 108 and p. 112.

²¹⁷ Trechsel, 2005, p. 209.

facilities that are discussed earlier and are linked to the other minimum defence rights, it remains relevant, in light of the EIO Proposal, to dig further into the question whether the defence is offered sufficient time and facilities to prepare the hearing of a witness and whether it is offered the time and the facilities to react on the results of witness interrogations. The latter questions are intrinsically related to the notification of the defence about the issuing of a EIO and to the possibility of access to the case file.

A. Information about the issuing of a European Investigation Order

As already stressed before, none of the provision of the EIO Proposal require the authorities to notify the defence about the issuing of an Investigation Order. This observation, *a fortiori*, entails the risk that nor the charged person, nor the defence counsel, are (timely) aware of the date and place of the witness interrogation abroad. On the one hand, when the defence is not informed at all, this will deprive it from the ability to interrogate the witness, and thus from a facility to prepare the defence. On the other hand, when no timely notification has been offered, problems might arise under the right to have adequate time to prepare the defence. Indeed, if the defence would like to examine the witness, this might require time for instance to obtain translations of documents and consult with other potential witnesses.²¹⁸ Depending on the awareness of the prosecution about the issuing of an EIO (and the date and place of the witness interrogation), the latter considerations also touch upon the principle of equality of arms taken together with sub-paragraph (b) of article 6 paragraph 3 of the ECHR. Both have indeed been linked with each other by the Strasbourg Court.²¹⁹

For all the foregoing reasons, it is recommendable that the EIO specifies that the defence should be informed, as soon as possible, about the issuing of an EIO and, more in particular, about the time and place of the hearing of a witness. This observation

²¹⁸ Fair Trials International, Fair Trials International's submission to the Joint Committee on Human Rights. The human rights implications of the European Arrest Warrant and the European Investigation Order, January 2010 (b), available at http://www.fairtrials.net/publications/article/submission_to_the_joint_committee_on_human_rights (consulted on 09/06/2011), p. 4.

²¹⁹ See, for example ECtHR, *Öcalan v. Turkey*, Application No. 46221/99, 12 May 2005, para. 140 and ECtHR, *Foucher v. France*, Application No. 22209/93, 18 March 1997, para. 36.

gains even more weight considering the strict deadlines for execution that are inserted in the EIO instrument.²²⁰

B. Access to the file

a. Importance

Adequate time and facilities to prepare the defence require timely access to the file. The latter is of great importance for the defence both in a continental system (where the judgment will be based on the file) as in a common-law system (where, although the judgment will generally be based on the oral evidence at trial, the defence should also have advance knowledge of the case of the prosecutor to oppose it effectively).²²¹

In regard of witness interrogations in particular, access to the file is crucial in the phase preceding the interrogation. Indeed, only if the defence is aware of the actual stage of investigations, which presupposes the facility of access to earlier evidence, its right to question witnesses will be fully effective.²²² Acceding the file (or at least parts of it), will, for instance, allow the defence to become familiar with earlier statements of the witness, or even with statements which he or she had made in other proceedings. As such, this will enable the defence, on condition that it could accede the file at a sufficient early stage, to prepare the interrogation and thus, to dig effectively into the credibility of the witness.²²³

The possibility of acceding the file is equally crucial after the interrogation of the witness took place. The defence should know the results of the questioning, in particular when it had not been offered an opportunity to challenge the witness or when only written questions had been permitted. Indeed, only after access to the results of the interrogation, the charged person will be fully able to prepare its defence and, for instance, to consider requests to ‘supplement’ the investigation, such as requests to pose further questions to the witness or to interrogate other witnesses.

²²⁰ See art. 11 of the Initiative regarding the EIO.

²²¹ Trechsel, 2005, p. 224. In common-law countries, rather than to speak about ‘access to the file’, it is referred to in terms of the ‘disclosure of evidence’, see for example the case of ECtHR, *Jasper v. the United Kingdom*, Application No. 27052/95, 16 February 2000 and ECtHR, *Fitt v. the United Kingdom*, Application No. 29777/96, 16 February 2000.

²²² Trechsel, 2005, p. 234 and p. 312.

²²³ *Ibidem*, p. 312.

For all aforementioned reasons, it may be clear that witness statements should not be withheld from the defence.²²⁴ They should be inserted on time in the case file, being accessible from the beginning of the proceedings, i.e. from the moment a person is ‘charged’.²²⁵

b. Case law

The ECJ considers the right of access to the file as a corollary of the principle of respect for the rights of the defence.²²⁶ The Strasbourg Court has equally acknowledged the importance of access to file and considers the right to have (timely) access to all elements that are useful to prepare the defence as part of the right to have adequate time and facilities.²²⁷ Also one of the elements of the broader concept of a fair trial, namely the principle of the equality of arms, plays in this context. The latter principle requires “each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent”.²²⁸ Both parties must thus be offered the opportunity to have knowledge of and comment on all the evidence adduced or observations filed.²²⁹ As such, the results of investigations carried out throughout the proceedings should be known to the defence.²³⁰ The equality

²²⁴ *Ibidem*.

²²⁵ For more information, see *ibidem*, pp. 234-235.

²²⁶ ECJ, Case C-407/08 P, *Knauf Gips KG v. European Commission*, judgment of 1 July 2010, para. 22.

²²⁷ ECtHR, *Öcalan v. Turkey*, Application No. 46221/99, 12 May 2005, para. 148; ECtHR, *Foucher v. France*, Application No. 22209/93, 18 March 1997, para. 36; ECtHR, *Kamasinki v. Austria*, Application No. 9783/82, 19 December 1989, paras. 87-88.

²²⁸ ECtHR, *Sevastyanov v. Russia*, Application No. 37024/02, 22 April 2010, para. 70; ECtHR, *Öcalan v. Turkey*, Application No. 46221/99, 12 May 2005, para. 140; ECtHR, *Foucher v. France*, Application No. 22209/93, 18 March 1997, para. 34.

²²⁹ ECtHR, *Pirali Orujov v. Azerbaijan*, Application No. 8460/07, 3 February 2011, para. 42; ECtHR, *Zhuk v. Ukraine*, Application No. 45783/05, 21 October 2010, para. 25; ECtHR, *Sevastyanov v. Russia*, Application No. 37024/02, 22 April 2010, para. 70; ECtHR, *Mokhov v. Russia*, Application No. 28245/04, 4 March 2010, para. 41; ECtHR, *Andrejeva v. Latvia*, Application No. 55707/00, 18 February 2009, para. 96; ECtHR, *Fitt v. the United Kingdom*, Application No. 29777/96, 16 February 2000, para. 44; ECtHR, *Jasper v. the United Kingdom*, Application No. 27052/95, 16 February 2000, para. 51; ECtHR, *Rowe and Davis v. the United Kingdom*, Application No. 28901/95, 16 February 2000, para. 60; ECtHR, *Lobo Machado v. Portugal*, Application No. 15764/89, 20 February 1996, para. 31; ECtHR, *Dombo Beheer BV v. the Netherlands*, Application No. 14448/88, 27 October 1993, para. 33.

