

# Opinion of the European Union Agency for Fundamental Rights on the draft Directive regarding the European Investigation Order

THE EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS  
(FRA),

Bearing in mind the Treaty on the European Union, in particular Article 6 thereof,

Recalling the obligations set out in the Charter of Fundamental Rights of the European Union,

In accordance with Council Regulation 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, in particular, Article 2 with the objective of the FRA ‘to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights’,<sup>1</sup>

Having regard to Article 4 (1) (d) of Council Regulation 168/2007, with the task of the FRA to ‘formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions and the Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission’,

Having regard also to Recital 13 of Council Regulation 168/2007, according to which ‘the institutions should be able to request opinions on their legislative proposals or positions taken in the course of legislative procedures as far as their compatibility with fundamental rights are concerned’,

Acknowledging the Opinion No. 15122/10 of 18 October 2010 of the European Data Protection Supervisor,

In response to the request of 26 January 2011 from the European Parliament for an Opinion on the draft Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters,

**SUBMITS THE FOLLOWING OPINION:**

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<sup>1</sup> OJ 2007 L 53/1.

# 1. Introduction

The draft Directive regarding the European Investigation Order (EIO),<sup>2</sup> aimed at mutual recognition of warrants for both existing and new evidence, is intended to replace an existing ‘fragmented regime’<sup>3</sup> with a more comprehensive instrument. This initiative promotes cross-border justice while simultaneously raising questions with respect to existing fundamental rights safeguards.<sup>4</sup> The latter has been designed to protect individuals against the misuse of investigatory measures issued and executed within a particular EU Member State.

At the time of writing, the initiative to develop a European Investigation Order in criminal matters<sup>5</sup> is still being debated at the Council of the European Union (Council Working Party on cooperation in criminal matters) and is therefore subject to ongoing changes.<sup>6</sup> The initiative is supported by seven EU Member States and based on Article 82 (1) (a) of the Treaty on the Functioning of the European Union (TFEU). This competence base foresees the ordinary legislative procedure with the European Parliament co-deciding. As requested by the European Parliament, the FRA Opinion addresses the following questions:

1. Does the Charter of Fundamental Rights of the European Union include certain standards for an instrument involving mutual recognition of investigation orders?
2. Should the EIO Directive provide for review by the executing state<sup>7</sup> of an issued measure, due to the current lack of comparability of existing standards in criminal procedural law between EU Member States?

Irrespective of whether legislation is initiated by the European Commission or by a group of EU Member States, the Stockholm Programme offers guidance:

<sup>2</sup> Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, 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 based on Article 81 (1) (a) TFEU (OJ 2010 C 165/22).

<sup>3</sup> European Council, *The Stockholm Programme – An open and secure Europe serving and protecting citizens*, OJ 2010 C 115/01, p. 12. The existing system includes two legal instruments: 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 2008 L 350/72) and Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property and evidence (OJ 2003 L 196/45).

<sup>4</sup> On the promotion aspects, see European Commission, *Delivering an area of freedom, security and justice for Europe’s citizens. Action Plan Implementing the Stockholm Programme*, COM(2010)171 final, 20 April 2010, p. 5.

<sup>5</sup> OJ 2010 C 165/22. This initiative was formally launched on 29 April 2010.

<sup>6</sup> See Proposal for a European Investigation Order Directive, 9288/10, OJ 2010 C 165/22 and the following EU Council Presidency papers: 13822/10 COPEN 196, 21 September 2010; 15329/10, COPEN 230, 21 October 2010; 15999/10, COPEN 251, 11 November 2010; and 5591/11 COPEL 10, 31 January 2011.

<sup>7</sup> The FRA Opinion uses the terminology employed by the draft directive. However, whenever a state refuses to execute a request on the basis of one or several refusal grounds, ‘requested’ state would have more aptly described the situation.

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’.<sup>8</sup> The present FRA Opinion has been drafted taking this as a point of departure.

## 2. Applicable fundamental rights standards

The EIO has potential implications for a number of fundamental rights.<sup>9</sup> The fundamental rights standards outlined in this section are relevant for a system based on mutual recognition. This FRA Opinion focuses on the right to fair trial, including defence requirements, as this area was specifically referenced in the European Parliament’s request. While most of the analysis herein will refer to the fundamental rights of suspects, reference will also be made to the fundamental rights of other parties. Furthermore, this section will examine fundamental rights standards for ‘severe interference’ by investigatory measures (such as physical search, search of premises, surveillance of residential premises, seizures, telecommunications surveillance), as this was requested by the European Parliament. It must be borne in mind that Article 52 (3) of the Charter of Fundamental Rights of the European Union (hereafter the Charter’) stipulates that, insofar as Charter rights are derived from the rights set out in the European Convention on Human Rights (ECHR), a Charter right is to have the same scope and meaning as the ECHR right in question.<sup>10</sup> Therefore, to elaborate on the fundamental rights standards this FRA Opinion will draw on case law of the European Court of Human Rights (ECtHR) as well as of the Court of Justice of the European Union (CJEU).<sup>11</sup>

### 2.1. The right to fair trial – Articles 47 and 48 Charter of

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<sup>8</sup> European Council, ‘A Europe built on fundamental rights’, Section 2.1, in *The Stockholm Programme*, p. 8.

