Part 2: The European Union

The present study shall now focus on another regional organization: the European Union. Following the same exercise made with the ASEAN, the following part shall be divided into different sections.

First, the present study shall explore the historical development of the European Union which shall begin from the early modern ages in Europe, including discussion on the times of war, to the historical development of the European Union itself as a regional organization. Such historical development shall focus on three stages such as what was done with the ASEAN, namely, the consolidation stage, the expansion stage, and the reconsolidation stage. Akin to the objective for the study of the historical development of the ASEAN starting from the historical development of the southeast Asian region, the earlier historical development of Europe cannot be completely ignored considering that the European Union came into being exactly because of the historical development in the region. This notwithstanding, this first portion of this section does not intend to bombard with every minute detail about European history but what would only be mentioned are those which have a nexus to understand the present day affairs of the European Union, its member states, decision and policymaking processes, and how it administers and conducts its external relations and cooperation mechanisms with other states.

Second, the present institutional and legal framework of the European Union shall be discussed, including the salient features of the regional organization, its organizational structure, and its fundamental principles, norms, and practices. As with the ASEAN part of the study, the fundamental principles, norms, and practices shall include the constitutional, normative, and decision-making principles.

Third, discussion shall focus on the cross-border movement of evidence. This portion of the study shall include the historical development of mutual legal assistance and the present EIO instrument in the regional level as well as the substantive and procedural provisions.

After centering on the regional level, it shall be followed by discussion of the respective member state level frameworks of the United Kingdom and Germany. The discussion of these respective member states shall follow the same exercise as what was done in the examination of the regional level framework.

Thereafter, the frameworks of the regional level and member state level shall be compared and contrasted with each other.

I. Regional Framework

A. Historical Development

1. Early Modern Ages

a. Europe in the Early Ages

An integral part of understanding the historical development of the European Union is understanding the historical development of Europe in general. Borrowing what has been previously mentioned in the review of the historical development of Southeast Asia and the ASEAN, understanding European history is not for the purpose of setting a barometer for the region's or the EU's future development but a review of the region's history could "illuminate the present," making clear internal dynamics within the region, and in relation to the subsequent establishment of the EU, understand how its development and decisions arguably emerge "from unique historical circumstances and will likely evolve in its own particular way."[1202]

At the outset, European civilization was a product of many things and built mainly on three (3) elements, namely, the culture from the classical antiquities of Ancient Greece and Ancient Rome, influence from Christianity, and the culture from German warriors who invaded the Roman Empire.[1203] The interaction between these three elements and its corresponding effects, which mainly occurred during the early medieval period of 300-1050, can be thought of as one of the most formative periods of European historical development.[1204]

First, civilization developed with influence from the cultures of the ancient antiquities such as the periods of Ancient Greece and Ancient Rome domination.[1205] This period has admittedly influenced greatly how

1202 See *Acharya,* Ideas, Identity and Institution-Building, p. 327; *Benda,* p. 111; *Evans,* p. 303; *Osborne,* p. 17.
1203 *Hirst,* p. 11.
1204 *Rollason*, p. 3.
1205 See *Stråth/Wagner*, p. 40.

Europe presently is. Ancient Greece was not only integral in the proliferation of various philosophical approaches and way of thinking but was also integral in the establishment of many colonies across the region.[1206] Thereafter, the rise of the Roman Empire from a city-state to an overarching empire which redefined or otherwise established the notions of imperial rule.[1207] The Roman political dominance had broad consequences for those conquered which was not only limited to political unification and/or subjugation, but also social, economic, religious, linguistic, and cultural change.[1208] These changes became generally universal throughout Europe; nonetheless, the exact cultural responses would still differ in its details, with some retaining at least parts of their own culture, religion, and languages.[1209] Understandably, any cultural change was not single-directional and one-dimensional in its process.[1210] Any cultural integration was a complex process that resulted from complex interactions between the Roman state and its representatives and the indigenous communities, the latter not being homogenous to begin with.[1211] Nevertheless, the his-

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1206 *Hirst,* p. 11. Interestingly, Ancient Greece was able to establish colonies in what is now Turkey, North Africa, Spain, southern France, and southern Italy. It was in Italy where Ancient Greece and Ancient Rome intersected, with the latter learning from the Ancient Greece many things and even improved on the same.

1207 See *Cooper*, pp. 158-160.

1208 *Roselaar*, p. 1. See for illustration *Lulić*, pp. 25-34.

1209 *Roselaar,* pp. 1,7.

1210 See *Lulić,* p. 21.

1211 *Roselaar,* pp. 1, 11.Roselaar herein explains:
"Protoracist views about the inferiority of 'barbarian' peoples helped to justify war, subjugation, mass murder, enslavement, and exploitation on an unprecedented scale across vast territories. Although it cannot be denied that living standards on average grew and that many people profited from their incorporation in the Roman state, the violence of the conquest must not be forgotten. After the conquest, rather than striving for integration and connectedness as aims in themselves, the main goal of the Romans was to gather material wealth from the conquered territories. 'The Roman Empire was not run on altruistic lines; it developed mechanisms for the exploitation of land and people.' Although there were undoubtedly benefits to being part of the Roman state, the Romans were mostly concerned with effectively exploiting the economic and manpower resources of their subjects – at Melos, for example, or in the trade between Italy and the transalpine regions, Romans were at the head of the economic chain. Locals benefited from these economic activities but they were not in control of them. 'Romanization' therefore was a result of elite negotiation and native agency, but this agency was only available to those who survived the conquest and remained loyal to Rome, especially the elites.

torical experience was ingrained in those whom the Romans ruled, which influenced their actions as will be shown later on.

Second, Christianity and the Christian Church played a centuries-long influential and important role in European history and the development of European civilization. Christianity first developed in the Middle East and spread further into the East as well as the Roman Empire, in particular the Roman North Africa.[1212] Christianity transformed thereafter into a world religion and would spread throughout the entire Roman empire.[1213] By the fourth century it was transformed in a state religion in what is now Algeria.[1214] The entirety of Europe was eventually Christianized during the middle Ages and Ethiopia remained Christian.[1215]

Other than Christianity and the classical antiquities, historian Hirst argues that a third element in the development of European civilization were the Germanic warriors who invaded the Roman Empire in western Europe.[1216] They were said to have lived on the northern borders and in the 400s they flooded in the territories of the Roman Empire in the west.[1217] By 476 AD they had destroyed the empire in the west and it was in Britain, France, Spain, and Italy that the mixture of European civilization took shape through the rise of different small kingdoms.[1218]

The three elements formed the foundation on which European civilization was built. For purposes of understanding European historical development vis-à-vis the subject matter at hand (development of international cooperation and/or mutual legal assistance), there is no need to delve into microscopic details of history. Needless to state, the interaction of these three elements brought about not only entanglement of church and state, which led to a distinguishable congruence and assimilation of the structures, policies, and nature of one another, but also the consolidation and creation of nation-states, administrative units, and/or new territories.[1219] Thus, one can note a common denominator existing across Europe in socio-political culture.

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xxx" See also for illustration, *Gregoratti*, pp. 239-249; *Le Quéré*, pp. 224-236; *Scopacasa*, pp. 41-42.

1212 *Rublack*, p. 577.
1213 *Hirst,* p. 22.
1214 *Rublack,* p. 577.
1215 *Rublack,* p. 577.
1216 *Hirst,* p. 23.
1217 *Hirst,* p. 23.
1218 *Collins*, pp. 173-429; *Hirst,* p. 23; *Rollason,* p. 3.
1219 *Collins,* pp. 62-63; *Hirst,* p. 25; *Rollason,* pp. 236, 279.

The influence of Christianity in Europe is widespread but not necessarily linear as illustrated by the different cultural changes for different countries and peoples.[1220] Internally, there was the difference spurring from within Christianity itself and the consequences thereof, for example, through the division of Eastern Orthodoxy from Roman Catholicism in the eleventh century, with the former settling in the Balkans, Russia, and Greek archipelago.[1221]

On an external level, one would likely be persecuted and expelled elsewhere if one was not part of the Catholic majority clique. The European Jews were a great example, being the ones closest to home.[1222] The same kind of antagonism equally applied to Muslims, Hindus, and even other forms of Christianity.[1223] Such continued in this period with Latin Christianity's encounter with Mediterranean Islam, which traditionally were already part of the European social landscape: they constituted the ruling

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1220 See *Collins S.J*, p. 545. See for illustration on assimilation of Christianity in socio-political environment especially in Northern Europe, *Wickham*, pp. 80-98.

1221 This was through the division of Eastern Orthodoxy from Roman Catholicism in the eleventh century, with the former settling in the Balkans, Russia, and Greek archipelago. *Rublack,* p. 577.At one point in time, when Byzantine fell, papal legates were reaching out to other Christians to accept papal jurisdiction and recognition in some form in exchange of political protection which Byzantine could no longer then afford. The papacy also reached out to make amends with the Greek church (which had Constantinople as its institutional center) -- the both branches of Christianity considered themselves in schism since the 12th century, but was ultimately rejected by the latter even if initially reconciliation seemed promising. See *Collins S.J,* p. 553. There was also the existence of other religions in the region. See *Rublack,* p. 577.

1222 Jews were expelled from England and from France in 1290 and 1394 respectively, and their largest concentration was in the Latin West spanning from Spain and the Rhineland to the Italian peninsula.Jews were expelled from England and from France in 1290 and 1394 respectively, and their largest concentration was in the Latin West spanning from Spain and the Rhineland to the Italian peninsula. The year 1391 is often taken as a turning point in the relationship between Christians and Jews in the Iberian Peninsula, wherein there was a shift from a previously peaceful coexistence between Christians and non-Christians to a popular and legal hostility of an increasingly inward-focused Spanish Christian society that resulted eventually to the numerous riots and anti-Jewish persecutions that occurred. The entanglement between church and state played a role with the Crown then entrusting to the Spanish Inquisition and Church in general the eradication of the Jewish religion and culture. Additionally, while the study of Hebrew was acknowledged to be important, it was often met with opposition and persecution.*Collins S.J,* p. 552.

1223 See *Terpstra*, p. 606.

class in Ottoman southeast and central Europe, while in Polish-Lithuanian Commonwealth were a substantial, enfranchised community with full religious and civil rights, and in western Europe, they comprised small but relevant communities in key trade, scholarly, slave, and diplomatic centers.[1224]

As Muslim existence in Europe has long been established, encounters with them by the Christian Church can be described as similarly complex as the one with Jews and wherein contact was normally on three (3) points: military (through eastward incursion of crusaders and westward movement of the Ottoman Turks into the Balkans), social (through the remnant Muslim peoples in the Iberian Peninsula), and commercial (through transactions with the southern and eastern rim of the Mediterranean).[1225] Notably, the military success of the Ottoman Turks had political, social, religious repercussions: by establishing a strong foothold in the Balkans by the end of the 14th century, for example, occupying the city of Constantinople, and playing a third-party role in European power politics by the middle of the 16th century.[1226] The occupation of Constantinople brought much worry as it symbolized the fall of the Roman Empire and the loss of an ancient center of Christianity.[1227]

The encounters as described above, both with other religions and other forms of Christianity, as well as different cultures and belief systems fundamentally affected European social and political order: the antagonistical patterns that befittedly describe how European Catholic responded to these differences resulted in forced conversions and purgations, numerous religious wars, merging of religion and nationalism, and forced refugees as a mass European phenomenon.[1228] Hundreds of thousands of people suffered forced migration and exile by reason of religious creed, and are often made worse by economic, political, and racial factors.[1229]

In addition to the changes on social and cultural order brought by Christianity and the Church in Europe, the rise of legitimizing bodies such as parliaments and councils gains more significance as one notes the birth of the modern state, which happened shortly before or during the time when the European elites and nobles started to gain significance in

1224 *Krstić*, p. 688.
1225 *Collins S.J,* pp. 552-553.
1226 *Collins S.J,* p. 553.
1227 *Collins S.J,* p. 553.
1228 *Terpstra,* p. 606.
1229 *Terpstra,* p. 606.

European society. The "modern state" was born in Western Europe in the fourteenth century as a natural child of war and taxation.[1230] A public finance system was developed to sustain the costs of war then coincided with the appearance of consolidated territories.[1231] This formed the origins of the unitary, "modern" state, which, while the term "modern" is not absolute, it often either denotes a democratic, liberal state, or connote the effectiveness of the institutional organization to "govern centrally and mobilize human and material resources."[1232]

As the foundations for the modern state were laid down, one could witness anew the political tension between the authority being exerted by monarchs and the other members of society such as the nobles and the ordinary people. During this time period, there was an effort to exercise absolute monarchism.[1233] This did not go uncontested although opposition was not always successful.[1234] Nevertheless, one could see political and legal discussions as well increased understanding in some parts of European society on what is "public good" and the direction it should take.[1235]

Moreover, one could witness papal legates reaching out to other Christian sectors within Europe. This transformed the medieval church immensely from a monolith to a "confederation of tribes and cultures that appropriated in a variety of ways the Christian faith" by the end of the 16th century.[1236] Linked with the evolution of the nation state, states started to coalesce towards princely courts and conflict over a prince's role in church affairs entered a new stage.[1237] Due to many factors, princely courts

1230 *Zmora*, p. 8.

1231 There was an endemic and incessant war between the monarchs of England and France. To able to sustain the costs of this war, which later spilled over to other parts of Europe such as the Iberian Peninsula, taxes were needed to be imposed on the constituents as current revenues were insufficient. There was lesser reliance on the existing "classical" feudal orders, which proved inadequate to meet the new circumstances. Instead, one can see how demands of monarchs impinge on the lives of those to whom the former could claim supreme jurisdiction. *Zmora,* p. 11.

1232 *Zmora,* pp. 11-12.

1233 There was an attempt for state monopoly on coercion and taxation: in France for example, lords and other nobles were prohibited from the use of physical force and a state monopoly was imposed on the levy of taxes and other duties.*Zmora,* pp. 37-38.

1234 *Zmora,* pp. 39-54.

1235 *Wickham,* p. 243.

1236 *Collins S.J,* p. 556.

1237 See *Collins S.J,* p. 556.

subsequently gained the upperhand in increasing its role in church affairs, including having a say on ecclesiastical finances and appointment of local officials, and eventually, the Church was nationalized in many European states such as France, Germany, Spain, England, etc.[1238]

One of the factors for the nationalization of the church in England and Germany was the growing Protestant Reformation, which challenged the church's existing structures and policies, pushed for reform, and consequently was able to garner support from many.[1239] Subsequently, Protestantism as both a religious and reform movement was not confined as a mere European story but had spread its influence to other parts of the world, and able to support various geographies of adherence, alliances between church and state, patterns of adherence, inter-faith relations, among others.[1240]

b. Building Empires and Colonies: East-West Relationship

Together with the early foundations of the European socio-political-cultural order that more or less still exists until today, one can also note the heavy influence the Roman Empire had on European structure as it has provided posterity with "rich and eclectic legacy" – from architecture to engineering, to the government structure and welfare – which merited emulation and admiration throughout the years.[1241] The Roman Empire expressed itself as an universal empire not sharing space with other political entities and only saw those outside its borders as barbarians.[1242]

The Romans also were said to have influenced the hegemonic rhetoric later espoused by European colonizers.[1243] While not being the first imperialists of the Western World, the Romans nevertheless were the first to "adopt a sophisticated language that justified interventionalist expansionism under a veneer of altruism and even humanitarism," even if their true intentions were far from being altruistic or benevolent.[1244] They were also seen to be fond of informal imperialism wherein instead of preferring

1238 *Collins S.J,* p. 556.
1239 *Collins S.J,* pp. 556-557, 558-566. See also *Rublack,* pp. 573-576.
1240 *Rublack,* pp. 576-577.
1241 *Parchami*, p. 105.
1242 *Cooper,* pp. 158-159.
1243 *Cooper,* p. 158; *Parchami,* p. 105.
1244 *Parchami,* pp. 105, 106-113.

direct rule and territorial annexation, they used existing sociopolitical structures to control and exploit.[1245]

In line with this, the period between approximately 1450-1500 and 1800 has been referred to as the early modern epoch of European history and there was a growing relationship of Europe to the world during this period through different voyages of exploration and the beginnings of the so-called "global age" especially with regard commerce.[1246] This period marked also the beginning of the colonization and/or spread of imperialism by the European states in Asian and African countries, wherein more or less the Roman influence was visible in this exercise.[1247] These explorations and subsequent colonizations ended up in many parts of the world, including Africa and Asia, where the Westerners were particularly lured by trade, economic gain, or generally establishing a power stronghold.[1248]

During this time period, Europe was coincidentally broken down into nation-states, which dealt with the limits of state expansion, lack of resources, and a high demand for security and domination over each other, driving them to seek power and wealth overseas.[1249] There was thus motivation to explore and/or colonize through trade competition, great

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1245 *Parchami,* p. 105. See also *Cooper,* pp. 158-160.

1246 *Fernández-Armesto*, pp. 184-191; *Scott*, pp. 1, 3.

1247 *Cotterell,* p. 239; *Tilman,* p. 17. See for example *Cooper,* pp. 159, 163-168.

1248 Exploration around the globe started as early as the 15th century, the Spanish and Portuguese were the first European states at the onset of the 16th century that began to colonize other countries. It showed that the Spanish and Portuguese conquests could be seen as defining spaces of empire, although they were not necessarily extensions of national power but signaled the beginnings of early western European empires. Forging overseas territories (or empires) after a period of conflict and dealing with domestic upheaval, Spain and Portugal expanded westwards and eastwards from the Iberian Peninsula and through circumnavigational endeavors of various kinds literally around the globe, such as the voyages of Vasco de Gama and Ferdinand Magellan. It was the Portuguese who first colonized parts of North Africa in 1415 and later ended up as also the first colonizers of some parts of India and the Southeast Asian region, when they captured Mallorca in 1511. The former was followed by the Dutch and the Spaniards which later on superseded the Portuguese as strong European powers in the region. The Spaniards began to colonize the Philippines in 1559. The Dutch followed in around 1606-1609 through the Dutch East India Company or the so-called VOC. See *Cotterell,* pp. 240-268; *Ricklefs/Lockhart/Lau, et al.,* pp. 165-166; *Solidum,* p. 4. See also for territories explored and later occupied *Christie,* p. 6; *Cotterell,* pp. 240-268; *Fernández-Armesto,* pp. 184-190; *SarDesai,* pp. 140-141; *Tarling,* pp. 22, 40-41.

1249 *Fernández-Armesto,* pp. 177-178; *Healy/Dal Lago,* p. 4; *Sèbe,* p. 125; *Tarling,* p. 22.

wealth accumulation, cultural expression, or the need to secure and extend political power.[1250]

The age of absolutism coincided with colonization and exploration in the 17th century, specifically during 1650 to 1720.[1251] While the first signs of absolutism occurred in the 13th to 14th century through efforts to have state monopoly on coercion and taxation, absolutism came into full throttle later on when rulers of continental Europe extended their powers.[1252] Although some western sovereigns had representative bodies such as parliaments, councils, etc., sovereigns of France, Prussia, Russia, Austria, and Sweden, in particular, became absolute rulers who are above challenge from within the state itself.[1253] Asserting a supreme right to maintain order, proclaim laws and levy taxes through a centralized and efficient bureaucracy, absolutism during this era was a response or effort to reassert public order and coercive state authority after several years of war that badly disrupted trade and agricultural production, which contributed to social and political chaos.[1254] Further, the age of absolutism coincided with the concept of "balance of power" gradually taking hold among the many European courts, wherein great powers should be in equilibrium and one power should not be allowed to become too powerful.[1255]

Consequently, the creation of the modern state came into fruition during the said age of absolutism. Through extending their respective authorities and expanding dynastic territories, state bureaucracies were developed and long standing armies were established.[1256] Thus, even if one can say that the foundations for the modern state were laid down during the 13th or 14th century when the long-lasting and pervasive wars started between European nations, the birth of the modern state became clearer in the 18th century.

At the beginning of the 19th century, the British, French, and Americans landed in Southeast Asian shores and colonized most of the territories.[1257] Also, Europe witnessed the rise of the first French empire or as others posit, the first modern empire, which studies would show was a blend of

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1250 *Christie,* pp. 3-8; *Fernández-Armesto,* pp. 173-179.
1251 *Merriman*, p. 274.
1252 *Merriman,* p. 274.
1253 *Merriman,* p. 274.
1254 *Merriman,* pp. 275, 277.
1255 *Merriman,* p. 316.
1256 *Merriman,* p. 323.
1257 *Reid,* A History of Southeast Asia, pp. 123-124; *Tarling,* pp. 25-26.

old and new imperial regimes.[1258] Whilst the Napoleonic empire made different socio-political contributions across Europe, for purposes of this study, it is significant to note that a self-conscious discussion during the 1815 Congress of Vienna about a post-Napoleonic future after the end of this empire's reign.[1259] With the said Congress still hinging on the aftermath of the Napoleonic empire, it claimed to have restored legitimate sovereigns, reduced the number of small states, and allowed France to remain a large one, while concurrently making declarations about state morality.[1260] It was not clear however with this 1815 Congress on whether the new Europe would be a Europe of nations through the participation of British, Germanic, Russian, and Austrian-Hungarian empires.[1261] It was clear though that there was by post-Vienna Congress a rise in industry, and subsequently, wealth and power, though asymmetrically distributed.[1262]

Interestingly, with the industrial progress being experienced by Europe during these years, the marriage between throne and altar came to an abrupt end when Europe was convulsed by revolution in 1830 to 1931 and at a bigger scale never seen before in European history.[1263] In the meantime, the idea of a European-wide consensus was later reinforced in the Conferences in Berlin and Brussels in 1884 and 1890, respectively, which set out rules of the expansion of overseas empires and definitions of boundaries.[1264] By this time, there was acknowledgment that empire-making and eventually, world domination, was part of 19th century European history.[1265]

Exploration and colonization in Africa started in around 1879 through King Leopold II of Belgium acting as a private citizen and organizing the Congo Company to explore Central Africa.[1266] Soon after, other European countries followed by conquering and competing for other parts of the African continent.[1267] Subsequently, the European powers and America divided the entire Pacific region in their quest for economic advantage

1258 *Cooper,* p. 168.
1259 *Cooper,* p. 171; *Merriman,* pp. 587, 589-592.
1260 *Cooper,* p. 171; *Merriman,* pp. 592-595.
1261 *Cooper,* p. 171.
1262 *Merriman,* pp. 844-857; *Stråth/Wagner,* p. 7.
1263 *Aston*, p. 331.
1264 *Cooper,* p. 171.
1265 *Cooper,* p. 171; *Stråth/Wagner,* p. 7.
1266 *Merriman,* p. 959.
1267 *Merriman,* pp. 959-977.

and political power.[1268] By 1913 or shortly before the First World War began, one could see that in Southeast Asia alone, the French colonized Indochina; the British, the Malay states and Brunei; and the Dutch, Indonesia.[1269] Japan was the only country in Asia which maintained real independence, because even if Thailand escaped imperialism and remained independent, it was at the cost of losing some of its territories to the British and French.[1270] By this same time period, the Americans colonized the Philippines after the latter declared in 1868 independence from the Spaniards (which colonized the former for 333 years).[1271]

The relationship of Europe during this colonial experience with its colonies became intrinsic to the former's identity during this period.[1272] Moreover, the European colonizers could be described as producers of norms and changes in the countries they have colonized, which is a trait carried on until the present with the European Union, as will be discussed in the next chapters. In relation to this, there was internally in Europe during this time period a continuous evolution of patterns of thought and there were coinciding movements in Europe that reflected human progress such as the granting of more democratic rights, etc.[1273] Noticeably however was that such ideas of human progress, etc. did not necessarily translate to what the actual circumstances were.[1274] As Deutsch illustrated, there are two kinds of European reality: there was unprecedented colonial expansion in other parts of the world such as Asia and Africa while democratic rights are being granted to male citizens in most European countries.[1275] And while the promotion of industrial-wage-labor-based economies was flourishing, one can equally witness the use of chattel slavery, forced labor, or indentured-labor-based ones somewhere else.[1276] In this respect, any true sense or idea of human progress or democratization that occurred post-colonialization should not be attributed to the

1268 *Merriman,* pp. 977-984.
1269 *Cotterell,* pp. 239-268; *SarDesai,* pp. 87-132; *Tarling,* pp. 39-41. See also *SarDesai,* p. 140.
1270 *Merriman,* p. 577; *Solidum,* p. 4. See for further information, *Ricklefs/Lockhart/Lau, et al.,* p. 167; *SarDesai,* pp. 133-139; *Tarling,* pp. 69-74.
1271 *Ricklefs/Lockhart/Lau, et al.,* pp. 227-237.
1272 *Kennedy*, p. 20.
1273 *Healy/Dal Lago,* p. 3. For further illustrations see *King*, pp. 3-26; *Robertson*, pp. 141-165.
1274 *Deutsch*, p. 36; *Scott,* p. 3.
1275 *Deutsch,* p. 36.
1276 *Deutsch,* p. 36; *Pacquette*, pp. 296-300.

European colonizers themselves, even if sometimes it was a legacy attributed to them, but instead through human progress and democratization on the part of the colonized occurring as reflex to the colonizers' stimuli of aggression and inhumane treatment.[1277]

This duality of reality has been created in the first place between the European world and its colonies from how the European colonizers viewed their colonized states. This same point of view quite explains equally the notion of European leadership in the success of its explorations and colonizations in general. It was not uncommon for European colonizers to imbibe the idea of how the countries they colonized, especially Africa, constituted the barbarian "other" and not part of the "modern World" – even to the point that one European explorer in 1830 even said how Africa lied on the threshold of world history but was not part of it.[1278] Indeed, the sense of European superiority – the sense that its societies were in some way ahead of all others – was strong and widespread – even if in hindsight, there is not much difference between social and economic life in Europe and other parts of the world, particularly Asia.[1279] Significantly, the practices and norms of the European Union with respect to its external actions is highly indicative of this belief, as will be further discussed in the next following chapters, when it flexes its normative powers towards others, by projecting its values and beliefs – even to the point of unsolicited intervention.[1280]

As to why this paradigm was necessary, it was seemingly to legitimize or rationalize their actions: it was "predominantly self-congratulatory" and made Europeans feel good and had little to do with the colonized countries themselves.[1281] This notably resonates what the Romans used before to justify interventionalist expansionism, with the sugar coating of altruism and humanitarianism.[1282] Thus, with such a mentality, colonial enthusiasts in Europe took upon themselves to embark on their colonial

1277 See *Deutsch,* p. 36.
1278 *Bose*, p. 47.
1279 *Stråth/Wagner,* pp. 4-5, 6.
1280 One need not look further than the example given in the introduction as to how the EU after the Cold War has started projecting its values and beliefs to the ASEAN and ASEAN member states by introducing discussion on human rights and democratization together with aids and economic assistance, which the ASEAN believed to be undue intervention.
1281 *Deutsch,* p. 35.
1282 See *Deutsch,* pp. 36, 37.

project because they purported the idea that they needed to civilize or enlighten those which allegedly needed it.[1283]

This idea more or less influenced how colonization brought new definitions and demarcations. In Asia, one could witness changes to existing national borders, the creation of modern political and administrative institutions, establishment of some basic parameters of economic systems, as well as industrialization and modern internal development through the introduction of Western laws, urban planning, educational institutions, immigration policies, money markets, location of administrative centers, as well as transportation and communication lines.[1284] In addition, the colonized states were fortified against neighbors thought to be hostile, were made part of an international network of posts subject to a single authority, and governed by regularly replaced administrators.[1285] This could have possibly mirrored the development in Europe of the "modern state", through the growth in authority of the central governments, which was evident through its growing agencies and responsibilities, higher fiscal income, and much enlarged armed forces.[1286]

While these observations might be equally applicable to the African colonized states, accounts of violence were more known. Despite the image of bringing enlightenment and civilization, what was initially seen from European colonizers were instead violence and abuses. Colonizers were said to not restrain from violent means should it be deemed necessary to curtail activities in view of the values it wanted to espouse.[1287] Moreover, slavery continued to be a practice in African colonies and later on, colonizers had no qualms to forcefully recruit people to send off during the First World War under the notion of empire as a legitimate polity in which all members, including the colonized, had a stake.[1288]

Indeed, terror and violence tactics regardless of whether in Asia or Africa – mass slaughters, collective punishments, etc. – were defining char-

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1283 *Parchami,* p. 105. See also for explanation of "civilizing mission", *Merriman,* pp. 995-996.

1284 See *Deutsch,* p. 37.

1285 See *SarDesai,* pp. 141, 146; *Tilman,* p. 17.

1286 See *Reid,* A History of Southeast Asia, p. 121.

1287 *Scott,* p. 3. There were accounts of the South African War, King Leopold's Congo policies, German atrocities in South-West Africa, and persistence of large-scale African resistance to repressive forms of colonial rule and instances of "ferocious economic exploitation" that had ran counter claims on the purpose and benefits of the colonial project. See also *Deutsch,* p. 38.

1288 *Cooper,* p. 185; *Deutsch,* p. 38.

acteristics of colonization and imperialism to maintain control.[1289] This "terrify-and-move-on" aspect of colonial rule nonetheless reflected weaknesses of routinized administration and policing employed by European colonizers and the need to keep administrative costs low at all times.[1290] At the end, notions of "modernity" and "European civilization were like a contagious disease to the African people and the consequent de-tribalization in Africa haunted European imagination, so much so that colonizers revisited their policies."[1291] The result was to perhaps adopt a strategy of "indirect rule" – especially for those under the British administration (something the British learned from the Romans) – which still encourage economic development (for government revenue tax purposes and benefits of European companies) but to maintain African political institutions, customs and traditions, and even restore the same if needed in areas destroyed by European rule.[1292]

This notwithstanding, and regardless of whether being in Asia or Africa, the colonial experience and the changes it brought consequently caused economic dislocation and distress and had the undesirable effect of actually lowering the economic well-being of people.[1293] Traditional structure and values of rural society was undermined intentionally – ultimately disrupting its economy and way of life, resulting in changes in the social strata.[1294] With the introduction of modern internal development and other forms of innovation, most colonizers reinforced distinction between elites and masses, and social distances were prescribed, which defined and delineated social classes.[1295] In Africa, for example, social research showed relentless poverty and insecurity in African cities, with evidence of joblessness, low skill levels among workers and presence of "large floating populations" in cities.[1296] In addition, colonization brought the non-development of a common language and past, which, if combined with insecurities of an urban life, prompted people to maintain rural ties instead.[1297] Any quest to fit African urbanization and industrialization into any universal model was strong but there were too many countertenden-

1289 *Cooper,* p. 157.
1290 *Cooper,* p. 157.
1291 *Deutsch,* p. 38.
1292 *Deutsch,* p. 39.
1293 See *Parchami,* p. 105.
1294 *SarDesai,* p. 161.
1295 *Reid,* A History of Southeast Asia, pp. 130-132; *SarDesai,* p. 161.
1296 *Cooper,* p. 39.
1297 *Cooper,* p. 39.

cies and complexities that resulted from colonization that complicates the situation.[1298]

Furthermore, the colonial experience more or less threatened the moral well-being of societies and traditions, especially since in most accounts, colonialism reinforced a different kind of cultural hybridity as well as heterogeneity amongst their colonized states.[1299] As Tilman narrates for Southeast Asia, for example, that while the Portuguese did not exert too much influence on their colonies, the French had much more impact on Vietnam, Kampuchea, and Laos; the British on Burma, Malaysia, and Singapore; the Spanish and Americans on the Philippines; and the Dutch, on Indonesia.[1300] Some colonizers were principally governed by considerations of religion with religious and civil-political authorities heavily intertwined, forcefully converting their colonies to religion such as Catholicism.[1301] As Collins described, "ecclesiastical efforts progressed hand in hand with the globalization of European political and economic power," even pointing out to the initial motivation of Christopher Columbus to outflank the Muslims by circumnavigating the globe while at the same time regaining Jerusalem for Christendom.[1302]

1298 *Cooper*, p. 39.

1299 *Pacquette*, p. 280; *Tilman*, p. 17.

1300 *Deutsch*, p. 39; *Reid*, A History of Southeast Asia, pp. 130-132.

1301 *Tilman*, p. 17.

1302 *Collins S.J*, pp. 553-554. Ecclesiastical efforts were also used by the Portuguese when they started colonizing in the eastern hemisphere, as they acted under the imprimatur of the Pope to "christianize the heathens of the world, and when they conducted a comprehensive inquisition in Goa, India in the beginning of 1560 to assure the Church that converts were not reverting to their previous religions. *Reid*, A History of Southeast Asia, pp. 112-113; *Ricklefs/Lockhart/Lau, et al.*, pp. 194-195; *SarDesai*, pp. 70-73, 82. The Spaniards were no different when they were given the imprimatur to conquer Africa in efforts to stage a war against Islam therein. The Spaniards were equally guilty of forcefully converting their colonial subjects to Christianity, like what they did when they colonized the Philippines in the 16th century. And aside from converting, colonizers like the Portuguese in the name of Christianity intervened on the laws of the colonized in efforts to make them better Christian subjects. On the other hand, in the African continent, European ideals and systems were brought in but the European colonizers like the British and French were mainly motivated by their profitable presence out of slave trade, for example, as well as their own scientific curiosity, economic interests, and existing geopolitical rivalries with one another. See *Reid*, A History of Southeast Asia, pp. 112-113; *Ricklefs/Lockhart/Lau/Reyes/Aung-Thwin*, pp. 194-195; *SarDesai*, pp. 70-73, 82

At this juncture imperial expansion or colonial experience was not the only theme in Europe's agenda. In between, ideas for an integrated Europe have been articulated before the arrival of the 20th century, which includes the establishment of an European Parliament by English Quaker, William Penn, after the state mosaic in 1693.[1303] However, strong sentiments of nationalism and great power politics overtook these propositions.[1304] Nationalism and great power politics notwithstanding, one could witness a continuous push and pull movement between integration and disintegration among the nation-states and within the international order.[1305] Two areas with such kind of movement is on economic integration and the transnational dimension in the work of legal scholars: the Anglo-French treaty of 1860, for example, inaugurated a period of commercial treaty-making so extensive, while on the other hand, there is a vast recognition that the power to create law was not exclusive to the states but also among a commonality of vital interests among a plurality of subjects and the consciousness of such commonality.[1306]

Moreover, the calls for the establishment of a European federation was prominent during the 19th century, with some pointing out that it was for a practical value of helping shape public opinion.[1307] In the late 19th century, an English historian, Sir John Robert Seeley, even considered the prospect of a United States of Europe, following the footsteps of the United States of America.[1308] Despite forwarding the prediction that Russia and the United States of America would overtake Europe in the future, the vision of empires and nationalistic interests nonetheless prevailed.[1309]

c. The Times of War

The campaign for European unity and/or integration was not over just yet as the following circumstances would show:

When the First World War began, the myth of European imperial superiority and invulnerability was seemingly debunked.[1310] Included herewith

1303 *Healy/Dal Lago,* p. 5.
1304 *Craig/de Búrca*, p. 4.
1305 *Stirk*, p. 12.
1306 *Stirk,* p. 13.
1307 *Stirk,* p. 17.
1308 *Stirk,* p. 17.
1309 *Stirk,* p. 17.
1310 *Stirk,* p. 17.

was the crumbling down of the purported reputation of natural sovereignty of European culture, its economic rationality, or political mastery.[1311] At the same time, it did not help that in throwing support to the Allies, the United States chose to put an ideological sugarcoating over the aims of the Allies during the war.[1312] If the Allies were fighting for the right to self-determination for all the peoples of Europe, it should not be surprising that the colonized states would demand for such right as well.[1313] Moreover, the disastrous effects to Africa brought by the First World War became known: there was not only the forced recruitment of African soldiers, as mentioned earlier, to die in the trenches of Flanders but there was also the incompetent and brutal conduct of war in East Africa that allegedly resulted in the death and serious injury of a quarter of a million African civilians.[1314] This resulted in Europe not only being confronted with the problems of the war but also problems in their colonized states.[1315]

Not long after, the Japanese interregnum and Second World War happened. Acting through the "Greater East Asia Prosperity Sphere" campaign, Japan conquered the Western colonies in Asia, particularly the southeast portion, as an alternative source of supply to sustain itself during its war against China and eventual conflict with Western powers.[1316] Japan eventually allied itself with Germany and Italy in the Second World War, and brought the war to the Southeast Asian region.[1317] This consequently caused problems with Europe, or the allies in general despite for example the establishment of America and Britain of the Supreme Allied Command in Southeast Asia ("SEAC") in August 1943.[1318] With the Japanese interregnum dismantling European and American colonial administrations, allied supporters in the colonized countries found themselves imprisoned or punished for continuing to support European and/or American endeavors.[1319]

1311 *Beeson,* p. 8; *SarDesai,* pp. 204-205.
1312 *Deutsch,* p. 39.
1313 *Christie,* p. 11.
1314 *Christie,* p. 11.
1315 *Deutsch,* p. 39.
1316 *Christie,* p. 11. See also *Cotterell,* p. 270; *Ricklefs/Lockhart/Lau, et al.,* p. 293.
1317 *Reid,* A History of Southeast Asia, p. 323.
1318 See *Cotterell,* pp. 270-280; *Reid,* A History of Southeast Asia, p. 324; *Ricklefs/Lockhart/Lau, et al.,* pp. 293-294.
1319 *Solidum,* p. 5.