²³⁰ ECtHR, *Fitt v. the United Kingdom*, Application No. 29777/96, 16 February 2000, paras. 46-50; ECtHR, *Jasper v. the United Kingdom*, Application No. 27052/95, 16 February 2000, paras. 55-57; ECtHR, *Rowe and Davis v. the United Kingdom*, Application No. 28901/95, 16 February 2000, paras. 46-50; ECtHR, *Foucher v. France*, Application No. 22209/93, 18 March 1997, para. 27. About the importance to have the opportunity to comment effectively on the evidence, see also ECJ, Case C-276/01, *Joachim Steffensen*, judgment of 10 April 2003, paras. 78-79.

of arms principle should generally be respected but, on the other hand, time and facilities may be adequate even if there remains a certain advantage for the prosecution.²³¹ The right of access to the file and disclosure of evidence, is furthermore not absolute but any restriction should pursue a legitimate aim (such as the protection of national security or the need to protect a witness), be strictly necessary and strictly proportionate, and should be counterbalanced by adequate procedural safeguards that compensate for the handicaps imposed on the defence.²³² What will ultimately count is the overall fairness of the proceedings.²³³ Finally, it is important to stress that the counsel's access to the file is sufficient to comply with the requirement of the Strasbourg Court.²³⁴

c. Examination of the Proposal regarding the European Investigation Order

The importance of access to the file has generally been reflected in the Strasbourg Case law. The remaining question is to what extent such access is granted in relation to documents that circulate in the context of a EIO and the interrogation of witnesses abroad.

Obviously, the answer to this question is linked to the national practices of the countries involved, and these do not seem to reflect a rosy picture. Indeed, as striking as it might be, the right to have access to the file is not provided for in the legislation of all EU Member States. In four EU countries, the right is not provided at all. Moreover, in six of those EU Members that do provide for access to the file, there is no legal obligation to inform the suspect on this right. Also the moment at which the defence is given access to the file, differs between the EU countries.²³⁵ Concerns equally appear when scrutinising the three countries that gain particular attention throughout this work. Firstly, regarding England and Wales, it appears that restrictions are placed on copies of

²³¹ Trechsel, 2005, p. 223.

²³² ECtHR, *Öcalan v. Turkey*, Application No. 46221/99, 12 May 2005, para. 139; ECtHR, *Fitt v. the United Kingdom*, Application No. 29777/96, 16 February 2000, para. 45; ECtHR, *Jasper v. the United Kingdom*, Application No. 27052/95, 16 February 2000, para. 52; ECtHR, *Rowe and Davis v. the United Kingdom*, Application No. 28901/95, 16 February 2000, para. 61.

²³³ ECtHR, *Fitt v. the United Kingdom*, Application No. 29777/96, 16 February 2000, para. 43; ECtHR, *Jasper v. the United Kingdom*, Application No. 27052/95, 16 February 2000, para. 50.

²³⁴ ECtHR, *Öcalan v. Turkey*, Application No. 46221/99, 12 May 2005, para. 139; ECtHR, *Lietzow v. Germany*, Application No. 24479/94, 13 February 2001, para. 44; ECtHR, *Kamasinski v. Austria*, Application No. 9783/82, 19 December 1989, paras. 87-88.

²³⁵ Spronken, Vermeulen, de Vocht & van Puyenbroeck, 2009, p. 102.

the prosecution evidence and thus on copies of the statements of prosecution witnesses.²³⁶ Disclosure obligations on the police are very limited: they are not legally obliged to inform a suspect of any evidence that they have. In practice, the police, do some efforts to disclose some information but this will always depend on the nature of the case and the attitude of the police officers involved. Generally taken, it is thus impossible for the defendant to be confident that the police have disclosed all relevant material.²³⁷ Moreover, a counsel is not permitted access to the file of evidence.²³⁸ In Poland, the defendant as well as the defence lawyer have a right to access to the file. The authorities, however, may justify any refusal of access by reference to the, rather broad category, of ‘interests of the investigations’. Also, regarding audio or video recorded material, the defence may not obtain a copy of the sound or image transcription in the case of investigative proceedings.²³⁹ In the Netherlands, at last, similar observations apply: the defence, including the counsel, has the right of access to the file but certain documents, including witness statements that were made in absence of the charged person, can be withheld in the interests of the investigation.²⁴⁰ In practice, it appears here that only a part of the file is disclosed to the defence in the course of the investigative proceedings. As such, disputes frequently arise between the defence lawyers and the prosecutors concerning the access to evidence that would lead to a discharge of the charged person and concerning the disclosure of investigative measures that are used by the police.²⁴¹

Obviously, these worrisome considerations would not be different in a case without cross-border components. In a purely national case, the defence would be faced with similar problems. However, just because of the problems that exist in this regard, it is regrettable that the EIO Proposal does not intend to address them. No specific provision occurs obliging the insertion of witness statements in the case file, let alone the access of the defence to the latter. The EIO is moreover silent on the retention of all original evidence and the issuing and executing authorities are not obliged to keep proper records of how evidence is gathered, stored, analysed and transferred. The possible unavailability of the original witness evidence, further complicated by the absence of an

²³⁶ Cape & Hodgson, 2007, p. 60.

²³⁷ *Ibidem*, p. 73.

²³⁸ *Ibidem*, p. 71.

²³⁹ Kruszynski, 2007, p. 197.

²⁴⁰ Art. 30 a.f. and art. 126aa a.f. of the Dutch Code of Criminal Procedure, Act of 15 January 1921.

²⁴¹ Prakken & Spronken, 2007, p. 170.

audit trail, may hinder the defence considerably in getting access to the original statements and in checking and correcting the followed investigative procedures.²⁴² These observations are even more worrisome given the observation that it is not uncommon for the prosecution (or the investigating authority) to be selective in deciding which material ought to figure in the file. Besides the fact that these authorities are not seen as the most neutral, and thus suitable, to make such a decision, this might moreover lead to a situation in which statements of persons that were first regarded as potential witnesses, but in the course of the investigation seemed to be of no relevance, do not appear in the case file.²⁴³ Such statements, nonetheless, might have been relevant for the defence. Problems of this kind appear for example in England and Wales. Here, the defence, in order to access unused material, must demonstrate the relevance of such additional disclosure. Of course, such proceedings are not advantageous from the eyes of the defendant as one cannot request information which he or she does not know it exists in the first place.²⁴⁴ Possible non-availability or non-access to (unused) original material, is thus not a recommendable practice. As such, and generally in line with the ECHR case law, the authorities should be obliged under the EIO to retain all original evidence material, to keep proper records, to insert the material in the case file, and to grant the defence access thereto (except some reasonable restrictions).

4. Preliminary conclusion

The examination of the rights of the defence in light of the issuing of a EIO to obtain witness statements abroad, demonstrates that the proposed MR approach on cross-border evidence gathering in criminal matters, might infringe or lower the minimum rights of the charged person. This might equally be detrimental to the principle of mutual trust on which the MR philosophy builds. Furthermore, principles of equal treatment might be undermined as the degraded standards of defence protection are

²⁴² Fair Trials International, Fair Trials International's response to a European Member States' legislative initiative for a Directive on a European Investigation Order, 26 October 2010, available at http://www.fairtrials.net/publications/article/fair_trials_internationals_submission_on_the_european_investigation_order (consulted on 06/07/2011), pp. 7-8.

²⁴³ See, also for further information: Trechsel, 2005, pp. 225-226. In England and Wales, the prosecutor is responsible of assessing what material might be of relevance to the defence and should thus be disclosed (see Cape & Hodgson, 2007, p. 60). Also in the Netherlands, the prosecutor decides what should be in the file and he or she has a wide discretionary power in this regard (see Prakken & Spronken, 2007, p. 170).

²⁴⁴ Cape & Hodgson, 2007, p. 60.

shown to be repeatedly linked with the specific situation of cross-border cooperation (as compared to a pure national setting).