<sup>9</sup> For example, prohibition of torture and inhuman and degrading treatment (Article 4 of the Charter of Fundamental Rights of the European Union; Article 3 of the European Convention on Human Rights (ECHR)), the right to liberty and security (Article 6 of the Charter; Article 5 ECHR), freedom of expression and information (Article 11 of the Charter; Article 10 ECHR), right to property (Article 17 of the Charter; Article 1 of Protocol 1 ECHR). It should be emphasised that this is not an exhaustive list.

<sup>10</sup> At the same time, this provision underlines that it does not prevent European Union law from providing more extensive protection. The reference to the ECHR includes also its protocols. Explanations relate to the Charter, OJ 2007/C 303/17, 14 December 2007, p. 33.

<sup>11</sup> The acronym CJEU is consistently used in this FRA Opinion, also when the case originates prior to the entry into force of the Treaty of Lisbon in December 2009.

# Fundamental Rights of the European Union

## 2.1.1. The right to fair trial during an investigation

It is a well-established principle that fair trial guarantees apply to criminal proceedings in their entirety, including the pre-trial investigation stages.<sup>12</sup> When assessing whether the right to fair trial has been violated, the ECtHR ‘must [...] satisfy itself that the proceedings as a whole were fair’.<sup>13</sup> It may also be deduced from the case law that no investigative measure is acceptable where its effect would be prejudicial to a fair trial.<sup>14</sup>

When examining the fairness of proceedings, the ECtHR may look at a number of other requirements in order to ensure the right to fair trial, including, the principle of *ne bis in idem*, also known as the double jeopardy rule, which is enshrined in Article 50 of the Charter.<sup>15</sup> This principle is particularly relevant in the EIO context, as it must be ensured that suspects are not tried for the same crime twice in different jurisdictions. Article 49 of the Charter also provides that the principles of legality and proportionality should be taken into consideration in order to guarantee fairness in criminal proceedings.

## 2.1.2. Defence rights

Article 48 of the Charter guarantees defence rights, which form an integral part of the right to fair trial. The minimum defence standards in criminal proceedings include, among others, the presumption of innocence and the right not to incriminate oneself, the right to be informed of the accusation, the right to legal representation and the right to free assistance of an interpreter (Article 48 of the Charter and Article 6 (2) and (3) ECHR). Indeed, in *Imbrioscia v. Switzerland*,<sup>16</sup> the ECtHR held that other requirements of Article 6 ECHR, especially paragraph 3 on minimum standards when charged with an offence, are relevant before a case is sent for trial. This applies if and insofar as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with the requirements set out in Article 48 of the Charter and Article 6 ECHR.

<sup>12</sup> This principle was recently reiterated in ECtHR, *Fernandez-Huidobro v. Spain*, No. 74181/01, 6 January 2010, paragraph 109.

<sup>13</sup> ECtHR, *Mialhe v. France*, No. 18978/91, 26 September 1996, paragraph 43.

<sup>14</sup> For example see ECtHR, *Teixeira de Castro v. Portugal*, No. 25829/94, 9 June 1998; and ECtHR, *Barbera Messegue and Jabardo v. Spain*, Nos. 10588/83, 10589/83, 10590/83, 6 December 1988 paragraph 89.

<sup>15</sup> In November 2010, the Belgian EU Council Presidency proposed to include this principle in the draft directive as a refusal ground (15999/10, COPEN 251, 11 November 2010). For relevant jurisprudence on the double jeopardy rule, see CJEU case law: C-7/72, *Boehringer Mannheim v. Commission*, or C-308/04 P, *SGL Carbon AG v. Commission*, paragraph 26.

<sup>16</sup> ECtHR, *Imbrioscia v. Switzerland*, No. 13972/88, 24 November 1993.

The importance of the presumption of innocence has been emphasised by the ECtHR.<sup>17</sup> The ECtHR has also held that the right not to incriminate oneself includes an implicit right to silence<sup>18</sup> and identified the rationale of this provision as being a means of ‘protecting the “person charged” against improper compulsion by the authorities and thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6’.<sup>19</sup> This standard is particularly relevant in the EIO context as testimony procured in a manner that violates this right should not be used against the accused. This principle also applies at pre-trial stage as a suspect is presumed innocent until proven guilty by a court. This may be relevant where testimony obtained under an EIO cannot, subsequently, be tested because the witness concerned is not available for the actual trial.