The Japanese interregnum had an undeniable impact to the process of decolonization in Asia.[1320] To illustrate, there was the opportunity to communicate and cooperate with rural communities and espouse ideas of an independent nation – something unspeakable, even seditious, under European or American colonial rule.[1321] In the meantime, any brutality the Japanese exhibited opened further the consciousness to rid the region of foreign overlords:[1322] foreign lords did not bring anything but harm and danger. To the same degree, African colonies were demystified of the European superiority both in political and military power as well as in culture to the point that the former did not want anything to do anymore with their European colonizers, urging them in the long run to be emboldened to stand ground against colonialism.[1323]

Both the First and Second World Wars brought with them devastating effects and ruined sites – both figuratively and literally – at its helm that needed to be reconstructed addressed, among others, by new communities or ideologies.[1324] On the external aspect, Western colonizers wanted to take back the colonies and territories taken from them during the Second World War but they did not only lack the needed resources to do so but after the war, there was also a differently charged spirit of nationalism and opposition to colonial rule that prevented re-colonization.[1325] There was shaking of European self-confidence and for both Africans and Asians, there was the experience of contingency of imperial rule.[1326]

Despite this, some Western colonizers like the French, British, and Dutch had difficulties letting go and thus, negotiations and revolutions anew and all in efforts to gain independence occurred.[1327] Stating it dif-

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1320 *Reid*, A History of Southeast Asia, pp. 324, 326; *Ricklefs/Lockhart/Lau*, *et al.*, p. 294.

1321 *Beeson*, p. 8; *SarDesai*, p. 204. There were also student leaders, nationalists, activists, and politicians who were able to voice out their ideas, which would have not been plausible under colonial rule. See for how transition to independence movements were supported by the Japanese, *Ricklefs/Lockhart/Lau*, *et al.*, pp. 300-316.

1322 *Reid*, A History of Southeast Asia, pp. 327-331. See also *Ricklefs/Lockhart/Lau*, *et al.*, p. 316.

1323 See *Deutsch*, p. 39.

1324 *Ioannou-Naoum-Wokoun/Ruelling*, p. 100; *Reid*, A History of Southeast Asia, p. 326.

1325 *Couperus/Kaal*, p. 1.

1326 *Cooper*, p. 187.

1327 See *Christie*, p. 16; *Cotterell*, pp. 287-291; *Ricklefs/Lockhart/Lau*, *et al.*, p. 317; *Tarling*, p. 120.

ferently, the colonized were willing to take up arms just to remove themselves from the clutches of their European colonizers and gain their autonomy without further foreign intervention. Asian countries subsequently gained their independence in from 1946 to 1957.[1328] Moreover, Asian colonies were organizing themselves to better deal with continuous problems brought by colonization.[1329]

As regards African colonized states, there were equally various social and political movements – even stages of civil unrest and war – while asking for equivalence one after another, as well as the general desire for cultural and political autonomy "conjugated with the quest for material improvement."[1330] One can cite incidents such as the Algerian War and the politics of decolonization in sub-Saharan Africa as examples.[1331] At first, colonizers such as the British and French tried to spin colonial rule out with a development idea for the region but colonial rule eventually fizzled out as there was revolutionary confrontation and the escalation of demands that "threatened to turn the rhetoric of imperial legitimacy into assertion of equivalent rights, voice, and standard of living."[1332] At the end of the day, especially in the context of a postwar decade, the costs of maintaining an empire and instilling development and social democracy were high.[1333] Eventually colonial rule in Africa also fell, with its interventionist movement collapsing first.[1334]

Within Europe on the other hand, there was as regards the build-up of society a transition from a society of communities to that of individuals, which is often referred to as a paradigm shift from a community-based society to an individual-based society.[1335] Within Europe, the notion of community permeated plans of rebuilding wherein the premise was that community is the social glue through which people tried to come to terms with the devastation brought by war, "where they tried to heal their wounds or urge for the redemption of past injustices." Accordingly, the many panaceas for the moral degeneration of humankind, which included

1328 See *Christie,* p. 16; *Cotterell,* pp. 291-294; *Ricklefs/Lockhart/Lau, et al.,* p. 317.
1329 See *Acharya,* Whose Ideas Matter?, p. 34; *Cooper,* p. 188.
1330 *Cooper,* p. 38.
1331 *Cooper,* p. 38.
1332 *Cooper,* p. 187.
1333 *Cooper,* p. 188.
1334 *Cooper,* p. 188.
1335 *Ricklefs/Lockhart/Lau, et al.,* pp. 321-345.

mass atrocities, etc., rested on a myriad of notions of what community is.[1336]

Aside from the foregoing, one could witness a gradual process in the late 1940s of the division of Europe into two spheres – the western was linked to the United States while the eastern was linked to the Soviet Union.[1337] If one may recall, this splitting into two world powers was already predicted by John Seeley when he proposed the concept of the United States of Europe.[1338] The Soviet Union, through its leader Josef Stalin, wanted to ascertain territorial security against future attacks, especially from Germany.[1339] He thought that the best way to achieve the same is to have buffer states in Eastern Europe and a disabled Germany.[1340] Poland was the most important buffer state of them all, given that it was through said country that Germany was able to conquer the Soviet Union in 1941.[1341] Through Poland and other buffer states, the Soviet Union would be able to build a sphere of influence.[1342] Likewise, Stalin thought of disabling Germany through various reparation payments in addition to economic and military restrictions that would impede German recovery for at least ten to fifteen years.[1343]

The United States was no different in pursuing goals in Europe as the war ended in 1945. It wanted to consolidate peace and prosperity in a new European-American relationship, which in turn would increase America's global influence, both economically and otherwise.[1344] This is very compatible with American foreign policy, which has always been to "maintain an external environment conducive to the survival and prosperity of the nation's domestic institutions."[1345] The methods employed in pursuit of the same has been notably varied and diversified. As Gaddis described, "methods employed in this search for security have varied considerably over the years: utopian efforts to reform the entire structure of international relations have coexisted with cold-blooded attempts to wield power within that system; military establishments have been both massive and

1336 *Scott,* p. 3.
1337 *Couperus/Kaal,* p. 1; *Ioannou-Naoum-Wokoun/Ruelling,* p. 100.
1338 *Stirk,* p. 17.
1339 *Messenger*, p. 36.
1340 *Messenger,* p. 37.
1341 *Messenger,* p. 37.
1342 *Messenger,* p. 37.
1343 *Messenger,* p. 37.
1344 *Messenger,* p. 37.
1345 *Messenger,* p. 37.

minute; interventionism has alternated with isolationism; multilateralism with rigid economic nationalism."[1346]

The differing views as above stated were highlighted during the tripartite agreements reached in 1945 in Yalta and Potsdam, respectively.[1347] In Yalta, Stalin wanted Soviet Union-friendly governments to be established in Poland and other Eastern European states.[1348] In other words, he wanted to build spheres of influence, which for all intents and purposes is a form of integration. The United States and Britain did not have qualms about the Soviet Union gaining influence in Eastern Europe and they even suggested that the communist party Lublin Poles in Poland could help in such endeavor.[1349] And although US President Roosevelt was in favor of Soviet-friendly Poland with some form of Soviet influence, its government should not merely be a Soviet puppet but still be able to maintain a level of independence in domestic policy.[1350] For example, there ought to be elections to give a chance to non-communist parties in Poland to go against Lublin Poles for government positions.[1351] Basically, Roosevelt wanted the Soviet Union to be discreet in establishing control over other countries, inasmuch as under the façade of democratic procedures.[1352] Additionally, Roosevelt wanted Stalin to abandon further attempts to spread communism outside the Soviet Union.[1353]

The Yalta conference resulted in the Declaration on Liberated Europe, which laid down how freed states from German control would go back to normal political lives and included a statement about how free elections were imperative.[1354] It is to be understood that even if the Declaration refers to "Europe", it actually refers only to Poland and the eastern European states.[1355] With respect to occupied Germany, there has been agreement in the same conference that the Allied Control Commission would be created as a form of cooperation among America, Britain, France, and the Soviet Union in running of the country.[1356] Last but not the least,

1346 *Gaddis*, p. 386.
1347 *Gaddis*, p. 387.
1348 *Messenger*, p. 37.
1349 *Messenger*, p. 37.
1350 *Messenger*, p. 37.
1351 *Messenger*, p. 37.
1352 *Messenger*, p. 37.
1353 *Gaddis, p. 388.*
1354 *Gaddis*, p. 388.
1355 *Messenger*, p. 38.
1356 *Messenger*, p. 38.

there was likewise agreement on key Soviet demands on its right to reparations.[1357]

In spite of the abovementioned agreement, cooperation did not wholly work due to the differing interpretations of the above involved countries.[1358] Differences in interpretation prompted the United States thereafter to look at Soviet Union's actions as litmus tests on the latter's true intentions, on whether cooperation is compatible with American national security goals.[1359] It became apparent soon after that the Soviet Union equated security with an insatiable craving for control over territory and states, which would ultimately undermine cooperation.[1360] And rightly so: Stalin never gave any indication the Soviet Union would make good the conditions agreed upon during the Yalta Conference.[1361] And when then US Secretary of State James Brynes was chastened for recognizing both Bulgarian and Romanian communist governments, it became apparent that the United States thought that the Soviet Union was failing the litmus tests miserably.[1362]

The events that followed illustrate the importance of trust among states for integration to be successful and effective. At this point in time, Germany was admittedly at the heart of changing threat perceptions of American policy-makers.[1363] Even if the Potsdam conference resulted in an agreement that the four powers have autonomy of decision in their respective spheres of influence, the seeds of distrust could not anymore be disregarded.[1364] Such distrust grew further in 1946, when George Kennan sent a "Long Telegram" from Moscow to the State Department in Washington, stating therein that the insecurity of Soviet leaders, together with the ideologies of Communism, sets the Soviet Union on an expansionist course.[1365] These worries were arguably valid as there was not only an

1357 *Messenger*, p. 38.
1358 *Messenger*, p. 38. For example, Stalin got the idea that he could make Poland a satellite state but the Americans however expected an election to be held immediately. When the Truman administration succeeded Roosevelt's in the US, it accepted the foreign policy of allowing the Soviet Union to establish influence in Eastern Europe and that elections in Poland would not likely ensue.
1359 *Messenger*, p. 38.
1360 *Messenger*, p. 38.
1361 See *Messenger*, p. 38.
1362 *Gaddis*, p. 388.
1363 *Messenger*, p. 38.
1364 *Messenger*, p. 39.
1365 *Messenger*, p. 39.

employ of a "crude combination of internal subversion and external pressure" that allowed the Soviet Union to control countries such as Poland, Bulgaria, Romania, East Germany, Turkey, Iran, and Manchuria between 1944 and 1946, but there was also, among other things, the revival of an international communist movement, which showed clear prospects of unlimited international expansion.[1366] Truman's suspicious and worries were further fueled when he brought in Winston Churchill at Westminster College in Missouri, and the latter gave his famous speech about the Soviet Union placing an "iron curtain" all over Eastern Europe.[1367] This meant that the West had to act quickly to prevent the Soviets from expanding their influence further.[1368]

The tone of American policy further changed when Britain found itself in economic crisis and pleaded the United States to fill in the responsibility of supporting Turkey and Greece.[1369] There came a clearer realization for the United States: to be able to have a congenial international environment, Europe should not fall in the hands of a single, hostile state and it was imperative to ensure a balance of powers within the region.[1370] In agreeing to fill in Britain's shoes, America showed that it felt obligated to defend democracy wherever it was threatened by Soviet and Communist expansion.[1371] This eventually became known as the Truman doctrine and the prevailing theme of the Cold War.[1372] Subsequently, the aid given by the US to Turkey and Greece represented the containment policy in action: this was the first situation in which special appropriations were necessary to carry out the United States' program.[1373]

It has to be clarified however that despite such strong words from Truman, the United States never meant to equate the totalitarianism being seen from the Soviets as that of Nazi Germany prior to and during the Second World War, especially as evinced by its actions and participation in the recent Second World War.[1374] Despite the ideological differences, the United States has expected cooperation from the Soviet Union in re-

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1366 *Gaddis*, pp. 388-389; *Messenger*, p. 39.
1367 *Gaddis*, p. 388.
1368 *Messenger*, p. 39.
1369 *Messenger*, p. 39.
1370 *Gaddis*, p. 389; *Messenger*, p. 39.
1371 *Gaddis*, p. 386.
1372 *Gaddis*, p. 386; *Messenger*, p. 39. See also *Ioannou-Naoum-Wokoun/Ruelling*, p. 100.
1373 *Messenger*, p. 39.
1374 *Gaddis*, p. 389; *Messenger*, p. 39.

constructing a peaceful postwar world.[1375] The United States however felt that the direction Stalin was bringing the Soviet Union into was making cooperation impossible and incompatible with the US foreign policy of ensuring balance of power in Europe.[1376]

In the meantime, Germany remained at the epicenter of policies of reconstruction and revitalization, especially with respect to the Western allies, and dealing with the said country after the war was an influential factor in the Cold War and European integration.[1377] Disagreements over Germany's reconstruction coincided with the Cold War and by then, the Americans argued that Germany needed to be restored quickly even if the same means losing Soviet cooperation.[1378] Plans were then made to combine the British and American zones to improve economic development in Germany, to which the French were initially aloof.[1379] Thereafter, the United States launched the Marshall Plan in June 1947 to revitalize Europe, including Germany, economically.[1380] European countries, including the Soviet Union, should work together to plan economic reconstruction, with the promise of American financial aid if such plan emerged.[1381] The Marshall Plan had many objectives in mind, including but not limited to, revitalization of the Western European economy, the diffusion of nationalism, including revitalization of German nationalism, and the need to contain possible Soviet expansion in Western Europe.[1382] Notably, the need to revitalize German nationalism was grounded on the idea that German resources were important in strengthening Western Europe.[1383] On this note, the French naturally was opposed to the thought that Germany was integral in taking Western Europe out of economic despair.[1384] Instead, French wanted to be ahead of Germany in certain industries, including steel, which was opposite to what the Marshall Plan was proposing: less about competition more on coordinating together each one's recovery measures – the initiatory steps toward integration and cooperation.[1385]

1375 *Gaddis*, p. 387.
1376 See *Gaddis*, p. 387.
1377 *Messenger*, p. 40.
1378 *Messenger*, p. 40.
1379 *Messenger*, p. 41.
1380 *Patrick*, p. 238.
1381 *Messenger*, pp. 42, 51.
1382 *Messenger*, p. 42.
1383 *Messenger*, p. 42.
1384 *Messenger*, p. 42.
1385 *Messenger*, p. 42.

It would seem that the Marshall Plan was fueling the flames at this point since the idea of unity within Europe had already shot into popularity after 1945, when various movements aimed at European integration were formed one after the other across Europe: various political families across Europe started forming organizations aimed at a federalist Europe.[1386] After the Second World War, many realized that cooperation created on a loose governmental basis, which is similar to the League of Nations and which operated in between the two world wars, could not provide a sufficient guarantee and safeguard for peaceful coexistence and development across and within the European states.[1387] Moreover, the Second World War has evinced that a state would not mind breaking existing cooperation with other countries and even starting a war should the same further its interests.[1388] Additionally, most in the western part of Europe realized after splitting up in the Second World War that Europe could become relevant again politically and economically, after suffering severe damage and loss, through integration.[1389]

In light of these realizations, regional economic cooperation seemed the viable option to boost many European countries with fragmented national markets, and also for recovering and bolstering the position occupied in the world economy.[1390] Admittedly however, these sentiments were still very much overshadowed by doubts and fears as regards integration, prompting most to prefer intergovernmental cooperation, in line with existing traditional policy-making of nation-states.[1391] Thus, when Western European officials met up in July 1947 vis-à-vis the framework laid down by the Marshall Plan on integration, they came up instead with an organization of intergovernmental nature through the establishment of the Committee on European Economic Cooperation, which later became the Organization for European Economic Cooperation ("OEEC").[1392] Although the aim of the Committee was to promote European trade, foster economic development and stability, distribute and coordinate the distribution of the aid received through the Marshall Plan,[1393] it was not what the Americans asked for because there was neither the establishment of

1386 *Messenger,* p. 42.
1387 *Horváth*, p. 26.
1388 *Horváth,* p. 25.
1389 *Horváth,* pp. 25-26.
1390 *Horváth,* p. 26. See also *Ioannou-Naoum-Wokoun/Ruelling,* p. 100.
1391 *Horváth,* p. 26.
1392 *Horváth,* p. 26. See also *Ioannou-Naoum-Wokoun/Ruelling,* p. 100.
1393 *Messenger,* p. 42.

strong, central institutions, nor the real sense of integrated, transnational planning for recovery.[1394]

At this point, one can already see visible traces of how the Cold War was related to the process of European integration by the manner the Soviet Union reacted to the various stages of the said process.[1395] As mentioned earlier, the Marshall Plan was meant to be inclusive of all European countries, including the Soviet Union. To the surprise of other participants, representatives of the Soviet Union were present during the July 1947 meeting and as Messenger explained, there are good reasons for their attendance: the fact that the Cold War has not completely set in, which makes reconciliation still possible albeit the chances are slim, and that the Soviet Union would benefit themselves should they take part of the American monies for their own rehabilitation.[1396]

The attendance was however short-lived with the seemingly self-reinforcing reaction by the Soviet Union to walk out of the July 1947 meeting in response to intelligence reports that the Marshall Plan was meant to "close ranks" among the United States and its western allies to ultimately break Europe into two blocs.[1397] Such closing of ranks by the Americans and western allies prompted further the Soviet Union to secure its own sphere in the east: a similar conference of primarily Eastern European communist parties was held. An organization called Cominform was formed in October 1947, and the same symbolized the Soviet Union's acknowledgment that Europe was divided into two irreconcilable camps.[1398] Cominform's leader, Andrei Zhdanov, mirrored Truman's speech, suggesting a high level of distrust, suspicion, and ideological conflict between the superpowers.[1399] As if to mirror the US containment policy, the Soviet Union employed a policy of "retrenchment" by expelling non-communist parties from government and purging political leaders who did not follow Stalin's lead.[1400] Such retrenchment policy led Western statesmen to consequently fear that the same was only the beginning of the Soviets' efforts to increase their influence, especially considering the spread of communist parties in

1394 *Horváth,* p. 28.
1395 *Ioannou-Naoum-Wokoun/Ruelling,* pp. 100-101; *Messenger,* p. 50.
1396 *Messenger,* p. 51.
1397 *Messenger,* p. 52.
1398 *Gaddis,* pp. 387-389.
1399 *Messenger,* p. 39.
1400 *Messenger,* p. 40.

central and western Europe and the support the Soviets give those who initiated coups in some areas of Europe.[1401]

Meanwhile, the intergovernmental nature of cooperation discussed by the western allies continued on when, Churchill presided over in May 1948 the Hague Congress. This was attended by European federalists, former political representatives, and current government officials, which resulted in the creation and establishment of the Council of Europe on 05 May 1949.[1402] Composed of Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, and the United Kingdom, the Council of Europe was fueled by Churchil's idea of a "United States of Europe" but did not represent a block aiming at integration, but rather a "regional international organization in its traditional sense."[1403]

Interestingly, even if Britain was the one who took the reins in leading the establishment of the Council of Europe, it did not exactly meet expectations in promoting integration based on the American point of view. Americans assumed that they could find a stark supporter with the British as the leader in promoting the idea that economic recovery and national security was more attainable through a supranational framework that integrated Europe, including Germany.[1404] The Marshall Plan as can be seen above was actually premised on this idea.[1405] However, Britain was adamant in leading or even participating in such Western European integrative exercise.[1406] With its colonial and commonwealth interests still at play, it was not buying the idea of far-reaching plans for European integration and did not intend to join the organization aimed at integration in which national sovereignty was restricted through the operation of supranational institutions.[1407] Britain even asked the United States a special status within the Marshall aid scheme that would connote its alignment more with the United States than with other European states: different from countries like Belgium, Netherlands, and Luxembourg, which eagerly pushed the establishment of an organization in pursuit of economic cooperation.[1408] Also referred to as the Benelux countries, these three countries previously established the Benelux Customs Union by entering

1401 *Messenger,* p. 40.
1402 *Messenger,* p. 43.
1403 *Horváth,* pp. 26-27; *Messenger,* p. 43.
1404 *Horváth,* p. 26.
1405 *Messenger,* p. 43.
1406 See *Cini*, p. 20.
1407 *Cini,* p. 20; *Ioannou-Naoum-Wokoun/Ruelling,* pp. 102, 104.
1408 *Craig/de Búrca*, p. 3; *Horváth,* p. 27.

the relevant treaty in September 1944 and effectuating the same in January 1948.[1409]

While the foregoing incidents were going on, the Soviet Union later on supported the coup staged by Czech communists in February 1948 against their coalition partners and was viewed by Stalin as a continuation of its retrenchment policy, clearing up any commixtion occurring in their camps and not necessarily an attack against the West.[1410] While this evinces that Soviet expansion may not necessarily be military in nature, the Americans took upon themselves to recast their containment policy in more military terms, and that it was imperative to strengthen Western Europe politically and economically to prevent what happened in Czechoslovakia again and prevent further Soviet Union expansion.[1411] However, the United States experienced a stumbling block in its endeavor with Britain's reluctance to join the former's envisioned Western European integrative exercise, which was thought to be imperative to the success of the Marshall plan.[1412]

Additionally, it was becoming high time to address the white elephant in the room: the issue of Germany. The four occupying powers had their differences as to how they wanted to deal with their former enemy: France and the Soviet Union thought of Germany as still an ultimate threat though they differed as regards Germany's reconstitution as a single country – France strongly opposed the idea while the same was alright with the Soviets as long as Germany was Soviet-friendly and severely weakened economically and militarily.[1413] On the other hand, the Americans were keen on the idea that German resources and industry was vital in the economic growth of Western Europe.[1414]

US policy vis-à-vis European integration took a new turn in around October 1949, wherein its approach "would be built on a Franco-German rapprochement and would have British and American support in the form of military guarantees, economic collaboration and other measures that stopped short of merging sovereignties."[1415] The conflict between France and Germany needed to be resolved quickly anyway as a condition

1409 *Horváth*, p. 27.
1410 *Horváth*, p. 27.
1411 *Messenger*, p. 40.
1412 See *Messenger*, p. 40.
1413 *Cini*, p. 20. See also *Messenger*, p. 52.
1414 *Messenger*, p. 41.
1415 See *Messenger*, p. 40.

precedent for a successful European Union.[1416] Having historical rivalries between the two, specifically with regard the Rheinland and Ruhr coal and steel, had been one of the sources of conflict in modern Europe.[1417] Thereafter, the French might have made things worse when after the First World War, it insisted on ruinous reparations that factored in making the Second World War happen.[1418] The French initially pursued a hard line approach against the Germans and they harbored a lingering fear of a recovering Germany that raises more issues as to how the latter's power could be controlled.[1419] Needless to state, the French were at rock bottom after the Second World War, and seeing the Germans recovering made them worry that such recovery would outstrip their own.[1420]

By the end of 1947, there was a change in mood and tone: the Four-Power cooperation on Germany had already formally broken down with the collapse of the foreign ministers meeting in December 1947 and the departure of the Soviet Union from the Allied Control Commission in March 1948.[1421] This time, the French were willing to merge its zone with those of Britain and the United States to reconstruct West Germany.[1422] While the same could easily be thought of as an abandonment of France's position towards Germany, it was not. Rather, by participating in integration and cooperative institutions promoted by the United States, the French would not only benefit from financial aid to bolster its recovery but also, they would have a say in Germany's recovery, its overriding goal since the beginning.[1423]

The Cold War factored in as well. Seeing that containment of both Germany and the Soviet Union ("double containment") was more practical, the French were more amenable to the idea of building Europe by adding West Germany to Western Europe, rather than causing more division within Western Europe and aggravating the Cold War situation.[1424] Also taken into consideration was the need by the French to access the Ruhr coal line and agreement to steel production, which was integral

1416 *Cini,* p. 20.
1417 *Horváth,* pp. 27-28.
1418 *Best*, p. 336. See also *Best,* p. 336.
1419 *Horváth,* p. 28.
1420 *Best,* p. 336; *Horváth,* p. 28.
1421 *Best,* p. 337.
1422 *Messenger,* pp. 41,44.
1423 *Messenger,* p. 44.
1424 *Messenger,* p. 44.

into their recovery and further benefit.[1425] This time however, the French seemingly learned from their mistake post-First World War and did not intend to destroy German production, although reparations ought to have been made, but rather integrate the productive forces of Germany into the new international order.[1426] Stating it simply, joining forces with the Americans and joining the integration bandwagon allowed France to have their cake and eat it too.

The first steps were taken in June 1948, when the United States, Britain, and France gave the green light for a constitutional convention that would establish the Federal Republic of Germany (West Germany), with which they established a currency – the Deutsche Mark – in their unified zones, and permitted its use in West Berlin, which although divided among the Western powers, was located within the Soviet zone of eastern Germany.[1427] Seemingly in retaliation, the Soviets introduced an East German Mark and blocked all road and rail access to East Berlin.[1428] Such so-called Berlin Blockade was the first overt conflict of the Cold War and led the Americans to airlift supplies to West Berlin.[1429] Meanwhile, West Germany continued to move into statehood with the new Federal Republic coming into being in May 1949, which prompted the Soviet Union to establish the German Democratic Republic (East Germany) the following October.[1430]

At this juncture, one could observe that aside from overt and covert interventions made by the West in response to threat perceptions, it likewise strengthened democratic and capitalist institutions, starting with German revitalization.[1431] The integration of Western Europe, politically and economically, became imperative to the process, wherein there was American support for a variety of initiatives over the next few years.[1432] One could then say that this reinforces the idea once more of how the Cold War was instrumental in a number of ways in pushing Western Europe towards supranationalism.[1433]

It must not be forgotten that while both political and economic integration became important in Europe at this moment in time, it was a

1425 *Ioannou-Naoum-Wokoun/Ruelling,* p. 101; *Messenger,* p. 44.
1426 *Best,* p. 337.
1427 *Best,* p. 337.
1428 *Messenger,* p. 41.
1429 *Messenger,* p. 41.
1430 *Messenger,* p. 41.
1431 *Best,* p. 337.
1432 *Messenger,* p. 42.
1433 *Messenger,* p. 42.

different story altogether in the beginning when European integration was equated only with political integration. This standpoint significantly changed after the establishment of the Council of Europe.[1434] It was equally important that in promoting the same, modest proposals ought to be made to be acceptable and appealing to more countries to be able to put such plans into fruition.[1435]

One should likewise note that this process of integration was not mutually exclusive within Western Europe. Central and Eastern Europe states were also embarking on a similar process: starting with the Cominform in 1947, they later formed in 1949 the Council for Mutual Economic Assistance ("COMECON").[1436] The COMECON was Moscow's further response to the Marshall Plan: its purpose was to coordinate central plans and trade relations among the Soviet bloc states.[1437] Though not a *par excellance* example of supranational integration,[1438] such formation of a political and economic cluster by eastern Europe fueled integration ambitions of western Europe, which admittedly pursued a different course altogether.[1439]

Other than the political and the economic, there was also the building of military and defense strategy in Western Europe during this time. Notwithstanding the offer of the United States to maintain military presence in Germany, the existence of the Berlin blockade gave the possibility of armed conflict.[1440] Hence, it was imperative to strengthen the security and defense system for Western Europe as a whole.[1441]

In light of this, most states were reluctant to allow German rearmament and instead wanted full commitment of the United States military to the defense of Western Europe should war erupt.[1442] This prompted the United States to propose, and later establish, the North Atlantic Treaty Organization ("NATO") in 1949 which provided political, military, and defense security against the growing Soviet threat.[1443] NATO was meant to be a political and military organization – a military alliance – that ensures

1434 *Messenger,* p. 42.
1435 *Best,* p. 337; *Horváth,* p. 31.
1436 *Craig/de Búrca,* EU Law (6th edition), p. 3.
1437 *Anderson*, p. 257; *Horváth,* p. 29.
1438 *Anderson,* p. 257.
1439 *Anderson,* p. 257.
1440 *Horváth,* pp. 29-30.
1441 *Messenger,* p. 46.
1442 *Messenger,* p. 46.
1443 *Messenger,* p. 46.

overall European security.[1444] Notably, the presence of the United States meant a guarantee in military terms to western European states. But at the same time, western European states yearned for an economic-centered integration that could hopefully not only negate the communist threat, but also make the western part of Europe independent of American influence.[1445] In other words, the ideal situation would be to achieve their ambitions without American intervention.

On 09 May 1950 Robert Schuman (the then French minister for foreign affairs) and Jean Monnet (the then head of the planning department of the French government) forwarded a proposal which will be better known as the "Schuman Plan", which would eventually lay down the foundation for European integration.[1446] The Schuman plan focused on building on the idea of European unity while working on a German-French axis.[1447] Working on a step-by-step basis, Schuman and Monet employed the classic carrot on a stick approach and focused on a crucial area: central control of coal and steel industries in Europe would make preparations for war impossible.[1448] Creating a common market for German coal and French iron ore, which would then offer a number of economic advantages, would also make preparations for war by either France or Germany impossible.[1449] Said proposal was timely considering that the coal and steel industries are the foundation on which other industries, including armaments, were grounded on, but likewise, the shortages experienced in both industries by the forties and fifties.[1450]

In line with this, the plan was to put the German coal and French iron industries under a single central authority in a system open to other countries as well.[1451] It was a marriage between the French's goal to control Germany's recovery and the desire of the United States to foster European

1444 *Horváth*, p. 30.
1445 *Horváth*, p. 30.
1446 *Horváth*, p. 30. Even if named the "Schuman Plan", the mastermind and the international coordinator behind the creation of a common coal and steel market for France and Germany was actually Jean Monnet. He was neither a politician nor did he have political connections required to put the ideas into fruition. It was through Schumann's intervention that made the plans possible. See *Ioannou-Naoum-Wokoun/Ruelling*, p. 101.
1447 *Horváth*, p. 31.
1448 *Hartley*, p. 9; *Horváth*, p. 31.
1449 *Craig/de Búrca*, EU Law (6th edition), p. 3; *Horváth*, p. 31. See also *Craig/de Búrca*, EU Law (6th edition), p. 3; *Hartley*, p. 9; *Horváth*, p. 31.
1450 *Hartley*, p. 9.
1451 *Hartley*, pp. 9-10; *Horváth*, p. 31; *Klimek*, p. 12.

integration, using supranational management of the Ruhr's coal and steel industries as a model.[1452] Despite undergoing opposition from many, the carrot and stick approach worked and said proposal was accepted warmly by both Germany and France, together with the Benelux countries and Italy.[1453]

On the other hand, Britain and the Soviet Union was not buying into the idea. Britain was still adamant and unwilling in joining once again such far-reaching plans for European integration and was more comfortable in an intergovernmental setting, shying away from supranational organizations.[1454] As regards the Soviet Union, they had the growing perception that European integration as proposed by the Americans and its western allies was just a ploy to perpetuate any existing division caused by the Cold War and make permanent the division of Germany.[1455] This prompted Stalin to act and propose a new German peace treaty to replace the Occupation Statute in efforts to end Germany's division and thwart any further integration of West Germany in the Atlantic system.[1456] The Soviet Union also saw the integration of Germany's coal and steel industries as a blatant deprivation of any say in the management of these resources, which was askew from the idea of a neutral, unified, and demilitarized Germany as previously agreed upon.[1457]

d. New challenges while paving avenues toward regional integration

On 18 April 1951, Germany, Belgium, Italy, Netherlands, Luxembourg, and France, signed the treaty establishing the European Coal and Steel Community ("ECSC"), which entered into force on 25 July 1952.[1458] At the heart of the institutional system of the ECSC is the idea of a "high authority", consisting of independent civil servants as members nominated by their respective governments, and acting as the main executive institution with decision-making power.[1459] There was at the same time

1452 *Craig/de Búrca*, EU Law (6th edition), p. 3; *Horváth*, p. 31.
1453 *Messenger*, p. 45.
1454 *Horváth*, p. 31; *Parsons*, pp. 119-122.
1455 *Messenger*, p. 52.
1456 *Messenger*, p. 52.
1457 *Messenger*, p. 52.
1458 *Horváth*, p. 31.
1459 *Craig/de Búrca*, EU Law (6th edition), p. 3; *Hartley*, p. 9; *Horváth*, p. 32; *Ioannou-Naoum-Wokoun/Ruelling*, p. 101.

the Council composed of competent ministers of the member states to counterbalance the supranational orientation.[1460] The Council of Ministers in turn supervised the High Authority and fulfilled a consultative role and legislative function.[1461] Pursuant to the ECSC treaty further, the Assembly was established, consisting of delegates from member state parliaments and which had a consultative function, as well as a Court of Justice of the ECSC that provided a forum for legal disputes.[1462] Jean Monnet was the first president of the High Authority.[1463]

Not long after the Schuman Plan and the establishment of the ECSC, there were new pressures leading to more opportunities to be explored. On 25 June 1950, the Korean War imploded.[1464] The communists of northern Korea, who have been clandestinely assisted by covert Soviet forces, invaded the American-backed south of the country.[1465] Americans rallied its allies to halt the communists' advancement in a war that would last three years.[1466] It was apparent that the Soviet Union was then taking a more proactive role, including towards German policy as evinced by its many proposals and initiatives.[1467] The pressure for German rearmament built up due to the increasing Soviet Union threat (which was turning global) and great want for military forces on the ground in Europe.[1468]

During this time, diverging views arose among interested countries. On one hand, the Americans considered increasing military strength in West Germany, to the point of insisting to fit Germany into an integrated command structure of the NATO and lifting economic conditions limiting Germany's defense contribution.[1469] Needless to admit, the German rearmament has become the price for America's support and protection of Europe.[1470] To this end, the United States gave a "virtual ultimatum" in September 1950 to reconsider this proposition.[1471] On the other hand,

1460 *Best,* p. 337; *Craig/de Búrca,* EU Law (6th edition), p. 3; *Horváth,* p. 32.
1461 *Horváth,* p. 32.
1462 *Craig/de Búrca,* EU Law (6th edition), p. 3; *Horváth,* p. 32.
1463 *Craig/de Búrca,* EU Law (6th edition), p. 3; *Horváth,* p. 32.
1464 *Horváth,* p. 32.
1465 *Service*, p. 2.
1466 *Service,* p. 2.
1467 *Messenger,* p. 52.
1468 *Messenger,* p. 47.
1469 *Best,* p. 338.See also *Best,* p. 338; *Messenger,* p. 47; *Parsons,* p. 122; *Horváth,* p. 27.
1470 *Craig/de Búrca,* EU Law (6th edition), p. 4.
1471 *Best,* p. 338.