Firstly, these observations relate to the fact that different sets of rules and practices, relevant in the context of the interrogation and challenging of witnesses, apply across the EU Member States. The latter observation, however, does not necessarily imply that these rules and practices infringe the rights of the defence in a national context. The position of the defence might indeed be ensured and balanced against the background of the domestic proceedings as a whole. But, when two national systems will be combined, as in the case of the execution of a EIO, this balance might become disturbed and as such, the position of the charged person weakened.²⁴⁵

Secondly, the position of the defence under cross-border cooperation based on the EIO, might become eroded for reasons of a lesser protection of the rights of the charged person in the executing country. Here, the main problem is not the combination of two different sets of national rules, but the fact that the criminal proceedings in the executing state guarantee the rights of the defence to an inferior degree than the issuing country. Indeed, despite the fact that all EU Members are party to the ECHR, some national practices and rules surrounding the witness interrogation appear to contradict the ECHR as interpreted by the Strasbourg Court.

Thirdly, the protection of the defence rights might be at risk due to some practices and rules in the issuing country. Although these concerns would equally occur in a national context, the specific situation of a witness being located abroad might aggravate the protection gaps.

Finally, some concerns might stem from the procedure's cross-border character itself. This increases for example the risk that the witness will not appear at the trial, that the charged person does not understand the language of the witness, etc.

Despite all revealed problems from a defence perspective, it appears that the specific provisions of the EIO Proposal do not address these concerns sufficiently. For this reason, several recommendations have been expressed.

²⁴⁵ For more information about the national balanced mechanisms under the rule of law, see Eurodefensor, Observations on the Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, available at http://ec.europa.eu/justice/news/consulting_public/0004/civil_society/eurodefensor_en.pdf (consulted on 09/06/2011), pp. 2-3.

III. CROSS-BORDER COOPERATION IN LIGHT OF THE EUROPEAN INVESTIGATION ORDER. A JUSTIFIABLE LOWERING OF THE DEFENCE'S PROTECTIVE STANDARDS?

As follows from the previous Chapter, the application of the EIO Proposal to hear a witness abroad, will give rise to concerns from a defence perspective. To prevent this as much as possible, this study included some specific recommendations. The problem is, however, that the adoption of such specific conditions and requirements, would imply a departure from the philosophy of MR and thus hinder the aim of simplification and acceleration.

Therefore, the question arises whether the launch of a EIO instrument, which effectively builds on a MR approach and thus possibly erodes the defence position, can be justified. Therefore, it appears useful to first consider the necessity of the new approach towards cross-border cooperation on the gathering of criminal evidence. Secondly, it will be investigated whether the current form, by which the aim is intended to be achieved, is proportional. The latter principle is concerned with creating a balance between the different interests involved and might be useful to address conflicts in this regard.²⁴⁶ Also the ECJ stresses that, in regulation, a balance should be maintained between the requirements of the general interest and those of the individual.²⁴⁷

In the context of this thesis, the interests at stake are: the interests of the charged person and the general interests of an ameliorated cooperation in criminal matters and thus, accelerated and simplified law enforcement. To assess the proportionality principle, this study will in the first place focus on the more general provisions of the EIO instrument and the process by which it has been drawn up, and investigate whether these provisions and processes provide for counterbalancing measures which prevent or lower the gaps in the protection of the defence. Secondly, some considerations will be developed which are prone to aggravate the eroded defence position and thus influence the assessment of the proportionality.

²⁴⁶ Maffei, 2006, p. 64.

²⁴⁷ ECJ, Case T-181/08, *Pye Phyo Tay Za v. Council of the European Union*, judgment of 19 May 2010, paras. 159 and 164. See also ECJ, Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union*, judgment of 3 September 2008, para. 360.

1. The necessity of the aim of introducing a European Investigation Order

The EIO Proposal itself explains why a new approach, based on MR of decisions to obtain evidence abroad, is necessary. The Preamble states that “*it has become clear that the existing framework for the gathering of evidence is too fragmented and too complicated*”.²⁴⁸ However, there is no common agreement on the necessity of this aim.

Having a look at the reactions on the EIO Proposal and at the responses to the earlier Commission’s Green Paper²⁴⁹ (which touches upon the same issue), it appears that most of the governments, NGO’s, and other organisations approve the idea of creating a single European instrument regarding EU cross-border evidence gathering. They agree on the necessity of simplification and acceleration in this regard, and, as a consequence, on the need for an ameliorated system of law enforcement.²⁵⁰ However, also critical voices, not convinced of the necessity of a new approach, are present. In sum, the latter authors are of the opinion that the deficiencies of the current MLA system are not (yet) proven, or that other reasons than its complexity or fragmentation explain the existing problems.²⁵¹

²⁴⁸ Recital no. 5 of the Initiative regarding the EIO.

²⁴⁹ European Commission, Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, Brussels, 11 November 2009, COM(2009) 624 final.

²⁵⁰ See for example: Amnesty International EU Office, Amnesty International’s Response to the Green Paper from the European Commission on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, January 2010, available at <http://www.amnesty.eu/static/documents/2010/RespGPaper220110.pdf> (consulted on 09/06/2011), p. 1; Deutscher Richterbund, Comments of the Deutscher Richterbund [German Judges’ Association] on the European Commission’s Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, February 2010, available at <http://www.drj.de/cms/index.php?id=626> (consulted on 09/06/2011), p. 1; Justice, Response to the Commission Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, January 2010, available at http://ec.europa.eu/justice/news/consulting_public/0004/civil_society/justice_en.pdf (consulted on 08/06/2011), pp. 2-3; Justice, Briefing for the UK on the European Investigation Order, July 2010, available at <http://www.justice.org.uk/images/pdfs/Briefing%20on%20the%20European%20Investigation%20Order.pdf> (consulted on 18/02/2011), p. 2; The General Council of the Bar of England & Wales, Response by the Bar Council of England and Wales to the Green Paper of the European Commission on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, ETI ID No. 85696601933-11, January 2010, available at <http://www.barcouncil.org.uk/consultations/pastresponsestoexternalconsultations/ResponsestoConsultationPaper2010/> (consulted on 09/06/2011), p. 5.

The fact that the latter organisations are in favour of a new MR instrument regarding the obtainment of evidence, does not imply that they agree on the specific content of the proposals that has been launched.

²⁵¹ European Criminal Bar Association (ECBA), Statement on the Green Paper on obtaining evidence in criminal matters from one member state to another and securing its admissibility, 2010, available at <http://www.ecba.org/extdocserv/ECBA2010onGreenPaperonEvidence.pdf> (consulted on 09/06/2011), p.

2. An upset balance to the detriment of the defence

A. Insufficient counterbalancing measures in the Initiative regarding the European Investigation Order

a. No general fundamental rights-based refusal ground

The MR characteristic of limiting the refusal grounds available to the executing state, has been clearly crystallised in the EIO legal instrument. Only four general grounds for non-recognition or non-execution are provided and no fundamental rights-based refusal ground whatsoever appears.²⁵² Therefore, taken into account the compulsory nature of a MR approach, the hands of the judge may be tied as he or she will not have any discretion to refuse the executing of a EIO in case it might infringe the rights of the defence.²⁵³ This despite the fact that article 1 (3) of the EIO Proposal argues the following:

“This Directive shall not have the effect of modifying the obligation to respect the fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty, and any obligations incumbent on judicial authorities in this respect shall remain unaffected [...]”.