The right to be notified of criminal charges is also an essential prerequisite for ensuring a fair trial as the accused must be aware of charges in order to construct a coherent and effective defence.<sup>20</sup> An accused person should be provided with information on the nature and causes of the accusation at least prior to an interview with the police.<sup>21</sup> Furthermore, those charged with a criminal offence have an absolute right to the assistance of an interpreter, free of charge, if they do not understand or speak the language used in court.<sup>22</sup> Therefore, it is necessary to establish clear safeguards in relation to the right to free and adequate translation services, especially given the multilingual aspect of cross-border procedures.<sup>23</sup>

It is also important to ensure access to a lawyer and, if necessary, legal aid during an investigation. Indeed, suspects are entitled to have access to a lawyer, even during the first interrogation by the police, unless it is demonstrated that there are compelling reasons to restrict this right.<sup>24</sup> Nevertheless, ‘[e]ven where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 [...]. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.’<sup>25</sup>

<sup>17</sup> See ECtHR, *Saunders v. UK*, No. 19187/91, 17 December 1996.

<sup>18</sup> See ECtHR, *Heaney and McGuinness v. Ireland*, No. 34720/97, 21 December 2000; ECtHR, *Salabiaku v. France*, No. 10519/83, 7 October 1988; ECtHR, *Salduz v. Turkey*, No. 36391/02, 27 November 2008.

<sup>19</sup> ECtHR, *Serves v. France*, No. 20225/92, 20 October 1997, paragraph 46.

<sup>20</sup> ECtHR, *Pélissier and Sassi v. France*, No. 25444/94, 25 March 1999. In this respect, note the similar right to be provided with such information contained in Article 5 (2) ECHR, which however seeks to enable an accused person to challenge the legal basis of his detention.

<sup>21</sup> ECtHR, *Mattocia v. Italy*, No. 23969/94, 25 July 2000.

<sup>22</sup> ECtHR, *Luedicke, Belkacem and Koc v. Germany*, Nos. 6210/73, 6877/75, 7132/75, 28 November 1978. See also, ECtHR, *Kamasinski v. Austria*, No. 9783/82, 19 December 1989.

<sup>23</sup> In this respect, a reference should be made to 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.

<sup>24</sup> ECtHR, *John Murray v. the United Kingdom*, No. 18731/91, 25 January 1996.

<sup>25</sup> For example, see ECtHR, *Salduz v. Turkey*, No. 36391/02, 27 November 2008, paragraph 55; this case concerns restriction on applicant’s right of access to a lawyer while in police custody for an offence falling under the jurisdiction of the state security courts, regardless of age. The elements that the ECtHR will take into account in this context include whether the applicant has made incriminating admissions in the absence of a lawyer (*Brennan v. the United Kingdom*, No. 39846/98, 16 October 2001), as well as whether pressure was exerted on the



Furthermore, where an accused has insufficient financial means, free legal assistance must be granted (Article 47 of the Charter). However, according to the relevant ECtHR case law, national authorities must consider the interests of justice as well as the means of the accused suspect.<sup>26</sup> If legal aid is refused, this decision must be susceptible to judicial review if it becomes apparent at a later stage in the proceedings that the interests of justice would require the provision of legal aid.<sup>27</sup> Given the cross-border nature of the EIO, it is necessary to provide for adequate and effective legal representation<sup>28</sup> in respect of all states concerned.

### 2.1.3. Safeguards for victims and witnesses affected by an European Investigation Order

An EIO may affect a wide range of persons. In order to uphold the right to fair trial, it is necessary to provide effective access to courts for all these persons. The adoption and execution of an EIO requires specific safeguards in order to ensure that the rights of victims and also those of witnesses are effectively protected. According to the CJEU, the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings must be interpreted so as to ensure respect for fundamental rights, particularly the right to fair trial as guaranteed by Article 6 ECHR and as interpreted by the ECtHR.<sup>29</sup> In its case law, the CJEU emphasises that Article 6 ECHR requires the right of the accused to fair trial to be balanced with the rights of vulnerable victims.<sup>30</sup> Accordingly, states are under an obligation to organise their criminal proceedings in such a way that the interests of victims and witnesses are not unjustifiably endangered.<sup>31</sup> In this context, the ECtHR held that particularly strict measures would have to be taken to protect victims who are minors, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence.<sup>32</sup>

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applicant in the absence of a lawyer (*Magee v. the United Kingdom*, No. 28135/95, 6 June 2000).

<sup>26</sup> ECtHR, *Ezeh and Connors v. UK*, Nos. 39665/98 and 40086/98, 9 October 2003 or ECtHR, *Engel and others v. Netherlands*, Nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, 23 November 1976. In case an accused has the necessary means, he or she can defend himself or herself through legal assistance of his or her own choosing: ECtHR, *Campbell and Fell v. UK*, Nos. 7819/77 and 7878/77, 28 June 1984.