France and other earlier western European allies were not so eager to support such measure due to lack of fail-safety guarantees.[1472]

Given these concerns, promoters of federalism believed that political integration or European integration is the most plausible solution, or a good counter-proposal to what the US wants.[1473] This came through the idea of the European Defense Community ("EDC"), which sought to form a European defense force to be overseen by a common political and military authority.[1474] The EDC was to the German army as what the ECSC was to Ruhr – neutralize the potential threat posed by German strength by incorporating into a united European system.[1475]

Despite finding itself in a treaty to which some countries acceded to, the EDC eventually collapsed in August 1954 and promoters gave up on pursuing further.[1476] Countries like France, one of the promoters of a European army, were suddenly not so keen to lose control over its military, which it saw as integral in maintaining national sovereignty.[1477] It did not help that the British refused to join and French forces were being overwhelmed in the armed conflict in Indochina.[1478]

This being said, the rejection of a European Defense Community pulled back as well from its tracks the proposal to establish a European Political Community ("EPC").[1479] The EPC was meant to set the required European foreign policy, as well as establish a federal, parliamentary-style form of European integration, consisting of a two-level parliament with real legislative power and an Executive Council, which will act as the government of the EPC.[1480] Unfortunately for the proponents of a defense and military union however, the conditions were not compatible with the general *zeitgeist* and thus, plans for the same had to be canned in the meantime.[1481] It did not help as well that during the same time period, it was becoming

1472 *Messenger,* p. 47.
1473 *Best,* p. 338; *Horváth,* p. 27.
1474 *Best,* p. 338; *Craig/de Búrca,* EU Law (6th edition), p. 4.
1475 *Best,* p. 338; *Horváth,* p. 32; *Messenger,* p. 48. See also *Best,* p. 338.
1476 *Messenger,* p. 48. See further *Best,* p. 338; *Horváth,* p. 32; *Ludlow*, p. 17.
1477 *Ioannou-Naoum-Wokoun/Ruelling,* p. 102; *Parsons,* pp. 124-125.
1478 *Craig/de Búrca,* EU Law (6th edition), p. 4; *Horváth,* p. 32; *Ioannou-Naoum-Wokoun/Ruelling,* p. 102.
1479 *Parsons,* p. 123.
1480 *Craig/de Búrca,* EU Law (6th edition), p. 4; *Horváth,* pp. 32-33.
1481 *Craig/de Búrca,* EU Law (6th edition), p. 4; *Ioannou-Naoum-Wokoun/Ruelling,* p. 102.

clearer that the ECSC was not functioning well as hoped for by its promoters.[1482]

While the negotiations for the EDC was ongoing, the Soviet Union sent a note on March 1952 asking for immediate talks aimed at a neutral and unified Germany, an end to occupation within one year, and a ban on German participation in alliances against the big four allied countries during the war.[1483] There had been mixed interpretations on why the Soviets sent this "bombshell" note but regardless of what intent the Soviets had, their proposal was dismissed immediately by the United States and its western allies even when the Soviets came up with a second proposal asking for an all-German election to be held.[1484] The United States government instead insisted on the finalizing of the EDC and German treaty negotiations and it later became apparent to both western and Soviet policy makers that the resolution of integration, especially as regards Germany, became key to the "construction of the Cold War settlement in Europe".[1485]

Movements toward European integration were not dampened or halted notwithstanding the rejection of both the EDC and EPC.[1486] The canning of such ambitious projects led proponents of integration to give priority to the economic and political policy, while still considering the ideas discussed during the drafting of the EPC.[1487] And indeed, such was the case in the historical development of European integration.

On 01 and 02 June 1955, an ECSC meeting was held in Messina through the initiative of the Benelux states to talk about deepening and expanding economic integration, with institutional issues of possible cooperation in the area of atomic energy and a common market in general.[1488] Previously, the Netherlands proposed during the drafting of the EPC the idea of establishing a common market but most found the same too avant-garde considering that most had a protectionist economic culture.[1489] To give the idea a chance, an agreement to pursue a common market through a customs union and later through the so-called Spaak report (the committee tasked post-Messina conference to come up with a plan was headed by Paul-Henri Spaak) was reached. A proposal to have "an institutional-

1482 *Craig/de Búrca,* EU Law (6th edition), p. 4.
1483 *Messenger,* p. 53.
1484 *Messenger,* p. 53.
1485 *Messenger,* p. 53.
1486 *Best,* p. 338.
1487 *Craig/de Búrca,* EU Law (6th edition), p. 4.
1488 *Craig/de Búrca,* EU Law (6th edition), p. 4.
1489 *Craig/de Búrca,* EU Law (6th edition), p. 4; *Horváth,* p. 33.

ized community structure for the would-be organization of integration in which issues pertaining to general politics and the operation of the common market were to be handled separately was tabled as well."[1490]

Whilst that proposal would remain within the penumbra of the member states, a body with authority and central responsibility shall take up the function of ensuring the operation of the common market.[1491] Significantly, the Spaak committee report avoided talking about a supranational organization given the initial sour response to the EDC and the growing dissatisfaction with the High Authority of the ECSC.[1492] Said approach proved successful for the Spaak committee because its proposal was acceptable to all six ECSC member states and on 25 March 1957, all six members of the ECSC signed the treaties establishing the European Economic Community ("EEC") and the European Atomic Energy Community ("Euratom"), otherwise known as the Treaties of Rome, which became effective on 01 January 1958.[1493] The United Kingdom was, notably, once again invited to join said endeavor but the invitation was denied.[1494] The United Kingdom was more interested in free trade cooperation only and thus proceeded with forming the European Free Trade Association ("EFTA") composed mainly of countries not part of the EEC and Euratom.[1495]

While the institutional framework for the EEC and Euratom was based on the ECSC institutional framework, there was an apparent paradigm shift as regards decision-making.[1496] At the outset, the substantive scope seemed bigger with the same, especially concerning the EEC.[1497] While the ECSC is concerned more with creating a single market for the coal and steel industries, the EEC aims for an economic community.[1498] This aim would be reached through the following measures such as eliminating custom duties and quantitative restrictions, and of all other measures having equivalent effect; establishing a customs union – wherein trade among countries in a certain area shall be liberalized while common custom tariffs shall be imposed to those outside said area; allowing free movement of not only goods and services, but also labor and capital within the

1490 *Craig/de Búrca*, EU Law (6th edition), p. 4.
1491 *Horváth*, p. 33.
1492 *Horváth*, p. 33.
1493 *Horváth*, p. 33; *Klimek*, pp. 11-12.
1494 *Hartley*, pp. 11-12; *Horváth*, pp. 33-34; *Woods/Watson*, pp. 3-4.
1495 *Horváth*, p. 34; *Ioannou-Naoum-Wokoun/Ruelling*, p. 104.
1496 *Horváth*, p. 34.
1497 *Horváth*, p. 34; *Woods/Watson*, p. 4.
1498 *Woods/Watson*, p. 4.

Community; establishing a common policy in the areas of agriculture, transport, and competition; as well as having legal integration.[1499] The aforementioned measures in turn explains the centrality to the Community of the so-called "four freedoms", which are often regarded as the core of its economic constitution: free movement of goods, workers, capital, and establishment and the provision of services.[1500] The idea is, for example, to allow an individual to seek a job in another member state that has a high demand for workers, and consequently enriching the value of labor resource within the community.[1501]

The provisions of the EEC might have been primarily economic-centered but its aims were not exclusively so.[1502] Member states were "fueled with ideals" as well as economic practicalities, as stated in the preamble of the Treaty of Rome establishing the EEC, the EEC is seen to lay down the "foundations of an even closer union among the peoples of Europe" and the decision to pool each other's resources is to strengthen peace and unity.[1503]

The institutional framework of both the EEC and Euratom can be described to have more intergovernmental characteristics than supranational,[1504] which was crucial to the success of the Rome Treaties because if one would look into the reason why the EPC failed, it was primarily due its parliamentary orientation, to which member states of the ECSC were against even up to the negotiations of the Rome treaty.[1505]

While having more intergovernmental characteristics, a salient feature of the EEC and Euratom was the sharing of legislative and executive functions among institutions. This is characterized as the so-called "institutional balance" (as opposed to the strict notion of separation of powers): the need to ensure decision-making is made to serve the public good rather than individual interests and the same would only be achieved should the form of public ordering take into consideration equally the different interests of different sections of society.[1506] Institutional balance however is not self-executing; it presumes by its nature of normative and political judg-

1499 Treaty establishing the European Economic Community, art. 3; *Woods/Watson*, p. 4.
1500 *Horváth*, p. 35.
1501 *Craig/de Búrca*, EU Law (6th edition), p. 5.
1502 *Craig/de Búrca*, EU Law (6th edition), p. 5.
1503 *Woods/Watson*, p. 4.
1504 *Woods/Watson*, p. 4.
1505 *Hartley*, pp. 12-13; *Horváth*, p. 34.
1506 *Craig/de Búrca*, EU Law (6th edition), p. 5.

ment as to which institutions should be able to partake of legislative and executive power and what would be the ideal balance between them.[1507]

The first fifteen years of the EEC could be described by rapid internal integration: the removal of customs and other qualitative restrictions among the member states was accomplished two years earlier than the planned date in 1970 and common tariffs were introduced.[1508] In 1962, a decision has been made on working on a common agricultural policy, given that the establishment of a customs union and introduction of a common market only benefited the industrial markets.[1509] Said decision eventually led to unification within the Community in terms of agricultural protectionism.[1510] This milestone was important as it confirms the ability of the member states to cooperate with one another in areas where "considerable reallocation of revenues" was involved from one member state to another.[1511] It provided valuable insight as to what makes member states agree to a certain decision and policymaking.

In between 1958 to 1973 there was exponential growth in trading relations among the member states as a result of trade liberalization and customs union and consequently, integration led to economic boom.[1512] These positive results motivated the member states to pursue a monetary union as early as 1969 and 1970.[1513]At the beginning of the 1960s, the supranational community format has been undeniably consolidated as the "core architecture of post-war Europe."[1514] Details as to how to put this plan into fruition however had yet to be discussed.[1515] Moreover, establishing a free movement of labor and capital was easier said than

1507 *Craig/de Búrca*, p. 43.
1508 *Best,* p. 339.
1509 *Horváth,* p. 36.
1510 *Horváth,* p. 36.
1511 *Horváth,* p. 36.
1512 The period could be characterized with vast "technological development, radical modernization of the structure of the economy, dynamic expression of consumption," and remarkable increases in Gross Domestic Product ("GDP") by five percent (5%) each year. Among other things, on 14 December 1960, the OEEC was reorganized to become the Organization of Economic Cooperation and Development ("OECD"), a cooperation organization for industrialized countries. *Horváth,* p. 36.
1513 *Horváth,* p. 28.
1514 *Horváth,* p. 36.
1515 *Parsons,* p. 116.

done, although a customs union has been fairly easy to implement and all the conditions necessary for a common market has been provided.[1516]

These issues notwithstanding, the main confirmation of the success of the EEC is arguably the re-evaluation of the British political attitude towards the community. While being previously lukewarm and apprehensive, the British expressed twice – the first being in July 1961 and the second being in 1967 – their interest to join the community after seeing the advantages reaped so far by the EEC member states.[1517] This was unfortunately seen by French President De Gaulle as a threat and as such, vetoed the application on both occasions.[1518] De Gaulle's actions were arguably expected to a certain degree at the moment given that the British acknowledged how much the French were basking in the privileged role given to it by the EEC – as long as the British stayed outside.[1519] The British so far had kept abreast of European trade through the EFTA but De Gaulle likewise rejected participation in the same in order to safeguard his interests in France.[1520] These dynamics resulted unfortunately to creating complications in both the external relations and internal functioning of the communities.[1521] It is imperative to mention that during the same time period, there was an apparent tension between an intergovernmental view of the Community, as espoused by De Gaulle, and a supranational one, which was espoused by then Commission President Walter Hallstein.[1522]

These circumstances elucidate the complications of international cooperation. Despite being in a mainly intergovernmental cooperation mechanism, member states would still want to pursue their own national interests even at the expense of true integration. Although a number of states decided to form a regional organization, relations between one another are influenced by the respective idiosyncrasies of each one, which then gives an understanding of the steps needed to be taken. Herein one finds De Gaulle who was a mercantilist that prioritized exports over imports to be able to strengthen state power, and he previously wanted then for Germans, who eventually made concessions with the former, to absorb French surpluses even if American and British prices were obviously more

1516 *Horváth*, p. 37.
1517 *Horváth*, p. 37.
1518 *Griffiths*, p. 170.
1519 *Craig/de Búrca*, EU Law (6th edition), p. 6; *Horváth*, p. 37; *Vanke*, pp. 151-153.
1520 *Ioannou-Naoum-Wokoun/Ruelling*, p. 105; *Vanke*, p. 145.
1521 *Ioannou-Naoum-Wokoun/Ruelling*, p. 106; *Vanke*, p. 145.
1522 *Horváth*, p. 37.

competitive.[1523] More or less, De Gaulle was rubbing his fellow member states in the EEC the wrong way. The brewing tension coming out from this became apparent in 1965 due to transitional provisions of the treaty calling a shift from unanimous voting to qualified majority, and De Gaulle objected to the Commission's idea that more revenues would be raised through external tariffs and agricultural levies, rather than national contributions.[1524] And after it was obvious that neither De Gaulle would win the argument nor a compromise would be met, De Gaulle personally brought upon the communities a serious crisis in 1965 when he boycotted participation for half a year as part of his "empty chair policy", just because he was not in agreement with the proposals made for financing agricultural policy.[1525]

Solution was met only through the so-called Luxembourg compromise, which is basically an agreement to disagree: "even in cases governed by majority decision-making, discussion should continue until unanimity was reached whenever important national interests were at stake" but at the same time, the Council should in such circumstances endeavor within reasonable time to reach solutions that can be adopted by all.[1526] Thereafter, it would seemed that the French view has prevailed and whenever a member state would raise its national interest during discussions on a matter, the same was treated as a veto, which the other member states would respect.[1527] Qualified majority voting was the exception and not the general rule.[1528] Although De Gaulle defended the same to be in favor of member states, in reality it has just slowed down immensely the decision-making process of the communities.[1529]

In 1965, the member states of the Communities entered into the Merger Treaty, which would unite the three integration communities – ECSC, the EEC, and the Euratom – by July 1967.[1530] The Court of Justice, Assembly, Council, and the Commission, were all reorganized to serve all

1523 *Craig/de Búrca*, EU Law (6th edition), p. 6; *Craig*, p. 43.
1524 *Ioannou-Naoum-Wokoun/Ruelling*, p. 106; *Vanke*, pp. 146-147.
1525 *Craig/de Búrca*, EU Law (6th edition), p. 6; *Ioannou-Naoum-Wokoun/Ruelling*, p. 106. See for further explanation *Craig/de Búrca*, EU Law (6th edition), p. 6; *Horváth*, p. 37.
1526 *Ioannou-Naoum-Wokoun/Ruelling*, p. 106; *Vanke*, pp. 153-155.
1527 *Craig/de Búrca*, EU Law (6th edition), p. 6; *Craig*, p. 44; *Horváth*, p. 37; *Ioannou-Naoum-Wokoun/Ruelling*, p. 106.
1528 *Craig*, p. 44.
1529 *Craig*, p. 44.
1530 *Horváth*, p. 37; *Ioannou-Naoum-Wokoun/Ruelling*, p. 106.

institutions.[1531] The High Authority of the ECSC was merged with the Commission.[1532] While the name "European Communities" have been used for a long time, the Communities still retained their independent international legal statuses and only their institutions became common institutions via the Merger Treaty.[1533] Furthermore, in clarifying the competences of the three Communities since the Merger Treaty, the EEC Treaty must be applied generally in areas not specifically regulated by the ECSC and Euratom treaty.[1534]

De Gaulle resigned in April 1969 and it made possible the prospect of progress on the political front of integration considering that the pending issues left by France's empty chair policy could now be tackled.[1535] Three (3) new economic and monetary targets were placed on the agenda,[1536] while the obstacle to British entry was removed.[1537] In June 1970 accession talks began with the United Kingdom as well as Denmark, Ireland, and Norway, and following a ratification procedure, these countries, except for Norway, became members of the European Communities on 01 January 1973.[1538]

Meanwhile, there was a move for enhanced participation from the member states and intergovernmentalism. In 1970, the Davignon Report recommended the holding of quarterly meetings of the foreign ministers from the different member states, which eventually became an inter-governmental forum for cooperation in foreign policy.[1539] This became eventually known in 1973 as European Political Cooperation that enabled the EEC to be represented as one voice in other international organizations in which member states participated, but also enhanced intergovernmentalism in the Community.[1540]

At this point, the Cold War was definitely still ongoing despite the waxing and waning of the tensions between the United States and the Soviet Union.[1541] The EC did not seek to stand in for its member states

1531 *Craig/de Búrca,* EU Law (6th edition), p. 6; *Horváth,* p. 38.
1532 *Horváth,* p. 38.
1533 *Horváth,* p. 38.
1534 *Horváth,* p. 38.
1535 *Horváth,* p. 38.
1536 *Ioannou-Naoum-Wokoun/Ruelling,* p. 107.
1537 *Griffiths,* p. 169.
1538 *Griffiths,* p. 169. See further *Horváth,* p. 39; *Woods/Watson,* p. 4.
1539 *Michalski*, pp. 285-287.
1540 *Craig/de Búrca,* EU Law (6th edition), p. 7.
1541 See *Craig/de Búrca,* EU Law (6th edition), p. 7.

with regard to establishing ties with the Soviet Union or its satellites, especially given the open hostile non-recognition given to it by its Eastern European counterpart, the COMECON.[1542] Given the same, there was not much meddling involved when West Germany's foreign policy towards the Soviet Union and its eastern bloc satellites took a major turn in 1970.[1543] Prompted by complex security interests and domestic policies, West Germany's *Ostpolitik* sought to forge regional unity that could withstand the power struggle between superpowers and to promote unification by drawing East Germany into a deeper relationship.[1544]

Meanwhile, it has become undeniable that the European Communities have gained quite the increasing significance in the world economy in the 1970's due to its enlargement and this did not quite sit well with the Americans, who previously were supportive of the restoration and development of Europe.[1545] The Americans now see the European Communities more as a threat and direct competitor, which, while having protectionist aspirations, were able to present themselves in a common trade policy and was able to establish good relations with the Socialist countries and developing countries.[1546]

The increasing economic significance was nonetheless confronted with threats and challenges. Despite the economic potential harnessed by the enlargement of the European Communities, its early years could not be exactly counted as a complete success. The world oil shock caused by the Arab-Israeli War of 1973 (and which only ended in 1982 and 1983) and the breakdown of the Bretton Woods system in 1971 (which ought to have stabilized the international monetary system after World War 2) placed significant challenges to establishing a common market and furthering integration among the member states as they were individually constrained to initiate protectionist measures in light of financial difficulties being faced.[1547] It made the realization of the Economic and Monetary Union difficult.[1548] In addition to this, British membership proved difficult given that it always argued for lesser British contributions to the budget over a long period. The British were always net budget contributors due to

1542 *Anderson*, p. 258.
1543 *Anderson*, p. 258.
1544 *Anderson*, p. 258.
1545 *Anderson*, p. 258.
1546 *Horváth*, p. 39.
1547 *Anderson*, pp. 260-261.
1548 *Ioannou-Naoum-Wokoun/Ruelling*, p. 107.

increasing costs related to agricultural policy and the United Kingdom being an importer of agricultural products.[1549]

The foregoing notwithstanding, there has been greater mutual dependence among the member states in terms of micro- and macro-economic policy.[1550] By the mid-seventies, the member states had more or less common commercial policies and uniform trade policies as regards third countries.[1551] The most notable achievement by this period is the establishment of the European Monetary System ("EMS"), as a response to the difficulties confronting the EMU, which did not only create financial stability and but was also a major step toward the establishment of an economic union through connecting European currencies to the European Currency Unit ("ECU"), the latter of which represented the average value of all currencies that ensured stable exchange rates.[1552]

There was also in mid-1974 the approval of the plan to introduce a notification and consultation procedure covering economic cooperation and trading agreements with state-trading (i.e. COMECON) and oil-producing countries.[1553] The purpose of said plan was to regulate uncontrolled, competitive bidding among EC members for contracts with partners in these regions, with the Commission having primary responsibility for oversight and implementation.[1554]

Additionally, on an institutional perspective, by 1974 onwards, it became a regular occurrence for member states to consult one another through their respective heads of state.[1555] These regularized meetings, which were called otherwise the European Council, paved way for efficiency in decision-making in Europe and key decisions were made with regard to strategic issues, compromises, and guidelines.[1556] However, one must not mistake the European Council as a separate institution altogether, nor was it intended as part of the framework envisioned by the treaties; instead, it played the role of being a top-level forum that has become decisive on steps taken for further integration.[1557] Decisions made in the European Council found themselves as a framework within which binding

1549 *Horváth*, p. 39.
1550 *Horváth*, p. 40.
1551 *Horváth*, p. 40.
1552 *Horváth*, p. 40. See also *Ioannou-Naoum-Wokoun/Ruelling*, p. 107.
1553 *Anderson*, p. 261.
1554 *Anderson*, p. 261.
1555 *Heisenberg*, p. 236.
1556 *Craig/de Búrca*, EU Law (6th edition), p. 7; *Horváth*, p. 40.
1557 *Craig/de Búrca*, EU Law (6th edition), p. 7; *Horváth*, p. 40.

Community initiatives were being pursued, although said decisions are not formally binding at the outset.[1558]

In light of this, some might view the regularization of European Council meetings as a weakening of the supranational elements of the Community.[1559] Together with the previous Luxembourg compromise a few years back, these movements had more earmarks of intergovernmental rather than a supranational nature.[1560] Having said that, there were still developments within the Communities geared towards enhanced supranationalism: on one hand, there was an agreement in 1976 on direct elections to the Assembly, the first being held in 1979, which provided the EEC with a direct electoral mandate it previously lacked; on the other hand, there were developments regarding resources and budget, wherein in 1969 an agreement was reached for the Community to fund itself more from its own resources and less from national contributions, resulting into greater financial independence and strengthened role of the Parliament in budgetary concerns.[1561]

The mixed institutional developments within the Community (towards intergovernmental on one hand, supranational on the other) aside, one can observe a significant development vis-à-vis integration in the 1980's with further enlargement of the European Communities. Greece, which entered into an Association Agreement with the EEC as early as 1962, was finally allowed to join the European Communities in 1981 following an arduous democratization and modernization period that began in 1974 when the military junta fell from power.[1562] Longer periods of transition were observed for Spain and Portugal after they became independent from military regimes.[1563] Interestingly, this easily demonstrates how any integration that began with western Europe initially did not have in mind the integration of all non-communist states.[1564] Any division caused by the Cold War did not automatically result to intending all of western Europe to be integrated and form parts of the supranational project.[1565] It was only

1558 *Craig/de Búrca*, EU Law (6th edition), p. 7; *Horváth*, p. 40.
1559 *Craig/de Búrca*, EU Law (6th edition), p. 7.
1560 *Craig/de Búrca*, EU Law (6th edition), p. 7.
1561 *Craig/de Búrca*, EU Law (6th edition), p. 7.
1562 *Craig/de Búrca*, EU Law (6th edition), p. 7. See also *Michalski*, p. 288.
1563 *Woods/Watson*, p. 4. See for more details *Horváth*, p. 41.
1564 *Messenger*, p. 53.
1565 *Messenger*, p. 53.

in 1986 when the Iberian countries eventually became members, bringing the total membership to 12 countries.[1566]

In line with this, the non-inclusion in the initial stages of the integration project of some states becomes understandable later due to certain issues and problems that arose out of the southern enlargement.[1567] First, these three countries, albeit not necessarily communists, all just came from right-wing dictatorships and commonly had frozen economic, social, and democratic development.[1568] Second, the long period of time of economic difficulties and backwardness prompted a dilemma for new political regimes, which knew that democracy depended on economic and social modernization in order to garner support from the public and their national elite.[1569] Discussing the issue on social and economic cohesion became all the more relevant at this moment in time given that the Communities were no longer homogenous in composition, but instead were composed of member-countries of varying potential and development.[1570]

As mentioned earlier, the outbreak of the oil crisis caused member states to initiate protectionist measures, which subsequently and expectedly ran counter to what has been envisioned and established already in the Communities.[1571] Taking away these protectionist and restrictive measures was imperative should a common market be brought into front and it became later apparent that the only solution after the taxing oil crisis was deregulation.[1572] It was easier thought than done however as taking away the national-like administrative regulations proved challenging should unanimous voting remain.[1573] Hence, it became important to revisit how decision-making must be done in the Communities, which would only be possible to amend by amending the Rome Treaty itself.[1574]

Coincidentally, the time was ripe to discuss said amendments as national and community interests were at a point that member states were more inclined to sacrifice a bit of their national sovereignty for the sake of escaping the crisis together and creating further impetus for integration.[1575]

1566 *Michalski*, p. 289.
1567 *Horváth*, p. 41; *Woods/Watson*, p. 4.
1568 *Horváth*, p. 41.
1569 *Michalski*, p. 287.
1570 *Michalski*, p. 288.
1571 *Horváth*, p. 41.
1572 *Horváth*, p. 41.
1573 *Horváth*, p. 41.
1574 *Horváth*, p. 41.
1575 *Horváth*, pp. 41-42.

By this time period, or specifically the 1980's, the EC was experiencing stagflation: unacceptable high employment, sluggish growth bordering on recession, and high inflation.[1576] Making the markets more flexible and creating a real common market became an urgent issue.[1577] This was indispensable for Western Europe, which was then significantly lagging behind the United States and Japan in terms of technological and structural development.[1578] Whatever peak it gained previously has now turned into a downward slope.

To address these problems, the Single European Act ("SEA") amending the Treaty of Rome was adopted.[1579] Signed on 18 February 1986 and entered into force on 01 January 1987, the said Act provides that a single market shall be constituted by 31 December 1992.[1580] It was consequently imperative for intensive community legislation and legal harmonization among member states to happen in the following years.[1581]

Through the Single European Act, changes in the institutional framework of the Communities were introduced.[1582] For instance, the European Parliament was granted more influence, the Commission's competence was widened, and the voting system in the Council was changed to increase the significance of qualified majority voting.[1583] Prior to the SEA, the Commission proposes legislative action while the Council disposes.[1584] With the advent of the SEA, this previous reality has changed.[1585] There is now the "cooperation procedure" wherein input from the three players – Parliament, Commission, and Council, is necessitated in certain circumstances of the legislative process, and the Commission should not take lightly the views of the European Parliament, when applicable.[1586] It could be thus gainsaid that the Parliament has been given real power in the

1576 *Horváth*, p. 42.
1577 *Ludlow*, p. 218.
1578 *Horváth*, p. 42.
1579 *Horváth*, p. 42.
1580 *Horváth*, p. 42.
1581 *Horváth*, p. 42; *Woods/Watson*, p. 6.
1582 *Horváth*, pp. 42-43.
1583 *Horváth*, p. 43.
1584 *Craig/de Búrca*, EU Law (6th edition), pp. 8-9; *Horváth*, p. 43; *Ludlow*, From Deadlock to Dynamism, p. 227.
1585 *Craig/de Búrca*, EU Law (6th edition), p. 8.
1586 *Craig*, p. 56.

legislative process through the SEA.[1587] The SEA also established the Court of First Instance ("CFI") which shall assist the Court of Justice.[1588]

Moreover, there have been institutional changes vis-à-vis the EPC and formal acknowledgment of the European Council for the first time.[1589] This development is significant because the European Council has been playing a greater role in shaping EU policy. It has the central role in shaping and pacing EU policy, establishing the parameters, and even action points, within which other institutions would operate, and provided a forum at the highest political level for discussion and resolution of tensions and issues among member states.[1590] It was also at the crux of treaty reform as initiatives for intergovernmental conferences came from the European Council and being able to touch base with different issues and concerns affecting the Union and its member states, the European Council was able to come up with constitutional initiatives or policy strategies that affect how the Union would eventually operate.[1591]

Aside from the foregoing, the impact of the cooperation procedure was further enhanced by the substantial changes the SEA made, such as the formation of a single market.[1592] This single market programme eventually caught the attention of both internal and external players.[1593] The relaunch of the mid-1980s influenced the decision of Austria, Finland, and Sweden to seek membership in the EC, albeit during this time period they avowed neutrality in the East-West conflict.[1594]

Likewise, the said relaunch coincided with the sharp changes happening vis-à-vis the Cold War between the Soviet Union and the United States. Mikhael Gorbachev, as the then General Secretary of the Soviet Union, sought a partnership for peace in March 1985 with President Reagan of the United States.[1595] Reagan, who entered into office in 1981, was shocked to realize that the United States actually did not have anything to adequately protect itself should there be a nuclear attack.[1596] Albeit he adopted a

1587 *Craig/de Búrca,* EU Law (6th edition), p. 8; *Craig,* p. 56; *Ludlow,* From Deadlock to Dynamism, p. 227.
1588 *Craig,* p. 56.
1589 *Craig/de Búrca,* EU Law (6th edition), p. 8.
1590 *Craig/de Búrca,* EU Law (6th edition), p. 8; *Craig,* p. 55.
1591 *Craig,* p. 55.
1592 *Craig,* p. 55.
1593 *Craig/de Búrca,* EU Law (6th edition), p. 9.
1594 *Ludlow,* From Deadlock to Dynamism, pp. 228-229.
1595 *Service,* p. 3.
1596 *Service,* pp. 3, 16.

more proactive position, as compared to his predecessors' reactive and imperialist line of policy, he later would initiate an end to the arms race – by calling a reduction of stocks of atomic and nuclear weapons held by both superpowers – and this appeal was seemingly echoed likewise by Gorbachev.[1597] Closer ties between the Soviet Union and western Europe was also seen from the mid-to-late 1980's, which was also made possible through Gorbachev's leadership.[1598] There was an open acknowledgment of the economic and political power center emerging in western Europe and this prompted the Soviet Union's diplomatic campaign.[1599]

This occurred when the future of Europe seemingly was open-ended and the Soviet Union took the opportunity to convince the European community on issues like conventional disarmament, stationing of short-range missiles, etc., which echoed part and parcel the meeting of the minds between Gorbachev and Reagan to direct their respective administrations to cooperate in reducing the number of nuclear missiles held on land, sea, and air.[1600] If one would take a few steps back, this was not the case earlier between the US and Soviet Union, which previously held hard lines against each other. Contrary to the European Political Cooperation that was more amiable towards the Soviet Union, the American government maintained a hard-line stance against the Soviet Union.[1601] It was even commonplace for western European politicians and leaders to work with the Americans to end hostilities with the Soviet Union.[1602]

Given these developments one could be still rightfully wary that the Soviet Union's campaign was only pure talk, but one could later on be convinced as Gorbachev's repeated reference to a "common European home" went hand in hand with practical attempts to reorient perceptions in the continent, which consequently opened doors to a normalization process in Europe and the eventual reunification that transcended the Cold War divide.[1603] At the same time, rapprochement grew to the surprise of many and the Soviet Union dismantled its totalitarian politics and communist ideology as well as permitted measures for political and economic reform.[1604] Against all expectations, in 1987-1990 alone, there were

1597 *Service,* pp. 3, 5, 14-15.
1598 *Anderson,* p. 263.
1599 *Anderson,* p. 263.
1600 *Service,* p. 3.
1601 *Anderson,* pp. 263-264.
1602 *Service,* p. 5.
1603 *Anderson,* p. 264.
1604 *Service,* p. 3.

agreements between the superpowers on intermediate range and strategic nuclear weapons, on Afghanistan, on conventional forces, and on German reunification.[1605] Anticommunist revolutions were also happening in Eastern Europe in 1989.[1606] On a global scale, politics was never going to be the same again and then US President Bush felt it safe to declare the close to the Cold War.[1607] These circumstances naturally elicited various reactions from western Europe: some were enthusiastic, some were suspicious, while some were worried that Germany would forsake western Europe for a chance at eventual reunification.[1608]

2. European Union's Historical Development

a. Consolidation Stage

A reading of the historical development of European integration shows undeniably the intention to form a union as early as the Treaties of Rome.[1609] However, there was difficulty to fulfill the same because it did not coincide with the sign of the times.[1610] It was only after the changes in the overall landscape in the 1980's that the movement towards a closer European Union grew and the momentum gained further ground with the Single European Act in 1986.[1611]

In the meantime, one could witness the unveiling of German unification during the same time period. This coincided with the discussions and further deliberations on the draft treaty submitted by the Luxembourg presidency of the European Council, which resulted in the Maastricht Treaty coming into being in December 1991.[1612] The Maastricht Treaty came in the advent of the Yugoslav crisis, with trouble brewing within the Soviet Union and the Balkan republics.[1613] The Community then not only offered to serve as broker in the situation but it likewise engaged

1605 *Service*, p. 3.
1606 *Service*, p. 3.
1607 *Service*, p. 3.
1608 *Anderson*, p. 264.
1609 *Ludlow*, From Deadlock to Dynamism, p. 229.
1610 *Woods/Watson*, p. 4.
1611 *Horváth*, p. 43.
1612 *Craig/de Búrca*, EU Law (Fourth Edition), p. 14; *Woods/Watson*, p. 7.
1613 *Anderson*, p. 267.

its Conference on Security and Cooperation in Europe crisis consultation mechanism established earlier.[1614]

The Maastricht Treaty was subsequently agreed upon and the same introduced two parts: one part introduced amendments to the EEC Treaty and renamed it to "European Community (EC)" which was more reflective of the treaty's wider purpose; while the other part stood as a separate treaty, later to be known as the Treaty on European Union ("TEU"), establishing the European Union ("EU").[1615] The same laid down a number of general principles and specifically provided for (1) cooperation in view of joint action in terms of foreign and security policy ("FSP"), and (2) cooperation in view of justice and home affairs ("JHA").[1616] These two eventually became known as the second and third pillars of the European Union while the EC, Euratom, and the ECSC (until its expiration in 2002) constituted the first pillar, otherwise referred to as a whole as "European Communities".[1617] As Craig and de Búrca explained, the structure of the European Union was visualized in the Maastricht treaty as a temple wherein its objectives constituted as a roof while the pillars supported the same.[1618] Furthermore, one can take sight of changes to the applicable decision-making procedures among the different institutions. The Maastricht Treaty introduced the co-decision procedure, wherein both the Council and EP should first approve before a measure is adopted, ensuring that differing interests are taken into consideration.[1619]

With respect to the second and third pillars of the EU, they were intended to be intergovernmental in nature, compared to the supranational nature of the first pillar.[1620] Member states were looking for some established mechanism through which they could cooperate in the areas of foreign and security policies and justice and home affairs as there existed a strong sentiment that setting up *ad hoc* meetings for such matters was cumbersome and time-consuming, and the transaction costs involved were high.[1621] Nonetheless, the member states were not too keen on putting these matters under the same kind of supranational arrangement as the European Communities in the first pillar as the former involved naturally

1614 *Anderson*, p. 267.
1615 *Craig/de Búrca*, EU Law (Fourth Edition), p. 15. See also *Woods/Watson*, p. 7.
1616 *Craig/de Búrca*, EU Law (Fourth Edition), p. 15.
1617 *Craig*, p. 60; *Woods/Watson*, p. 7. See also *Woods/Watson*, p. 7.
1618 *Craig/de Búrca*, EU Law (Fourth Edition), p. 15.
1619 *Woods/Watson*, pp. 68, 70.
1620 *Craig*, p. 56.
1621 *Craig*; *Woods/Watson*, p. 9.

important and sensitive matters of policy touching on national sovereignty itself.[1622] Hence, it was decided to have the three-pillar structure that allows a more intergovernmental structure, wherein the primary power still dwells in the member states' respective hands.[1623] One must be careful at this point, however, of exaggerating the intergovernmental nature of the second and third pillars because even if the primary power belongs to the European Council, which represents the member states in this case, the importance of the Commission should not be discounted.[1624]

The Maastricht Treaty eventually entered into force on 01 November 1993, but not without the criticisms and heavy analysis given that it introduced extreme changes that aimed to expand and strengthen the previous institutional machinery.[1625] For instance, the pursuit of a full economic and monetary union by 1999 touched a lot of nerves in the process, proof of which is that on one hand, both Britain and Denmark were incessant in negotiating provisions that allowed them to opt out of this provision, while Germany encountered opposition in its own constitutional court because of its decision to enter into the single currency.[1626]

On 01 January 1995, the European Union gained new member states through the accession of Austria, Finland, and Sweden.[1627] As one may recall, these three countries earlier expressed interest in becoming members when the Single European Act came into view. Norway was supposedly part of this group of countries but for the second time in just twenty years, accession was denied through the results of a national referendum.[1628]

In relation to the further enlargement of the EU membership, an Agreement on the European Economic Area ("EEA") between the EC and EFTA was made four years prior, or in 1991, that provided for free movement provisions similar to the EC Treaty, similar competition policy and rules, and close cooperation in a range of other policy fields.[1629] Coming into force in 1994, the Agreement for a while was held incompatible with the EC treaty but after some revisions and amendments, including the establishment of an EFTA Court, which is independent and separate from

1622 *Craig,* p. 60; *Craig/de Búrca,* EU Law (Fourth Edition), p. 15.
1623 *Craig/de Búrca,* EU Law (Fourth Edition), p. 15; *Craig,* p. 60.
1624 *Craig/de Búrca,* EU Law (Fourth Edition), p. 15; *Craig,* p. 60.
1625 *Craig/de Búrca,* EU Law (Fourth Edition), p. 15.
1626 *Craig/de Búrca,* EU Law (Fourth Edition), p. 18; *Woods/Watson,* p. 7.
1627 *Craig/de Búrca,* EU Law (Fourth Edition), p. 17.
1628 *Woods/Watson,* p. 4.
1629 *Craig/de Búrca,* EU Law (Fourth Edition), p. 17.

the Court of Justice of the European Union ("CJEU"), its compatibility with the EC treaty was later upheld.[1630]

On 02 October 1997 the Treaty of Amsterdam (ToA) was signed as a product of regular intergovernmental conferences ("IGC") with its intended entry into force on 01 May 1999.[1631] It was declared to be more about "consolidation rather than extension of Community powers."[1632] The ToA was able to expand the competence of the EU through strengthening the EC pillar by streamlining decision-making processes and allocating new competencies, such as adding the principle of openness to Article 1 of the TEU, so that decisions are to be taken "as openly as possible" and as closely as possible to the citizens.[1633] The Amsterdam treaty likewise transferred provisions governing third-country nationals from the JHA to the then EC, and the Schengen Agreement, which although outside the EC/EU Framework, governs nonetheless internal borders among EU member states, was incorporated into the then EC treaty.[1634] Additional provisions were incorporated, including those on unemployment, and the previously annexed protocol on social policy, has found itself in the treaty's main text.[1635]

Given the foregoing, one can notice a shift of emphasis to build the image of the EU and assert its normative framework: what began as purely and mainly economic now involves more political ideas founded on fundamental rights and principles.[1636] Article 6 of the TEU was amended to mention that the Union is founded on human rights, democracy, and the rule of the law.[1637] Not only that, but respect for the same was made as condition *sine qua non* for any application for membership in the EU.[1638] One can place attention of the same degree on the emphasis to promote and instill equality and prohibit discrimination, to the point that the Council is authorized to take appropriate action to combat discrimination

1630 *Craig/de Búrca*, EU Law (Fourth Edition), p. 20.
1631 *Craig/de Búrca*, EU Law (Fourth Edition), p. 20.
1632 *Woods/Watson*, p. 9.
1633 *Woods/Watson*, p. 9.
1634 *Craig/de Búrca*, EU Law (Fourth Edition), p. 20; *Woods/Watson*, p. 10.
1635 *Craig/de Búrca*, EU Law (Fourth Edition), pp. 20, 22; *Woods/Watson*, p. 10.
1636 *Woods/Watson*, p. 10.
1637 *Craig/de Búrca*, EU Law (Fourth Edition), p. 20; *Woods/Watson*, p. 10.
1638 *Craig/de Búrca*, EU Law (Fourth Edition), p. 20.

on the basis of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.[1639]

The Amsterdam Treaty additionally allowed "closer cooperation" between the member states.[1640] Viewed as an example of the principle of flexibility, this allows "different conceptions of the European ideal and different degrees of commitment to exist within the European framework."[1641] The ToA allowed member states to cooperate on areas within the general scope of the treaties although the same might not yet be subject to Union legislation.[1642] To some degree this gives the advantage of being open to compromise within the Union but then again, one could not really tell where the line is between being only within the sphere of the Union and the areas permitting close cooperation.[1643]

Overall, the Amsterdam Treaty has made a general impact in two respects: first, it eroded the demarcation and delineation between the three pillars which have been crafted four years earlier – this was seen in the transferring of provisions, i.e. on asylum and immigration, from the JHA to the EC pillar for example; second, there was the constitutionalization and legitimization of mechanisms for allowing different degrees of integration and/or cooperation among different groups of states.[1644] Differentiated integration, as demonstrated by the different provisions introduced by the Amsterdam Treaty has become at this juncture neither "an aberration within the EC and EU legal order nor as a temporary solution or means of gradually easing member states into a uniform system."[1645]

b. Expansion Stage

Throughout the history of the European Commission thus far, it has existed without any IGC from 1957 to 1985 but one could observe a continuous process of amendment since the advent of the SEA.[1646] This was the case even more after the Amsterdam Treaty entered into force.