The latter provision is vague and general and as such, does not cover a detailed obligation for the Member States to protect the fundamental rights, including the rights of the defence.²⁵⁴ Given the absence of an explicit fundamental rights-based refusal ground, article 1 (3) of the EIO Proposal thus not seems concretised in a clear way. It is indeed difficult to foresee whether the Member States will treat this more general article as a *de facto* refusal ground. This uncertainty might lead to inconsistencies in its

3; Fair Trials International, Fair Trials International’s response to a European Member States’ legislative initiative for a Directive on a European Investigation Order, 26 October 2010, available at http://www.fairtrials.net/publications/article/fair_trials_internationals_submission_on_the_european_investigation_order (consulted on 06/07/2011), pp. 4-5; Spencer, 2010, p. 3.

²⁵² See art. 10 of the Initiative regarding the EIO.

²⁵³ Fair Trials International, Fair Trials International’s response to a European Member States’ legislative initiative for a Directive on a European Investigation Order, 26 October 2010, available at http://www.fairtrials.net/publications/article/fair_trials_internationals_submission_on_the_european_investigation_order (consulted on 06/07/2011), pp. 3-4.

²⁵⁴ Peers, 2010, p. 7.

implementation and therefore, further compromise the protection of fundamental rights.²⁵⁵

b. No specific fundamental rights-based refusal grounds

In addition to the general grounds for non-recognition and non-execution, the EIO Proposal allows for specific refusal grounds related to certain investigative measures. Investigative measures regulated more precisely and relevant in light of the interrogation of witnesses abroad, are the hearing by video – and telephone conference. However, between the rules applying to these types of interrogation, no particular reference has been made to the protection of the rights of the defence, let alone to a refusal ground based on such rights.²⁵⁶

c. Insufficient legal remedies

Article 13 of the EIO Proposal foresees a legal remedy. The defence will be able to challenge the EIO in a hearing before a court of the issuing state, which is very advantageous from its perspective.

However, the observation that no legal remedy is offered in the executing state, still generates some concerns. The absence of such an opportunity indeed fails to organise a hearing at the most crucial stage, namely *before* the release of the evidence material to the issuing state.²⁵⁷ Therefore, the transferred evidence material itself as well as the manner in which it has been gathered, seems out of discussion.²⁵⁸

²⁵⁵ European Union Agency for Fundamental Rights (FRA), Opinion of the European Union Agency for Fundamental Rights on the Draft Directive regarding the European Investigation Order, 14 February 2011, available at <http://fra.europa.eu/fraWebsite/attachments/FRA-Opinion-EIO-Directive-15022011.pdf> (consulted on 07/07/2011), p. 11.

²⁵⁶ Reference does appear to "*the fundamental principles of the law of the executing member state*" but, in line with the comments of the Commission, this reference is not considered to be sufficient to stress the importance of the obligation to protect fundamental rights. See European Commission, Comments on the Initiative regarding the European Investigation Order in criminal matters, D (2010) 6815, available at http://ec.europa.eu/justice/news/intro/doc/comment_2010_08_24_en.pdf (consulted on 04/07/2011), p. 27.

²⁵⁷ Justice, Briefing for the UK on the European Investigation Order, July 2010, available at <http://www.justice.org.uk/images/pdfs/Briefing%20on%20the%20European%20Investigation%20Order.pdf> (consulted on 18/02/2011), pp. 11-12.

²⁵⁸ The latter concern was equally made in light of the instrument of a EEW, see Justice, Response to the Commission Green Paper on obtaining evidence in criminal matters from one Member State to another

The aforementioned insufficient organisation of a legal remedy, is however tempered by the recent partial general approach on the EIO Proposal, reached at the Council meeting on 9 and 10 June 2011²⁵⁹, which will serve as a basis for further negotiations. This approach alters article 13 and includes legal remedies in the issuing as well as in the executing state.

d. Insufficient non-legislative measures

Non-legislative measures are measures that might supplement the new legal instrument on cross-border evidence gathering in criminal matters, and might prove favourable to the defence. They might include: evaluation and monitoring of the implementation and application of the EIO instrument, and training opportunities for practitioners involved in issuing and executing orders.

Firstly, regarding the evaluation and monitoring, article 32 of the EIO Proposal foresees reporting on the application of the directive, no longer that five years after its entering into force, on the basis of both qualitative and quantitative information. The latter article is formulated in a rather restricted way. It does not refer to the characteristics and qualifications of the persons that would be in charge of gathering the information and giving advice. Furthermore, the provision does not require a continuous and regular monitoring from the moment the EIO instrument is operational. The latter is however an important prerequisite for the identification of human rights concerns and thus for a fair administration of cross-border justice.²⁶⁰

Secondly, it might be useful to establish training opportunities for professionals involved, such as judges, public prosecutors and defence lawyers. This could make them more familiar with the envisaged instrument and increase their knowledge on the

and securing its admissibility, January 2010, available at http://ec.europa.eu/justice/news/consulting_public/0004/civil_society/justice_en.pdf (consulted on 08/06/2011), p. 17.

²⁵⁹ Council of the European Union, Brussels, 17 June 2011, 11735/11 COPEN 158, available at <http://register.consilium.europa.eu/pdf/en/11/st11/st11735.en11.pdf> (consulted on 07/07/2011).

²⁶⁰ Therefore, also the European Union Agency for Fundamental Rights (FRA) recommended a collection and analysis of *ex post* data as soon the EIO instrument is operational, see European Union Agency for Fundamental Rights (FRA), Opinion of the European Union Agency for Fundamental Rights on the Draft Directive regarding the European Investigation Order, 14 February 2011, available at <http://fra.europa.eu/fraWebsite/attachments/FRA-Opinion-EIO-Directive-15022011.pdf> (consulted on 07/07/2011), p. 13.

rights of the defence, in cross-border criminal cooperation in particular.²⁶¹ Additional non-legislative measures regarding the training of practitioners do however not occur in the EIO Proposal.

e. Absence of a prior impact assessment and consultation

Just like an *ex post* evaluation and assessment play a key role in ensuring the protection of the rights of the defence, also a *prior* impact assessment and consultation procedure are crucial. As prevention is better than cure, it is indeed important to assess the potentially affected defence rights in the phase preceding the launch of a new proposal. As such, it could be examined more precisely whether the EIO Proposal risks to infringe the rights under the ECHR and the EU Charter and how this could be prevented. Also a prior open consultation process could add useful information in this respect. The EIO Proposal has however been released without prior public consultation and without a comprehensive impact assessment and is therefore not drawn on proper information and analysis.²⁶² The latter underlines the need for an extensive evaluation *ex post* even more.²⁶³ Against the background of the current discussions about the EIO on the EU level, several organisations did already utter their opinions and concerns, also regarding the protection of the rights of the defence. Furthermore, in response to the request of 26

²⁶¹ Training opportunities for practitioners in the wake of a new approach on obtaining evidence in criminal matters has, among others, been recommended by: European Criminal Bar Association (ECBA), Statement on the Green Paper on obtaining evidence in criminal matters from one member state to another and securing its admissibility, 2010, available at <http://www.ecba.org/extdocserv/ECBA2010onGreenPaperonEvidence.pdf> (consulted on 09/06/2011), p. 4; Response of the Dutch Government to the Commission's Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, available at http://ec.europa.eu/justice/news/consulting_public/0004/national_governments/the_netherlands_en.pdf (consulted on 09/06/2011), p. 4; The General Council of the Bar of England & Wales, Response by the Bar Council of England and Wales to the Green Paper of the European Commission on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, ETI ID No. 85696601933-11, January 2010, available at <http://www.barcouncil.org.uk/consultations/pastresponsesstoexternalconsultations/ResponsestoConsultationPaper2010/> (consulted on 09/06/2011), p. 7.