<sup>27</sup> ECtHR, *Granger v. UK*, No. 11932/86, 28 March 1990.

<sup>28</sup> See, in a national context, ECtHR, *Daud v. Portugal*, No. 22600/93, 21 April 1998. In this case, the ECtHR reiterated 'that assigning counsel does not in itself ensure the effectiveness of the assistance he may afford an accused', paragraph 38.

<sup>29</sup> CJEU, C-105/03, *Maria Pupino*.

<sup>30</sup> *Ibid.*

<sup>31</sup> See, for example ECtHR, *Doorson v. Netherlands*, No. 20524/92, 26 March 1996; ECtHR, *T. v. Austria*, No. 27783/95, 14 November 2000 or ECtHR, *Imbroscio v. Switzerland*, No. 13972/88, 24 November 1993. For relevant CJEU case law in this field, see: CJEU, C-328/05 P, *Appeal of SGL Carbon AG*, paragraph 59. See also, CJEU, joined cases C-46/87 and C-227/88, *Hoechst AG v. Commission*; C-85/87, *Dow Benelux NV v. Commission*; and C-94/00, *Roquette Frères*.

<sup>32</sup> See ECtHR, *S.N. v. Sweden*, No. 34209/96, 2 July 2002.

## 2.2. Privacy and Data Protection – Articles 7 and 8 Charter of Fundamental Rights of the European Union

Since investigatory measures are not explicitly defined in the draft directive, it would appear that EU Member States would be able to request a wide range of investigatory measures under an EIO. Such measures would inevitably vary in terms of the degree of intrusiveness and, thereby, interfere with the right to privacy and the protection of personal data. However, it is accepted that these rights are not absolute and in certain circumstances, such as those set out in Article 8 (2) ECHR,<sup>33</sup> an interference may be justified. As stated, the European Parliament requested an evaluation of fundamental rights standards for ‘severe interference’. Such an analysis will be set out in this section in accordance with jurisprudence. Nevertheless, it is submitted that safeguards must be put in place to ensure that any interference, regardless of the degree of intrusiveness, is proportionate, necessary and in accordance with the law.

### 2.2.1. House searches, seizures and body searches

In *Funke v. France* it was held that Article 8 ECHR does not require prior judicial authorisation for physical searches or searches of premises and seizures of property.<sup>34</sup> The ECtHR also noted in that case, that although the law of a Member State may require such judicial authorisation, this will not always amount to a sufficient safeguard in accordance with Article 8 ECHR.<sup>35</sup> If such judicial authorisation has been granted, it must set out the way in which searches and seizures should be conducted in a very clear and detailed manner.<sup>36</sup>

In its request, the European Parliament asked specifically about standards relating to ‘protection of attorney’s offices from search and seizure’. It is clear from the case law that a stricter standard of scrutiny is usually applied when it comes to searches of lawyers’ offices and seizures of documents or computers containing the information on the lawyers’ clients (and similarly for other groups with professional secrecy requirements). In such cases, both the CJEU and ECtHR require more safeguards to be put in place in order to protect professional secrecy.<sup>37</sup>

Furthermore, the draft EIO Directive should afford adequate and effective safeguards against abuse of this system *vis-à-vis* an accused person’s right to

<sup>33</sup> According to Article 8 (2) ECHR: ‘There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

<sup>34</sup> See ECtHR, *Funke v. France*, No. 10828/84, 25 February 1993.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> CJEU, joined cases T-125/03 and T-253/03, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. Commission*, paragraph 82. See also, ECtHR, *Mancevschi v. Moldova*, No. 33066/04, 7 October 2008; and ECtHR, *Smirnov v. Russia*, No. 71362/01, 7 June 2007.

respect for their private life, including bodily privacy<sup>38</sup> and their homes.<sup>39</sup> Where evidence is seized pursuant to an EIO, this would have an effect on the right to property and as a result it is necessary to have safeguards in place to protect against unduly long retention of such evidence.<sup>40</sup> Moreover, there ought to be protection against the seizure of items or material under an EIO that are unrelated to the investigation.<sup>41</sup>

Lastly, reflecting on the preceding discussion in the context of the right to fair trial (section 2.1) it is essential that any person affected by searches and seizures is granted the opportunity to challenge the nature, duration and gravity of such measures before a court.<sup>42</sup> Pursuant to Article 47 (1) of the Charter every individual affected by an investigation order has to be granted effective remedies before a court.<sup>43</sup>

## 2.2.2. Data protection

The right to the protection of personal data is set out in Article 8 of the Charter and in Article 8 ECHR.<sup>44</sup> The Council Framework Decision 2008/977/JHA of 27 November on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters is particularly relevant for the EIO. However, as noted by the European Data Protection Supervisor (EDPS), this Council Framework Decision is not mentioned in the EIO, which may lead to legal uncertainty.<sup>45</sup> The EDPS identifies a number of challenges for effective data protection in criminal cooperation and the FRA supports the EDPS recommendations in this regard. As a result, this FRA Opinion focuses on the fundamental rights standards set out in the ECtHR jurisprudence.