1639 Treaty on the Functioning of the European Union ("TFEU"), arts. 18, 19; *Craig/de Búrca*, EU Law (Fourth Edition), p. 20.
1640 *Woods/Watson*, p. 11.
1641 *Woods/Watson*, p. 11.
1642 *Woods/Watson*, p. 11.
1643 *Woods/Watson*, p. 11.
1644 *Woods/Watson*, p. 11.
1645 *Craig/de Búrca*, EU Law (Fourth Edition), p. 21.
1646 *Craig/de Búrca*, EU Law (Fourth Edition), p. 25.

Should the Amsterdam Treaty's success be measured as to how it was able to address institutional issues concerning the eventual enlargement of the European Union within its provisions, then it would have failed to score high marks. This in turn is problematic because enlargement was already a decided vector in the development of the EU even before the process of coming up with the Amsterdam Treaty began.[1647] Thus, two months after the ToA was signed new treaty negotiations came forth when the European Council at the Cologne Summit of 1999 called for another intergovernmental conference to address unresolved issues such as the size and composition of the Commission, weighing of votes within the Council, the extension of the qualified majority voting ("QMV"), the legitimacy of the Union and how broad the scope of its power and authority is.[1648]

The scope of the contemplated treaty remained however narrow until the 2000 Feira European Council, wherein it was decided to include "enhanced cooperation" as a theme.[1649] Notably, such was already contemplated within the Amsterdam Treaty but this time around, there was a change in nomenclature from "closer" cooperation to "enhanced", wherein member states which are interested to forge cooperation with one another can use the existing mechanisms and procedures available as long as they are consistent with the spirit and letter of the existing treaties.[1650] Taking the same into consideration, the contemplated Treaty of Nice basically aimed to deal with the leftovers the ToA was not able to discuss.[1651]

The Nice Treaty was concluded in December 2000 after an otherwise "notoriously fractious and badly run" European Summit.[1652] It consisted of two parts wherein one part concerned substantial amendments to the EU and EC treaties while the other consisted of transitory and final provisions; four protocols on enlargement, Statue of the Court of Justice, financial consequences of the expiration of the ECSC treaty, and on Article 67 EC Treaty vis-à-vis free movement of persons; twenty-four declarations, including declarations on Enlargement and Future of the Union.[1653]

Ratification of the Nice Treaty was not easy as member states sought approval within their own legal orders.[1654] It was also a stumbling block

1647 *Craig/de Búrca*, EU Law (Fourth Edition), p. 25.
1648 *Craig/de Búrca*, EU Law (Fourth Edition), p. 25; *Woods/Watson*, p. 11.
1649 *Craig/de Búrca*, EU Law (Fourth Edition), p. 25; *Woods/Watson*, p. 11.
1650 *Woods/Watson*, p. 11.
1651 *Craig/de Búrca*, EU Law (Fourth Edition), p. 29.
1652 *Woods/Watson*, p. 11.
1653 *Craig/de Búrca*, EU Law (Fourth Edition), p. 26.
1654 *Craig/de Búrca*, EU Law (Fourth Edition), p. 26.

that the Irish voted "no" to it given that the Nice Treaty was supposedly an imperative precursor to further EU expansion.[1655] It was only through a second round of referendum in October 2002 that the Irish gave their thumbs up, while Ireland, on the other hand, lodged its ratification instrument on 18 December 2002.[1656] The Treaty of Nice came into force on 01 February 2003, as stated in the treaty.

As a precursor to enlargement of the EU and providing a roadmap as to how this enlargement could proceed, some heads of state and/or government expressed their intention to enter into accession negotiations with the most advanced candidates before the end of 2002 as well as allowing the latter's citizens to take part in the European Parliament elections in June 2004.[1657] Other than having this enlargement in mind, the Nice Treaty also concerned itself with other amendments, including the provision dealing with the suspension of a member state found to be in serious and persistent breach of the principles of respect for democracy, human rights, and the rule of law.[1658] Now, the concerned provision – Article 7 – provides for a more detailed provision before a negative determination could be made, such as an opportunity to be heard and for an independent report to be made, and also the possibility of acting where there is a clear risk of breach.[1659] There was also agreement on the institutional questions relevant to enlargement: setting the weighing of votes in the Council, distribution of seats in the European Parliament, and composition of the Commission.[1660]

In the meantime, the Cologne Council launched also an initiative of major constitutional significance, wherein a body would be constituted from national parliamentarians, European parliamentarians, and national government representatives to draft a Charter of Fundamental Rights.[1661] Said body eventually turned into a "Convention" that began work in 2000 and was able to come up with a "Charter" by the end of the year.[1662] In light of this, one could notice that the process of drafting the Charter was made in an unusually open and public way, with regular posting and sharing of documents, materials, and drafts in the dedicated website,

1655 *Woods/Watson*, p. 12.
1656 *Woods/Watson*, p. 12.
1657 *Woods/Watson*, p. 4.
1658 *Horváth*, p. 59.
1659 *Craig/de Búrca*, EU Law (Fourth Edition), p. 27.
1660 *Craig/de Búrca*, EU Law (Fourth Edition), p. 27.
1661 *Craig/de Búrca*, EU Law (Fourth Edition), p. 27.
1662 *Craig/de Búrca*, EU Law (Fourth Edition), p. 26.

and meetings were made openly.[1663] While it was solemnly proclaimed by the Commission, Parliament, and Council and politically approved by the member states at the December 2000 Nice Council, there were still questions as to its status and possible integration into the Treaties that were scheduled to be discussed instead in the 2004 intergovernmental conference.[1664]

With the aforementioned still very much on the table, the 11 September 2001 terrorist attacks in the United States shook the world and it was interesting to see how Europe reacted to the same. On one hand, one could see the outright sympathy given to the victims of the attacks and the initial outright support given for America's efforts to bring the perpetrators to justice, which subsequently led to a "level of transnational concord" unprecedented in history wherein European governments and the European Union were more than willing to adapt counterterrorism measures and create new ones in response to terrorism as an increasing security threat.[1665] This eventually led to a revamp of policy areas including, but not limited to, foreign and security policy, law enforcement, judicial affairs, migration, international trade, and even finance and democratization.[1666]

On the other hand, it became sooner or later undeniable that at the onset of the 9/11 attacks in the United States Europe had been providing said perpetrators a basis for these attacks.[1667] The realization did not take long that Europe too was a primary target of terrorism and such was not prompted by the September 2001 or the other attacks in Europe thereafter, but rather, by the growing number of marginalized and radicalized Muslim communities in European societies and the early warning signs such as the 1994-1995 attacks by Algerian Islamists in France or the thwarted attack on the Christmas market in Strasbourg, France on New Year's Day in 2000.[1668] With this in mind, Europe became a stronger partner in the global battle against the threat posed by transnational terrorism using the means available through the European Union and its member states.[1669]

1663 *Craig/de Búrca*, EU Law (Fourth Edition), p. 26.
1664 *Craig/de Búrca*, EU Law (Fourth Edition), p. 26.
1665 *Craig/de Búrca*, EU Law (Fourth Edition), p. 26; *Woods/Watson*, p. 11.
1666 *Eder/Senn*, p. 13.
1667 *Eder/Senn*, p. 13.
1668 *Eder/Senn*, p. 13.
1669 *Eder/Senn*, pp. 13-14.

The Nice roadmap was confirmed during the Laeken summit in December 2001.[1670] At the same time, 10 candidate countries were named to have a good chance of early entry: Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia.[1671] Furthermore, the resulting Laeken Declaration confirmed by the next round of treaty negotiations the issues laid down in the Declaration on the Future of Europe, which was attached to the Treaty of Nice: "the delimitation of powers between the EU and the member states, the simplification of powers, and the role of the national parliaments in the EU," as well as the much-needed discussion as to the future of the EU.[1672] Through growing consensus from major institutional players, the aforementioned was thought to be reconciled with two other issues: content of the reform agenda and the reform process.[1673] With respect to the overall content of the reform agenda, it was realized that some issues that were not discussed in the Nice Treaty touched on the imperative need to re-evaluate and re-think the substantive and institutional rudiments of the EU.[1674] On the other hand, there was clamor that the reform process should at least be legitimated by a broader "constituency" than hitherto given the broad range of issues being tackled.[1675]

The Laeken Declaration then became the catalyst for a Convention in June 2003 which paved way to the draft Treaty establishing a Constitution for Europe ("the Constitution") and submitted for the consideration of the European Council in July.[1676] It consisted of four parts, discussing the (1) basic objectives and values of the EU, fundamental rights, competencies, forms of law-making, institutional division of power, etc.; (2) charter of rights; (3) policies and functions of the EU; and (4) general and final provisions.[1677] Included herein was the merger of the three pillars, creation of a single legal framework, and affording the European Union legal personality.[1678] The Constitution Treaty simplified decision making, including the streamlining of applicable procedures and defining matters

1670 *Eder/Senn*, p. 14.
1671 *Horváth*, p. 59.
1672 *Horváth*, p. 59.
1673 See *Craig*, p. 73; *Horváth*, p. 61; *Woods/Watson*, p. 12.
1674 *Craig/de Búrca*, EU Law (Fourth Edition), p. 31; *Craig*, p. 73; *Woods/Watson*, p. 12.
1675 *Craig/de Búrca*, EU Law (Fourth Edition), p. 27.
1676 *Craig/de Búrca*, EU Law (Fourth Edition), p. 27.
1677 *Craig/de Búrca*, EU Law (Fourth Edition), p. 33; *Craig*, p. 73.
1678 *Craig/de Búrca*, EU Law (Fourth Edition), p. 33.

for which unanimous voting is not required, and at the same time, defined what the competencies of the EU are and what were those that exclusively belonged to the member states.[1679] On this point, some were adamant about the inclusion of part III on the policies and functions of the EU as the same did not only put too much on the plate but it also endangered losing the complex bargains done over the years among the member states to the point that it might necessitate amendment of existing treaties to make them consistent with one another and the Constitution Treaty.[1680] Despite these issues and concerns, the Constitution Treaty was still signed on 29 October 2004 and was essentially a Convention on the future of Europe.[1681]

Uncertainty ensued because although it was ratified by 13 member states, France and the Netherlands disapproved.[1682] Such rejection by the French and Dutch raises the question on political legitimacy. One would realize that this was not an isolated incident considering that prior to this, there have been rejections made: the Danish rejection of the Maastricht Treaty in June 1992 is one, and the repeated closely contested referenda on treaty reform.[1683] There was restive public opinion about the scope and pace of European integration and unfamiliarity with the workings and accountability of EU institutions.[1684] Some political leaders point out that there was the fear of the people, for example in the Netherlands, that with the Constitution Treaty, their children would be less well-off than themselves.[1685] The French and Dutch public pointed out to the lingering problems and issues surrounding the different European countries and that the European Union was accountable as to what has it done for its citizens, how was EU membership beneficial to the daily lives of its citizens, and why the Constitution Treaty did not include provisions addressing these concerns.[1686] There was a general sense of mistrust and suspicion as regards what benefits and solutions the EU has delivered, which consequently prompted others to be conservative instead: as Frans Timmermans worded it, "if you believe things can only get worse, you try to hold on

1679 *Horváth,* p. 65.
1680 *Horváth,* p. 65.
1681 *Craig/de Búrca,* EU Law (Fourth Edition), p. 33.
1682 *Horváth,* pp. 66-67; *Woods/Watson,* pp. 12-13.
1683 *Horváth,* p. 67; *Woods/Watson,* p. 13.
1684 *Dinan*, p. 1.
1685 *Dinan*, p. 1.
1686 *Timmermans*, p. 106.

to what you have."[1687] It did not help likewise that national governments worsened the situation by always pointing the finger to EU decisions.[1688] These realizations and stumbling block on further integration definitely dealt a blow to the European Union which suddenly felt befuddled as to what next steps to take.[1689]

In light of this, many suggestions were brought to the table. The Netherlands, for example, suggested going back to the Nice Treaty, which obviously had shortcomings that ought to be rectified, while using elements found in the Constitution Treaty.[1690] It was important however that in doing so, it would be acceptable to all member states.[1691]

In the intervening time, the Nice Treaty as earlier mentioned was instrumental in accelerating the pace of accession negotiations in 2001 and 2002, resulting in negotiations with the earlier mentioned ten candidate countries to be concluded during the Copenhagen summit on 13 December 2002.[1692] The relevant Accession Treaty was signed in April 2003 and thereafter, ratification procedures were held in each candidate country.[1693] The resulting accession on 01 May 2004 of Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia, and Slovakia resulted in the biggest enlargement of the EU and at the same time, marked a significant event in its historical development.[1694] The entry of the aforementioned Eastern European countries in the EU meant the reunification of Europe, bringing an end to the division caused after the Second World War.[1695] As Horváth remarked, this event has symbolized that the "Iron Curtain" has finally fallen for good.[1696] And indeed, not so long after this accession, negotiations were concluded with Bulgaria and Romania during the summit in December 2004 and they acceded in 2007, while negotiations were then still ongoing with Croatia and Turkey.[1697]

1687 *Horváth*, p. 69.
1688 *Timmermans*, pp. 106, 107.
1689 *Dinan*, p. 1.
1690 *Horváth*, pp. 67, 68; *Woods/Watson*, p. 13.
1691 *Timmermans*, p. 107.
1692 *Timmermans*, p. 107.
1693 *Horváth*, p. 59; *Michalski*, pp. 292-293.
1694 *Horváth*, p. 59.
1695 *Craig/de Búrca*, EU Law (6th edition), p. 19; *Michalski*, p. 292.
1696 *Horváth*, p. 60.
1697 *Horváth*, p. 60.

Coinciding with the entry of new countries in May 2004, the European Union launched the European Neighborhood Policy ("ENP").[1698] Initially, countries outside the EU and found in the east, except for Russia, were not a priority in the EU agenda but due to the 2004 expansion, the EU found itself closer to them.[1699] There was then the need to ensure stability in the wider neighborhood because otherwise, any instability might risk itself of spilling over to the EU's borders.[1700] As Smith noted, the extension of EU borders became the most important of all foreign policy implications of enlargement during this time as it created new demarcating lines between insiders and outsiders, which in turn could create concerns and problems to those involved.[1701] Such issues led to the establishment of the ENP.[1702] And while the ENP was instituted for the benefit of the EU and stalling off any possible risk of instability brought upon by its enlargement, the rhetoric that could be found in the ENP is that the EU seeks to be a "force for good" in its dealings with neighboring countries.[1703] The European Security Strategy of 2003 had previously declared that building security in the neighborhood was one of the strategic objectives of the EU, which includes fostering well governed countries east of the European Union and on the borders of the Mediterranean, and furthering "a world seen as offering justice and opportunity for everyone" and in fulfilling the same, the EU endeavors to work proactively.[1704]

The ENP stretches over a large geographical area and covers a diversity of countries, including those, as aforementioned, in the east of the European Union and those bordering in the Mediterranean.[1705] It must be noted that prior to the ENP framework, there has been prior attempts to establish something similar: they either entailed discussions or meetings at high levels on political issues without necessarily establishing decision making frameworks, or avenues wherein bilateralism, multilateralism or moves towards regionalism were being promoted.[1706] Alternatively, the ENP framework distinguishes by not having regular scheduled meetings of all neighbors at any level but rather, a preference for bilateralism,

1698 *Craig/de Búrca*, EU Law (6th edition), p. 19; *Horváth,* p. 60; *Michalski,* p. 294.
1699 *Barbé/Johansson-Nogués*, p. 81; *Smith*, pp. 757, 758.
1700 *Smith,* p. 758.
1701 *Smith,* p. 758.
1702 *Smith,* p. 758.
1703 *Smith,* p. 758.
1704 *Barbé/Johansson-Nogués,* p. 81.
1705 *Barbé/Johansson-Nogués,* p. 81; *Smith,* p. 759.
1706 See *Smith,* p. 759.

wherein emphasis is given to fostering bilateral relations between the EU and individual countries to be able to influence, more or less, the latter's internal and external policies.[1707] In connection to this, the EU steers away from the use of sanctions to get what it wants but in its place, the EU seeks to be more "benevolent" by means of using incentives through the ENP to promote "stability, security and well-being for all" and to foster cooperation in areas of mutual consent and interest."[1708]

With the ENP as an instrument, the EU is not only able to have a proactive role in ensuring security and stability within its borders and those of its neighbors but it has also been able to promote the norms and values it espouses through the same.[1709] A reading of the action plans within the ENP would show the emphasis of the EU towards the promotion and use of human rights and democratic principles amongst its neighbors.[1710] Not only that but EU neighbors are expected to conform not only to EU values but likewise EU standards and laws in social and economic areas, to be able to build a good neighborhood relationship.[1711] While governing to the EU by approximating its standards and values is understandable to ensure growth and economic development,[1712] these provisions within the ENP undeniably likewise show how the ENP is being used by the EU to play its normative role with its global partners and neighbors.[1713]

By 2007, the new financial instrument for the ENP came into force and there was a noticeable increase in money allocated over previous EU aid programmes to countries covered by the same.[1714] The policy thus appears remarkably balanced in its attention to interest and values, soft in respect of the absence of elements of coercion and rather generous in its offer of material assistance.

c. Reconsolidation Stage

As the enlargement of the EU was ongoing, there was the going concern of how the EU was trying to bring its act together after the Constitution

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1707 *Smith,* pp. 761-762.
1708 *Smith,* p. 762.
1709 *Barbé/Johansson-Nogués,* p. 81.
1710 *Smith,* p. 765.
1711 *Smith,* p. 765.
1712 *Smith,* p. 763.
1713 *Smith,* p. 763.
1714 *Manners*, pp. 45, 46.

Treaty. The European Council in 2005 thought it best to encourage the member states to reflect and engage their citizens into debate as regards the EU.[1715] Due to the failure of the Constitution Treaty, the EU then needed to function on the basis of the Rome Treaty, as amended by other treaties including the Nice Treaty.[1716] However, this was believed to be insufficient to guarantee the efficacy of the Union with a membership of around 25-27 member states.[1717]

In the first half of 2007, the German presidency of the European Council sought agreement on a so-called Reform Treaty, which shall primarily concern itself in amending both the TEU and EC Treaty, with the former retaining its name while the latter would be known as the Treaty on the Functioning of the EU ("TFEU").[1718] Coincidingly, the Union would embody a single personality and for purposes of consistency, the word "Community" shall be replaced by "Union".[1719] There was also a conscious effort to be careful with terminology, which obviously includes excising the mention of constitutional terms in the new treaty.[1720] This coincides with the issue that misunderstandings arose from the words and symbols used in the Constitution Treaty, which were normally reserved to the national level.[1721] Though drafters of the Constitution Treaty thought that usage of familiar terms would allow the people to understand the same better, this move backfired as people thought that the European level would then take over the national level – and this of course did not quell the fears already being harbored by many.[1722] Also, the usage of "Constitution Treaty" was itself a misnomer considering it was not a constitution.[1723] As a stark opponent of said treaty said, the problem was that in explaining the Constitution Treaty one must start by saying it is not a Constitution, and with this, the entire story surrounding it starts with a lie.[1724]

1715 *Barbé/Johansson-Nogués*, p. 81.
1716 *Craig/de Búrca*, EU Law (6th edition), p. 19.
1717 *Craig/de Búrca*, EU Law (6th edition), p. 19.
1718 *Horváth*, p. 61.
1719 *Craig/de Búrca*, EU Law (6th edition), p. 20; *Woods/Watson*, p. 14.
1720 *Craig/de Búrca*, EU Law (6th edition), p. 20. See for details *Craig/de Búrca*, EU Law (6th edition), p. 20.
1721 *Craig*, p. 75.
1722 *Timmermans*, p. 107.
1723 *Timmermans*, pp. 107-108.
1724 *Timmermans*, p. 108.

It must be mentioned that the year 2007 coincided with the 50th Anniversary of the European Union and to commemorate the same, its representatives signed the Berlin Declaration which includes the values, goals, and further aspirations for the European Union.[1725] With the agreement to come up with a Reform Treaty, including the formation of an IGC to work towards the same, there were rapid developments towards the same when the second half of 2007 came.[1726] The speed by which those involved worked was to some degree influenced by the Portuguese presidency of the European Council during this time, which wanted the new treaty to be attributed to it.[1727] Thus, the new Reform Treaty, which was now known as the Lisbon Treaty, came in fast and was signed and agreed upon in a special summit in Lisbon on 13 December 2007 and entered into force in 01 December 2009.[1728]

The Lisbon Treaty did not reach the finish line without obstacles, however. The Lisbon Treaty ought to be ratified by the member states and Ireland needed two referenda before it was able to ratify.[1729] On the other hand, the Czech president was initially unwilling to sign and only reluctantly did so when the constitutional challenge to the Lisbon Treaty was rejected by the Czech Constitutional Court and when other member states agreed to the inclusion of a protocol relating to the Czech Republic and Charter of Rights.[1730]

There was very much a hot debate regarding the Lisbon Treaty, especially given that it is heavily influenced by the Constitution that was previously voted "no" for by France and the Netherlands.[1731] To appease all parties, the treaty did not only need to be distinguishable from the Constitutional Treaty but also, it has to retain the proposed reforms in said Constitutional Treaty for the betterment of the Union.[1732] Moreover, concerns post-TEU period mainly involved the issue on how to make the EU function more efficacious, especially with respect to treaty-making.[1733]

More or less, the Lisbon Treaty was able to tackle these issues. At the outset, the Lisbon Treaty was able to fortify the co-decision procedure now

1725 *Timmermans*, p. 108.
1726 *Woods/Watson*, p. 14.
1727 *Craig/de Búrca*, EU Law (6th edition), p. 20.
1728 *Craig/de Búrca*, EU Law (6th edition), p. 20.
1729 *Craig/de Búrca*, EU Law (6th edition), p. 20; *Woods/Watson*, p. 14.
1730 *Craig/de Búrca*, EU Law (6th edition), p. 20.
1731 *Craig/de Búrca*, EU Law (6th edition), p. 20.
1732 *Woods/Watson*, p. 14.
1733 *Woods/Watson*, p. 14.

applicable in the primary, or ordinary, legislative process.[1734] Although the Commission retains its right of legislative initiative, it is now on an increasingly equal footing with both the EP and Council in the legislative areas in more policy areas.[1735] As Craig noted, this is a welcomed development as not only the Union's interest is represented in legislation through the Commission, but also the interests of the electorate and the member states themselves, through the EP and Council, respectively, which results to a framework of deliberative dialogue among the main Union institutions.[1736]

The Lisbon Treaty also tackled other themes, including those which give value to human beings as more than economic actors, but more so, as political and social beings.[1737] To illustrate, there was a change in status of the Charter of Fundamental Rights in light of the Lisbon Treaty: introduced during the Treaty of Nice but without any legal effect, the Lisbon Treaty now recognized the rights set forth therein and conferred the same legal value as any other treaty.[1738] Aside from this, the Lisbon Treaty introduced changes to freedom and security through its criminal law provisions.[1739] Another issue relates to democracy: changes were introduced vis-à-vis the role of national parliaments in EU processes through the emphasis of the principal of conferral and in the attempt to delimit EU competence more cautiously.[1740] There is also the applicability of the principle of subsidiarity that imposes the obligation to consult widely before proposing legislative acts, including the transmittal of legislative proposals to national parliaments coincidingly with the Union institutions.[1741] Some provisions regarding this are predicated on the idea that the power of the EU actually emanates from the member states and thus, provisions on member states opting out of the EU find themselves in the same line.[1742] Lastly, institutional innovations were introduced as regards giving the EU an external profile to the world, such as the new High Representative of the Union on Foreign Affairs and the legal personality of the EU.[1743]

1734 *Woods/Watson,* p. 15.
1735 *Craig,* p. 74.
1736 *Craig,* p. 74.
1737 *Craig,* p. 74.
1738 Lisbon Treaty, art. 6(1); *Woods/Watson,* p. 15.
1739 *Woods/Watson,* p. 148.
1740 *Woods/Watson,* p. 15.
1741 *Craig*, pp. 75-77.
1742 *Craig,* pp. 75-77; *Woods/Watson,* p. 15.
1743 *Woods/Watson,* p. 15.

In addition to the aforementioned, the Lisbon Treaty was like the Constitution Treaty inasmuch as it disposes of the pillar structure albeit there remains a demarcation between the first and third pillars and the CFSP.[1744] The first and third pillars now form a single treaty through the EC treaty and the new Treaty on the Functioning of the European Union ("TFEU"), while the CFSP remains with the TEU.[1745] In other words, while the JHA is within the penumbra of greater Union institutions as a part of the Area of Freedom, Security and Justice, CFSP remains intergovernmental in nature.[1746] Further, any reference to the "Community" are now references to the "Union" and unlike before, the EU through the Lisbon treaty has obtained legal personality.[1747]

The successful conclusion of the Lisbon Treaty corresponded with the time when the world economic crisis, which started with the collapse of the United States housing market in 2007, found its way in EU shores.[1748] If one may recall, one of things the Maastricht Treaty introduced was the establishment of a monetary and economic union, which connoted the use of a single currency to be overseen by the European Central Bank.[1749] The idea was that, with controlling national fiscal and budgetary policy, it ensures that member states would not spend more than they earn.[1750] Otherwise, the strength and stability of the Euro would be undermined.[1751]

Albeit the foregoing seems nice on paper, the financial crisis exposed inherent structural and policy flaws. It did not only show European central bankers and financial ministers how opaque EU banking supervision was,[1752] but more importantly, how two parts of the Maastricht settlement were out of sync and that apparently, EU control over national budgetary policy was relatively weak and unable to exert control over national economic policy.[1753]

The financial crisis in the EU happened on two fronts: banking crisis among member states and a sovereign debt crisis.[1754] As regards the bank-

1744 *Woods/Watson*, p. 15.
1745 *Woods/Watson*, p. 15.
1746 *Woods/Watson*, p. 15.
1747 *Woods/Watson*, p. 15.
1748 *Craig/de Búrca*, EU Law (6th edition), p. 22.
1749 *Craig/de Búrca*, EU Law (6th edition), p. 23; *Heisenberg*, p. 249.
1750 *Craig/de Búrca*, EU Law (6th edition), pp. 22-23.
1751 *Craig/de Búrca*, EU Law (6th edition), p. 23.
1752 *Craig/de Búrca*, EU Law (6th edition), p. 23.
1753 *Heisenberg*, p. 249.
1754 *Craig/de Búrca*, EU Law (6th edition), p. 23.

ing crisis, there was a snowball effect that occurred with regard financial institutions. It was difficult for the European Central Bank to discover how seriously affected major banks in member states were, given the different domestic institutions in the member states handling banking capitalization reporting and regulation.[1755] In respect of financial markets, the uncertainty resulted in reluctance to lending, even to the point that the banking sector was at a standstill because of lack of information on either the fundamental capitalization of banks or their involvement in then exotic securities and/or investments in the US or Spanish real estate.[1756] This eventually resulted in not only having the European Central Bank ("ECB") as the lender of last resort and instituting stability mechanisms to safeguard financial stability, but also institutional reforms that gave more authority to the ECB in EU banking supervision.[1757]

The banking crisis was only the tip of the iceberg. Before the 2007-2009 crisis, member states in the Eurozone were able to borrow at German interest rates, on the assumption that risk of being at default was negligible.[1758] It turns out however that the risk of sovereign default was high, especially for most southern states, which in turn prompted the EU to force austerity measures as suspensive condition for aid.[1759] The most acute problem came from Greece, whose credit rating to repay was downgraded to "junk status" after it requested a €45 Million loan from the IMF and EU.[1760] The concern over the budgetary health of other countries came into front.[1761] Interest rates pushed up and successively, there was downward pressure to the euro.[1762] The latter was only alleviated when other member states stepped in to provide financial assistance to Greece and the other states heavily affected.[1763] The financial assistance notably was under strict conditionality and fellow member states, especially Germany, did not mince their words against Greece as to how it ran its budgetary policy.[1764]

1755 *Heisenberg,* p. 249.
1756 *Heisenberg,* p. 249.
1757 *Heisenberg,* p. 249.
1758 *Heisenberg,* p. 249.
1759 *Heisenberg,* p. 250.
1760 *Heisenberg,* p. 250.
1761 *Craig/de Búrca,* EU Law (6th edition), p. 23; *Heisenberg,* p. 250.
1762 *Craig/de Búrca,* EU Law (6th edition), p. 23.
1763 *Craig/de Búrca,* EU Law (6th edition), p. 23; *Heisenberg,* p. 250.
1764 *Craig/de Búrca,* EU Law (6th edition), p. 23.

The economic and financial crisis had profound effects on the EU and contributed admittedly to the further evolution of the same.[1765] Emulating the famous adage of never allowing a serious crisis to go to waste, the EU endeavored on different institutional developments that would hopefully strengthen EU fiscal policy oversight and make it more effective.[1766]

In 2013, Croatia became a member likewise.[1767]

Prompted by a public vote through referendum in June 2016, the United Kingdom was the first EU member state to engage Article 50 TEU and exit the European Union.[1768] It formally left the EU on 31 January 2020 but negotiations are still needed during the transition period that would end in December 2020. By virtue of the so-called Trade and Cooperation Agreement, the EU and the UK entered into a form of partnership effective on 01 January 2021.

B. Present Institutional and Legal Framework

The next portion of the discussion focuses on the present institutional and legal framework of the European Union as a regional organization. This is mainly done in three (3) parts: (1) the EU as a Regional Organization; (2) its organizational structure; and (3) the different principles, norms, and practices of the EU.

1. European Union as a Regional Organization

The European Union is described as both an alliance and a legal person. As an alliance, the EU was not only founded on two treaties, namely the Treaty on European Union ("TEU") and Treaty on the Functioning of the European Union ("TFEU"), but the alliance character is also eminent from one its applicable principles, the principal of conferral of competencies, wherein whatever is not conferred to the Union shall remain within the competencies of the member states.[1769] The classic international law adage is also mentioned in the Treaties, wherein there is respect for the equal-

1765 *Heisenberg,* p. 250.
1766 *Craig/de Búrca,* EU Law (6th edition), p. 23.
1767 *Heisenberg,* pp. 251-252.
1768 *Gordon,* p. 21; *van Wijk,* p. 155.
1769 Treaty on European Union, art. 4(1); *Woods/Watson,* p. 4.

ity of state, their national identities, and their essential state functions, including ensuring territorial integrity, maintaining law and order, and safeguarding national security.[1770] It bears mentioning as well that in many accounts, the roles of member states are stronger, particularly the increased role of the European Council, which, although is an organ of the Union, still remains in many respects a conference of the governments of the member states, and given much authority to decide on important Union matters.[1771]

It is unequivocal too, that the Union is a legal person vis-à-vis its internal and external structure. On one hand, the Lisbon Treaty has explicitly referred to it as a single entity and refuses to acknowledge it having different regimes of different entities.[1772] This is further expressed by the fact that the European Union itself has organs and institutions that could act on its own.[1773] This is one of its distinguishing, if not most known characteristic: the European Union as a supranational organization has significant powers and authority itself that can be exercised independently and distinctly from its member states.[1774] It is a force of its own, existing more than member states acting together.[1775] The scope and level of power and authority given to its institutions is one of the defining features of the European Union, ensuring the Union's objectives are carried out efficaciously.[1776] The Union's objectives and the manner these objectives are being carried out by the institutions affect the EU as a whole with respect to its nature, and likewise influence the scope and content of EU law.[1777] In this respect, the EU as a supranational organization can pass legislation, in many instances wherein unanimity among member states cannot be reached, and said legislation is binding on the member states and must thereafter be applied by their respective courts and law enforcement agencies.[1778] Additionally, its judicial organ – the CJEU – can adjudicate cases originating from the member-countries, and even the member states are

1770 *Curtin/Dekker*, p. 164.
1771 *Curtin/Dekker*, p. 164.
1772 *Curtin/Dekker*, p. 164.
1773 *Curtin/Dekker*, p. 164.
1774 *Curtin/Dekker*, p. 165.
1775 *Hartley*, p. 1.
1776 *Hartley*, p. 1.
1777 *Woods/Watson*, p. 23.
1778 *Woods/Watson*, p. 23.

subject to the said court's compulsory jurisdiction in cases concerning the Treaties and/or Community legislation.[1779]

A word of caution must be forwarded in relation to the foregoing however. Inasmuch as the Union and its institutions can act on its own and on behalf of its member states as a supranational organization, this power is not all encompassing and without bounds. It may only act in the policy fields which the member states have conferred to it.[1780] No less than the TEU and TFEU themselves provide for these different competencies, which is mainly categorized into the following: exclusive competence, shared competence, and the competence to support, coordinate or supplement actions of the member states.[1781]

Exclusive competence, as the description suggests, means that it is only the EU which can act on these acts, which are the following: "(1) customs union; (2) the establishing of the competition rules necessary for the functioning of the internal market; (3) monetary policy for the member states whose currency is the euro; (4) conservation of marine biological resources under the common fisheries policy; (5) common commercial policy; (6) concluding international agreements."[1782] With respect to international agreements, the same is a matter of conditional exclusivity because as Article 3(2) of the TFEU provides, it could only be done when either (1) the conclusion is provided in a legislative act of the Union, or (2) when the same is necessary to enable the EU to exercise its internal competence, or (3) insofar as their conclusion may affect common rules or alter their scope.[1783] Accordingly, Article 3(2) should be read together with Article 216 of the same TFEU because as some explain, Article 216 explains whether the EU has competence to enter into international agreements, Article 3(2) then explains whether the same is exclusive or otherwise.[1784] Article 216 of the TFEU reads as follows:

> "1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally

1779 *Hartley,* p. 1.
1780 Treaty on European Union, arts.5 and 13(1); *Hartley,* p. 1.
1781 Treaty on Functioning of the European Union, arts. 2-6; *Woods/Watson,* p. 50.
1782 Treaty on Functioning of the European Union, arts. 2, 3; *Woods/Watson,* p. 57.
1783 Treaty on Functioning of the European Union, art. 3(2).
1784 *Woods/Watson,* p. 57.