²⁶² The importance of a prior impact assessment and public consultation has, among others, been stressed by: Fair Trials International, Fair Trials International's response to a European Member States' legislative initiative for a Directive on a European Investigation Order, 26 October 2010, available at http://www.fairtrials.net/publications/article/fair_trials_internationals_submission_on_the_european_investigation_order (consulted on 06/07/2011), p. 3; Peers, 2010, p. 2.

²⁶³ European Union Agency for Fundamental Rights (FRA), Opinion of the European Union Agency for Fundamental Rights on the Draft Directive regarding the European Investigation Order, 14 February 2011, available at <http://fra.europa.eu/fraWebsite/attachments/FRA-Opinion-EIO-Directive-15022011.pdf> (consulted on 07/07/2011), p. 14.

January 2011 from the European Parliament, the European Union Agency for Fundamental rights offered its opinion on the EIO Proposal last February.²⁶⁴ Also the latter document is critical of the impact of the initiative on the rights of the defence. In finalising the EIO legal instrument, one can hope that the EU institutions take account of all the elaborated concerns and recommendations.

f. No veto powers

The legal basis of the EIO Proposal is article 82 of the TFEU. Paragraph two of this article foresees the qualified majority voting in the Council with ‘co-decision’ of the European Parliament (known as the ‘ordinary legislative procedure’). Therefore, there is no veto and thus no power for any Member State to pull an ‘emergency brake’ to halt the discussions in case it is of the opinion that the EIO Proposal threatens fundamental defence rights.²⁶⁵

B. Aggravating factors not particularly related to the instrument of a European Investigation Order

a. Admissibility of unfairly or illegally obtained evidence

The admissibility of evidence is an issue that is often not mentioned in instruments regarding the cooperation between the EU Member States in criminal matters.²⁶⁶ The same observation applies to the EIO Proposal.

Considerations about the admissibility of evidence are however important. Regarding the interrogation of witnesses abroad, large differences exist between the national criminal procedural rules. Therefore, concerns might arise regarding the admissibility of the witness statements in the country of the trial in case the interrogation abroad is not

²⁶⁴ See European Union Agency for Fundamental Rights (FRA), Opinion of the European Union Agency for Fundamental Rights on the Draft Directive regarding the European Investigation Order, 14 February 2011, available at <http://fra.europa.eu/fraWebsite/attachments/FRA-Opinion-EIO-Directive-15022011.pdf> (consulted on 07/07/2011).

²⁶⁵ Peers, 2010, p. 2.

²⁶⁶ Vermeulen, De Bondt & Van Damme, 2010, p. 41.

exercised in line with its national formalities and procedures, including those that aim to protect the defence.

To tackle this problem, the EIO Proposal foresees the following:

“the executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority unless otherwise provided in this Directive [...]”.²⁶⁷

The question however remains what will be the consequence of a situation in which the issuing country does not indicate such formalities or procedures (or the executing country does not take them into account) and the interrogation of the witness has been exercised contrary to the national law of the issuing Member State (possibly to the detriment of the rights of the defence), or contrary to the rights of the charged person under the ECHR (regardless of whether it infringes the domestic rules of the issuing Member State).

Some authors are clearly against the admissibility of illegally or unfairly obtained evidence which has been transferred to the issuing country.²⁶⁸ Part of the rationale to apply such an exclusionary rule to evidence, is that law enforcement officers will acquire greater respect for the rights of the individuals if they realise that evidence obtained in breach of fundamental rights is likely to be excluded. Furthermore, the use of illegally obtained evidence is said to undermine the integrity of the criminal justice system.²⁶⁹

Despite the aforementioned considerations, the Strasbourg Court does not seem to establish an exclusionary rule regarding illegally obtained evidence. It considers the regulation of the admissibility of evidence primarily as a matter of national law.²⁷⁰

²⁶⁷ Art. 8(2) of the Initiative regarding the EIO.

²⁶⁸ See for example European Criminal Bar Association (ECBA), Statement on the Green Paper on obtaining evidence in criminal matters from one member state to another and securing its admissibility, 2010, available at <http://www.ecba.org/extdocserv/ECBA2010onGreenPaperonEvidence.pdf> (consulted on 09/06/2011), pp. 5-6; Council of Bars and Law Societies of Europe (CCBE), CCBE Submission, Green Paper on Obtaining Evidence in Criminal Matters from one Member State to Another and Securing its Admissibility, 23 January 2010, available at http://ec.europa.eu/justice/news/consulting_public/0004/civil_society/ccbe_en.pdf (consulted on 08/06/2011), p. 3.

²⁶⁹ Emmerson & Ashworth, 2001, p. 426.

²⁷⁰ ECtHR, *Zhukovskiy v. Ukraine*, Application No. 31240/03, 3 March 2011, para. 40; ECtHR, *Welke and Bialek v. Poland*, Application No. 15924/05, 1 March 2011, para. 57; ECtHR, *A.S. v. Finland*, Application No. 40156/07, 28 September 2010, para. 50; ECtHR, *Bielaj v. Poland*, Application No. 43643/04, 27 April 2010, para. 53; ECtHR, *Sevastyanov v. Russia*, Application No. 37024/02, 22 April 2010, para. 67; ECtHR, *Novikas v. Lithuania*, Application No. 45756/05, 20 April 2010, para. 36; ECtHR, *Mamikonyan v. Armenia*, Application No. 25083/05, 16 March 2010, para. 41; ECtHR, *Janatuinen v. Finland*, Application No. 28552/05, 8 December 2009, para. 57; ECtHR, *Ramanauskas v.*

Therefore, it is not the Strasbourg Court's competence to determine whether a particular type of evidence, for example unlawfully obtained evidence, may be admissible or not.²⁷¹ Similar considerations apply regarding the ECJ.²⁷²

The absence of an exclusionary rule under the Strasbourg argumentation, has, for instance, been criticised by Judge Loucaides.²⁷³ Quoting his remarkable words, it is unacceptable

“that a trial can be ‘fair’, as required by Article 6, if a person’s guilt for any offence is established through evidence obtained in breach of the human rights guaranteed by the Convention”.

He argues further that:

“The basic argument against such an exclusionary rule is the pursuit of the truth and the public interest values in effective criminal law enforcement which entail the admission of reliable and trustworthy evidence, for otherwise these values may suffer and guilty defendants may escape the sanctions. Breaking the law, in order to enforce it, is a contradiction in terms and an absurd proposition”.

It appears, however, that many EU Member States do not act according to the concerns of Judge Loucaides, but indeed give priority to values of law enforcement as several among them admit illegally obtained evidence.²⁷⁴ A recent study has shown that in case the executing Member State obtains information or evidence in an unlawful or irregular manner, 30 percent of the EU Member States does not have any rules regarding the absolute nullity for such evidence. Moreover, from the countries that do have rules, 10 percent still allows the illegal or irregular evidence to be used as supportive evidence.²⁷⁵ Furthermore, 20 percent of the Member States has no rules regarding the violation of the right to a fair trial when using illegally or irregularly obtained evidence. From the

Lithuania, Application No. 74420/01, 5 February 2008, para. 52; ECtHR, *Schenk v. Switzerland*, Application No. 10862/84, 12 July 1988, para. 46.

²⁷¹ ECtHR, *Welke and Bialek v. Poland*, Application No. 15924/05, 1 March 2011, para. 58; ECtHR, *A.S. v. Finland*, Application No. 40156/07, 28 September 2010, para. 51; ECtHR, *Janatuinen v. Finland*, Application No. 28552/05, 8 December 2009, para. 57; ECtHR, *Jalloh v. Germany*, Application No. 54810/00, 11 July 2006, para. 95.