<sup>38</sup> For body searches, see, for example, ECtHR, *McFeeley v. UK*, No. 8317/78, 15 May 1980. In a broader context, see ECtHR, *Wainwright v. The United Kingdom*, No. 12350/04, 26 September 2006.

<sup>39</sup> For home searches and seizures, see, for example, ECtHR, *Mialhe v. France (no. 2)*, No. 18978/91, 26 September 1996; and ECtHR, *Gillan and Quinton v. the UK*, No. 4158/05, 12 January 2010.

<sup>40</sup> See ECtHR, *Raimondo v. Italy*, No. 12954/87, 22 February 1994.

<sup>41</sup> ECtHR, *Panteleyenko v. Ukraine* No. 11901/02, 29 June 2006. In this case, the ECtHR held that there was a breach of Article 8 because the Court used the applicants' psychiatric data in a manner which was not 'in accordance with the law'.

<sup>42</sup> ECtHR, *Camenzind v. Switzerland*, No. 21353/93, 16 December 1997.

<sup>43</sup> In order to avoid misuse of legal remedies, a concrete solution may be to include a rebuttable presumption that such an action is manifestly ill-founded to provide for accelerated procedures and/or even, in case of refusal, to include an obligation to inform the Council immediately.

<sup>44</sup> For further information on the Charter and EU law standards in relation to data protection, see the FRA Opinion on the Council Framework Decision on the use of Passenger Name Record (PNR) data for law enforcement purposes, 28 October 2008, paragraphs 24-33, available at: [http://fra.europa.eu/fraWebsite/attachments/FRA\\_opinion\\_PNR\\_en.pdf](http://fra.europa.eu/fraWebsite/attachments/FRA_opinion_PNR_en.pdf); and the FRA Opinion on the Stockholm Programme, 14 July 2009, pp. 8-9, available at: <http://fra.europa.eu/fraWebsite/attachments/FRA-comments-on-Stockholm-Programme.pdf>.

<sup>45</sup> EDPS, Opinion No. 15122/10 on the European Investigation Order, 18 October 2010, paragraph 31. The EDPS Opinion also makes reference to the need for a coherent EU legal framework on data protection (paragraphs 53-55), which includes protecting the personal data of victims (paragraph 13).



In general terms, the ECtHR held that even ‘the storing by a public authority of information relating to an individual’s private life amounts to an interference within the meaning of Article 8’.<sup>46</sup> However, Article 8 ECHR is not an absolute right and many of the cases are decided on the basis of whether the interference with the right to protection of personal data was in accordance with the law. For example, in relation to telephone tapping, the ECtHR stated in *Malone v. the United Kingdom* that ‘the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence’.<sup>47</sup> The ECtHR also held that a judicial order to tap a telephone constituted a violation of Article 8 ECHR due to the fact that the national law did not clearly indicate the scope of the authorities’ discretion in this area.<sup>48</sup> Elaborating on this principle, the ECtHR noted that ‘[s]ince the implementation in practice of measures of secret surveillance of communications is not open to scrutiny [...] it would be contrary to the rule of law for the legal discretion granted to the executive – or to a judge – to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion [...] to give the individual adequate protection against arbitrary interference’.<sup>49</sup> Moreover, the ECtHR has also held that recordings, which have not been carried out pursuant to a judicial procedure and have not been ordered by an investigating judge – in other words, in accordance with the law of that Member State – will constitute a breach of Article 8 ECHR.<sup>50</sup>

It is also important that safeguards are put in place for the retention of evidence.<sup>51</sup> For example, if records are to be kept of a video or telephone conference, it is necessary that personal data is stored in a manner which is in compliance with data protection laws.<sup>52</sup> It is foreseeable that a number of other data protection issues may arise, such as in the context of sharing personal details of suspects between states. Therefore, in line with the EDPS Opinion, the EIO should include a provision that gives effect to the right to protection of personal data, which is particularly sensitive in the cross-border context. In a document submitted to the European Council, the European Commission has proposed the wording of such a provision.<sup>53</sup>

<sup>46</sup> See, ECtHR, *Amann v. Switzerland*, No. 27798/95, 16 February 2000.

<sup>47</sup> ECtHR, *Malone v. the United Kingdom*, No. 8691/79, 2 August 1984, paragraph 67. See also, ECtHR, *Khan v. the United Kingdom*, No. 35394/97, 12 May 2000.