> binding Union act or is likely to affect common rules or alter their scope.
>
> "2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States."[1785]

While admittedly the evolution of this given exclusive (but conditional) competence has been complex, the reality based on the foregoing is that it would be rare, if ever, that the EU lacks power to conclude an international agreement.[1786] Referring back to Article 3(2), should a legislative act provide for the conclusion of an international agreement, then the Union has exclusive external competence. This consequently preempts member states on acting independently or on their own, or even legislating or adopting any legally binding act.[1787] Secondly, as long as the EU has internal competence and conclusion of the international agreement shall be necessary to effectuate said competence, then the EU again has exclusive external competence, regardless of whether the same is exclusive or shared.[1788] And lastly, in being able to conclude international agreements that may affect common rules or alter their scope, this drives home the point that as long as the EU has exercised a power internally, it can then very well do so exercise external competence over said matter.[1789]

Other than the aforementioned exclusive competencies of the EU, there are the shared competencies, which in actuality are the general residual category.[1790] Article 2(2) of the TFEU explains the workings of this competence best as follows:

> "2. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall exercise their

1785 Treaty on Functioning of the European Union, art. 216.
1786 *Craig/de Búrca*, EU Law (6th edition), p. 79.
1787 See Treaty on Functioning of the European Union, art. 3(2); *Craig/de Búrca*, EU Law (6th edition), p. 79.
1788 See Treaty on Functioning of the European Union, art. 3(2); *Craig/de Búrca*, EU Law (6th edition), p. 79.
1789 See Treaty on Functioning of the European Union, art. 3(2); *Craig/de Búrca*, EU Law (6th edition), p. 79.
1790 *Craig/de Búrca*, EU Law (6th edition), p. 79.

competence again to the extent that the Union has decided to cease exercising its competence."[1791]

Article 4 of the TFEU correspondingly defines and enumerates the different areas where competence is shared, namely, (1) internal market; (2) social policy, limited to the aspects defined in the TFEU; (3) economic, social and territorial cohesion; (3) agriculture and fisheries, excluding the conservation of marine biological resources: (4) environment; (5) consumer protection; (6) transport; (7) trans-European networks; (8) energy; (9) area of freedom, security and justice; (10) common safety concerns in public health matters, limited to the aspects defined in the TFEU; (11) research, technological development and space; and (12) development cooperation and humanitarian aid.[1792]

As Article 2(2) provides, there is a preemption element with respect to shared competence as "member states shall exercise competence to the extent that the Union has not exercised its competence" and/or "to the extent that the Union has decided to cease exercising its competence." While these instances can diminish the amount of shared power over time, not all is lost for the member states because at the outset, one must look first in the detailed provisions that delineate what the EU can do in the diverse areas where power is shared, to be able to have a good gauge on limitation on Union competence.[1793] Secondly, preemption occurs to the extent the EU exercised its competence, meaning, there are various ways the Union could exercise its power without stopping member states from exercising their own competence outright.[1794] And even the possibility is still there that the EU shall exercise competence concerning an entire area, the Protocol on Shared Competence itself nonetheless provides to make things clearer that "the scope of exercise of competence only covers those elements governed by the Union act in question and does not cover the entire area."[1795] Thirdly, competence could always revert to the member states should the EU cease to exercise competence in the area

1791 Treaty on Functioning of the European Union, art. 2(2); *Craig/de Búrca*, EU Law (6th edition), p. 83.
1792 Treaty on Functioning of the European Union, art. 4.
1793 *Woods/Watson*, p. 57.
1794 *Craig/de Búrca*, EU Law (6th edition), p. 84.
1795 Protocol on Shared Competence, art. 2(2); *Craig/de Búrca*, EU Law (6th edition), pp. 84-85.

subject to shared competence.[1796] Lastly, member states are not preempted from pursuing on their own areas of shared competence should the EU exercise competence on the areas of research, technological development and space, as well as development cooperation and humanitarian aid.[1797]

Another area of competence when the EU as a regional organization could act on is the supporting, coordinating, or supplementing member state action, without necessarily superseding the latter's competence in these areas, and without entailing harmonization of member state laws.[1798] These areas include the (1) protection and improvement of human health; (2) health; (3) industry; (4) culture; (5) tourism; (6) education, vocational training, youth, and sports; (7) civil protection; and (8) administrative cooperation.[1799] In the exercise of this competence, the EU shall endeavor to complement national legislation on the foregoing topics and member states are still obliged to coordinate and/or liaise their national policies on said matters to the Commission.[1800] There could be coordination by the Commission thereafter on what could be the best practices, periodic monitoring, and evaluation, and even could still intervene through the use persuasive soft law such as formation of guidelines and the like, as well as incentive measures.[1801]

The demarcations between exclusive, shared, and supporting competence could be understood despite the stumbling blocks that may exist among each one.[1802] But in addition to these three (3) major competences enumerated in the Treaties, the latter creates a different type of competence altogether with regard economic, employment, and social policy, wherein member states are obliged to "coordinate their economic and employment policies within the arrangements determined by the Treaty, which the Union shall have competence to provide."[1803] The same applies to employment policies and social policies.[1804] As to why a different com-

1796 Treaty on Functioning of the European Union, art. 2(2); *Craig/de Búrca*, EU Law (6th edition), p. 85.
1797 Treaty on Functioning of the European Union, art. 2(2); *Craig/de Búrca*, EU Law (6th edition), p. 85.
1798 Treaty on Functioning of the European Union, art. 2(5).
1799 Treaty on Functioning of the European Union, art. 6.
1800 *Craig/de Búrca*, EU Law (6th edition), p. 85.
1801 *Craig/de Búrca*, EU Law (6th edition), pp. 86-87.
1802 *Craig/de Búrca*, EU Law (6th edition), p. 87.
1803 Treaty on Functioning of the European Union, arts. 2(4), 5; *Craig/de Búrca*, EU Law (6th edition), p. 88.
1804 Treaty on Functioning of the European Union, art. 5.

petence is needed for these areas, the reason is mainly political: on one hand, there would definitely be opposition should it be a shared competence given that there is always the possibility of preemption should the EU act within this area; on the other hand, just to coordinate, support, and supplant would just be too weak.[1805] Separating another category does not erase the difficulties encountered as above stated, particularly with regard social policy: there are certain aspects of social policy that belong within shared competence and within the category of supporting, coordinating, and supplementing action, but it is not clear cut theretofore which ones belong to each.[1806]

On this point, one might ask within which competence does common foreign and security policy, including defense, belong to. This has not been clearly mentioned as what is only provided for is that the Union shall accordingly have the competence with the provisions of the Treaty on European Union, to define and implement the common foreign and security policy, including the progressive framing of a common defense policy.[1807] With that being said, CFSP remains to be intergovernmental rather than supranational.[1808] In this area, the European Council and the Council dominate decision-making and legal instruments normally applicable to other Union objectives are distinct from those applicable to CFSP.[1809]

Given the foregoing different competencies the EU possesses as a regional and supranational organization, it is naturally important to know that the same are exercised through the different types of EU instruments. Article 288 of the TFEU is the foundational provision:

> "To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.
> "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
> "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

1805 *Craig/de Búrca*, EU Law (6th edition), p. 88.
1806 *Craig/de Búrca*, EU Law (6th edition), p. 89.
1807 Treaty on Functioning of the European Union, art.2(4).
1808 *Craig/de Búrca*, EU Law (6th edition), p. 89.
1809 *Craig/de Búrca*, EU Law (6th edition), p. 90; *Cremona*.

> "A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.
> "Recommendations and opinions shall have no binding force."[1810]

Craig and de Búrca mention that there are five (5) points that ought to be taken into account in relation to the foregoing: (1) there is no formal hierarchy between these provisions; (2) these can take the form of legislative acts, delegated, or implementing acts, and the same shall determine on what place in the hierarchy of norms they would belong; (3) the Treaties may specify what instrument to be used but will often not do so; (4) there is an obligation to give reasons for legal acts, which may include proposals, initiatives, recommendations, requests, or opinions required by the Treaties; and (5) there are also specific rules to be followed in the making of the legal acts mentioned above.[1811]

Regulations, being binding in its entirety and directly applicable to the member states, they can be thought of as akin to national legislation.[1812] By stating that regulations are directly applicable, this could either mean that individuals have rights they could enforce through national courts, or that the regulations are already deemed part of the national legal system and member states do not need anything more to do to transform the same or adopt the same into their national legal systems.[1813] Nonetheless, member states may still need to modify their laws to further comply with the regulation, or make things consistent within their national legal orders, or provide legal measures to ensure full implementation and effect of the regulation.[1814]

Directives differ on two (2) points from regulations, as described above: they do not necessarily address all member states and they are only binding insofar as the end is concerned, while giving some elbow room to member states as to form and method.[1815] They are particularly useful when the aim is "to harmonize the laws within a certain area" or "introduce complex legislative change".[1816]

1810 Treaty on Functioning of the European Union, art. 288.
1811 Treaty on Functioning of the European Union, arts. 296, 297; *Craig/de Búrca*, EU Law (6th edition), p. 90.
1812 Treaty on Functioning of the European Union, art. 288; *Craig/de Búrca*, EU Law (6th edition), p. 106.
1813 Variola v. AmministrazionedelleFinanze, Case 34/73, [1973] ECR 981; *Craig/de Búrca*, EU Law (6th edition), p. 107.
1814 *Craig/de Búrca*, EU Law (6th edition), p. 107.
1815 *Craig/de Búrca*, EU Law (6th edition), p. 107.
1816 *Craig/de Búrca*, EU Law (6th edition), p. 108.

Decisions are similar to directives to a certain degree. They do not also necessarily bind all member states: a decision which specifies to whom it is addressed is binding only to them.[1817] As such, directives could either be in a general nature or individualized.[1818]

In light of the ongoing discussion, one could have an idea that there would be no room for informal law or soft law in the EU legal order because it is a supranational organization,. This is not true because the applicability of both formal and informal law is existing in any legal order, the EU included.[1819] Recommendations and opinions, together with the open method of coordination as a form of EU initiative and policy guidelines the Commission may issue in relation to state aids, illustrate this best.[1820] And although they are not necessarily binding in force, as indicated in Article 288 TFEU, recommendations and opinions may be referenced by member states before the CJEU concerning their interpretation and/or validity.[1821]

With much of the nature of the EU as a supranational entity being exhaustively touched upon, including the different ways it acts and/or enacts its objectives and policies, one can already get the idea that the EU is an international legal person. Indeed, many already harbored this presumption since the days of the European Community, the predecessor of the EU.[1822] This notwithstanding, the Lisbon Treaty still has belabored and spelled out clearly for everyone that the European Union has international legal personality.[1823] It is beyond doubt that said provision was not necessary for the EU to externally act from the time of its establishment, the EU nonetheless finally codified what have been a general and consistent practice.[1824] Said provision has now further legitimized the independence of the EU's actions, when it acts on its own right and not merely acting as a representative of a collective of member states, which is more important than the scope of its powers.[1825]

1817 Treaty on Functioning of the European Union, art. 288; *Craig/de Búrca*, EU Law (6th edition), p. 108.
1818 *Craig/de Búrca*, EU Law (6th edition), p. 108.
1819 *Craig/de Búrca*, EU Law (6th edition), p. 109.
1820 *Craig/de Búrca*, EU Law (6th edition), p. 109.
1821 Grimaldi v. Fonds des Maladies Professionelles, Case C-322/88, [1989] ECR 4407; *Craig/de Búrca*, EU Law (6th edition), p. 109.
1822 *Craig/de Búrca*, EU Law (6th edition), p. 109.
1823 Treaty on European Union, art. 4(1).
1824 *Curtin/Dekker*, p. 167.
1825 See *Curtin/Dekker*, p. 167.

In relation to this, one of the Union's actions revolves around its external relations and concluding agreements and arrangements with other countries and organizations. In this respect, the EU has the exclusive competence to enter into international agreements as long as conditions laid down by the Treaties are met.[1826] EU external action is comprised of four fields, namely, (1) a common commercial policy ("CCP"); (2) association, partnership, cooperation, and neighborhood policy; (3) development, technical cooperation and humanitarian aid; and (4) the external dimension of internal policies.[1827]

In relation to this, the EU can conclude agreements with one or more states, including international organizations agreements establishing an association involving reciprocal rights and obligations, common action, and special procedure.[1828] While what should be involved in an institution is not provided for, this has not stopped the EU from entering into a lot of association agreements with different countries as well as similar agreements with less intensive forms of integration or a narrower range of fields.[1829] Moreover, the EU has been greatly engaged with agreements involving development policy, or economic, technical, and financial cooperation, as a way of furthering its objective of developing and consolidating democracy and the rule of law, and the general objectives of human rights and fundamental freedoms.[1830]

At this juncture, one can observe that this external action is highly illustrative of what has been earlier mentioned in the EU's 1997 publication, "Agenda 2000: For a Stronger and Wider Europe".[1831] Reverting to the same, the European Commission proposed a range of ambitious, global roles for the European Union, which included the importance of the EU increasing its influence globally, while promoting values such as peace and security, democracy and human rights, and providing aid to less privileged countries, defend its social model, establish its presence on the world markets, prevent major damage to the environment, and ensure sustainable growth.[1832] As worded by the Agenda 2000 itself: "collective action by the European Union is an ever increasing necessity if these interests are to be

1826 See Treaty on Functioning of the European Union, arts. 3, 21.
1827 *Cremona,* p. 219.
1828 Treaty on Functioning of the European Union, art. 217.
1829 *Craig/de Búrca,* EU Law (6th edition), p. 335.
1830 *Craig/de Búrca,* EU Law (6th edition), p. 340.
1831 *Craig/de Búrca,* EU Law (6th edition), p. 341.
1832 *Bretherton/Vogler*, p. 15. See also *Bretherton/Vogler,* p. 15.

defended, if full advantage is to be taken of the benefits of globalization and if the constraints it imposes are to be faced successfully."[1833]

This vision-mission statement more or less found itself in the provisions of the Lisbon Treaty, wherein the European Union "shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter."[1834] The EU is expected as an international actor to be guided "by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law."[1835]

Considering the foregoing, one could then easily gain the idea that as an external actor, the European Union does not only intend to be influential, but also more or less wishes to influence and/or transform the global world to imbibe and internalize the former's own values and norms, which it thinks are important and fundamental.[1836] Stating it otherwise, the EU sets itself apart as a normative power in global politics – sometimes even referred to by other authors as a "civilian power".[1837] A case in point is the numerous developmental programs it endeavors on. Another example is much closer to home: the European Neighborhood Policy, wherein the EU and its neighbor-partners agree on action plans grounded on incentives, which more or less caters to the EU standards and values within the socio-, economic, and political planes.[1838] Not all analysts however buy into the idea of the EU as solely a normative power. They believe that the EU does not act so benignly all the time but also as a "soft imperialism power": the emphasis on democratization projects, strategies for "new abroad" are seen as examples of the EU's hegemonic

1833 *Manners,* p. 46.
1834 Reform Treaty 2007, arts. 3-5; *Bretherton/Vogler,* p. 15.
1835 Reform Treaty 2007, art. 10; *Manners,* p. 47.
1836 See *Manners,* p. 48.
1837 *Bono*, p. 23; *Manners,* pp. 45, 46.
1838 *Bono,* p. 23; *Manners,* pp. 45, 46.

power driven by both normative and strategic interests such as the need for stability.[1839] The same examples cited earlier equally apply: a look into the historical development of the ENP, for example, was initiated at the first place to secure the EU's borders, believing that what happens with its neighbors might spill over to its affairs. The provisions of the ENP were fashioned more or less to cater to EU's stability and not only to influence the Union's neighbors to internalize EU values and policies.

As regards regional peace and security, the EU's historical development shows that the European integration project has been since its inception a security project, with its key output being a powerful security community.[1840] In light of this, the EU slowly eased out from its emphasis on "foreign policy" (diplomatic correspondence) towards "security policy", which focuses on mechanisms for ensuring security both among its member states and between them and the wider world, and influences thereafter the "fluctuating balance between the EU's position as consumer and producer of security."[1841] With regard the security and defense policy, the EU handles the same uniquely given that the EU commits itself in its external action to "effective multilateralism" and prevention rather than preemption as a means of conflict management.[1842] With respect to this commitment, not only has the EU deepened and broadened the reach of its foreign and security policy, but it likewise adheres to a more comprehensive concept of security.[1843] In relation to this comprehensive concept of security, the EU is equally devoted to it vis-à-vis the area of "freedom, security, and justice, which was created in the Treaty of Amsterdam.[1844] Thus, the EU has enacted a substantial number of measures in connection therewith, including, if not particularly, on police and judicial cooperation in criminal matters, which is all what was left of the Justice and Home Affairs after asylum, immigration, and civil matters were transferred to the EC after the Amsterdam Treaty.[1845]

1839 *Smith,* pp. 763-767.
1840 *Bono,* p. 24.
1841 *Smith*, p. 38.
1842 *Smith,* p. 39.
1843 *Smith,* p. 39.
1844 *Smith,* pp. 40-43.
1845 *Douglas-Scott*, p. 220.

2. EU Organizational Structure

Taking the foregoing discussion on the Union's distinguishing characteristics as a regional organization, external actor, and position on overall regional security in mind, it would be now interesting to know how the same is interplayed among the different components and institutions of the Union. The following discussion shall be a walkthrough of the Union's organization structure or the different EU institutions as mentioned in the Treaties. Focus however shall be given, for purposes of the present study, to the institutions which play a role in the general decision and policymaking in the EU.

In relation to this, there are underlying points ought to be discussed *en passant* at the outset in considering the institutions and how they work.[1846] First, there is the so-called institutional balance that ensures that within the institutions there are checks and balances.[1847] However, one should not be quick to associate the notion of institutional balance to the traditional notion of governmental functions of legislative, executive, and judicial powers. Instead of the traditional notion of separation of powers amongst national governments, the institutional balance contemplated within the Union is that of ensuring that an institutional actor from becoming too powerful.[1848] Secondly, one must understand the dynamism involved as regards how these institutions exercise their powers: it is not static but it undergoes an evolution in accordance with how the Union itself further develops and what people expect of its effectiveness, accountability, and responsibility.[1849] Lastly, although to some degree this has been reduced or eliminated by virtue of the Lisbon Treaty, the powers of the institutions depend on the different areas of competence and the same illustrates how different competencies interplay and interrelate with one another.[1850]

1846 See *Douglas-Scott*, p. 220.
1847 *Woods/Watson*, p. 23.
1848 *Woods/Watson*, p. 23.
1849 *Woods/Watson*, p. 23.
1850 *Woods/Watson*, p. 23.

a. Commission

When one speaks of the term "Commission" within the European Union, it could refer to either the College of Commissioners or the permanent Brussels bureaucracy which staff the Commission services.[1851]

The presidency of the Commission has a huge significance given that it places first among equals in the Commission and its authority has been increased over time.[1852] As to how the Commission President is elected, the Lisbon Treaty provides that it shall be indirectly elected by the European Council: the European Council acting by qualified majority and after appropriate consultation, shall forward a candidate to the European Parliament, which in turn shall elect on the candidate by a majority of its members.[1853] Should the candidate not receive majority support, the Council shall then forward a new candidate within one month's time, and the same procedure shall be followed.[1854] This naturally means that the candidate ought to have the support from the majority grouping in the Parliament.[1855]

The election procedure aside, the President takes the wheel with regard the workings of the Commission. It influences overall Commission policy, in negotiating with the Council and Parliament, and lays down the guidelines on how the Commission works, including deciding on its internal organization and the appointment of the Vice-Presidents of the Commission, the latter heading project teams with other Commissioners.[1856] Necessarily included in the President's powers and responsibilities is the power to allocate the different responsibilities of the Commissioner to the different Commissioners, including the power to reshuffle portfolios.[1857]

Together with the President, the Commission is also composed of the College of Commissioners, which after 2014 and by virtue of the Lisbon Treaty, shall be composed of members, including the President and High Representative for Foreign Affairs, who correspond to 2/3 of the member states, unless the European Council – acting unanimously – decides to

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1851 *Woods/Watson*, p. 24.
1852 *Craig/de Búrca*, EU Law (6th edition), p. 31; *Woods/Watson*, pp. 37-38.
1853 Treaty on the European Union, art. 14(1).
1854 Treaty on the European Union, art. 14(1).
1855 *Craig/de Búrca*, EU Law (6th edition), p. 31.
1856 Treaty on the European Union, art. 17(6); *Craig/de Búrca*, EU Law (6th edition), p. 31.
1857 *Craig/de Búrca*, EU Law (6th edition), p. 32.

alter this number.[1858] It is imperative that member states are treated on a strictly equal footing vis-à-vis determination of the sequence of, and time spent by, their nationals as members in the Commission.[1859]

In line with this, the member states make suggestions as to who they want for Commissioners and by common agreement by the European Council and the President, shall submit a list for consideration of the European Parliament.[1860] The Parliament shall then give a vote of approval, on the basis of which the Council shall appoint formally the Commissioners.[1861] The appointed Commissioners shall have a term of five (5) years, subject to renewal.[1862] It must be mentioned additionally that Commissioners ought to be appointed based on their general competence and that their independence is beyond question.[1863] They ought to be independent in the fulfillment of their duties and responsibilities, and should not be influenced in their actions by any government or any other body, including the member states from which they were elected from.[1864] They shall meet collectively in the College of Commissioners that shall in turn operate under the President's guidance and take decisions by majority vote.[1865]

Another thing that ought to be mentioned regarding the Commission's structure is the applicable bureaucracy therein. Directorates-General ("DG") oversee major internal areas over which the Commission is responsible for.[1866] Accordingly, the Commission bureaucracy is composed of four (4) layers: there is the Commissioner who would have the portfolio for a particular area; the Director-General, who is the head bureaucrat of a particular DG and answerable to the Commissioner; Deputy Director General; Directors, who would formally head the different directorates under the DG; and the different heads of division or unit.[1867] Given the said layers, decisions and draft legislative proposals normally follow a

1858 *Craig/de Búrca,* EU Law (6th edition), p. 32.
1859 *Craig/de Búrca,* EU Law (6th edition), p. 32.
1860 Treaty on the European Union, art. 17(5).
1861 Treaty on the European Union, art. 17(5).
1862 Treaty on the European Union, art. 17(3).
1863 *Craig/de Búrca,* EU Law (6th edition), p. 32.
1864 Treaty on the European Union, art. 17(3).
1865 Treaty on the Functioning of the European Union, art. 250.
1866 *Craig/de Búrca,* EU Law (6th edition), p. 33.
1867 *Craig/de Búrca,* EU Law (6th edition), p. 34.

down-top approach – emanating from the lower part of the hierarchy, upwards towards the College of Commissioners.[1868]

The structure and bureaucracy notwithstanding, the Commission has a gamut of powers within the construct of the European Union, as set out in Article 17 of the TEU:

> "Article 17
> "1. The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the CJEU. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements.
> "2. Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise. Other acts shall be adopted on the basis of a Commission proposal where the Treaties so provide."[1869]

In light of the number of tasks listed above, the Commission is said to be entrusted with task of being an initiator, watchdog, and executive.[1870] The Commission's role as an initiator comes with respect to the legislative process, wherein it has the right of legislative initiative, which coincides with the Commission's role of being the EU's motor for integration.[1871] It may formulate proposals in any matter that maybe provided for by the TFEU, including those where the power is specifically granted or where general power is provided for.[1872] In light of this, the Council ought to make important decisions on the basis of the Commission's proposals and the power of the Parliament to request proposals from the Commission.[1873] This is without prejudice to the Council, on the other hand,

1868 *Craig/de Búrca,* EU Law (6th edition), p. 35.
1869 Treaty on European Union, art. 17.
1870 *Craig/de Búrca,* EU Law (6th edition), p. 35.
1871 Treaty on the European Union, art. 17(2), *Woods/Watson,* p. 38.
1872 Treaty on the Functioning of the European Union, art. 352, *Alesina/Perotti*, p. 29; *Craig/de Búrca,* EU Law (6th edition), p. 36; *Woods/Watson,* p. 38.
1873 *Woods/Watson,* p. 38.

requesting the Commission to conduct studies in relation to a matter the former deems important.[1874] Closely related to this is its development of an overall legislative plan for any single year.[1875] This sets the tone of what could be the priorities of the EU during any given year, which is consistent to what has been set in Article 17(1) TEU on the Commission initiating an annual or multi-annual programme that would ensure inter-institutional agreement within the EU. The Commission likewise affects the legislative process through its development of general policy strategies.[1876] Examples of this include the White Paper developed in furtherance of the Single European Act.[1877] Additionally, the Commission more or less exercises legislative power in its power to enact EU norms in certain areas without necessitating the involvement of other institutions, as well as the delegated power to the Commission to enact regulations within particular areas.[1878]

As regards the Commission's role of the watchdog, this more or less entails its role to ensure compliance with the Treaties vis-à-vis the Commission's judicial powers.[1879] At the outset, member states are expected to cooperate with the Union in carrying out tasks laid down in the Treaties under the principle of sincere cooperation:

> "xxx The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
> "The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives."[1880]

The Commission is responsible to seek out and bring to an end any infringement being committed by any member state. In line with this, it can proceed in two (2) ways. On one hand, the Commission can initiate actions against member states when they are in breach of EU law before the CJEU.[1881] On the other hand, the Commission itself in certain areas could act as an investigator and initial judge of a treaty violation whether

1874 *Woods/Watson,* p. 38.
1875 *Woods/Watson,* p. 38.
1876 *Craig/de Búrca,* EU Law (6th edition), p. 36.
1877 *Craig/de Búrca,* EU Law (6th edition), p. 36.
1878 *Craig/de Búrca,* EU Law (6th edition), p. 36.
1879 *Craig/de Búrca,* EU Law (6th edition), p. 37.
1880 Treaty on European Union, art. 4(3).
1881 Treaty on the Functioning of the European Union, art. 258.

the same is committed by a member state or private firm.[1882] Two of these areas concern competition and state aid.[1883] By affording the Commission adjudicatory power, it can effectuate better the development of EU policy, although it ought to be remembered that the Commission's decision is subject to review by the General Court.[1884] In connection to this, there is an administrative element to the Commission's powers: the Commission shall manage programmes, including policies, which would naturally entail working using national agencies.[1885] The Commission shall have general oversight over these matters to ensure that the rules are properly applied within the member states.[1886]

As regards the Commission's executive role, the Commission is the executive of the Union.[1887] Once a policy decision has been made by the Council, it is incumbent upon the Commission to proceed with the detailed implementation of said policy, including further legislation, should the same be required.[1888] Additionally, the Commission has its own power of decision wherein regulations needed to be enacted entail decisions of an executive nature.[1889] The Commission also exercises an executive function with respect to finance and external relations: it has significant powers over expenditure and structural policy, and maintains extensive diplomatic missions abroad, respectively.[1890]

b. European Parliament

The European Parliament is an institution which underwent gradual transformation: from a relatively powerless Assembly under the 1959 ECSC Treaty to the considerable strengthened institution as defined in the Lisbon Treaty.[1891] Notably, it was not envisioned as a democratic body at the onset of the Rome Treaty but instead, it was constituted of members who

1882 *Alesina/Perotti*, p. 30; *Woods/Watson*, p. 39.
1883 *Craig/de Búrca*, EU Law (6th edition), p. 38.
1884 *Craig/de Búrca*, EU Law (6th edition), p. 38.
1885 Treaty on the European Union, art. 17(1).
1886 *Craig/de Búrca*, EU Law (6th edition), p. 38.
1887 *Craig/de Búrca*, EU Law (6th edition), p. 37.
1888 *Woods/Watson*, p. 39.
1889 *Alesina/Perotti*, pp. 29-30; *Woods/Watson*, p. 39.
1890 *Woods/Watson*, p. 40.
1891 *Craig/de Búrca*, EU Law (6th edition), pp. 37-38.

needed to be members of their own national parliaments.[1892] With the introduction of direct elections by the Lisbon treaty, there was increased democracy, competition, and expertise because members are now responsible to the electorate and not necessarily intertwined with duality of mandates in the national and European levels.[1893] This in turn creates a direct link between national electorates and Union political institutions.[1894]

As it presently stands, the European Parliament seats in Strasbourg, but there is a secretariat based in Luxembourg and some sessions and committee meetings are held in Brussels, to facilitate contact with the Commission and Council.[1895] The members of Parliament, just like the Commission, have a term of five (5) years,[1896] and the Parliament shall be composed as follows:

> "The European Parliament shall be composed of representatives of the Union's citizens. They shall not exceed seven hundred and fifty in number, plus the President. Representation of citizens shall be degressively proportional, with a minimum threshold of six members per Member State. No Member State shall be allocated more than ninety-six seats.
> "The European Council shall adopt by unanimity, on the initiative of the European Parliament and with its consent, a decision establishing the composition of the European Parliament, respecting the principles referred to in the first subparagraph."[1897]

Given the aforementioned, the European Parliament is entrusted with, jointly with the Council, legislative and budgetary functions.[1898] Under the legislative role the Parliament presently plays, it has a right of co-decision with the Council on certain matters.[1899] Referred to as the "ordinary legislative procedure", the Parliament is effectively an equal partner in the legislative process to the extent that it would have significant veto power in matters subject to the procedure.[1900] Further, the Parliament more or

1892 *Craig/de Búrca,* EU Law (6th edition), p. 50.
1893 *Woods/Watson,* p. 24.
1894 *Woods/Watson,* pp. 24-25.
1895 *Woods/Watson,* p. 25.
1896 Treaty on European Union, art. 14(3).
1897 Treaty on European Union, art. 14(2); *Craig/de Búrca,* EU Law (6th edition), p. 51.
1898 Treaty on European Union, art. 14(1).
1899 *Craig/de Búrca,* EU Law (6th edition), p. 51.
1900 *Woods/Watson,* p. 28.

less has the power of initiative, wherein it has the power to request the Commission, acting by a majority of its members, to submit any appropriate proposal on which it considers a Union act is necessitated for purposes of implementing the treaty.[1901] One must understand nonetheless at this instance that the operative word in this case is "request": the Parliament may only request from the Commission the policy initiative but not initiate any policy on its own.[1902]

At this juncture, it is best to discuss the role the European Parliament plays in terms of treaty negotiations, albeit the same is not strictly legislative in nature. The Commission is duty-bound to transmit regularly to the Parliament relevant documents and reports on the progress of trade negotiations, and at the same time, trade agreements require the Parliament's assent before they could be ratified.[1903] This has happened in some occasions wherein upon voting on a proposal by the Commission, it was turned down by the Parliament.[1904] There are however instances wherein the European Parliament has expressed concerns over existing international agreements and would desire that said agreements be suspended or terminated. In such instances, the TFEU is bereft of any provision granting formal powers to the Parliament to do so.[1905] This notwithstanding, the Parliament came up with a Resolution on October 2013 wherein it states that even if it does not have formal powers under the TFEU regarding suspension or termination of international agreements, it nonetheless expects the Commission to act appropriately should the Parliament withdraw its support for a particular agreement, and that on whether the Parliament shall support future agreements, it shall take into account the responses of both the Commission and Council in relation to the agreements the Parliament has withdrawn support from.[1906] Indeed, the EP has not shied away from its frequent use of legislation to defend its role in the legislative process.[1907] And after much hesitation, the CJEU held that the Parliament could be a plaintiff in annulment proceedings, where its prerogatives have been violated.[1908] This later became integrated in treaty amendments and

1901 Treaty on Functioning of European Union, art. 225; *Craig/de Búrca*, EU Law (6th edition), p. 54; *Woods/Watson*, p. 28.
1902 *Woods/Watson*, p. 28.
1903 Treaty on Functioning of European Union, art. 218; *Woods/Watson*, p. 28.
1904 See *Woods/Watson*, p. 28.
1905 *Woods/Watson*, p. 28.
1906 *Woods/Watson*, p. 29.
1907 *Woods/Watson*, p. 29.
1908 *Craig/de Búrca*, EU Law (6th edition), p. 54.

the Parliament, together with the Commission, Council, and any member state, has equal and full legal standing to bring annulment proceedings.[1909]

The Parliament also possesses dismissal and appointment power. The accountability of the Commission to the Parliament has gradually increased.[1910] The EP has the power to censure the Commission, the same is carried out through a vote of two-thirds majority of the votes cast, which should represent the majority of the Parliament.[1911] Notably however, that while the Parliament can exercise censure, the Commission exercises holdover of its position until such time their replacements are appointed.[1912] Further, there is no restriction as to the reappointment of the same censured Commission by the member states.[1913]

In connection to this, the European Parliament likewise has the power to appoint. This is necessarily connected to its supervisory power.[1914] The Parliament in its supervisory role exercises direct political control over the Commission.[1915] At the outset, the EP elects the President of the Commission, subject to the list of candidates the Council may submit for the former's consideration, in addition to approving the appointment of the Commissioners and the Commission as a whole.[1916] Furthermore, the EP monitors the Commission's activities and exercises direct political control over it through the asking of questions – to which the Commission ought to reply in writing or orally – and establishment of committees of inquiry.[1917] The Commission ought to also come up with a general report for the Parliament's perusal and in practice, the Parliament is consulted often by the former during pre-legislative phases.[1918] The Council is equally subject to the supervisory authority of the Parliament, although the latter does not exercise direct control of its actions: activities of the Council are reported three times a year and the President of the Council must address the Parliament at the beginning of every year, which is followed by a

1909 Treaty on Functioning of European Union, art. 263; *Craig/de Búrca*, EU Law (6th edition), p. 54.
1910 *Craig/de Búrca*, EU Law (6th edition), p. 54.
1911 Treaty on Functioning of European Union, art. 234; *Craig/de Búrca*, EU Law (6th edition), p. 54.
1912 *Woods/Watson*, p. 29.
1913 *Woods/Watson*, p. 29.
1914 *Woods/Watson*, p. 29.
1915 *Craig/de Búrca*, EU Law (6th edition), p. 54; *Woods/Watson*, p. 29.
1916 Treaty on European Union, art. 14(1); *Woods/Watson*, p. 29.
1917 *Craig/de Búrca*, EU Law (6th edition), p. 54; *Woods/Watson*, p. 29.
1918 *Craig/de Búrca*, EU Law (6th edition), p. 55; *Woods/Watson*, p. 29.

general debate.[1919] In addition to this, the Council President must present a report to the Parliament at the conclusion of every European Council meeting.[1920]

Complimentary to the supervisory role the Parliament plays is its task to establish the office of the Ombudsman under the Maastricht Treaty.[1921] Appointed for the duration of the EP and dismissible by the Court of Justice of the European Union ("CJEU") (on request by the Parliament) on instances of serious misconduct or non-fulfillment of the conditions of the office, the Ombudsman is tasked to receive complaints from Union citizens or resident third-country nationals or legal persons, concerning instances of "maladministration in the activities of Union institutions, agencies, bodies, and offices" and to "conduct inquiries for which he finds grounds, either on his own initiative, or on the basis of complaints submitted to him direct or through a member of the European Parliament."[1922] On account of this, the concerned EU institution must supply the requested information and give access to the imperative files, unless the ground of secrecy is applicable.[1923]

In addition to the foregoing, the Parliament shall exercise functions of political control and consultation as laid down in the Treaties.[1924] The Council of Ministers is required to consult the Parliament on legislation in relation to particular areas.[1925] It must be said however that while the Council ought to consult and take into account what the Parliament opines, it is of no obligation to follow the latter.[1926] That said, it remains an essential procedural requirement.[1927] Failure to oblige, or passing regulations without receiving the Parliament's opinion first, has promoted the Court to annul the said regulations for failure to satisfy the requirement.[1928] Nonetheless, should the opinion be required in urgency and the Council had made the best efforts to secure it, but still failed to meet the

1919 *Woods/Watson*, p. 29.
1920 *Woods/Watson*, p. 29.
1921 *Woods/Watson*, p. 29.
1922 Treaty on Functioning of European Union, art. 228(1); *Craig/de Búrca*, EU Law (6th edition), p. 55.
1923 *Craig/de Búrca*, EU Law (6th edition), p. 55.
1924 Treaty on European Union, art. 14(1).
1925 *Craig/de Búrca*, EU Law (6th edition), p. 55.
1926 *Woods/Watson*, p. 27.
1927 *Woods/Watson*, p. 27.
1928 Roquette Freres v. Council (case 138/79); Maizena GmbH v. Council (case C-21/94); *Woods/Watson*, p. 27.

deadline, the Court has upheld the regulation for the apparent failure of the Parliament in its duty to cooperate.[1929]

c. European Council

Formally established as a Union institution by the Lisbon Treaty,[1930] the European Council shall bring together Heads of State or of Government of the member states, the President of the Council, and the President of the Commission.[1931] Meeting at least twice a year, they shall be assisted by the Lisbon Treaty-created Representative for the Union for Foreign Affairs.[1932]

As to how the European Council plays a role in the European Union, it is not meant to exercise legislative function, yet it is the most influential body: it is here that all the major policy guidelines are set and that all decisions on the big issues are taken.[1933] It shall provide the Union with the necessary impetus for development and defining the general political directions and priorities thereof.[1934] In doing so, it acts by consensus.[1935]

d. Council

The Council shall consist of one representative from each member state, who needed to be at the ministerial level and able to commit the government of that member state.[1936] While there are recurring concerns on how members of the Council tend to look out for the interests of their own member state rather than what is best for the Union, ministers appointed to the Council are normally appointed as ministers in their respective member states for purposes of fulfilling their Union function.[1937]

Something distinguishable about the Council as a Union institution is that it is composed of different configurations, no less than the Lisbon

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1929 Parliament v. Council (case C-65/93); *Woods/Watson,* p. 27.
1930 Treaty on European Union, art. 13(1).
1931 *Woods/Watson,* p. 27.
1932 *Woods/Watson,* p. 30. See also Treaty on Functioning of European Union, arts. 235-236.
1933 *Woods/Watson,* pp. 30-31.
1934 Treaty on European Union, art. 15(1).
1935 Treaty on European Union, art. 15(4).
1936 Treaty on European Union, art. 16(2).
1937 *Alesina/Perotti,* p. 29.