²⁷² See ECJ, Case C-276/01, *Joachim Steffensen*, judgment of 10 April 2003, paras. 62 and 75.

²⁷³ Dissenting Opinion of Judge Loucaides in ECtHR, *Khan v. the United Kingdom*, Application No. 35394/97, 12 May 2010.

²⁷⁴ Cape, Hodgson, Prakken & Spronken, 2007, p. 14.

²⁷⁵ Vermeulen, De Bondt & Van Damme, 2010, p. 134.

states that do have regulation about it, 30 percent still allows it as supportive evidence (despite of the breach of the right to a fair trial).²⁷⁶

Against the background of cross-border cooperation, it is particularly worrisome that some Member States treat illegally or irregularly obtained evidence differently in a national context than when it is obtained by foreign authorities. Although it concerns only a minority, it has been shown that some EU countries even attribute a higher value to such evidence when it is obtained abroad, compared to the case in which such evidence is gathered in the national sphere.²⁷⁷ The latter observations cross the, somehow exaggerated, fear of *Klip* that MR in itself will not lead to further harmonisation but rather lead to a ‘wild west’ scenario in which any piece of evidence must be admitted as long as it comes from abroad.²⁷⁸

b. Obstacles to bring a complaint before the European Court of Human Rights related to cases of cross-border cooperation

In case the application relates to cross-border cooperation, legal as well as practical obstacles might arise which hamper the charged person to complain about a violation of the rights of the defence before the ECtHR, as it might be difficult to determine which state is responsible for the alleged infringement of his or her rights.

Legal obstacles might occur because the executing Member State, under MR, will execute the order on obtaining evidence as if it had been emanated from its own authorities. As such, the issuing state will not have a direct influence on the way the foreign authorities exercise the investigative measure and, therefore, it might be difficult to establish a direct responsibility with regard to the issuing state. On the other hand, the latter might be considered as indirectly responsible in case it allows any illegally obtained evidence. However, the ECtHR, as stressed above, is reluctant to decide upon the admissibility of evidence and, furthermore, considers the use of evidence always in light of the proceedings as a whole. The responsibility of the executing state might be hard to establish as well. Despite the fact that it could in principle be held responsible for that part of the trial which takes place on its territory, problems might arise to

²⁷⁶ *Ibidem*, p. 136.

²⁷⁷ *Ibidem*.

²⁷⁸ *Klip*, 2009, p. 351.

determine its exact responsibility in practice. This relates to the fact that proceedings are assessed as a whole while the executing state does not have an overview of the entire proceedings. The executing state can indeed not exactly foresee the consequences of the investigative measures it exercises.

Practical problems originate from the observation that a person, whose defence rights have been violated, might be faced with an inadmissible complaint. Indeed, as it is hard to assess the responsibility of each state, he or she might consider to complain against the issuing as well as against the executing state. Such a collective complaint, however, entails the risk of being inadmissible for reasons of non exhaustion of domestic remedies in all states against which it is directed.²⁷⁹

3. Preliminary conclusion

When the EIO instrument would be applied in its current form, the position of the defence in cross-border cooperation on obtaining witness evidence in a EU context, is in danger. Taking into account the foregoing chapter, it seems that such a lowering of protective standards is hardly justifiable from a defence perspective.

First of all, some doubts are present as to whether it is necessary to introduce a EIO based on a MR approach. Furthermore, even when one agrees on the necessity of the current proposal, it has been demonstrated that the latter fails to insert adequate general safeguards to counterbalance the eroded position of the defence. Indeed, no fundamental rights-based refusal grounds appear and legal remedies, evaluation (*ex-post* as well as *ex-ante*) and training opportunities are insufficiently addressed. The latter consideration becomes even more worrisome given the absence of any attributed veto power to the Member States in the course of the legislative process.

The vulnerable position of the defence is further compromised by observations regarding the admissibility of unfairly or illegally obtained evidence and regarding the obstacles to bring a complaint related to cross-border cases before the Strasbourg Court. Following from the aforementioned considerations, it seems that the EIO Proposal does not reflect a balance between the interests of an ameliorated law enforcement and the interests of the defence, and thus, cannot be justified in its current form. The following

²⁷⁹ See, also for further information: Klip, 2009, pp. 376-380 and Klip, 1994, pp. 370-379.

general conclusion, therefore, aims to create alternative scenarios which intend to achieve an efficient cross-border cooperation on obtaining criminal evidence in a proportional way.

IV. CONCLUSION

Given the increasing movement of persons within the EU and, as a consequence, the growing amount of criminal cases with cross-border aspects, the EIO Proposal on facilitating the obtainment of criminal evidence abroad, could be a welcome initiative. The instrument of a EIO, based on a MR approach, has the potential to serve the interests of law enforcement authorities as well as the interests of the defence itself. The charged person might indeed do well out of an instrument that facilitates the obtainment of evidence because, the more evidence available, the more likely a just outcome will be achieved.²⁸⁰

A prerequisite for creating such advantages is however that the application of a EIO is organised in a balanced manner and upholds the protection of the charged person in a sufficient way. Nonetheless, both aforementioned preliminary conclusions, developed in the context of a witness interrogation abroad, do not reflect such a rosy picture. Therefore, the EIO seems to repeat earlier expressed concerns regarding the area of EU judicial and police cooperation, namely that it focuses excessively on facilitating prosecution while losing sight of the individual rights of the citizens.²⁸¹

Any new instrument should however break with this tradition and ensure that cross-border cooperation is organised with respect for human rights. Serving the interests of law enforcement agencies certainly reflects an important progress, but this should not neglect the defence perspective. Indeed, if greater security seems to be the major concern, it cannot be ignored that citizens also need to feel safe in terms of being protected against inconveniences stemming from over-zealous investigating and prosecuting authorities, and from being wrongly suspected of crime.²⁸² Therefore, defence rights and appropriate procedural guarantees should be given far more

²⁸⁰ Fair Trials International, Response to Green Paper on Obtaining Evidence in Criminal Matters from one Member State to another and Securing its Admissibility: COM(2009) 624, 11 November 2009, January 2010, available at

<http://www.fairtrials.net/publications/article/response-to-european-commission-green-paper-on-sharing-criminal-evidence-wi> (consulted on 12/06/2011), p. 2.

²⁸¹ Recital no. 10 of Council of the European Union, Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ No. C 295/01 of 4.12.2009.

²⁸² In the same sense, see The General Council of the Bar of England & Wales, Response by the Bar Council of England and Wales to the Green Paper of the European Commission on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, ETI ID No. 85696601933-11, January 2010, available at <http://www.barcouncil.org.uk/consultations/pastresponses-to-external-consultations/ResponsestoConsultationPaper2010/> (consulted on 09/06/2011), p. 3; Van der Linden, 2010, p. 1.

consideration before the EIO can come into operation.²⁸³ Indeed, a repetition of the trend of previous MR instruments to improve efficiency to the detriment of defence rights, should be avoided at all costs.²⁸⁴

The question thus remains under which scenario the interests of law enforcement can be served in a proportional way. In other words, how can a EIO operate in practice without considerably lowering or infringing the protection which the charged person has been offered in the European human rights context? Several alternative scenarios, all differing from the EIO Proposal in its current form, will be considered.