<sup>48</sup> See also, ECtHR, *Halford v. the United Kingdom*, No. 20605/92, 25 June 1997; ECtHR, *Klass and Others v. Germany*, No. 5029/71, 6 September 1978; ECtHR, *Kruslin v. France*, No. 11801/85, 24 April 1990; and ECtHR, *P.G. and J.H. v. the United Kingdom* No. 54810/00, 25 September 2001.

<sup>49</sup> ECtHR, *Bykov v. Russia*, No. 4378/02, 10 March 2009, paragraph 78.

<sup>50</sup> ECtHR, *A. v. France*, No. 14838/89, 23 November 1993.

<sup>51</sup> See, ECtHR, *S and Marper v. United Kingdom*, Nos. 30562/04 and 30566/04, 4 December 2008.

<sup>52</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

<sup>53</sup> European Council, 13446/10, COPEN 186, 10 September 2010.

### 3. Review by the executing state

The European Parliament also asked the FRA whether it would be necessary to have a ‘review by the executing state of an issued measure due to the current lack of comparability of existing standards in criminal procedural law between Member States’. Considering the potential lack of comparability in criminal procedural law alongside the obligation to respect fundamental rights, answering the European Parliament’s question requires consideration of whether the executing state should be able to refuse to execute an EIO on the basis of a perceived fundamental rights violation. This is even more important given the changing circumstances brought about by the Treaty of Lisbon.<sup>54</sup> In light of the evolving landscape of EU law, section 3.1 addresses this issue. Following on from this analysis and drawing on the discussions in section 2, section 3.2 looks at ways in which fundamental rights safeguards may be implemented within the framework of the EIO. The analysis also takes practical concerns into consideration, in particular their possible impact on the overall effectiveness of cooperation in cross-border investigation.

#### 3.1. A fundamental rights-based refusal ground

It is noted that there is a primary law obligation on EU Member States to respect all fundamental rights (Article 6 TEU)<sup>55</sup> when they are implementing EU law.<sup>56</sup> It is also emphasised that respect for fundamental rights constitutes a key component of the area of freedom, security and justice, as foreseen by Article 67 (1) TFEU: ‘The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States’.<sup>57</sup> So, even if mutual recognition is presented as a ‘principle’<sup>58</sup> which is used by EU Member States to facilitate cooperation in the area of freedom, security and justice, Member States must comply with their legal obligations to respect fundamental rights.<sup>59</sup> Moreover,

<sup>54</sup> Refusals to execute an EIO will have to be in full compliance with the directive in order to avoid infringement proceedings before the CJEU.

<sup>55</sup> Read in conjunction with Article 51 (1) of the Charter.

<sup>56</sup> In this context, one should be reminded of the principle of extraterritorial responsibility under the ECHR. EU Member States are responsible under the ECHR for human rights violations committed in another territory where through their action they have placed someone in that situation; see ECtHR, *Soering v. United Kingdom*, No 14038/88, 7 July 1989. See also ECtHR, *Bosphorus v. Ireland*, No. 45036/98, 30 June 2005, ‘the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the [EU].’ This presumption was considered to be *rebuttable*.

<sup>57</sup> In general, EU secondary law must comply with fundamental rights standards. See CJEU, joined cases C-92 and 93/09, *Volker und Markus Schecke GbR and Hartmut Eifert v. Land Hessen*, where the CJEU struck down a piece of EU secondary law for non-compliance with fundamental rights.

<sup>58</sup> See, Article 70 TFEU.

<sup>59</sup> The EU asylum system where primary law establishes the principle that EU Member States shall regard each other as ‘constituting safe countries of origin’ still allows to deviate from

as the scope of the draft directive extends much further than its main predecessor,<sup>60</sup> in terms of allowing for a wider range of investigatory measures, it is important that EU Member States fundamental rights obligations are clearly reflected in the text of the directive.

A fundamental rights-based refusal ground could act as an adequate tool to prevent fundamental rights violations occurring during cross-border investigations. At the same time, the executing state would be required to be familiar with the criminal law rules and procedures of the issuing state, as well as the details of the case at hand. Therefore, a fully-fledged fundamental rights assessment in every case would not only counteract the idea of mutual recognition, but due to complex and long procedures it might also undermine some of the fundamental rights standards set out in section 2.2. For this reason, any establishment of a fundamental rights-based refusal ground in the directive should ideally be complemented by explicit parameters. Such parameters could limit the refusal ground to circumstances where an EU Member State has a well-founded fear that the execution of an EIO would lead to a violation of fundamental rights of the individual concerned. In this way, a fundamental rights-based refusal ground could serve as a ‘safety-valve’, facilitating EU Member States’ compliance with fundamental rights obligations flowing from EU primary law without Member States having to deviate from EU secondary law.<sup>61</sup>

In its current form, Article 10 of the draft directive lists general grounds for non-recognition or non-execution of an EIO in the executing state. In addition to these general grounds, the draft directive allows for specific refusal grounds in cases of certain investigative measures, such as hearing by telephone or video conference, sharing the information on bank accounts or temporary transfer of a person held in custody. While the draft text does not provide for a fundamental rights-based refusal ground, it is arguable that Article 1 (3) could establish a *de facto* refusal ground in stating that the 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 [...]’.<sup>62</sup> If these elements of the draft text remain, this could create a contradiction within the directive, which could lead to the adoption of diverging approaches between Member States when transposing and implementing the directive. This risks compromising both the purpose of protecting fundamental rights and the principle of mutual recognition.