Treaty acknowledges.[1938] Its composition varies depending on the topic to be discussed.[1939] As a safety mechanism to ensure coordination and coherence, there is not only a General Affairs Council which coordinates all the work of the different configurations, but the European Council has been given to the power to determine the various configurations of the Council of Ministers.[1940] In connection to this, the Council Presidency comes into play: while the High Representative of the Union for Foreign Affairs presides over the Foreign Affairs Council, the European Council decides by qualified majority on the list of other Council formations and the Presidency of these formations.[1941] The Presidency of the formations, except the Foreign Affairs Council, must be made in accordance with the principle of equal rotation.[1942]

Given the abovementioned, the Lisbon Treaty provides that the work of the Council is prepared by the Committee on Permanent Representatives, which shall in turn effectuate the tasks given by the Council.[1943] Having its origins since the Rome Treaty, said Committee is composed of senior officials and operate on two (2) levels: one level is composed of permanent representatives in an ambassadorial rank and deal with more contentious issues such as economic and financial affairs as well as external relations; and the other, composed of permanent representatives responsible for issues such as environment, social affairs, the internal market, and transport.[1944] Working on two (2) levels, the Committee does not make substantive decisions on its own right but nonetheless plays an imperative role in decision-making in the EU as it considers the draft legislative proposals from the Commission and help set the agenda for Council meetings.[1945]

1938 Treaty on European Union, art. 16(6), (9); Treaty on Functioning of European Union, art. 236; *Woods/Watson,* p. 31.
1939 *Woods/Watson,* p. 31.
1940 Treaty on European Union, art. 16(6); Treaty on Functioning of European Union, art. 236; *Woods/Watson,* p. 31.
1941 Treaty on European Union, art. 16(6); Treaty on Functioning of European Union, art. 236; *Craig/de Búrca,* EU Law (6th edition), p. 41.
1942 Treaty on European Union, art. 16(6); Treaty on Functioning of European Union, art. 236; *Craig/de Búrca,* EU Law (6th edition), p. 41.
1943 Treaty on European Union, art. 16(7); Treaty on Functioning of European Union, art. 240(1).
1944 *Craig/de Búrca,* EU Law (6th edition), p. 41.
1945 *Craig/de Búrca,* EU Law (6th edition), p. 43; *Craig,* p. 45.

Alongside the Committee of Permanent Representatives, the Council also has a General Secretariat which provides general administrative support to it.[1946]

The composition and appointment of the Council aside, it plays a crucial role as both executive authority, which it has in large part delegated to the Commission, and legislative authority.[1947] It has to vote approval of almost all Commission proposals before the same can be law.[1948] As to whether vote shall be by unanimity, qualified majority, or simple majority depends on the applicable treaty provision.[1949] Moreover, the Council is empowered to take a proactive role by requesting the Commission through a simple majority request to undertake any studies the Council deems important to attain desirable objectives.[1950] At the same time, the Council can delegate the Commission power to pass further regulation within a particular area.[1951] The Council also plays a role in budgetary issues, on which many initiatives would depend.[1952] Additionally, the Council is responsible for concluding agreements on behalf of the Union with third states or international organizations.[1953]

The Council, in addition to the foregoing, also plays a significant role in the Common Foreign and Security Policy ("CFSP") by taking the necessary decisions for defining and implementing the CFSP in the light of guidelines that may have been established by the European Council.[1954] Closely related to this, the Council is also involved with the Area of Freedom, Security, and Justice.[1955]

e. Court of Justice of the European Union

The Court of Justice of the European Union shall include the Court of Justice, the General Court, and specialized courts.[1956]

1946 *Craig/de Búrca,* EU Law (6th edition), p. 43; *Craig,* p. 45.
1947 *Craig/de Búrca,* EU Law (6th edition), p. 43.
1948 Treaty on European Union, art. 16(3).
1949 Treaty on European Union, art. 16(3).
1950 Treaty on Functioning of the European Union, art. 241.
1951 Treaty on Functioning of the European Union, art. 290.
1952 *Alesina/Perotti,* p. 29.
1953 *Craig/de Búrca,* EU Law (6th edition), p. 44.
1954 *Craig/de Búrca,* EU Law (6th edition), p. 44.
1955 *Craig/de Búrca,* EU Law (6th edition), pp. 44-45.
1956 Treaty on European Union, art. 19(1).

With respect to the Court of Justice, there shall be one judge per member state and they shall be appointed by common accord of the governments of the member states, after consultation with a designated panel that looks into the suitability of the person to perform duties as a CJEU judge.[1957] Accordingly, those chosen must have independence and possess the qualifications making them eligible to be appointed to the highest judicial offices in their respective member states.[1958] The term of office shall be six (6) years, without prejudice to reappointment.[1959] Appointments are made in a staggered manner so that there will be reappointments made every three years.[1960] The Court elects among its own judges the President and Vice President, and likewise appoints its Registrar.[1961]

The CJEU is assisted by Advocates General, who are appointed in the same manner as CJEU judges, and their duty is to make in open court, reasoned submissions on cases.[1962]

In view of the foregoing, the CJEU can sit as a full court – Grand Chamber – composed of 15 judges, or in Chambers, in accordance with the rules set out by Statute.[1963] It sits as a full court in instances where the matter is of exceptionally important, or when the subject matter warrants, such as when it involves the removal of the Ombudsman or Commissioner.[1964] The Grand Chamber likewise applies when the member state or an institution that is a party to the proceedings so requests, and in complex and important cases.[1965]

Other than the Court of Justice, there is the General Court which is accorded the responsibility within the sphere of its jurisdiction to ensure the law is observed in the interpretation and application of the Treaty.[1966] It shall be comprised of at least one judge per member state, compared to the CJEU.[1967] There are no separate Advocates General in the General

1957 Treaty on Functioning of the European Union, arts. 253, 255.
1958 Treaty on European Union, art. 19(2); Treaty on Functioning of the European Union, art. 253.
1959 *Craig/de Búrca*, EU Law (6th edition), p. 45.
1960 Treaty on Functioning of the European Union, art. 253.
1961 Treaty on Functioning of the European Union, arts. 252, 253; *Craig/de Búrca*, EU Law (6th edition), p. 58.
1962 Treaty on Functioning of the European Union, art. 254; *Craig/de Búrca*, EU Law (6th edition), p. 58.
1963 *Craig/de Búrca*, EU Law (6th edition), p. 58.
1964 *Craig/de Búrca*, EU Law (6th edition), p. 58.
1965 *Craig/de Búrca*, EU Law (6th edition), p. 58.
1966 Treaty on European Union, art. 19(1).
1967 Treaty on European Union, art. 19(2).

Court but a judge can be requested to provide assistance as the same.[1968] Similar with the qualifications of being a judge in the Court of Justice, one should be independent without doubt and possess the ability required for appointment to high judicial office.[1969] They shall be appointed by common accord of the member states for a renewable term of six (6) years, upon consultation with the judicial panel that advises on judicial appointments.[1970] The General Court shall have its own Registrar and a President, whom shall be appointed among the judges.[1971] It can sit in chambers of three or five judges, or sometimes by a single judge, without prejudice to sitting as a Grand Chamber or full court when the case's complexity or independence demands it.[1972]

Any decision of the General Court is appealable to the Court of Justice within two (2) months from date of notification of said decision.[1973] This appeal shall be however limited to questions of law, which may cover "grounds of lack of competence of the General Court, a breach of procedure before it which adversely affects the interests of the appellant as well as the infringement of Union law by the General Court."[1974]

Aside from the Court of Justice and General Court, there are also the specialized courts meant to ease the caseload of the two previously mentioned.[1975] Accordingly, the European Parliament and the Council through ordinary legislative procedure establish these specialized courts attached to the General Court to hear at first instance certain classes of actions in certain areas.[1976]

Given the foregoing, the CJEU plays an imperative role among the EU institutions because it ensures that in the interpretation and implementation of the Treaties the law is always observed.[1977] In relation to this, the CJEU was instrumental in fashioning principles of the EU legal order, such as, but not limited to, direct effect, supremacy, and state liability in

1968 *Craig/de Búrca*, EU Law (6th edition), p. 58.
1969 Treaty on Functioning of European Union, art. 254.
1970 Treaty on Functioning of European Union, art. 255.
1971 Treaty on Functioning of European Union, art. 254.
1972 Protocol (No. 3) on the Statute of the European Court of Justice, art. 50.
1973 Protocol (No. 3) on the Statute of the European Court of Justice, art. 56.
1974 Protocol (No. 3) on the Statute of the European Court of Justice, art. 58.
1975 *Craig/de Búrca*, EU Law (6th edition), p. 59.
1976 Treaty of Functioning of the European Union, art. 257.
1977 Treaty on the European Union, art. 19(1); *Craig/de Búrca*, EU Law (6th edition), p. 60.

damages, which consequently defined the very nature of the EU.[1978] Craig and Búrca elucidate:

> "These principles have defined the very nature of the EU, constitutionalizing it and distinguishing it from other international treaties. They were especially significant in the years of so-called institutional malaise or stagnation. The Court rendered the Treaty and EC legislation effective when the provisions had not been implemented as required by the political institutions and the Member States. This was exemplified by the Court's role in the creation of the single market, requiring removal of national trade barriers, when progress towards completing the single market through legislative harmonization was hindered by institutional inaction."[1979]

With the foregoing in mind, the Court's role is rather dynamic than static, and not consistently an "activist" court at all times or in all policy areas: it may intervene in one aspect but lay low on another aspect.[1980] In connection to this, the Court normally engages into a purposive or tautological approach in its jurisprudence, meaning, it shall examine the whole context wherein a particular provision is located and gives the interpretation that shall most likely further the purpose sought to be achieved by the provision, which not be sometimes the literal interpretation of the subject Treaty or legislation.[1981]

3. EU Fundamental Principles, Norms, and Practices

As one knows the organizational structure of the Union, one would inevitably be interested on how Union works – whether there are principles, norms, or practices that the EU abide with and need to take into account of in its decision-making and actions in general. Indeed there are and these are clearly etched in the Treaties and reflected in the different legal and non-legal instruments.

1978 *Alesina/Perotti*, p. 30.
1979 *Craig/de Búrca*, EU Law (6th edition), p. 63.
1980 *Craig/de Búrca*, EU Law (6th edition), p. 63.
1981 *Craig/de Búrca*, EU Law (6th edition), p. 63.

a. Constitutional Principles

The constitutional principles of the EU provide the grounds for Union-level legitimacy and govern the relationship between the supranational and national levels.[1982] It must be mentioned that although the Treaties steered away from being referred to as a "Constitution", the EU member states in fact have broaden the scope of international agreements with the same by giving the Treaties the same function as a constitution by providing a primary body of law that "incorporates constitutional principles" and underpins the existence and mechanism of the Union.[1983]

First, there is the principle of conferral, which has been mentioned *en passant* with respect competencies of the Union. This means, the EU may only act on matters or policy fields which the member states have conferred upon it.[1984] Member states, hence, remain as "masters of the Treaties" and whatever they do not confer to the Union, remains to be their exclusive competence.[1985] In relation to this principle, there has been growing concerns on the expanding competence of the Union or the so-called "mission creep", wherein the Union has been accumulating more and more powers at the expense of member states.[1986] Jurisprudence has not overlooked these concerns, one of which is the landmark decision by the German Federal Constitutional Court ("FCC") in Brunner v. European Union Treaty on the issue of ratification by the German Parliament of the Maastricht Treaty. Whilst affirming the authority of the German Parliament to ratify the Maastricht Treaty, the Court was not afraid to issue a warning that because the EU was conferred limited powers and it does not have authority to expand its powers on its own, any claim of further powers and authority is dependent on the modification or amendment of the Treaty and the affirmative decisions of the national parliaments.[1987]

The second and third constitutional principles that could be found in the Treaties are the principles of subsidiarity and proportionality. While some member states' constitutional courts acted to preempt any further "mission creep" by the European Union, the apprehensions and worries persisted. In response, the principles of subsidiarity and proportionality

1982 *Craig/de Búrca,* EU Law (6th edition), p. 64. See for details on constitutionalization of Union law, *Stavrou,* pp. 1-9.
1983 *Von Bogdandy*, pp. 96-97. See *Stavrou*.
1984 Treaty on European Union, art. 1; *Von Bogdandy,* pp. 96-97.
1985 *Woods/Watson,* p. 50.
1986 *Woods/Watson,* p. 51.
1987 Brunner v. European Union Treaty, [1994] 1 CMLR 57; *Woods/Watson,* p. 51.

exist to provide a stop-lock gate to any further expansion of powers of the Union beyond what has been provided for.[1988] On one hand, the principle of subsidiarity decides, "where there are multiple layers of government, at which level policy decisions will be made."[1989] Accordingly, Article 10(3) TEU provides that decisions should be taken as close as possible to the citizen, mirroring the preamble of the TEU.[1990] Hence, while it might be discerned that the EU has competence to act, it is a different question altogether on whether said competence should be exercised or not.[1991] It must be qualified however, that the same pertains only to those matters outside the exclusive competence of the Union. As the relevant paragraph of Article 5(3) TEU provides:

> "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."[1992]

The foregoing paragraph connotes (1) that no EU action ought to be taken unless said action cannot be sufficiently achieved by the member states; and (2) that EU action should be taken if it would better achieve the end result desired by reason of the proposed scale and effect of the proposed action.[1993] To discern, the subsidiary test could be applied, wherein one asks: (1) whether the issue has transnational effects, which cannot be satisfactorily regulated by the member states; (2) actions by member states alone would conflict with the requirements of the treaty, such as internal market provisions; and (3) action at Union level would clearly benefit by reason of its scale and effects.[1994] In connection to this, the Protocol on the Principles of Subsidiarity and Proportionality provide how the same shall be further implemented:

> "Draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft legislative act should

1988 *Woods/Watson*, p. 51.
1989 *Woods/Watson*, p. 59.
1990 Treaty on European Union, art. 10(3).
1991 *Woods/Watson*, p. 59.
1992 Treaty on European Union, art. 5(3).
1993 *Woods/Watson*, p. 59.
1994 *Woods/Watson*, p. 59.

> contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. Draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimized and commensurate with the objective to be achieved."[1995]

Additionally, the national parliaments are given a role to play should they believe that the principle of subsidiarity has not been complied with. The relevant article provides:

> "Any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, in the official languages of the Union, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers.
>
> "If the draft legislative act originates from a group of Member States, the President of the Council shall forward the opinion to the governments of those Member States.
>
> "If the draft legislative act originates from the Court of Justice, the European Central Bank or the European Investment Bank, the President of the Council shall forward the opinion to the institution or body concerned."[1996]

Going hand in hand with the principle of subsidiarity is the principle of proportionality. This principle states that the "content and form Union action shall not exceed what is necessary to achieve the objectives of the

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1995 Protocol (No. 2) on the Application of the Principle of Subsidiarity and Proportionality, art. 5.

1996 Protocol (No. 2) on the Application of the Principle of Subsidiarity and Proportionality, art. 6.

Treaties."[1997] Applied in the context of administrative law, the principle requires that "the means used to achieve a given end must be no more than which is appropriate and necessary to achieve that end."[1998] Stating it more bluntly, action should not be an overkill and the means employed ought to be reasonable, taking into account likewise of other possible alternative actions.[1999]

The fourth constitutional principle that could be mentioned is the principle of institutional balance, or sometimes referred to as the division of powers among the different EU institutions. If one would recall the immediately preceding discussion on the different EU institutions, one would observe that each institution has its own duties and responsibilities independent of the other, and underlying these functions is the principle of institutional balance, which is not completely the same with the traditional notion of separation of powers amongst national governments. This institutional balance needs to be respected by the institutions as the same also governs their relationships with one another.[2000] In respect to this, institutions ought to act within bounds but it does not necessarily follow that there is a balanced distribution of weight among the different institutions' powers.[2001] Instead, it means that the Treaties provide the institutional structure every institution ought to follow and that they are not allowed to overstretch their powers to the detriment of the others.[2002] In other words, it ensures that no single institution becomes too powerful.[2003]

In light of the foregoing, the principle of institutional balance becomes imperative in the decision-making process and governing intra-institution practice. On one hand, the legal basis on which a particular decision of a particular institution normally needs to be scrutinized to determine whether the particular institution has acted within its prerogative. Moreover, one keeps in mind that the powers of the institutions depend on the different areas of competence and the same provides how different competencies should interplay and interrelate with one another.[2004] Said legal basis is a manifestation of the principle of institutional balance and should one have acted without legal basis, then the Court would not

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1997 Treaty on European Union, art. 5(4).
1998 *Woods/Watson,* p. 60.
1999 See *Woods/Watson,* p. 159.
2000 *Woods/Watson,* p. 159.
2001 *Jacqué*, p. 383.
2002 *Jacqué*, p. 383.
2003 *Jacqué*, p. 384.
2004 *Jacqué*, p. 384; *Woods/Watson,* p. 23.

hesitate to sustain an action for annulment.[2005] As the Court of Justice once did, in sustaining the Parliament's action for annulment to preserve its prerogative:

> "Those prerogatives are one of the elements of the institutional balance created by the Treaties. The Treaties set up a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community. Observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions. It also requires that it should be possible to penalize any breach of that rule which may occur."[2006]

As Jacqué noted, the Court interpreted the principle in a dynamic way, wherein, while the principle only states that institutions should act within their boundaries, the Court now allows redress for any violation of the same.[2007]

In addition, the principle of institutional balance becomes important in terms of intra-institution practice. It was used by the Commission in blocking actions of the Parliament.[2008] The Parliament, on the other hand, has historically been codifying its vision as regards the role it ought to play, or already playing in the legislative process that the Commission and Council ought to respect, which the latter – also on the basis of institutional balance – object to.[2009] The use of the principle to embolden opposition notwithstanding, the principle also paved way to inter-institutional agreements between the Council, Commission, and the Parliament: said agreements act like a "constitutional glue through which the institutions could resolve high-level issues, provide guiding principles, or lay the groundwork for concrete legislative action.[2010] Sanctioned by the treaties, Article 295 TFEU enjoins the Parliament, Council, and Commission to consult each other and by common agreement make arrangements for cooperation, which in turn, may arise to inter-institutional agreements.[2011]

2005 *Woods/Watson,* p. 24.
2006 Case 70/88, Parliament v. Council, [1990] ECR I-2041, §§ 21–22, as cited in *Jacqué*, p. 386.
2007 *Jacqué*, p. 386.
2008 *Jacqué*, p. 386.
2009 *Jacqué*, p. 386.
2010 See *Craig/de Búrca*, EU Law (6th edition), p. 54; *Jacqué*, p. 386.
2011 Treaty on Functioning of the European Union, art. 295.

It can be said that the principle applies herein because each institution needs to acknowledge the role the other plays in the legislative and overall decision-making process, and thus, instead of butting heads with one another, find ways to cooperate and coordinate more efficiently with one another.

Lastly, there is the constitutional principle of delegated sovereignty. When a member state decides to join the European Union, it gives up its sovereignty but not its entirety given that as mentioned above, whatever competence was not conferred to the Union, remains exclusively to the member states. Moreover, a member state can opt out of the Union subject to the applicable provisions of the Treaties. Article 50 TEU provides:

> "1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
> "2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
> "3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
> "4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.
> "A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union."[2012]

The decision of withdrawal does not solely rest on the discretion of the member state, however. As can be read above, it has to be voted on by

2012 Treaty on European Union, art. 50.

the European Council, with prior consent from the European Parliament. With regard to this, the idea of a member state's sovereignty being absolute seems diminished, given that the member state could not even unilaterally decide on its own to leave an organization it has earlier consented to join.

b. Normative Principles

Other than the constitutional principles that governs legitimacy at the Union-level and governs the relationship between the supranational and national levels, there are also the normative values that constitute part of the fundamental principles of Union law.[2013] These values being "sustainable peace, freedom, democracy, human rights, rule of law, equality, social solidarity, sustainable development and good governance", they are not only to be considered as founding principles but also objectives to be attained by the Union in its actions and decisions.[2014] As such, the EU does not only internalize these values but promotes the same by virtue of the principles of "living by example"; by duty of its actions in "being reasonable"; and by consequence of its impact in "doing least harm".[2015] If one may recall the discussion on how the EU proceeds as an external actor, one can remember how the EU can also be described as a normative actor, promoting the values which it deems important, reasonable, and desirable. The same is evident in partnership programs, developmental programs, humanitarian aid, and the like, wherein one or more fundamental principle/norm is being promoted.[2016]

c. Decision-making principles

Having a supranational nature, the Union follows a carefully laid down procedure for decision making and legislation. As one may recall, the Commission, among the Union institutions, has the right to legislative initiative.[2017] The Council ought to make important decisions on the basis

2013 See *Craig/de Búrca,* EU Law (6th edition), p. 109.
2014 *Manners,* p. 46; *Von Bogdandy,* p. 106.
2015 *Manners,* p. 46.
2016 See for specifics *Manners,* p. 46.
2017 Treaty on the European Union, art. 17(2), *Manners,* pp. 46-59.

of the Commission's proposals.[2018] This is without prejudice however to the Council itself asking the Commission to conduct studies the former considers imperative to attaining common objectives, and to submit appropriate proposals concerning these common objectives.[2019] In the same vein, the EP may request the Commission to submit proposals on matters it believes the Union should act on to implement the Treaties, and the latter thereafter should make a prompt and sufficiently detailed response.[2020] Additionally, there is also a people's initiative in the EU decision-making framework notwithstanding the Commission's right of legislative initiative.[2021] Under said people's initiative, no fewer than one million citizens who are nationals of a significant number of member states may take the "initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters which the citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties."[2022]

Having mentioned the nuances of legislative initiative within the Union, one must know that there are two (2) types of legislative procedure: ordinary legislative procedure and special legislative procedure.[2023] On one hand, the ordinary legislative procedure consists of the joint adoption by the Parliament and Council of a regulation, directive, or decision on a proposal from the Commission.[2024] It is always important to know the particular treaty article as it would dictate the legislative procedure applicable to a certain area, though in most cases it is the ordinary legislative

2018 *Alesina/Perotti,* p. 29; *Craig/de Búrca,* EU Law (6th edition), p. 36; *Woods/Watson,* p. 38.
2019 *Woods/Watson,* p. 38.
2020 Framework Agreement on Relations between the European Parliament and the Commission, C5-349/2000[2001]; *Craig/de Búrca,* EU Law (6th edition), p. 125.
2021 Treaty on European Union, art. 11(4).
2022 Treaty on European Union, art. 11(4); Treaty on the Functioning of the European Union, art. 24.
2023 Treaty on Functioning of the European Union, art. 289; *Craig/de Búrca,* EU Law (6th edition), p. 125.
2024 Treaty on Functioning of the European Union, art. 289(1); *Woods/Watson,* p. 67.

procedure that shall apply.[2025] In this case, Article 294 TFEU provides for ordinary legislative procedure.[2026]

2025 *Craig/de Búrca,* EU Law (6th edition), p. 127.

2026 Said Article states:
"1. Where reference is made in the Treaties to the ordinary legislative procedure for the adoption of an act, the following procedure shall apply.
"2. The Commission shall submit a proposal to the European Parliament and the Council.
"3. The European Parliament shall adopt its position at first reading and communicate it to the Council.
"4. If the Council approves the European Parliament's position, the act concerned shall be adopted in the wording which corresponds to the position of the European Parliament.
"5. If the Council does not approve the European Parliament's position, it shall adopt its position at first reading and communicate it to the European Parliament.
"6. The Council shall inform the European Parliament fully of the reasons which led it to adopt its position at first reading. The Commission shall inform the European Parliament fully of its position.
"7. If, within three months of such communication, the European Parliament:
"(a) approves the Council's position at first reading or has not taken a decision, the act concerned shall be deemed to have been adopted in the wording which corresponds to the position of the Council;
"(b) rejects, by a majority of its component members, the Council's position at first reading, the proposed act shall be deemed not to have been adopted;
"(c) proposes, by a majority of its component members, amendments to the Council's position at first reading, the text thus amended shall be forwarded to the Council and to the Commission, which shall deliver an opinion on those amendments.
"8. If, within three months of receiving the European Parliament's amendments, the Council, acting by a qualified majority:
"(a) approves all those amendments, the act in question shall be deemed to have been adopted;
"(b) does not approve all the amendments, the President of the Council, in agreement with the President of the European Parliament, shall within six weeks convene a meeting of the Conciliation Committee.
"9. The Council shall act unanimously on the amendments on which the Commission has delivered a negative opinion.
"10. The Conciliation Committee, which shall be composed of the members of the Council or their representatives and an equal number of members representing the European Parliament, shall have the task of reaching agreement on a joint text, by a qualified majority of the members of the Council or their representatives and by a majority of the members representing the European Parliament within six weeks of its being convened, on the basis of the positions of the European Parliament and the Council at second reading.

There are three (3) things that can be noted from the provision on ordinary legislative procedure. First, there are stages in the process, including the first reading, second reading, conciliation, and if necessary, third reading.[2027] During the first reading, the Commission's proposal, at its simplest, may already be accepted by both the EP and the Council without amendments.[2028] But should there be no approval or amendments are proposed, then the procedure advances to second, and even third, reading, with efforts to conciliate positions and compromise.[2029]

The second thing one can take away from the ordinary legislative procedure is that even if it is formalistic in its rules, there is emphasis on compromise and dialogue, which is reflected in no less than the EP's Rules of Procedure, Joint Declaration, and Framework Agreement between the EP and Commission.[2030] Moreover, there is the institutionalization of

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"11. The Commission shall take part in the Conciliation Committee's proceedings and shall take all necessary initiatives with a view to reconciling the positions of the European Parliament and the Council.
"12. If, within six weeks of its being convened, the Conciliation Committee does not approve the joint text, the proposed act shall be deemed not to have been adopted.
"13. If, within that period, the Conciliation Committee approves a joint text, the European Parliament, acting by a majority of the votes cast, and the Council, acting by a qualified majority, shall each have a period of six weeks from that approval in which to adopt the act in question in accordance with the joint text. If they fail to do so, the proposed act shall be deemed not to have been adopted.
"14. The periods of three months and six weeks referred to in this Article shall be extended by a maximum of one month and two weeks respectively at the initiative of the European Parliament or the Council.
"15. Where, in the cases provided for in the Treaties, a legislative act is submitted to the ordinary legislative procedure on the initiative of a group of Member States, on a recommendation by the European Central Bank, or at the request of the Court of Justice, paragraph 2, the second sentence of paragraph 6, and paragraph 9 shall not apply.
"In such cases, the European Parliament and the Council shall communicate the proposed act to the Commission with their positions at first and second readings. The European Parliament or the Council may request the opinion of the Commission throughout the procedure, which the Commission may also deliver on its own initiative. It may also, if it deems it necessary, take part in the Conciliation Committee in accordance with paragraph 11."

2027 *Craig/de Búrca,* EU Law (6th edition), p. 127.
2028 *Craig/de Búrca,* EU Law (6th edition), pp. 128-130.
2029 *Woods/Watson,* p. 68.
2030 Joint Declaration of the European Parliament, the Council, and the Commission of 13 June 2007 on practical arrangements for the co-decision procedure

trilogues, which are attended by representatives from the Council, Parliament, and Commission – normally not more than 10 from each institution – the aim being to facilitate compromise.[2031]

Lastly, one can take away from the ordinary legislative procedure an insight on power dynamics and normative foundations. The EP had always pushed for a co-equal role in the legislative process prior to the Lisbon Treaty and this has been achieved in the ordinary legislative procedure, which was priorly known as co-decision procedure.[2032] It has also been conferred a veto power, which although it has historically applied sparingly, there is a relative power that could be observed.[2033] Having said that, there is also power from the Commission itself in the entire process, being the main initiator of legislation: it is authorized to withdraw a proposal before it is adopted, submit a modified version, or refuse to proceed again, if it feels that the amendments to be proposed shall be fundamentally averse.[2034]

Aside from the ordinary legislative procedure, there is also the special legislative procedure, which is mainly a consultative procedure required by the Treaties for certain areas wherein a regulation, directive, or decision is adopted by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament.[2035] In instances wherein special legislative procedure is applicable, the Council must consult the Parliament before it acts; otherwise, its actions may be annulled.[2036] This is the bare minimum requirement that ought to be complied with. There could also be instances wherein the Parliament ought to be consulted again should there have been important changes made

(Article 251 of the EC Treaty), [2007] OJ CI45/5; Rules of Procedure of the European Parliament, Annex XIX; *Craig/de Búrca*, EU Law (6th edition), pp. 129-130; *Woods/Watson*, pp. 69-71.

2031 *Craig/de Búrca*, EU Law (6th edition), pp. 130-131.

2032 *Craig/de Búrca*, EU Law (6th edition), p. 131; *Woods/Watson*, p. 71.

2033 *Craig/de Búrca*, EU Law (6th edition), p. 133.

2034 *Craig/de Búrca*, EU Law (6th edition), p. 132; *Woods/Watson*, p. 71.

2035 Treaty on Functioning of the European Union, art. 289(2); *Craig/de Búrca*, EU Law (6th edition), pp. 132-133.

2036 Case 138/79, Roquette Freres v. Council, [1980] ECR 333; Case C-65/93, European Parliament v. Council (Re Generalized Tariff Preferences), [1995] ECR I-643; Case C-156/93, European Parliament v. Commission (Re Geneticaly Modified Microorganisms in Organic Products, [1995] ECR I-2019; Case C-658/11, European Parliament v. Council, EC:C:2014:2025; as cited in *Woods/Watson*, p. 71.

to a measure previously consulted.[2037] It should be clarified though that consulting is one thing, but following what has been advised is another. The Council must take it into consideration but is under no obligation to follow the Parliament's view or even defend its position on the matter.[2038]

C. Cross-border movement of evidence: European Investigation Order

The following portion discusses the applicable regime of the European Union on mutual legal assistance in criminal matters. Before delving into the substantive and procedural provisions, there would be a preliminary discussion on its historical development of mutual legal assistance in the EU.

With respect to this, it would be easier to just enumerate the different regimes and policies the EU has implemented, but the same would only be half-baked. Therefore, this chapter also intends to show the reasons and motivations the EU has used in developing its mutual legal assistance regime, which would necessarily include a discussion on how the EU developed its policy on criminal matters and how the EU historically developed its legal cooperation on criminal matters as a response to the sign of the times. By going through this exercise, one could gain a better understanding on how the EU positions itself in matters of legal cooperation, what normally drives its decisions on these matters, and what changes, if ever, has it made through time. Afterwards, focus shall be given to the presently applicable mutual legal assistance in criminal matters regime, which shall include discussions on its substantive and procedural provisions.

1. Historical Development of Mutual Legal Assistance in the EU

The historical development of mutual legal assistance in criminal matters, or international and transnational cooperation in general, in the European Union is nothing short of interesting. International cooperation in general was not only influenced by the sign of the times, but its development also took into consideration the issues and concerns raised regarding said cooperation.

2037 *Craig/de Búrca*, EU Law (6th edition), p. 134.
2038 *Craig/de Búrca*, EU Law (6th edition), p. 134.