A first, rather drastic alternative, might be to drop the entire idea of a MR approach regarding the obtainment of evidence abroad, including witness statements. Under this scenario, further information should be gathered about the current failures of the MLA system and, according to the outcome of these studies, the MLA approach should be ameliorated and promoted more widely.²⁸⁵

Another alternative might be to introduce the new EIO instrument in an adapted form. The EIO can indeed be a useful initiative, as it is broad in scope and therefore, able to replace the former complex regime by one single instrument. However, as demonstrated above, its current form does not pay sufficient attention towards the rights of the defence. To address this concern and in line with the preliminary conclusions of this work, two categories of changes should be developed.

The first category of alterations needs to respond to the observation that the provisions of the EIO Proposal address insufficiently the concerns stemming from the combination of two (different) national systems in the collection and transfer of witness statements in

²⁸³ Summary of the replies to the Green Paper on obtaining evidence in criminal matters from one member state to another and securing its admissibility, available at http://ec.europa.eu/justice/news/consulting_public/0004/summary_of_replies_en.pdf (consulted on 09/06/2011), p. 3.

²⁸⁴ For further information about the concerns regarding the EAW from a human rights perspective, see Broadbridge, 2009, p. 3; Dieben, 2006, pp. 247-255; Fichera, 2009, pp. 77-97.

²⁸⁵ This proposal is in accordance with European Criminal Bar Association (ECBA), Statement on the Green Paper on obtaining evidence in criminal matters from one member state to another and securing its admissibility, 2010, available at <http://www.ecba.org/extdocserv/ECBA2010onGreenPaperonEvidence.pdf> (consulted on 09/06/2011), p. 3.

criminal matters. To alter this unfortunate situation, the specific recommendations developed under Chapter II of this study, should be inserted.

As these recommendations are rather detailed, it seems however impossible to reflect them in provisions of a general nature. Specific rules regarding the investigative measure of witness interrogation would thus be required. This way of reasoning is consistent with the idea that a MR approach on the obtainment of evidence should, in a first phase, only address certain types of evidence-gathering measures, which should be regulated exhaustively and in a differentiated manner. Since interrogating witnesses, in general, does not reflect an intrusive measure, this seems to be a suitable investigatory technique to appear in an initial EIO instrument. In a later stage, more intrusive types of measures could be included and regulated specifically. Therefore, further research regarding these other types of investigative measures is recommendable, in order to reveal the potential bottlenecks from a defence perspective.

This step-by-step approach, which gradually regulates the different types of investigative measures, taking their specificities into account and including rules providing protection for the defence, will increase the probability that the cross-border criminal proceedings are developed with respect for the rights of the charged person. As such, the protective defence standards could be raised and the goal of a fair trial reached.²⁸⁶

Under this alternative, a second category of alterations seems required as well. This category should address the demonstrated (see Chapter III) absence or insufficiency of general counterbalancing measures in the current EIO Proposal. Thereto, the executing state should be able to refuse the execution of a EIO, in case the defence safeguards are disregarded. Furthermore, a detailed *ex-post* and *ex-ante* evaluation and assessment should be established as well as legal remedies for the charged person and training

²⁸⁶ The step-by-step approach has also been recommended by: European Criminal Bar Association (ECBA), Statement on the Green Paper on obtaining evidence in criminal matters from one member state to another and securing its admissibility, 2010, available at <http://www.ecba.org/extdocserv/ECBA2010onGreenPaperonEvidence.pdf> (consulted on 09/06/2011), p. 3; European Network of Councils for the Judiciary (ENCJ), Response of the ENCJ to the European Commission's Green Paper on Obtaining Evidence in Criminal Proceedings, January 2010, available at <http://www.encj.eu/images/stories/pdf/opinions/encjresponsetogreenpaperobtainingevidence.pdf> (consulted on 09/06/2011), pp. 2-3; Response of the Dutch Government to the Commission's Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, available at http://ec.europa.eu/justice/news/consulting_public/0004/national_governments/the_netherlands_en.pdf (consulted on 09/06/2011), p. 3.

facilities for professionals. If all these recommendations are taken into account, the absence of veto powers no longer seems of great concern.

The major disadvantage of this alternative is, however, that it is not perfectly in line with a MR philosophy. The idea of MR indeed relates to a fast and rather automatic execution of orders, not hindered by a complex amalgam of specific formalities, rules and refusal grounds. Another disadvantage of the step-by-step approach is that practitioners will still be faced with a complex combination of various instruments in the first, transitional, period of the application of the instrument.²⁸⁷ Furthermore, as the specific defence rights and procedural arrangements would be inserted into the EIO Proposal itself, it will create a risk of unequal treatment of cross-border cases, in comparison with pure national cases. Finally, given the differences in the criminal procedural systems of the EU countries, agreement on the specific rules will be hard to achieve.

A last alternative this work takes into consideration, is the postponement of the launch of the EIO Proposal until the moment minimum procedural defence safeguards (when obtaining evidence in another Member State) are put into effect across the EU.

Today, as demonstrated above, divergent rules and practices, for instance regarding the witness interrogation, apply and therefore, very little common standards are in place. Furthermore, the ECHR does not seem to establish an effective common commitment to the minimum rights of the charged person.²⁸⁸

The supplementation of the EIO by EU minimum procedural defence standards, will possibly strengthen the general framework of procedural criminal law with regard to fair trial rights.²⁸⁹ Respect for defence rights will therefore increase, at least to a common acceptable minimum level. This is subsequently expected to encourage mutual trust in the various criminal procedural systems across the EU. Given these advantages, it is not

²⁸⁷ The latter disadvantage has also been stressed by Response of the Dutch Government to the Commission's Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, available at http://ec.europa.eu/justice/news/consulting_public/0004/national_governments/the_netherlands_en.pdf (consulted on 09/06/2011), p. 3.

²⁸⁸ This has been demonstrated in the course of this work regarding the specific measure of the interrogation of witnesses abroad. More generally, this has been shown by the following study: Cape, Hodgson, Prakken & Spronken, 2007.

²⁸⁹ Amnesty International EU Office, Amnesty International's Response to the Green Paper from the European Commission on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, January 2010, available at <http://www.amnesty.eu/static/documents/2010/RespGPaper220110.pdf> (consulted on 09/06/2011), p. 1.

surprising that several organisations support the idea of establishing minimum procedural defence safeguards as a prerequisite for the elaboration of a new MR instrument on the obtainment of evidence abroad.²⁹⁰

The proposed alternative should be seen against the background of the Council resolution of November 2009 on a *Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings*²⁹¹, considered necessary to ensure the right to a fair trial.²⁹² The Roadmap refers explicitly to the MR approach and stresses that it presupposes mutual trust in each other's criminal justice systems. To enhance this trust within the EU, the existence of EU standards for the protection of procedural rights, complementary to the ECHR, is considered to be very important.²⁹³ In this context, the Roadmap calls for the adoption of several measures, consistent with the minimum standards of the ECHR.²⁹⁴

²⁹⁰ Among others, see Amnesty International EU Office, Amnesty International's Response to the Green Paper from the European Commission on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, January 2010, available at <http://www.amnesty.eu/static/documents/2010/RespGPaper220110.pdf> (consulted on 09/06/2011), p. 1; Bundesrechtsanwaltskammer, Statement by the German Federal Bar on the Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility presented by the Commission of the European Communities, Statement No. 2/2010, January 2010, available at <http://www.brak.de/seiten/pdf/Stellungnahmen/2010/Stn2engl.pdf> (consulted on 09/06/2011), p. 2; Council of Bars and Law Societies of Europe (CCBE), CCBE Submission, Green Paper on Obtaining Evidence in Criminal Matters from one Member State to Another and Securing its Admissibility, 23 January 2010, available at http://ec.europa.eu/justice/news/consulting_public/0004/civil_society/ccbe_en.pdf (consulted on 08/06/2011), p. 2; Deutscher Richterbund, Comments of the Deutscher Richterbund [German Judges' Association] on the European Commission's Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, February 2010, available at <http://www.drj.de/cms/index.php?id=626> (consulted on 09/06/2011), p. 2; Eurodefensor, Observations on the Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, available at http://ec.europa.eu/justice/news/consulting_public/0004/civil_society/eurodefensor_en.pdf (consulted on 09/06/2011), pp. 13-14; European Criminal Bar Association (ECBA), Statement on the Green Paper on obtaining evidence in criminal matters from one member state to another and securing its admissibility, 2010, available at <http://www.ecba.org/extdocserv/ECBA2010onGreenPaperonEvidence.pdf> (consulted on 09/06/2011), p. 2.