In the interests of legal clarity and given EU Member States general obligation to respect fundamental rights, it is arguable that this possible contradiction

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this presumption in order to ensure that fundamental rights of an individual can be taken into account in exceptional cases. See the sole Article (d) of Protocol 24 to the Treaties.

<sup>60</sup> 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 2008 L 350/72.

<sup>61</sup> See the discussion on Article 6 TEU and Article 67 (1) TFEU in section 3.1. Furthermore, it ought to be underlined that a failure to ensure proper respect for fundamental rights in the execution of an EIO will engage the responsibility of the executing state under instruments such as the ECHR: ECtHR, *MSS v. Belgium and Greece*, No. 30696/09, 21 January 2011.

<sup>62</sup> The second sentence of Article 1 (3) singles out ‘freedom of association, freedom of the press and freedom of expression in other media’ instead of referring to fundamental rights in general. Compare also footnote 66.

could be remedied by amending Article 10 of the draft directive to include a clear reference to Article 1 (3). Another option, proposed by the EU Council Presidency<sup>63</sup> and the European Commission<sup>64</sup> would be to introduce the concept of the double jeopardy rule (*ne bis in idem*) as a refusal ground. Despite the fact this principle may be applied in a relatively objective way, it is submitted that only including certain fundamental rights as refusal grounds could lead to the implicit creation of a hierarchy of fundamental rights within the directive.<sup>65</sup>

## 3.2. Safeguards

The protection of fundamental rights may be enhanced when executing an EIO by ensuring that a number of safeguards are put in place in line with the fundamental rights standards set out in section 2.

Firstly, it is acknowledged that the ‘use of special investigative methods [...] cannot in itself infringe the right to fair trial.’<sup>66</sup> However, when employing such measures, the executing state is required to comply with the well-established principle of proportionality.<sup>67</sup> In order to give effect to this principle, it would be advisable to include a provision in the directive which explicitly requires the executing state to adopt the least intrusive investigatory measures as regards interference with fundamental rights when executing the issuing state’s request.

Secondly, as discussed in the context of data protection,<sup>68</sup> if authorities in Member States are afforded unlimited discretion when issuing an EIO, this may give rise to legal uncertainty. In the interests of legal clarity, it is desirable for the directive to explicitly define terms such as ‘investigatory measures’ so that these measures may be executed in accordance with the law.

Thirdly, as established above, the right to fair trial must be respected during an investigation.<sup>69</sup> In that regard it is necessary to ensure cross-border equality of arms. This could be achieved by ensuring that the affected person is provided with effective legal advice with respect to the legal systems of the Member States involved. The existing jurisprudence of the ECtHR does not generally require prior judicial authorisation for the use of most intrusive investigatory measures,<sup>70</sup> cross-border investigations are different with respect to the interaction of two possibly incompatible legal systems. As such investigations often give rise to fundamental rights concerns, and therefore it may be

<sup>63</sup> 2010/0817 (COD), COPEN 196, 21 September 2010.

<sup>64</sup> JUST/B/1/AA-etD(2010)6815, p. 16.

<sup>65</sup> From the viewpoint of safeguarding general respect for all fundamental rights the second sentence of recital 17 also appears too narrow, since it links a duty to respect fundamental rights with non-discrimination only and does not appear to extend to all fundamental rights. Again, while non-discrimination is a central fundamental right, it is important that the directive does not seek to establish a hierarchy of rights as Member States have an obligation to respect all fundamental rights.

<sup>66</sup> ECtHR, *Ramanauskas v. Lithuania*, No. 74420/01, 5 February 2008, paragraph 50. This has been reiterated more recently in ECtHR, *Bannikova v. Russia*, No. 18757/06, 4 November 2010.

<sup>67</sup> *Ibid.* See also discussion at section 2.1.1.

<sup>68</sup> See discussion at section 2.2.2.

<sup>69</sup> See discussion at section 2.1.

<sup>70</sup> See discussion at section 2.2 .

necessary to require mandatory validation by a judge in the issuing state rather than a prosecutor or investigating magistrate. Specific procedures should be put in place for such a validation in order to avoid unnecessary delays. It is submitted that this may be necessary given the ‘current lack of comparability of existing standards in criminal procedural law between Member States.’<sup>71</sup>

Finally, in order to ensure access to justice for all persons who may be affected by an EIO there is a need for clear provisions on legal remedies as well as time limits. Moreover, given the ongoing discussions on the reform of EU criminal law<sup>72</sup> and in order to address new challenges in future, it may be necessary to introduce an *ex post* evaluation and assessment of the system’s operability (section 4).