One must first understand that any criminal law policy or cooperation among member states on criminal matters historically was and remained purely intergovernmental, and often informal.[2039] For example, one of the earliest multilateral extradition treaties existed in 1802 through the Treaty of Amiens between France, Spain, Great Britain and Holland, Article 20 of which provided for the extradition of persons accused of murder, forgery or fraudulent bankrupt.[2040] The implementation of said treaty was only hindered by the war against Napoleonic France.[2041] The intergovernmental, and sometimes informal, characteristic remained even when the European Community took effect in January 1958.[2042] Community institutions were barely given any role to play in the negotiations of these type of criminal cooperation agreements or conventions, except for the Court of Justice to interpret civil law conventions, subject to restrictive jurisdictional rules then applied under the EEC treaty.[2043] In fact, developments in this area occurred in many fronts but almost, if not completely, without Community involvement. Developments occurred in the framework of the Council of Europe (which as one would recall is mainly intergovernmental in nature), within the framework of the European Political Cooperation (which addressed mostly criminal law issues), and the developed Schengen cooperation.[2044]

As regards the Council of Europe, it took the lead on multilateral agreements at the international level on cross-border cooperation, while the United Nations took the backseat.[2045] With cross-border cooperation traditionally encompassing six (6) elements of extradition, mutual legal assistance, transfer of prisoners, enforcement of sentences, transfer of proceedings, and confiscation of proceeds of crime, the Council of Europe was able to have conventions regarding the same, with the exception of the Conventions on enforcement of sentences and transfer of proceedings as having the least amount of support from member states.[2046] Among these conventions on cross-border cooperation, the 1957 European Convention on Extradition and 1959 European Convention on Mutual Legal Assis-

2039 *Woods/Watson,* p. 71.
2040 *Douglas-Scott,* p. 221; *Peers*, p. 269.
2041 *O'Higgins*, p. 492.
2042 *O'Higgins,* p. 492.
2043 *Peers,* p. 269.
2044 See *Peers,* p. 270.
2045 *Peers,* pp. 268-269, 270.
2046 *Peers*, pp. 6-7.

tance in Criminal Matters eventually became the key or core agreements in Europe.[2047]

On one hand, the 1957 Convention on Extradition provided that to implement extradition, the "requesting" state asks the "requested" state to "surrender" the fugitive to it, possibly after a provisional arrest to prevent flight.[2048] In view thereof, special extradition proceedings shall be held in accordance with what the national law of the requested state provides.[2049] The Convention however would provide that extradition should be granted should the subject person escaped from custodial sentence of over four months detention, or is accused of committing a crime punishable in at least one year detention in both the requesting and requested states (concept of dual criminality).[2050] This does not mean that there were no exceptions to granting extradition. Among others, extradition could be limited to a specific list of crimes and extradition could not be allowed should the subject offense is political, military, or sometimes, fiscal, or whether the purpose of the extradition is discriminatory in nature.[2051] Extradition is likewise not allowed should the subject person be a national of the requested state.[2052]

The 1959 Convention on Mutual Legal Assistance would apply to all offenses except political, military, and fiscal offenses, as well as those involving sovereignty, national interest or public order cases,[2053] and unlike the Extradition Convention, there is no sentencing threshold or dual criminality requirement except for search and seizure measures.[2054] Should a judge in the "home state" of the prosecution want a piece of evidence or any other relevant material, it should send a formal request called "letters rogatory" – usually through its own national ministry – to the relevant ministry of the "host state", which then forwards the request to a national judicial authority, i.e. a judge or prosecutor .[2055] Requests for mutual legal assistance could be denied should the home state think that it shall "preju-

2047 *Peers*, Mutual Recognition, pp. 6-7.
2048 *Peers*, p. 694.
2049 *Peers*, EU Justice and Home Affairs Law, p. 694.
2050 *Peers*, EU Justice and Home Affairs Law, p. 694.
2051 *Peers*, EU Justice and Home Affairs Law, p. 694.
2052 *Peers*, EU Justice and Home Affairs Law, p. 694.
2053 1959 European Convention on Mutual Legal Assistance, arts. 1(2) and 2.
2054 *Peers*, EU Justice and Home Affairs Law, p. 711.
2055 *Peers*, EU Justice and Home Affairs Law, p. 711.

dice the sovereignty, security, public order, and other essential interests of the country."[2056]

While being the key agreements on extradition and mutual legal assistance, the European Conventions were not without issue.[2057] The European Convention on Mutual Legal Assistance, as stated above, provides political, military and fiscal offenses, together with national interest as the only grounds for refusing a request for mutual legal assistance.[2058] Akin to the European Convention on Extradition, the European MLA Convention did not provide definitions of fundamental concepts and provisions such as what is "political offense" or "fiscal offense."[2059] These issues and concerns notwithstanding, the two instruments brought a crucial development in terms of legal/judicial cooperation in criminal matters as they did not only close a considerable gap in the present system of bilateral treaties among European States, but it successfully imparted an "important step forward in the doctrine of uniformity in the practice and procedure" of both extradition and mutual legal assistance in criminal matters.[2060]

Within the Community framework, which were mostly in the context of the European Political Cooperation, the established cooperation mechanisms were mostly informal or ad hoc.[2061] There was the establishment in 1975 of the Terrorism, Radicalism, Extremism, and International Violence ("TREVI") group and the European Convention on the Suppression of Terrorism ("ECST") in 1977, which could be said to be one of the intergovernmental arrangements that heralded the modern era of European counter-terrorism measures.[2062] Starting as a forum for exchanging information regarding organized crime and terrorism, the TREVI group was formed by European police officials to exchange information and provide mutual assistance on terrorism and related international crimes and in pur-

2056 *Peers*, EU Justice and Home Affairs Law, p. 711.
2057 *Peers*, Mutual Recognition, pp. 6-7.
2058 Article 2 of the Convention reads as follows: "Article 2. Assistance may be refused: (a) if the request concerns an offence which the requested Party considers a political offence, an offence connected with a political offence, or a fiscal offence; (b) if the requested Party considers that execution of the request is likely to prejudice the sovereignty, security, ordre public or other essential interests of its country." This is more or less the same grounds for refusal vis-à-vis political and fiscal offenses as provided for in the European Convention on Extradition. *O'Higgins*, p. 493.
2059 See *O'Higgins*, p. 493.
2060 *O'Higgins*, p. 493.
2061 *O'Higgins*, pp. 492,494.
2062 *Vermeulen/De Bondt*, p. 117.

suit thereof, high level meetings and gatherings were held among interior and justice ministers and top level security officials.[2063] It was only after a while when these cooperation activities were formally approved by the Ministers of Justice and Home Affairs and included within the European Economic Community.[2064] Given TREVI, there were other cooperative arrangements to combat terrorism, which included the Police Working Group on terrorism and the Counter-Terrorism Group.[2065]

The Schengen process among a small number of member states was ongoing coincidentally, which entailed the adoption of treaties and implementing measures vis-à-vis the adoption of internal border controls and parallel compensatory measures necessary to ensure and increase security.[2066] This started with a small agreement in 1985, to be followed by a longer Convention implementing the Schengen Agreement in 1990.[2067] While intergovernmentalism was the preferred approach, this move proved itself as a more effective measure as it was ratified in 1993 – or three years' time after signature, even if there was some opposition from some member states in the Community like the United Kingdom, Denmark, and Ireland.[2068] Considering that the 1959 Convention on Mutual Legal Assistance allowed additional bilateral or multilateral agreements to supplant or fill in details of its provisions, Schengen member states took the opportunity to integrate into the Schengen Framework additional requirements and/or obligation on mutual assistance.[2069] Accordingly, the grounds for refusal were reduced, the ground on double incrimination has been restricted, and simplified procedure on how requests for assistance are transmitted – allowing direct contact between judicial authorities and the executing state.[2070]

Things changed a bit after the Maastricht Treaty or between the years 1993 to 1998, which formalized the intergovernmentalism involved in Justice and Home Affairs.[2071] In 1993, the TREVI Group and other European institutions dealing with judicial, customs, and immigration issues were

2063 *Casale*, p. 50.
2064 *Casale*, p. 50.
2065 *Casale*, p. 50.
2066 *Casale*, p. 50.
2067 *Peers*, EU Justice and Home Affairs Law (Non-Civil), p. 270.
2068 *Peers*, EU Justice and Home Affairs Law (Non-Civil), p. 270.
2069 *Peers*, EU Justice and Home Affairs Law (Non-Civil), p. 270.
2070 *Winter*, pp. 580-581.
2071 *Klimek*, p. 15; *Peers*, EU Justice and Home Affairs Law (Non-Civil), pp. 292-293.

brought under the third pillar of the European Union.[2072] Occupying the third pillar in the original TEU structure, EC institutions together with the Council were assigned roles regarding the same but they were limited nonetheless.[2073] For instance, the European Parliament only had the right to be informed by the Council on any ongoing negotiations, while the European Commission did not have the right to initiate proposals on the areas of policing and criminal law.[2074] This mechanism ensured maximum control by the member states on these areas but it definitely hampered EU action.[2075]

There were admittedly moderate achievements notwithstanding the foregoing limitations on the Union structure. In terms of international cooperation in criminal matters, the relevant provisions of the Maastricht Treaty did not only provide for compensatory measures that would have to be taken once border controls between the member states have been removed. In addition to the consolidated TREVI and other European institutions dealing with crime, the Maastricht Treaty provided for the creation of the European Police Office ("EUROPOL"), for which, prior to being operational in 1998, a counter-terrorism preparatory group was established in 1997 to formulate the office's role in matters of counter-terrorism.[2076]

Additionally, the member states were not particularly shying away from introducing innovative ideas as regards formal modes of cooperation in criminal matters to improve the same, especially since they have long realized the need to improve its efficiency and effectiveness, particularly extradition.[2077] The European Union may be considered a "laboratory" at this moment in which several new ideas have developed and some "experiments" have been carried out in the field of international cooperation in criminal matters.[2078] These "experiments" admittedly ought to be not too drastic however and baby steps were imperative to make things work. To illustrate, the member states were able to agree within the Maastricht period on the 1995 Convention on simplified extradition process and the 1996 Convention relating to Extradition between Member States of the EU, both of which meant to accelerate and simplify the mechanisms of

2072 *Peers*, EU Justice and Home Affairs Law (Non-Civil), p. 270.
2073 *Casale*, p. 50.
2074 *Peers*, EU Justice and Home Affairs Law (Non-Civil), p. 271; *Vermeulen/De Bondt*, pp. 117-118.
2075 *Peers*, EU Justice and Home Affairs Law (Non-Civil), p. 271.
2076 *Peers*, EU Justice and Home Affairs Law (Non-Civil), p. 271.
2077 *Casale*, p. 50.
2078 *Plachta*, p. 179.

the 1957 European Convention on Extradition.[2079] While the new Conventions tackling extradition was laudable, it still contained a reservation clause that greatly diminished the practical mechanism of the provisions and at the same time, the two Conventions did not break free from the traditional extradition mechanism of being highly political and intergovernmental.[2080] With only a few member states ratifying these Conventions, they did not enter into force and consequently, disillusioning political figures in the EU from pursuing further innovations with regard judicial cooperation.[2081]

At this juncture, one may be compelled to ask why there was a need in the first place to undertake cross-border cooperation agreements when this has been covered quite extensively by the Council of Europe, even covering all six (6) traditional elements of the same.[2082] It was explained that member states wanted either to supplement widely ratified Council of Europe Conventions, like the one on Extradition, for instance by "reducing the number of exceptions to the rules as between EU member states," or "to find alternative routes to achieve the same ends where the Council of Europe measures had not attracted many ratifications."[2083] In view thereof, agreements regarding the same failed to enter into force even if the member states have made agreements and/or arrangements prior to the Maastricht Treaty.[2084]

Although it was not a complete win on extradition despite earnest efforts to be more efficient, one could notice agreements on corruption, fraud, and driving disqualification, as well as joint actions on efforts to harmonize substantive criminal law, as regards drug trafficking, racism, trafficking in persons, sexual exploitation, and organized crime.[2085] The EU realized that not only good and respectable citizens profit from the discontinuation of internal borders and freedom of passenger traffic, service traffic, and movement of goods.[2086] The centers of affluent societies of the EU member states provide a motivation for illegal products and services

2079 *Plachta,* p. 179.
2080 *Peers,* Mutual Recognition, p. 8; *Plachta,* p. 179; *Vermeulen/De Bondt,* p. 118.
2081 *Plachta,* p. 179.
2082 As mentioned earlier, this includes extradition, mutual legal assistance, transfer of prisoners, enforcement of sentences, transfer of proceedings, and confiscation of proceeds of crime.
2083 *Peers,* Mutual Recognition, p. 8; *Plachta,* p. 179.
2084 *Peers,* Mutual Recognition, p. 7.
2085 *Luchtman*, p. 74; *Peers,* Mutual Recognition, p. 7.
2086 *Luchtman,* p. 74; *Peers,* EU Justice and Home Affairs Law (Non-Civil), p. 293.

of all kinds as well as a target of criminal attacks on regular economic, finance, and competitive processes.[2087] Moreover, there is the ever looming threat of terrorism and the inherent problem of corruption and mafia-like structures.[2088] The potential menaces these threats and concerns brought influenced member states to discuss counter-measures, one of which is strengthening of cross-border cooperation.[2089]

In the 1997 Action Plan to combat organized crime, it became apparent that there is lack of knowledge on competent authorities in other member states and this consequently affects negatively efficient cooperation.[2090] Henceforward, the European Council adopted the Joint Action of 29 June 1998 on the creation of a European Judicial Network ("EJN") with the objective of creating a decentralized network of contact points, which were to play a crucial role in relation to international cooperation in criminal matters among member states.[2091] Included herein is a Joint Action on Good Practice in mutual legal assistance, promoting through said Joint Action the use of liaison magistrates and setting up so-called mutual "peer evaluation" where the first reports tackled the functioning of mutual legal assistance in Europe.[2092] The achievements of the Schengen framework could not be likewise ignored. As Vermeulen and De Bondt surmised, these achievements were perhaps attributable to the involvement of a lesser number of member states.[2093] The Schengen Convention was applied from 1995 and implemented by measures instituted by the Executive Committee, which was created by virtue of the Schengen Convention.[2094] It must be mentioned however that the scope of cooperation was growing more than expected and was exceeding the capacity of the Schengen institutional framework in terms of a dedicated administrative staff to oversee the process.[2095]

Changes were introduced during the Amsterdam Treaty, which covered the years 1999 to 2005, and more or less could be described as modified intergovernmentalism in terms of the Justice and Home Affairs: retaining key features of intergovernmentalism but acceding competencies to the

2087 *Hecker*, p. 65.
2088 *Hecker*, p. 65.
2089 *Hecker*, p. 65.
2090 *Hecker*, p. 65.
2091 *Vermeulen/De Bondt*, p. 118.
2092 *Nilsson*, p. 55.
2093 *Vermeulen/De Bondt*, p. 118.
2094 *Peers*, EU Justice and Home Affairs Law (Non-Civil), p. 272.
2095 *Peers*, EU Justice and Home Affairs Law (Non-Civil), p. 272.

Union on certain matters such as judicial cooperation, allowing the latter to take a conceptual approach in the development of said area.[2096] In this regard, the Amsterdam Treaty introduces the concept of the "area of freedom, security, and justice."[2097] To further develop this area, the content of the action taken on judicial cooperation included two (2) components: (1) the idea of approximating national law by providing minimum standards regarding definitions of crimes and their sanctions; and (2) the further development of a regulatory framework applicable to judicial cooperation.[2098] This eventually led to the 1998 Vienna Action Plan that called for an extensive use of the new possibility of harmonization and gradual adoption of minimum standards while prioritizing criminal acts linked to organized crime, terrorism, and illegal drug trafficking, as well as the speeding up and streamlining the judicial cooperation between member states and third countries.[2099]

Pursuant to the Amsterdam Treaty, concepts of "framework decisions" and "decisions" to supplant Conventions and common decisions were introduced: the first, to be used to approximate national law, with the same definition as directives; the latter: to be used for purposes other than approximating national law – with both ruling out direct effect.[2100] In practice, the Council favored the use of these instruments in the legislative process as they do not require ratification by national parliaments to take effect, which consequently phased out the need to use conventions and protocols.[2101] The Council eventually used the same instruments to replace pending pre-Amsterdam Treaty Joint Actions and conventions, which meant that national parliaments did not anymore have a power of approval over third pillar acts, even if some instances, they still tried to exert influence over them.[2102] For instance, a Decision was used to create the office of the Eurojust, which serves as the EU prosecutor's agency.[2103]

Moreover, the Treaty of Amsterdam introduced changes in relation to "closer cooperation" in AFSJ between certain member states. There was the integration of the Schengen *acquis* to the EC and EU legal order, while

2096 *Peers*, EU Justice and Home Affairs Law (Non-Civil), p. 272.
2097 Treaty on European Union, art. 29; *Klimek*, p. 16; *Peers*, EU Justice and Home Affairs Law (Non-Civil), p. 272; *Vermeulen/De Bondt*, p. 118.
2098 *Vermeulen/De Bondt*, p. 118.
2099 *Vermeulen/De Bondt*, p. 118.
2100 *Vermeulen/De Bondt*, pp. 118-119.
2101 *Peers*, EU Justice and Home Affairs Law (Non-Civil), p. 273.
2102 *Peers*, EU Justice and Home Affairs Law (Non-Civil), p. 273.
2103 *Peers*, EU Justice and Home Affairs Law (Non-Civil), p. 274.

granting UK, Ireland, and Denmark special status under the same, but nonetheless incorporating all Schengen measures, present and future, to the EC and EU system.[2104]

As regards the substantive measures adopted in criminal law during this period, the foundations were laid in 1999-2001 for the establishment of the principle of mutual recognition in criminal matters, which is sought to be the "cornerstone of judicial cooperation."[2105] Previously, cooperation in criminal matters was premised on "mutual assistance", which connoted flexibility and lack of stringency in cooperation.[2106] It was thought in the concepts of having a requesting state and requested state, wherein the latter retained a broad margin of appreciation on whether to give a request its due course and execution.[2107] The principle of mutual recognition, as proposed, is about acknowledging differences between the different legal and/or judicial systems of each member state and accepting them.[2108] Judicial decisions from another member state under the said principle are afforded the same effect and value as national judicial decisions "without any prior procedure needed for recognition and/or homologation."[2109] It is basically grounded on mutual trust as there is renunciation on the part of the executing state of any control upon the grounds that motivate the request for evidence of the issuing state, because the executing state can trust that the requesting authorities have already checked the legality, necessity, and proportionality of the measure requested.[2110]

One of the programmes the European Council undertook for the development of JHA law was the Tampere Programme of October 1999, which reflected the awareness of the European Council that revolutionary steps (and not just a mere evolutionary approach) ought to be taken by the EU should it want to succeed in innovating judicial cooperation in criminal matters and making the said mechanism more effective.[2111] This is more

2104 *Peers*, EU Justice and Home Affairs Law (Non-Civil), p. 293. The three (3) mentioned countries were also given special opt out status vis-à-vis Title IV legislation which could then be exercised during negotiations or adoption of the measure.
2105 *Alegre/Leaf*, p. 201; *Peers*, EU Justice and Home Affairs Law (Non-Civil), p. 274.
2106 *De Hert/Weis/Cloosen*, p. 55; *Plachta*, p. 180.
2107 *Vermeulen/De Bondt*, p. 119.
2108 *Vermeulen/De Bondt*, p. 119.
2109 *Luchtman*, p. 78; *Winter*, p. 581.
2110 *Winter*, p. 581.See also *Alegre/Leaf*, p. 201.
2111 *De Hert/Weis/Cloosen*, p. 56.

especially the case considering the perceived rise in cross-border crime.[2112] Consequently, the Tampere document included four (4) main points: (1) A common EU Asylum and Migration Policy, (2) a genuine European area of justice; (3) a unionwide fight against crime; and (4) stronger external action.[2113]

The principle on mutual recognition in criminal matters as mentioned above falls under the discussion on building an European area of justice. The European Council endorsed the said principle due to reasons that an "enhanced mutual recognition of judicial decisions and judgments and the necessary approximation of legislation would facilitate cooperation between authorities and the protection of individual rights."[2114] The European Council enjoined the Council and the Commission to adopt by December 2000 a programme to implement the mutual recognition principle, and additionally to work on an "European Enforcement Order and 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 principles of the member states."[2115] This has thereafter set into motion policies designed to enhance the free movement of criminal investigations, prosecutions, and sentences, across EU borders, by means of implementing the principle of mutual recognition to criminal matters.[2116]

Additionally, the Tampere Programme mentioned the need to step up the cooperation against crime. In relation thereto, the European Council states that "maximum benefit should be derived from cooperation between member state authorities when investigating cross-border crime in any member state."[2117] As a first step towards the realization of this goal, the European Council called for the setup of joint investigative teams to combat trafficking in drugs and human beings as well as terrorism.[2118]

2112 *Peers,* EU Justice and Home Affairs Law (Non-Civil), pp. 274, 293; *Plachta,* p. 179.

2113 Tampere European Council 15 and 16 October 1999 Presidency Conclusions.

2114 Tampere European Council 15 and 16 October 1999 Presidency Conclusions, Sec. B, Part VI, para. 33. See also *Peers,* Mutual Recognition, p. 5.

2115 Tampere European Council 15 and 16 October 1999 Presidency Conclusions, Sec. B, Part VI, para. 36.

2116 *Plachta,* p. 180.

2117 Tampere European Council 15 and 16 October 1999 Presidency Conclusions, Sec. B, Part IX, para. 43.

2118 Tampere European Council 15 and 16 October 1999 Presidency Conclusions, Sec. B, Part VI, para. 36.

Along the same timeline, one of the earlier developments was the 2000 Convention on Mutual Legal Assistance, meant to enter into force on August 2005.[2119] The Convention is said to have greatly expanded, simplified, and modernized the European Criminal Law on mutual assistance.[2120] At the outset, it must be clarified that the 2000 Mutual Legal Assistance Convention does not have elements relating to the principle of mutual recognition. Having clarified this, the 2000 MLA Convention is general in character and contracting parties ought to supplement and facilitate the application of the various agreements mentioned in the Convention.[2121] As Denza explained, the first point of the 2000 Convention is to recognize that mutual assistance was already grounded on the 1959 Convention and its additional protocol, the Schengen documents, and regional agreements such as those existing among the Benelux countries, and the purpose of the 2000 Convention is to modernize and further develop these provisions, taking into consideration technological advances.[2122]

The 2000 Convention introduced the principle of *forum regit actum* and the horizontalization of cooperation within the EU.[2123] First, the principle of *forum regit actum* relates to the law that is applicable to the execution of the request: the requesting state may now indicate the procedure and formalities that ought to be applied in the execution of a request, a concept otherwise not provided for in the 1959 European Convention on Mutual Legal Assistance.[2124] Second, the orientation of cooperation was changed from a vertical one, wherein requests are issued and received through central authorities, to generally a horizontal one wherein requests shall be made directly between judicial authorities with territorial competence for initiating and executing them.[2125]

2119 *Peers,* Mutual Recognition, p. 5. One can note herein that the 2000 Convention on Mutual Legal Assistance has been negotiated since the 1990's, albeit it has only been finally introduced during the same timeline as the Tampere Programme.

2120 *Douglas-Scott,* p. 227; *Peers,* Mutual Recognition, p. 8.

2121 *Denza*, p. 1048.

2122 See *Denza,* p. 1056.

2123 *Denza,* p. 1056.

2124 *Vermeulen/De Bondt,* p. 119. See also *Satzger*, p. 145.

2125 2000 Mutual Legal Assistance Convention, art. 6, para. 1. This is without prejudice to an exchange between central authorities or between a central authority and a judicial authority (para. 2). Also, the UK and Ireland are equivocally mentioned in the Convention as member states retaining the use of their respective central authorities (para. 3). See also *Vermeulen/De Bondt,* p. 120.

In relation to this, gaining familiarity with the other member states' practice on criminal matters remained an issue and thus the 2000 MLA Convention aimed to increase this, and at the same time, the subsequent uniformity in practice as more EU member states accede to the 2000 Convention.[2126] Providing for the different types of request a member state could make, which includes, but is not limited to, taking of testimonies or statements, interceptions of communication, the formation of joint investigation teams, etc., and allowing spontaneous exchange of information without a prior request,[2127] the 2000 Convention through its 2001 Protocol does not exclude political, military, and fiscal offenses, and parties are not allowed to exclude offenses which fail to satisfy the dual criminality test or are not extraditable under their own law.[2128]

It did not take long when Europe soon realized that aside from the modernization and simplification of mutual assistance, how urgently it needed to press the start button on the other endeavors laid down in the Tampere Programme.[2129] After the September 2001 attacks in the United States, the EU saw the bigger role it has to play.[2130] It dawned on Europe that it was not merely a target, or a contributor due to the growing number of radicalized, marginalized, and poorly integrated Muslims in European societies, but more importantly, it was a quintessential player that needed immediate response in countering and/or battling terrorism and transborder crime.[2131] As a way to respond, there was a change in many policy areas as well as new countermeasures and strategies to impede the increasing security threat of transnational crime and terrorism.[2132] In fact, the development of EU Criminal Law was at its high peak during 2001 to 2004.[2133] One could observe at the outset the substantial momentum gained with the nexus between internal and external security resulting in merging of police systems, judicial systems, special forces, and external military action.[2134] There was a reorganization of the security apparatus

2126 *Vermeulen/De Bondt,* p. 120.
2127 2000 Convention on Mutual Legal Assistance, arts. 8-20. See also *Denza,* p. 1056.
2128 *Vermeulen/De Bondt,* p. 120.
2129 See *Alegre/Leaf,* p. 202.
2130 See *Denza,* p. 1057.
2131 *Casale,* p. 51; *Eder/Senn,* p. 14.
2132 *Casale,* p. 51; *Eder/Senn,* p. 14; *Komárek*, p. 14.
2133 *Eder/Senn,* p. 13.
2134 *Peers,* EU Justice and Home Affairs Law (Non-Civil), p. 293. See also *Klimek,* pp. 17, 22-23.

at the local, national, and European level wherein one could see a closer cooperation between intelligence services, the police, and the military at the national and transatlantic levels.[2135]

This notwithstanding, the approach employed by Europe still retained a stark difference with the United States' on this matter. Compared to the United States which invoked "the first war of the 21st century" in its fight against terrorism and generally prefers military measures to stop the same, experience with domestic terrorism and other forms of "grass-roots" terrorism (e.g. left-wing terrorism in Germany, national terrorism in France, Spain, and the United Kingdom) has prompted Europe to adopt an all-encompassing approach, which included in particular an intensification in improving and/or innovating its law enforcement and judicial measures.[2136] Europe generally stayed on the path of a criminal justice model, and not the war model the United States espoused, even if several tensions admittedly would still be met in such a model.[2137] To start with, there was the deployment of the JHA policy making apparatus under the third pillar of the EU,[2138] from which there was the adoption on 21 September 2001 of the comprehensive EU Action Plan to Fight Terrorism.[2139] Accordingly, this received political approval in less than three months and key framework decisions were formally adopted by the European Council on 13 June 2002.[2140] These Framework Decisions on the European Arrest Warrant, Joint Investigation Teams, and Terrorism came at the advent of such action plans, which meant to expedite the extradition process among member states, allow the establishment of teams comprising law enforcement and judicial representatives jointly working in cross-border investigations involving two or more member states, and enumerate acts that could constitute terrorism, respectively.[2141] It can be

2135 *Bono,* p. 26.
2136 *Bono,* p. 26; *Walker*, p. 1145.
2137 See *Walker,* p. 1145.
2138 *Eder/Senn,* p. 14; *Peers,* EU Justice and Home Affairs Law (Non-Civil), p. 293.
2139 *Alegre/Leaf,* p. 202; *Bono,* p. 26; *Douglas-Scott,* p. 220.
2140 *Alegre/Leaf,* p. 202.
2141 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant, OJ L190, 18.7.2002, p. 1-20; Council Framework Decision 2002/475/JHA of 13 June 2002 on Combating Terrorism, OJ L 164, 22.6.2002, p. 3-7; Council Framework Decision 2002/465/JHA of 13 June 2002 on Joint Investigation Teams, OJ L 162, 20.6.2002, p. 1-3; *Casale,* p. 51; *Douglas-Scott,* p. 220.

said that these three framework decisions overall meant to stress the importance of harmonizing the legislation of serious crimes.[2142]

One may notice at this point in time that due to the political need to respond, probably due to the heightened emotions brought by the 9/11 attacks, European policy makers "reached for recipes that they had decided upon two (2) years previously" because most of the foregoing, including the establishment of structures such as Eurojust, Police Chiefs Task Force, and the European Police College, and strengthening of the existing Europol, were all outputs of the Tampere programme.[2143] Inevitably, this leads to the notion that the policy changes being introduced were not from a careful study of the threat but instead, were only through a "reactive borrowing" from a list the EU policy makers thought sufficient to address the emerging issues.[2144] But then again, sunk costs might have been too high for policy makers to tailor fit policy changes to the existing threat and time constraints did not permit them to sit down and deliberate on the matters further.[2145]

The terrorist attacks in Madrid thereafter occurred in March 2004 and a look on the member states would show a dismal implementation record of the measures adopted on 21 September 2001.[2146] With the Madrid attacks providing a loud wake up call, the Justice and Home Affairs Ministers came up with the Declaration on Combating Terrorism, which was adopted by the European Council on 25 March 2004.[2147] Prior to this, the emergence of terrorism as a priority of the EU was mentioned in the 2003 European Security Strategy but still, implementation among member states has not been impressive.[2148] The Declaration to Combat Terrorism referred to the existing implementation flaws and urged member states to urgently and fully implement the measures on police and judicial cooperation.[2149] It called for new measures that would reinforce operational cooperation and intelligence exchange not only between national authorities but with European bodies such as Europol and Eurojust as well.[2150] It likewise provided clear guidelines for action by setting out seven (7) overarching

2142 *Argomaniz,* p. 7; *Eder/Senn,* p. 14; *Casale,* p. 51; *Douglas-Scott,* p. 220.
2143 *Argomaniz,* p. 7; *Casale,* p. 51.
2144 *Apap/Carrera*, p. 3; *Argomaniz,* pp. 7, 8; *Douglas-Scott,* p. 220.
2145 *Argomaniz,* p. 7.
2146 *Argomaniz,* p. 7.
2147 *Argomaniz,* p. 9.
2148 *Casale,* p. 51.
2149 *Argomaniz,* p. 8.
2150 *Argomaniz,* p. 10.

strategic objectives, which was accompanied thereafter by a "Solidarity Clause" – a symbolic "Europeanization" of the threat through the formal commitment of each member states to assist should another member state fall victim to a terrorist attack.[2151] A few days short of three months after the Declaration on Combating Terrorism, the European Council endorsed a revised EU Action Plan on Combating Terrorism on 18 June 2004, which elucidated the seven (7) strategic objectives mentioned in the March 2004 Declaration and presented measures in a scoreboard form, attributing tasks with clearly defined deadlines to monitor implementation, and without shying away from "naming and shaming" those which failed to satisfy their obligations.[2152]

Subsequently, one could witness the European Commission fulfilling its role as policy entrepreneur when it fielded months after the Declaration communications formulating policies on terrorism financing, infrastructure protection, and response management, all of which were within its competencies.[2153] Mindful of sensibilities it may touch should its proposals have supranational recipes considering that criminal matters still belonged to intergovernmentalism, the Commission focused on increasing information exchange and enhancing coordination with mechanisms such as the European Programme for Critical Infrastructure Protection ("EPCIP"), Critical Infrastructure Warning Information Network ("CIWIN") or the networking of rapid alert systems ("ARGUS").[2154]

The European Council accepted on 04-05 November 2004 the Hague Programme, reaffirming its priority to the development of an area of freedom, security, and justice.[2155] The approximation of substantive criminal law provisions should make it easier to apply the principle of mutual recognition of penal-judicial decisions, especially so in serious offense areas with an international dimension.[2156] At the same time, the European Council recognized the need or importance to improve international exchange of information about criminal prosecutions and to this end, introduced the "principle of availability of information", under which criminal prosecuting authorities of member states should be able to perform their duties unhindered, since all useful information would be universally

2151 *Argomaniz,* p. 10; *Douglas-Scott,* p. 220.
2152 *Argomaniz,* p. 10.
2153 *Argomaniz,* p. 11; *Casale,* p. 51.
2154 *Argomaniz,* p. 11.
2155 *Argomaniz,* p. 11.
2156 *Hecker,* p. 66.

accessible.[2157] The principle meant that data collected by one member state shall be made available to the others to same extent the collecting member state itself could access the data.[2158] Aside from this, one can witness institutional changes in general within the Union through either the creation of new offices or the revigorization of existing ones as regards counterterrorism measures.[2159]

Concurrent to the foregoing, the Framework Decision on the European Arrest Warrant ("EAW"), finally came into force on 01 January 2004 after much discussion among the EU institutions.[2160] Regarded as the "first and most striking example of extensive judicial cooperation in criminal matters within the EU Third Pillar," the EAW allows arrest warrants in one member state to be recognized and enforced in other EU states.[2161] Thus, it is basically "a judicial decision issued by a member state with a view to the arrest and surrender by another member state of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order" for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months..[2162]

The purpose of the EAW then is "to simplify and expedite extradition procedures of persons convicted or accused of crimes between the EU member states."[2163] Noticeably, the extradition process, which was traditionally and mainly under executive discretion and subjected to intergovernmental processes, was now made into a purely judicial matter, whereby only the judicial authorities of the member states cooperate.[2164] This "judicialization" was necessitated to bring the extradition process within the ambits of mutual recognition and mutual trust.[2165] The EAW is the "first concrete measure implementing the principle of mutual recognition of judicial decisions in European Union Criminal law" and eventually provided the groundwork for other mutual recognition instruments, each setting

2157 *Hecker*, p. 67.
2158 *Satzger*, p. 162.
2159 *Hecker*, p. 67.
2160 *Argomaniz*, p. 11.
2161 *Casale*, p. 63; *Eder/Senn*, p. 14; *Peers*, EU Justice and Home Affairs Law (Non-Civil), p. 293.
2162 Framework Decision on European Arrest Warrant, art. 2(1); *Casale*, p. 63; *Douglas-Scott*, p. 223; *Komárek*, p. 14.
2163 *Douglas-Scott*, p. 223; *Plachta*, p. 184.
2164 *Casale*, p. 63; *Komárek*, p. 14.
2165 *Komárek*, p. 14.

out the principle that member states must recognize decisions of another member state's criminal authorities as regards a particular nature, subject to a limited number of grounds for refusal, detailed rules on procedures (such as time limits and standard forms), and vague provisions on human rights.[2166] These new measures, which included the Framework Decisions on freezing of assets and evidence in 2003 and on the recognition of criminal judgments in 2005,[2167] reduced the number of grounds a member state can use to refuse a request and abolished the applicability of the principle of dual criminality for a long list of crimes.[2168]

It bears to mention that while implementation of the EAW was somehow fast, the implementation of those which followed it, like the one on freezing of assets and evidence as well as recognition of (non-custodial) criminal judgments, was not.[2169] Revolutionary approaches, such as with the EAW and like instruments, would eventually meet opposition and the challenges to the EAW since its inception have caught up. It was not long after that there were intra-European debates that did not only question the implementation of these measures but also about the need to balance efficient measures and the necessity to secure civil and human rights of European citizens.[2170] To illustrate, the requested person has certain explicit rights under Article 11(2) EAW such the right to legal counsel and to an interpreter according to the law of the executing state but nowhere else could there be found in the EAW any concrete reference to the ECHR, especially to Articles 5 and 6 that ensure rights to liberty and fair trial, nor any explicit right to refuse on human rights consideration.[2171] Further, with working on a mutual recognition platform instead of the usual harmonization of laws among member states, the net effect (unwittingly or unwillingly) was the narrowing and reducing of the necessary guarantees of the right to defense, to the detriment of the principle of due process, among other things.[2172] Thus, constitutional courts, like those of Germany, went head to head against EU institutions because the Consti-

2166 *Klimek*, p. 1; *Plachta*, p. 184. See for details *Peers*, EU Justice and Home Affairs Law (Non-Civil), p. 293.
2167 OJ L196/45 2003 & OJ L76/16 2005, See *Plachta*, pp. 184-189.
2168 *Douglas-Scott*, p. 220.
2169 *Casale*, p. 64; *Peers*, EU Justice and Home Affairs Law (Non-Civil), p. 293.
2170 *Peers*, EU Justice and Home Affairs Law (Non-Civil), p. 294.
2171 *Douglas-Scott*, pp. 226-227; *Eder/Senn*, p. 14.
2172 *Douglas-Scott*, p. 226. See also for other concerns regarding mutual recognition and human rights, *Casale*, p. 65.

tutional Courts opined that with the EAW mechanism, constitutionally provided fundamental rights and guarantees are compromised.[2173]

There were contentions as well on the surrender of one's own nationals, which as one observed, was largely derived from a "jealously guarded conception of national sovereignty" that presupposes the existence of stark differences in the administration of criminal justice that might result to unfair treatment, something in contrast to the idea of mutual trust on which criminal justice cooperation within the Area of Freedom, Security and Justice ("AFSJ") is based.[2174] In addition, there was opposition regarding the abolition of the dual criminality principle, proposals to increase the allowed grounds for refusal, and contentions touching on conflicts of jurisdiction.[2175]

Such debates affected the slowdown in implementation of framework decisions that followed the EAW (all of which also incorporated the mutual recognition component espoused in the EAW), such as those on recognition of confiscation orders, transfer of custodial sentences, probation and parole, the European Evidence Warrant, and pretrial suspension orders, wherein there was admittedly great difficulty to find a concession with the lastly mentioned that consequently halted the framework decision on updating double jeopardy rules or regulating the transfer of proceedings from pushing any further.[2176] There was even a failure to agree on a framework decision on suspect's rights, which had been a high profile issue.[2177]

Among the aforementioned framework decisions that encountered stumbling blocks with regard implementation, the European Evidence Warrant ("EEW"), was meant to be the first stage in a two-stage process of replacing mutual legal assistance with mutual recognition.[2178] Created on 18 December 2008 and intended to be applied by 19 January 2011, the EEW was meant to be a judicial decision to obtain any object, document and data for use in proceedings in criminal matters for which it may be issued.[2179] One of first things noticeable in this framework decision is the use of "issuing" and "executing" authorities with regard the EEW instead

2173 *Douglas-Scott,* pp. 227-228. See further for decisions of Czech and Polish Constitutional Courts, *Casale,* p. 65.
2174 *Komárek,* pp. 11-14.
2175 *Komárek,* p. 15.
2176 *Peers,* EU Justice and Home Affairs Law (Non-Civil), pp. 294-295.
2177 *Peers,* EU Justice and Home Affairs Law (Non-Civil), p. 295.
2178 *Peers,* EU Justice and Home Affairs Law, p. 714.
2179 Framework Decision on the European Evidence Warrant, arts. 1(1) and 5; *Peers,* EU Justice and Home Affairs Law (Non-Civil), p. 295.

of the usual requesting and requested states and/or authority in mutual legal assistance instruments.[2180] As discussed earlier, cooperation in criminal matters grounded on requests often resulted in negative consequences on efficiency in cooperation. With the EEW, "the judicial decision will be recognized and executed directly by the executing state, without its having to be converted into a 'national' decision."[2181] Stating it otherwise, no further formality shall be required and the executing authority, which receives the EEW, shall forthwith take the necessary measures for the execution of the same in the same manner as an authority of the executing state would obtain objects, documents, or data in a similar domestic case, unless that authority invokes any of the grounds for non-recognition, non-execution, or postponement provided for.[2182]

In this case, the issuing authority then would be "a judge, a court, an investigating magistrate or a public prosecutor as defined by the issuing State and, in the specific case, acting in its capacity as an investigating authority in criminal proceedings with competence to order the obtaining of evidence in cross-border cases in accordance with national law."[2183] And should it be that the issuing authority is not anyone as previously mentioned, nor was the EEW validated by one of those authorities in the issuing state, the executing authority can decide in the specific case that no search or seizure can be carried out for the purpose of executing the EEW.[2184]

In light of this, the EEW does not concern itself with all movements of evidence and is issued in reference to objects, documents, and data which are "directly available" in the executing state, and may also include related objects, documents, and data which the executing authority may discover during the execution of the EEW.[2185] This means that evidence that could be only obtained by the holding of hearings or similar measures is not covered by the EEW.[2186] Other types of evidence such as for example, "DNA tests, obtaining information in real time, analysis, communications data retained by providers of a publicly available electronic communica-

2180 Framework Decision on the European Evidence Warrant, art. 2.
2181 *De Hert/Weis/Cloosen*, p. 57.
2182 Framework Decision on the European Evidence Warrant, arts. 1(2), 11; *De Hert/Weis/Cloosen,* p. 57.
2183 Framework Decision on the European Evidence Warrant, art. 2.
2184 Framework Decision on the European Evidence Warrant, art. 11(4).
2185 Framework Decision on the European Evidence Warrant, art. 4(5); *De Hert/Weis/Cloosen*, p. 61; *Peers,* EU Justice and Home Affairs Law, p. 714.
2186 *Peers,* EU Justice and Home Affairs Law, p. 714.

tions service or a public communications network and the exchange of information on criminal convictions extracted from the criminal record" are generally excluded from the scope of the EEW, except when they are already in the possession of the executing authority before the warrant was issued.[2187] Statements from persons present during the execution of the EEW and directly related to the subject of the warrant may equally fall within the scope of the EEW as long as it has been likewise requested by the issuing authority.[2188]

Additionally, the EEW provides a limited number of grounds by which execution may be refused by the executing authority. These include, but is not limited to, an incomplete EEW, double jeopardy, immunity or privilege, territoriality, proportionality, and national interests.[2189] As regards dual criminality, it is abolished as a requirement for searches and seizures for evidence falling within the scope of the Framework Decision, as long as the crime is enumerated in the list, drafted originally for the EAW, of 32 crime categories.[2190] As for remedies, the EEW provides different procedural safeguards for both the issuing and executing authorities although the substance of the EEW may only be challenged in the issuing state.[2191] The issuing state must be able to grant remedies "equivalent to those applicable in purely domestic proceedings," and both states would have to take into account "time limits and the facilitation of proceedings."[2192] Also, the EEW provides for *forum regit actum* arrangements to counteract human rights questions that may arise, e.g. admissibility rules, exclusion of evidence rules vis-à-vis substantive or procedural rights, on a purely mutual recognition application.[2193] In addition to this discretionary human rights safeguard, the EEW contains other standard human rights clauses with additional provisions that "any obligations incumbent on judicial author-

2187 Framework Decision on the European Evidence Warrant, art. 4, (2), (3), and (4); *De Hert/Weis/Cloosen,* p. 60.

2188 Framework Decision on the European Evidence Warrant, art. 4 (6); *De Hert/Weis/Cloosen,* p. 60.

2189 Framework Decision on the European Evidence Warrant, arts. 7, 13[1(f)], 14; *De Hert/Weis/Cloosen,* p. 60; *Peers,* EU Justice and Home Affairs Law, p. 714.