Also the 1999 Tampere European Council conclusion no. 37 stressed that, in the context of implementing the principle of mutual recognition, work should also be launched on those aspects of procedural law on which common minimum standards are considered necessary in order to facilitate the application of the principle of mutual recognition, respecting the fundamental legal principles of Member States (Presidency Conclusions of the Tampere European Council of 15 and 16 October, available at http://www.europarl.europa.eu/summits/tam_en.htm (consulted on 05/07/2011)).

²⁹¹ Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ No. 295/01 of 4.12.2009.

²⁹² *Ibidem*, recital no. 3.

²⁹³ *Ibidem*, recital no. 8.

²⁹⁴ *Ibidem*, see annex.

Against the background of the investigative measure of interrogating witnesses (abroad), three of these measures are particularly useful and advantageous from the perspective of the defence, namely the measures regarding the right to translation and interpretation, the right to information (as it includes access to the case file), and the right to legal advice and legal aid. Regarding these rights, some important progress has recently been made. Firstly, *Directive 2010/64/EU on the right to translation and interpretation in criminal proceedings*²⁹⁵ has been adopted (which has shown to be useful in the specific case in which the witness speaks another language than the charged person, see above). Further steps have been taken very recently by the European Commission by adopting the *Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings*²⁹⁶ and the *Proposal for a Directive of the European Parliament and of the Council on the right to access to a lawyer in criminal proceedings and on the right to communicate upon arrest*²⁹⁷. Although considerable progress has been made, the elaboration of EU legislation giving consequence to the Roadmap, is still an ongoing process.

Furthermore, the Roadmap does not touch upon all the issues that are relevant from the eyes of the defence in the case of a witness interrogation. Indeed, despite the fact that the Roadmap considers the catalogue of measures as non-exhaustive, and despite the fact that the Commission²⁹⁸, already in 2003, stressed that fairness in the handling of evidence should be covered by a separate measure after further examination, specific legal initiatives related to the collection and use of evidence, are yet to be adopted in the EU. If such measures would be considered, it seems recommendable, in line with the concerns revealed in the course of this work, to insert common minimum standards specifically dealing with the following aspects of witness interrogation: the fair trial conditions in light of the preferable immediacy principle, the notification about the initiatives taken in the course of the investigation stage, the right to disclosure of evidence, the right to access to the file, the inadmissibility of statements obtained in

²⁹⁵ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ No. L 280/1 of 26.10.2010.

²⁹⁶ European Commission, Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings, Brussels, 20 July 2010, COM(2010) 392 final.

²⁹⁷ European Commission, Proposal for a Directive of the European Parliament and of the Council on the right to access to a lawyer in criminal proceedings and on the right to communicate upon arrest, Brussels, 8 June 2011, COM(2011) 326 final.

²⁹⁸ See para. 2.6. of European Commission, Green Paper from the Commission on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, Brussels, 19 February 2003, COM(2003) 75 final.

violation of the minimum safeguards, the ordering of investigative measures by a judge only, legal representation and legal aid, translation and interpretation services, the recording of interviews, the retention of the original evidence, the insurance of the quality of technical equipment in case of hearings by video – or telephone conference, and the problem of anonymous witnesses.²⁹⁹

It seems recommendable to map the relevant (domains of) common minimum standards also regarding other specific types of investigative measures. Building on this research, a complete set of visible minimum procedural standards applying to the gathering and handling of evidence, could become established in a separate EU legal document. Such legislation would have a large potential to harmonise and ameliorate conditions for cross-border evidence gathering, as well as to create firm protective standards for the defence. Therefore, it might also increase the level of trust between the EU Member States, being an important precondition for any MR instrument.³⁰⁰

Whether these expected advantages will be reflected in practice as well, might be a topic for further research. Only when these studies reflect positive results, it seems fair to adopt a EIO based on MR. Indeed, under a scenario in which the authorities issue and execute a EIO, according to minimum standards which have shown to be effective, the mandatory nature and quasi-automatic execution of the EIO no longer seem to hinder an effective protection of the charged person.

²⁹⁹ It does not concern the creation of new rights but of common *minimum* standards ensuring a minimum and reasonable level of protection, while the member states still have the opportunity to impose safeguards over and above such standards in order to prevent the reduction of the level of protection that has been developed over years in national law. See Council of Bars and Law Societies of Europe (CCBE), CCBE Submission, Green Paper on Obtaining Evidence in Criminal Matters from one Member State to Another and Securing its Admissibility, 23 January 2010, available at http://ec.europa.eu/justice/news/consulting_public/0004/civil_society/ccbe_en.pdf (consulted on 08/06/2011), p. 4; European Commission, Green Paper from the Commission on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, Brussels, 19 February 2003, COM(2003) 75 final, para. 1.7.; Spronken & Attinger, 2005, p. 5. Furthermore, it concerns standards that would also apply in a pure national context because, creating specific procedural law only for transnational proceedings is unacceptable, as it might lead to a two-tier process and unequal treatment. See Eurodefensor, Observations on the Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, available at http://ec.europa.eu/justice/news/consulting_public/0004/civil_society/eurodefensor_en.pdf (consulted on 09/06/2011), p. 14.

³⁰⁰ Eurodefensor, Observations on the Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, available at http://ec.europa.eu/justice/news/consulting_public/0004/civil_society/eurodefensor_en.pdf (consulted on 09/06/2011), p. 1; Spronken & Attinger, 2005, p. 5.

Despite the difficulties that might arise in reaching agreement on the specific characteristics of the minimum safeguards, the final alternative seems the preferable option in case the EIO-instrument aims to reflect a real MR philosophy while ensuring respect for the rights of the defence at the same time.³⁰¹ Therefore, the establishment of the EIO should be postponed until the Roadmap has been given full consequence and, in addition, until minimum safeguards regarding the gathering and handling of evidence have been developed at EU level. Both instruments should also be proven to be effective. Meanwhile, MLA could further be applied and ameliorated. This overall scenario might approach a fair balance between the interests of efficient law enforcement in cross-border criminal cases and the interests of the charged person. Therefore, unlike the current EIO Proposal, it does not seem to lose sight of the valuable defence perspective.

³⁰¹ More information about the difficulties to compromise, see Eurodefensor, Observations on the Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, available at http://ec.europa.eu/justice/news/consulting_public/0004/civil_society/eurodefensor_en.pdf (consulted on 09/06/2011), p. 3; Justice, Response to the Commission Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, January 2010, available at http://ec.europa.eu/justice/news/consulting_public/0004/civil_society/justice_en.pdf (consulted on 08/06/2011), p. 14; Cape, Hodgson, Prakken & Spronken, 2007, p. 16.

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³⁰³ All available in the database of ECJ case law, at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en>.

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