## 4. Evidence-based evaluation

Reporting on the application of the directive is foreseen in the current draft of the EIO.<sup>73</sup> It is submitted here that any assessment and eventual review of the directive should build on comparative data collected in all EU Member States by an independent body so as to allow for an evidence-based assessment of both the needs of and the fundamental rights implications for individuals. Against this background, it would be desirable to have an *ex post* data collection and analysis of the actual operation of European investigation orders in place, which would begin as soon as the EIO Directive is operational. This would identify practical fundamental rights concerns related to the cross-border application of an EIO and shed light on the role which an investigation order plays in criminal proceedings as a whole. Recalling the discussion on the right to fair trial above, in particular the ECtHR’s approach, such an evaluation would play an integral role in ensuring good administration of cross-border justice.

Therefore, applying the ECtHR approach to a cross-border setting requires analysis of the process as a whole, irrespective of different national systems of safeguards, which may or may not be compatible with one another. The evaluation would also assess which safeguards, including a fundamental rights-based refusal ground, need to be put in place in practice, in order to ensure effective protection of fundamental rights. Such a mechanism would provide for an evidence-based analysis of fundamental rights at risk but also of the extent to which mutual recognition of investigation orders safeguard fundamental rights

<sup>71</sup> As recognised by the European Parliament in their request to the FRA.

<sup>72</sup> See the Roadmap on criminal procedures and the proposal for reinforced legislation for the protection of victims: Council Resolution, 30 November 2009, OJ 2009 C 295 pp. 1-3. See also European Commission, *Delivering an area of freedom, security and justice for Europe’s citizens. Action Plan Implementing the Stockholm Programme*, COM (2010) 171 final, 20 April 2010; on planned developments related to rights of victims, see p. 14 of the EC Communication: ‘Legislative proposal on a comprehensive instrument on the protection of victims and action plan on practical measures including developing a European Protection Order’.

<sup>73</sup> Article 32 of the draft proposal of 24 June 2010 states: ‘No later than five years after the entry into force of this Directive, the Commission shall present a report on the application of this Directive, on the basis of both qualitative and quantitative information. This report shall be accompanied, if need be, by proposals for adaptations to this Directive’; see OJ 2010 C 165/22.



by, for instance, reducing detention periods, facilitating equality of arms, and ensuring effective access to justice across borders.

## 5. Concluding observations

Acting under Article 4 (1) (d) of Council Regulation 168/2007, the European Union Agency for Fundamental Rights is with this Opinion responding to the request of the European Parliament of 26 January 2011 concerning the fundamental rights aspects of the draft Directive regarding the European Investigation Order in criminal matters.

Specifically, the European Parliament poses two questions:

1. Does the EU Charter of Fundamental Rights include certain standards for an instrument involving mutual recognition of investigation orders?
2. Should the EIO Directive provide for review by the executing state of an issued measure due to the current lack of comparability of existing standards in criminal procedural law between Member States?

The FRA Opinion addresses the first question by providing an overview of existing European standards, with particular emphasis on elements of fair trial, including standards related to severe interference by investigatory measures, based on the case law of the Court of Justice of the European Union and the European Court of Human Rights (section 2).

The second question is addressed in section 3 of this FRA Opinion, by considering the possibility of having a fundamental rights-based refusal ground. It is acknowledged that such a provision would have to be clearly defined; in any event, it is submitted that fundamental rights may be effectively protected when executing an EIO by ensuring that a number of safeguards are put in place.

It appears that the draft directive is neither based on a proper impact assessment nor on an extensive gathering of evidence in the 27 EU Member States. Thus, the draft legislation might not sufficiently draw on factual, comparative analysis of the shortcomings in the daily functioning of the existing systems across the European Union. Against this background, it seems even more important to build in evidence-based mechanisms both in the observation of how this new instrument is operating in practice as well as in future revisions (see section 4).

The draft directive should be seen in the light of two other ongoing processes, namely the *Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings*<sup>74</sup> and legislative developments aimed at ensuring effective protection for the rights of victims. These processes will reinforce the ongoing framework of rights in which the EIO would operate. The combined effects of these various instruments on fundamental rights will only

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<sup>74</sup> European Council, Resolution of the Council of 30 November 2009, OJ 2009 C 295, pp. 1-3.

become apparent once the overall system is in place. Even at that point, independent expert advice based on continuous and regular comparative monitoring of the situation will remain useful in terms of assessing the new integrated European system, as well as facilitating trust between national criminal law systems.

Vienna, 14 February 2011