2190 *Peers,* EU Justice and Home Affairs Law, p. 714.

2191 *De Hert/Weis/Cloosen,* pp. 63-66.

2192 *Peers,* EU Justice and Home Affairs Law, p. 714.

2193 Framework Decision on European Evidence Warrant, art. 12(1) provides "The executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority unless otherwise provided in this Framework Decision and provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State."

ities in this respect shall remain unaffected."[2194] This notwithstanding, the EEW was not meant to replace mutual legal assistance measures but will coexist with them in the transitional period until such time that the second stage happened.[2195]

Given the promising characteristics of the EEW, it may seem disappointing that the same and similar instruments with mutual recognition elements have undergone some issues and concerns. However, it was not all too bad in finding agreement among each other during this time period because on one hand, it was easier to agree on the Framework Decisions on the more populist subjects of crime victim's rights and national confiscation proceedings (in view of mutual recognition), and on the other hand, the Court of Justice has begun to engage further notwithstanding limits of its jurisdiction on issues regarding double jeopardy, the EAW, and crime victim's rights.[2196] There was also agreement, especially after the London terrorist attacks of 2005, to urgently strengthen Schengen and visa information systems, implement biometric details on passports, and exercise more control over the trade, storage, and transport of explosives.[2197] Furthermore, there have been substantive additions to the area of substantive criminal law wherein there have been many framework decisions on additional areas, including but not limited to counterfeiting the Euro, attacks on information systems, imposing rules on minimum penalties member states should impose, etc., as well as further steps to amend the Framework Decision on Terrorism by adding further crimes in line with a Council of Europe decision such as regards terrorism financing, recruitment, and radicalization, and amendments to the Framework Decisions on trafficking in persons and sexual offenses against children.[2198]

Given these, the London bombings in July 2005 could have prompted said agreements because this period was indeed instrumental in the institutionalization process as the immediate reaction to these attacks was to accelerate efforts and ongoing work on the existing framework.[2199] During this same time period, one can see the stronger link between internal and external security, with the EU bolstering their European Foreign and Security Policy ("EFSP") by intensifying their development programs, hu-

2194 *Peers,* EU Justice and Home Affairs Law, p. 714.
2195 *Peers,* EU Justice and Home Affairs Law, pp. 714-715.
2196 *De Hert/Weis/Cloosen,* pp. 67-77.
2197 *Peers,* EU Justice and Home Affairs Law (Non-Civil), p. 295.
2198 *Casale,* p. 51.
2199 *Casale,* p. 51; *Peers,* EU Justice and Home Affairs Law (Non-Civil), pp. 295-296.

manitarian aids, etc. to complement counter-terrorism measures on the premise that lack of development among non-European states posed a threat to European security.[2200] Also included herein are the inclusion of counter-terrorism measures and provisions in the European Neighborhood Policy ("ENP") agreements.[2201] With that being said, a reevaluation of the nature of threat and concomitant strategies occurred thereafter, which led to a realization that the threat is multifaceted and could not be handled in a linear manner.[2202] Coming up with the 01 December 2005 European Union Counter-Terrorism Strategy, one soon saw that among the four pillars of strategy, namely, prevent, protect, pursue, and respond, more attention was given to preventive measures.[2203]

Noticeably, there have been developments at the mid-point of the Amsterdam Treaty (2005-2009) that altered the institutional framework as regards JHA law.[2204] During this period, the Nice Treaty had already entered into force in February 2003 and one could observe the spilling over application of First Pillar principles to the Third Pillar, including indirect effect, scope of the Court of Justice's jurisdiction, and autonomous interpretation of Third Pillar measures, as well as the shifting of certain aspects of EU Criminal Law and policing policy to the First Pillar, particularly Community competence to determine criminal sanctions and rules applicable to cooperation between law enforcement authorities and the private sector.[2205]

Within this time period, the principle of availability of information, as introduced in the Hague Programme of 2004, was realized by a small group of member states by concluding the Prüm Convention on 27 May 2007.[2206] The Convention allows certain national authorities mutual access to DNA profiles and fingerprinting data.[2207] However, if there is a match, the personal information about identification is not automatically transferred.[2208] Further, it is the respective domestic law of the member

2200 *Argomaniz,* p. 14.
2201 *Bono,* p. 28.
2202 See for illustration *Bono,* p. 26.
2203 *Argomaniz,* p. 14.
2204 *Argomaniz,* p. 14.
2205 *Peers,* EU Justice and Home Affairs Law (Non-Civil), pp. 274-275.
2206 The member states were Belgium, Germany, Spain, France, Luxembourg, the Netherlands, and Austria. *Satzger,* p. 163.
2207 *Satzger,* p. 163.
2208 *Satzger,* p. 163.

states involved which governs the sharing of information.[2209] The Prüm Convention was later unionized through a Council Decision in 2008, at the request of nine (9) other member states which wanted to accede to the same.[2210]

In addition, the principle of availability was not limited to information but also evidence. It played a role in the framework decision on taking account of convictions in the member states of the European Union in the course of new criminal proceedings.[2211] Previous convictions of an accused in other member states are taken into consideration especially with respect to assessment of penalty in a new criminal proceeding.[2212]

With these developments, the European Council one year after adopted the Stockholm Programme on 10-11 December 2009 which expresses the conviction of strengthening measures at the European Union level vis-a-vis better coordination at regional and national levels to protect against the menaces and dangers brought by transnational crime, such as terrorism and organized crime, drug trafficking, human trafficking, etc.[2213] Included herewith is to consider pursuing further the setting up of a comprehensive system for obtaining evidence in cases with a cross-border dimension based on the principle of mutual recognition.[2214] There is acknowledgment that fragmentation exists among the existing instruments in this area and based on this, a new approach was needed.[2215] Therefore, there was a call for "a comprehensive system to replace all the existing instruments in this area, covering as far as possible all types of evidence, containing time-limits for enforcement, and limiting as far as possible the grounds for refusal."[2216] To this end, the European Council and Commission developed a comprehensive internal security strategy for the EU on 22 November 2010, which included serious and organized crime as one of the five (5) main issues the Union ought to address.[2217] Human trafficking, sexual exploitation of

2209 *Satzger*, p. 163.
2210 *Satzger*, p. 163.
2211 Council Framework Decision 2008/675/JHA, OJ (EU) 2008 No. L 220/32; *Satzger*, p. 163.
2212 *Satzger*, p. 163.
2213 *Peers*, EU Justice and Home Affairs Law (Non-Civil), pp. 276-277; *Riehle/Clozel*, 10 years after the roadmap: procedural rights in criminal proceedings in the EU today.
2214 Directive on European Investigation Order, recital 6.
2215 Directive on European Investigation Order, recital 5.
2216 Directive on European Investigation Order, recital 6.
2217 *Hecker*, p. 67.

children and child pornography, economic criminal activity, criminal drug activity, and terrorism were stated as priorities.[2218]

Any confusion that might have resulted from the commixtion between Third Pillar and First Pillar rules or procedures with respect to JHA areas has been resolved by the Lisbon Treaty. It is settled now that qualified majority voting and ordinary legislative procedure, i.e. regulation and directives, extended to JHA areas, particularly legal migration and most criminal law and policing issues.[2219] As a general rule, there is now a constitutional framework for decision-making in the Area of Freedom, Security and Justice, to which criminal matters belong.[2220] This structure warrants transparency, accountability, and participation from all concerned.[2221] Last minute agenda-setting by member states in view of quick European successes are thus proscribed, while the Council cannot ignore any amendment the Parliament may propose.[2222] Instead, transparency and democracy is highly promoted outside and (to a certain degree) inside the European Council.[2223] This notwithstanding, it is not exactly crack-proof because member states are still allowed to present initiatives to rival those of the Commission vis-à-vis policing and criminal law initiatives.[2224]

Also, the principle of mutual recognition on criminal matters was addressed in the provisions on the area of freedom, security, and justice, which was acknowledged to be one of the Union's tools in its endeavors to ensure a high level of security.[2225] The said applicable provision likewise addresses approximation, which is only allowed or justified if they are necessary to further the system of mutual recognition.[2226] In relation to this, the Lisbon Treaty provided for the possibility of having minimum requirements relating to criminal procedure, including enumerated aspects on (1) mutual admissibility of evidence between member states; (2) the rights of individuals in criminal proceedings; (3) the rights of victims of

2218 *Hecker,* p. 67.
2219 *Hecker,* p. 67.
2220 See *Klip*, pp. 115-123; *Vogel*, p. 125.
2221 *De Hert/Aguinaldo*, p. 5.
2222 *De Hert/Aguinaldo*, p. 5.
2223 See for the regime before Lisbon and its lack of constitutional features, *De Hert*, pp. 61-113.
2224 *Peers,* EU Justice and Home Affairs Law (Non-Civil), p. 278.
2225 Treaty on Functioning of the European Union, art. 67(3); *Peers,* EU Justice and Home Affairs Law (Non-Civil), p. 278; *Satzger,* p. 139.
2226 Treaty on Functioning of the European Union, art. 67(3); *Vermeulen/De Bondt,* p. 126.

crime; and (4) any other specific aspects of criminal procedure.[2227] These aspects are further intended to flank the development of the principle of mutual recognition in criminal matters.[2228]

Based on the aforementioned, the Council eventually came up with a Roadmap for Strengthening Procedural Rights of Suspected and Accused Persons in Criminal Proceedings in November 2009. Composed of six (6) measures, the Council via the Roadmap adopted a gradual approach with regard procedural rights due to the complexity of issues.[2229] These measures include translation and interpretation, information on rights and charge, legal advice and legal aid, right to communicate, special safeguards for vulnerable suspects and accused, and a green paper on pretrial detention.[2230] The Council thereafter endorsed this Roadmap to the European Council to make it a part of the Stockholm Programme.[2231] In the following years, agreements could be reached on six Directives outlining the rights to interpretation and translation (2010/64/EU), to information (2012/13/EU), to access to a lawyer (2013/48/EU), to legal aid (2016/1919/EU), the presumption of innocence (2016/343/EU), and procedural safeguards for children suspected or accused in criminal proceedings.[2232] The Commission also published a Green Paper on Pretrial Detention (COM [2011] 327 final) and a recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings (2016/800/EU).[2233]

In the same vein, measures were adopted in terms of victims' rights and participation anew through the Directive of 25 October 2012, considering

2227 *Vermeulen/De Bondt*, p. 126. See Treaty on Functioning of the European Union, art. 82(2).
2228 *Vermeulen/De Bondt*, pp. 126-127.
2229 *Vermeulen/De Bondt*, pp. 126-127.
2230 *Vermeulen/De Bondt*, p. 127.
2231 *Riehle/Clozel*, p. 2.
2232 *Riehle/Clozel*, p. 2.
2233 *Riehle/Clozel*, p. 2.Riehle/Clozel notes that the Directives as herein mentioned are not still implemented by all member states. "Taking a look at the status of implementation of the Directives provided by the European Judicial Network (EJN),13 it shows that Directive 2010/64/EU is currently in force in 27 Member States; Directive 2012/13/EU still needs to be implemented in Belgium; Directive 2013/48/EU still needs to be implemented in four Member States (Bulgaria, Croatia, Cyprus, Romania). Only three Member States (Czech Republic, Hungary and Portugal) have implemented Directive 2016/343/EU in their domestic legal order. Finally, Directives 2016/800/EU and 2016/1919/EU have so far only been implemented in Poland."

that the previously adopted measures were thought to be outdated and minimum standards were provided as regards rights, support, and protection of victims of crime.[2234]

Given these changes, another development in the area of cross-border cooperation soon ensued. A group of member states proposed a Directive to establish the European Investigation Order ("EIO") in spring 2010.[2235] Said directive ("DEIO") was approved on 03 April 2014 and being more extensive in substance compared to the EEW, nullified the latter's practical significance.[2236] The EIO meant to replace earlier international law agreements on judicial assistance from 22 May 2017 onwards, as well as the different framework decisions on protective measures, i.e. freezing of evidence, and the European Evidence Warrant, resulting in the combination and compilation into a single act and unified legal framework governing the collection and transfer of evidence within the Union is crafted.[2237] It must be noted however that the Framework Decision 2002/46 on Joint Investigation Teams continues to be applicable despite the existence of the EIO.[2238] This is understandable that while the objectives of the EIO and joint investigation teams are generally the same, they differ on how they operate, what principles would apply, and what the scope of each one is.[2239] The applicable principle for example for the EIO is the principle of mutual recognition while the terms in the establishment of a joint investigation team depends on what would be agreed by the member states involved. Moreover, the joint investigation team to be constituted would be present in the forum state when evidence is to be collected, contrary to the situation of an EIO.[2240]

At this point of the discussion, one can identify distinguishing characteristics of the EIO as compared to the EEW. While the EEW only covers movements of evidence readily and directly available, the EIO provides for measures applicable to evidence collection.[2241] The EIO also strengthens the position of the issuing state pursuant to mutual recognition, wherein should there be uncertainties regarding a certain measure, it should be de-

2234 *Vermeulen/De Bondt,* p. 128.
2235 *Peers,* EU Justice and Home Affairs Law, p. 715.
2236 *Satzger,* p. 145; *Bachmaier-Winter*, p. 47.
2237 *Satzger,* p. 146; *Bachmaier-Winter,* p. 47.
2238 Directive on European Investigation Order, art. 3; *Bachmaier-Winter,* p. 47.
2239 *Bachmaier-Winter,* p. 48.
2240 *Bachmaier-Winter,* p. 48.
2241 Directive on European Investigation Order, art. 3; *Satzger,* p. 146.

termined by the law of the issuing state.[2242] As Satzger comments, the use of the wording "order" rather than "request" bolsters this, together with the arrangement of terms the executing authority is obliged to comply with.[2243] Further, the EIO differentiates itself from the EEW by adding the novel ground to refuse if the respective investigative measure is incompatible with the executing state's treaty obligations vis-à-vis Article 6 TEU and the CFR.[2244] Furthermore, to prevent conflicts arising from different procedural legal orders in the EU, the EIO now allows an executing state to replace the requested measure with another should less intrusive measures are available.[2245]

During the transposition period of the EIO directive, the EU undertook activities and policies that were meant to complement each other in terms of criminal justice, and maintaining security in the region in general. Not exactly to digress but the EU continues to adopt measures and policies applicable to different aspects of crime. One of these things are the post-Stockholm Programme strategic guidelines from June 2014, or the Renewed EU Internal Security Strategy.[2246] There was a need to revisit the Stockholm Programme especially after the January 2015 attacks in Paris, France.[2247] Running from 2015 to 2020, the programme focuses on consolidation and actual implementation of an already created *acquis communautaire*, including the aim of guaranteeing a genuine area of security for European citizens through "operational police cooperation and preventing and combating serious organized crime."[2248] In relation to this, one can witness the further use of the principle of availability of information among the more recent initiatives in this area, including the Directive on the use of passenger name record ("PNR") data for the prevention, detection, investigation, and prosecution of terrorist offenses and serious crimes, as well the exchange of information through the European Criminal Records Information System ("ECRIS") of third country nationals.[2249]

2242 *Satzger,* p. 146.
2243 *Satzger,* p. 146.
2244 *Satzger,* pp. 146-147.
2245 *Satzger,* p. 147.
2246 *De Busser/Riehle*, p. 39.
2247 *De Busser/Riehle,* p. 39.
2248 *Hecker,* p. 67.
2249 See Directive 2016/681/EU; *Satzger,* p. 163.

2. Substantive Provisions: European Investigation Order

The following discussion shall focus on the substantive and procedural provisions of the EIO, the applicable legal instrument with respect to the movement and securing of evidence in the EU.

a. Applicability of Assistance

Four (4) matters could be mentioned as regards the applicability of assistance vis-à-vis the EIO.

First, notwithstanding the general obligation to give the widest possible assistance that could be granted in traditional mutual legal assistance instruments, traditional mutual legal assistance instruments would still subject a request for cross-border movement of evidence to the discretion of a requested state.[2250] The EIO changes this dimension drastically. As defined, the EIO is a "a judicial decision which has been issued or validated by a judicial authority of a Member State ('the issuing State') to have one or several specific investigative measure(s) carried out in another Member State ('the executing State') to obtain evidence" in accordance with the Directive.[2251] And with the shifting to a demand-based system from one based on requests, the DEIO purports to give minimum (if not none at all) elbow room for the receiving state to enact the order.[2252]

Second, the DEIO does not necessarily define what constitutes matters (or criminal matters) covered by an EIO instrument. Instead, the DEIO enumerates the following as the types of proceedings to which the EIO may be used: "(1) with respect to criminal proceedings that are brought by, or that may be brought before, a judicial authority in respect of a criminal offence under the national State; (2) in proceedings brought by administrative authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law and where the decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters; and (3) in proceedings brought by judicial authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law, and where the decision may give rise to

2250 *Heard/Mansell,* p. 354.
2251 Directive on European Investigation Order, art. 1(1).
2252 *Heard/Mansell,* p. 354.

proceedings before a court having jurisdiction, in particular, in criminal matters."[2253] Hence, "criminal proceedings" includes not only judicial proceedings but also those proceedings before an administrative authority that can be reviewed by a judicial authority.[2254]

Third, and in relation to the matters covered by the EIO, the EIO can be issued against both natural and legal persons.[2255] This contemplates situations wherein corporate criminal liability is an issue.

Fourth, one can mention the territorial application or geographical variability of the EIO within the European Union. Not all member states are implementing the EIO such as Denmark and Ireland.[2256] The UK for instance ought to opt in, which it did and opted to apply the EIO.[2257] The Directive shall be applicable to all EIO's received after 22 May 2017, the deadline for the transposition of the Directive by the member states.[2258]

b. Types of Assistance

The EIO does not only apply to information, documents, objects, or evidence in general that are readily or directly available. This is what distinguishes the EIO from the EEW. The EIO concerns itself not only with cross-border movement of evidence but also the collecting and securing of the same. In relation to this, the investigative measures contemplated by the EIO do not distinguish between coercive and non-coercive measures, with specific measures provided for the following measures: the temporary transfer to either the issuing or executing state of persons held in custody for the purpose of carrying out an investigative measure (art. 23); hearing by videoconference or other audiovisual transmission (art. 24); hearing by teleconference (art. 25); information on banks or other financial accounts (art. 26); information on banking and other financial operations (art. 27); investigative measures implying the gathering of evidence in real time, continuously and over a certain period of time (art. 28); covert operations (art. 29); and interception of communications (arts. 30 and 31).[2259]

2253 Directive on European Investigation Order, art. 4.
2254 *Bachmaier-Winter*, p. 48.
2255 See Directive on European Investigation Order, art. 4(d).
2256 Directive on European Investigation Order, recital 44 & 45, *Bachmaier-Winter*, p. 48.
2257 Directive on European Investigation Order, recital 43.
2258 *Bachmaier-Winter*, p. 48.
2259 See Directive on European Investigation Order, arts. 23-31.

c. Compatibility with other Arrangements

As already mentioned, the EIO was meant to be the single applicable legal framework to the cross-border movement of evidence among the member states. Effective 22 May 2017, it replaces the corresponding provisions of the following conventions applicable between the Member States bound by this Directive: (1) European Convention on Mutual Assistance in Criminal Matters of the Council of Europe of 20 April 1959, as well as its two additional protocols, and the bilateral agreements concluded pursuant to Article 26 thereof; (2) Convention implementing the Schengen Agreement, and (3) Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and its protocol.[2260] It also replaces the Framework Decision on Freezing of Evidence, and any reference to the same shall be construed as reference to the DEIO.[2261]

However, the DEIO member states are entitled to "conclude or continue to apply bilateral or multilateral agreements or arrangements with other Member States after 22 May 2017 only insofar as these make it possible to further strengthen the aims of this Directive and contribute to simplifying or further facilitating the procedures for gathering evidence and provided that the level of safeguards set out in this Directive is respected."[2262] It is incumbent upon member states to inform the Commission of which existing agreements and/or arrangements they still want to be applicable, and should also inform the Commission within three (3) months after entering into a new agreement/arrangement in relation to the DEIO.[2263]

Even with these provisions, one bears in mind that the EIO is not the only applicable instrument for the purpose of trans-border gathering of evidence within the EU. Not all EU Member States are bound by the EIO Directive.[2264] In fact, under certain circumstances, as Ramos highlighted, the Directive does not preclude the application of other international conventions on mutual legal assistance (MLA) by judicial authorities.[2265] Therefore, practitioners need a clear idea as to the situations in which it is compulsory to use an EIO, when it would be merely convenient to use it,

2260 Directive on European Investigation Order, art. 34(1).
2261 Directive on European Investigation Order, art. 34(2).
2262 Directive on European Investigation Order, art. 34(3).
2263 Directive on European Investigation Order, art. 34(4).
2264 *Ramos*, p. 1.
2265 *Ramos,* p. 1.

or when it would be impossible to gather evidence abroad by means of an EIO.[2266]

Aside from the foregoing, it must be remembered that the EIO is only a part of the entire existing EU Criminal Justice architecture. As discussed in the historical development of cross-border cooperation among EU member states, many programs and even information systems databases have been instilled within the EU to help and foster continued and strengthened cooperation among the EU member states. A quick example that can be cited is the formation of joint investigation teams, which the DEIO itself mentions as not being part of its coverage. Information lawfully obtained while being part of the joint investigation team may thereafter be used for purposes specified in the Framework Decision and the 2000 MLA convention.[2267]

Further, there could be use of the existing EU databases. Among many there is the Schengen Information System ("SIS"), which is available not only to immigration, border control, police, and custom authorities, but likewise accessible to judicial authorities.[2268] There is also the Customs Information System ("CIS") for use of customs authorities and the EU member states' access to the Visa Information System ("VIS") of information on visa applicants.[2269] Furthermore, there are the Prüm measures, which allow collection and exchange of DNA data, and the public-private partnerships in field of policing and surveillance as well as financial data surveillance such as the EU Passenger Name Records ("PNR") transfer system and Fourth EU Money Laundering Directive through national financial intelligence units ("FIU"), respectively.[2270]

In addition to these, one can mention the extensive legal framework the EU has as regards the exchange of information. There is the Framework Decision 2006/960 on Exchange of Information that regulates the exchange of information and intelligence between law enforcement authorities.[2271] There is moreover the framework as regards information exchange on criminal records through the Framework Decision 2009/315 on Criminal Records and the European Criminal Records Information System ("ECRIS"), the latter being a "decentralized information technolo-

2266 *Ramos,* p. 1.
2267 Framework Decision on Joint Investigation Teams, art. 1, § 11.
2268 *Peers,* EU Justice and Home Affairs Law, p. 907.
2269 *Peers,* EU Justice and Home Affairs Law, p. 907.
2270 See *Mitsilegas*, pp. 213-214.
2271 *Klip,* European Criminal Law, pp. 438-439.

gy system that should facilitate the exchange of information on criminal records."[2272]

Last but not the least, it must be mentioned that cooperation mechanisms could also be seen at the police, prosecutorial, and judicial level within the EU through the Europol, Eurojust, European Prosecutor's Office, and European Judicial Network.[2273] To further elucidate, the Europol is the official EU agency for law enforcement cooperation after its new regulation entered into force.[2274] The Europol acts as a support center for law enforcement operations, which includes providing or storing information on criminal activities, and acts as a center for law enforcement expertise.[2275] Its competence extends to organized crime, terrorism, and other forms of crime that affect a common interest covered by Union policy such as drug trafficking, immigrant smuggling, human trafficking, etc.[2276] The Eurojust (EU Agency for Criminal Justice Cooperation) is equally imperative in supporting and strengthening coordination and cooperation between national investigating and prosecuting authoritions in relation to serious crime affecting two or more member states.[2277] It mirrors more or less the Europol but in the judicial side.[2278] In November 2018, a Regulation on the European Union Agency for Criminal Justice Cooperation was adopted, which established a new governance system for Eurojust, provided clarifications on its relations to the European Public Prosecutors' Office, among other things. The Regulation shall be applied on 12 December 2019. Other than the Europol and Eurojust, the EJN as mentioned earlier in the study was created by Joint Action 98/428 JHA of 29 June 1998 and in December 2008, Council Decision 2008/976/JHA of 16 December 2008 became its new legal basis and/or framework. The EJN

2272 *Klip*, European Criminal Law, pp. 439-440.
2273 *Klip*, European Criminal Law, pp. 481-505.
2274 See Regulation (EU) 2016/794 on the European Union Agency for Law Enforcement Cooperation.
2275 See Regulation (EU) 2016/794 on the European Union Agency for Law Enforcement Cooperation, arts. 1 and 3. It must be understood that the Europol is not yet an operational police unit with executive authority. Member states allot or dedicate a national unit to form the sole connection with Europol for example. See *Satzger*, pp. 126-128.
2276 *Satzger*, p. 126.
2277 See Treaty on Functioning of the European Union, art. 85; *Satzger*, pp. 128-130.
2278 *Satzger*, p. 128.

was intended to be a network of national contact points for the facilitation of judicial cooperation in criminal matters.[2279]

d. Principles, Conditions, and Exceptions Applicable

i. Sufficiency of Evidence Requirement

Traditional mutual legal assistance instruments would have an integrated sufficiency of evidence requirement, wherein normally there is a direct relationship between how intrusive the investigative measure is and the amount of information to be given, including how relevant the evidence is to the criminal matter subject of the request. The requested state has the discretion to deny a request should the information be insufficient or irrelevant to merit the execution of the request. To a certain degree, this applies to the EIO.

As a general rule, the EIO ought to be recognized by the executing authority without any further formalities and executed in the same way and under the same modalities as if the investigative measure concerned had been ordered by an authority of the executing state.[2280] Based on this, the executing state should execute without question as if the investigative measure is related to its own domestic case and the order issued by one of its own.

However, it is simpler said than done. As provided also by the DEIO, the issuing state should ensure and subject to its own determination that the EIO issued is necessary and proportionate for the purpose of the subject proceedings, taking into consideration the fundamental rights of the suspected or accused person, and that the investigative measure "could have been ordered under the same conditions in a similar domestic case."[2281] It must be noted though that in instances wherein the executing authority reasonably believes that the issued EIO is not necessary and/or proportionate, the executing authority cannot deny recognition and/or execution of the same.[2282] Instead, it shall consult with the issuing authority on the importance of the EIO and the latter shall decide whether to withdraw the

2279 *Satzger,* p. 128.
2280 Directive on European Investigation Order, art. 9(1).
2281 Directive on European Investigation Order, art. 6(1).
2282 Directive on European Investigation Order, art. 6(3).

EIO or not.[2283] Alternatively, the executing authority may resort to another form of investigative measure should the purpose of the EIO still be met by less intrusive means, but the executing authority needs to consult or inform the issuing authority prior to doing this.[2284]

In connection with this, the specific procedures applicable to certain specific types of investigative measures within the ambits of the EIO still imbibe the sufficiency of evidence requirement by requiring more information to be provided, notwithstanding the general pieces of information already needed to be given in the EIO. To illustrate, with respect to information about bank and/or other financial accounts, the issuing authority should give reasons "why it considers that the requested information is likely to be of substantial value for the purpose of the criminal proceedings concerned and on what grounds it presumes that banks in the executing state hold the account and, to the extent available, which banks may be involved."[2285] Additional available information ought to be provided that could better facilitate execution of the EIO.[2286] With respect to information on bank and other financial operations, the issuing authority must be able to indicate the relevance of the information to the criminal proceedings subject of the EIO.[2287] The same equally applies should the investigative measure entail the gathering of evidence (whether real time, continuous, or for a specific period of time),[2288] establishment of covert operations,[2289] and interception of telecommunications.[2290]

ii. Dual Criminality

Mutual recognition, the applicable principle in the EIO instrument, is traditionally directly proportional to dual criminality: the more far-reaching mutual recognition is, the less far-reaching dual criminality requirement would likely be.[2291] It is said that this is closely linked to the rationale behind the dual criminality requirement: stemming from the principle

2283 Directive on European Investigation Order, art. 6(3).
2284 Directive on European Investigation Order, art. 10(3).
2285 Directive on European Investigation Order, art. 26(5).
2286 Directive on European Investigation Order, art. 26(5).
2287 Directive on European Investigation Order, art. 27(4).
2288 Directive on European Investigation Order, art. 28(3).
2289 Directive on European Investigation Order, art. 29(2).
2290 Directive on European Investigation Order, art. 30(4).
2291 *Vermeulen/De Bondt/Van Damme*, p. 63.

of legality (*nulla poena sine lege*) and closely linked to sovereignty and reciprocity,[2292] it is a protection mechanism aimed to protect member states to enforce something contrary to their own legal and criminal policy views.[2293] Interestingly, there is quite difficulty in defining the concept of dual criminality because it appears in many forms across the different existing EU instruments.[2294] As some commented, the definition that the behavior constitutes an offense in both states may sometimes not suffice in light of the diversity illustrated in some EU instruments like the EAW for example, wherein it is required that the act is an "offense under the law of the executing member state, whatever the constituent elements or however it is described", but no mention on territoriality and points to the irrelevance of how the offense could be labeled.[2295]

The many shapes and sizes of how dual criminality is defined across the many European instruments aside, there is nowadays a trend in the European Union to limit, if not totally abandon, the requirement of dual criminality.[2296] Although it could sometimes be discretionary, many believed that dual criminality constitutes an obstacle to effective cooperation and many argue that it is no longer necessary.[2297]

Interestingly, the limitation on the use of the dual criminality requirement really began with the European Arrest Warrant – wherein the requirement does not apply to a list of 32 offenses – and then for the European Evidence Warrant, its limitation was only applicable to search and seizure procedures similar to the 2000 Mutual Legal Assistance Convention.[2298] As regards the European Investigation Order, the requirement of dual criminality is present although it seems limited in application in the same manner as the EAW. Generally, the recognition and/or execution of the EIO may be denied "should the conduct for which the EIO has been issued does not constitute an offence under the law of the executing State." However, the dual criminality requirement does not apply if it concerns one of the 32 offenses provided in the DEIO, as indicated by the issuing authority in the EIO, "if it is punishable in the issuing State by a custodial sentence or a detention order for a maximum period of

2292 *Klimek,* p. 81.
2293 *Vermeulen/De Bondt/Van Damme,* p. 63.
2294 *Vermeulen/De Bondt/Ryckman*, p. 106.
2295 *Vermeulen/De Bondt/Ryckman,* p. 106.
2296 *Vermeulen/De Bondt/Van Damme,* p. 63.
2297 *Klimek,* pp. 81-82.
2298 See *Douglas-Scott,* p. 220; *Peers,* EU Justice and Home Affairs Law, p. 714.

at least three years."[2299] These offenses are the following: "(1) participation in a criminal organization; (2) terrorism; (3) trafficking in human beings; (4) sexual exploitation of children and child pornography; (5) illicit trafficking in narcotic drugs and psychotropic substances; (6) illicit trafficking in weapons, munitions and explosives; (7) corruption; (8) fraud, including that affecting the financial interests of the European Union within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests; (9) laundering of the proceeds of crime; (10) counterfeiting currency, including of the euro; (11) computer-related crime; (12) environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties; (13) facilitation of unauthorized entry and residence; (14) murder, grievous bodily injury; (15) illicit trade in human organs and tissue; (16) kidnapping, illegal restraint and hostage-taking; (17) racism and xenophobia; (18) organized or armed robbery; (19) illicit trafficking in cultural goods, including antiques and works of art; (20) swindling; (21) racketeering and extortion; (22) counterfeiting and piracy of products; (23) forgery of administrative documents and trafficking therein; (24) forgery of means of payment; (25) illicit trafficking in hormonal substances and other growth promoters; (26) illicit trafficking in nuclear or radioactive materials; (27) trafficking in stolen vehicles; (28) rape; (29) arson; (30) crimes within the jurisdiction of the International Criminal Court: (31) unlawful seizure of aircraft/ships; and (32) sabotage.[2300]

iii. Double Jeopardy

The prohibition on double jeopardy or the rule of *ne bis in idem* is a ground for refusal under the EIO, wherein an executing authority may refuse to recognize and/or execute an EIO when "the execution of the EIO would be contrary to the principle of *ne bis in idem*."[2301]

2299 Directive on European Investigation Order, art. 11(1)(g).

2300 Directive on European Investigation Order, Annex D.

2301 Directive on European Investigation Order, art. 11(1)(d). Based on the common understanding that *ne bis in idem* is a procedural side effect of *res juridicata pro veritatehabetur*, the present study agrees with Lelieur's conclusion that it is not a principle nor general principle of law but rather, *res judicata* is the principle and *ne bis in idem* is the rule drawn from said principle. See *Lelieur*, p. 198.

The prohibition on double jeopardy basically means that the offender, who has already been punished or finally acquitted, is protected against repeated prosecution and punishment due to the same act.[2302] It is a recognized fundamental principle of EU law and rooted in the laws of member states.[2303] It has also been codified under Article 50 in the Charter of Fundamental Rights, and which could be considered to apply to cases decided on the basis of EU rather than domestic law.[2304] Said Article 50 reads as follows:

> "No one shall be held liable to be tried or punished again in criminal proceedings for an offense for which he or she has already been acquitted or convicted within the Union in accordance with the law."

The general rule was that the rule of *ne bis in idem* only had internal effect and is relevant within the respective legal order, and is not applicable to judgments in other member states.[2305] At most, foreign punishment already executed is simply accredited to the new sentence, in view of which the Framework Decision on taking account of convictions in the member states in the course of new criminal proceedings has been helpful.[2306] Presently, member states have different rules on the territorial scope of its criminal law and there is no clear distribution of competences concerning the conduct of criminal proceedings in Europe.[2307] It also does not help that national definitions of the principle often differ from those propounded by the European Court of Justice.[2308] On account of these, there is the inherent risk of double punishment.[2309]

Worse, said risk is increased by virtue of member states needing to frame their transnational criminal law in favor of the Union to punish violations of EU law to the greatest possible extent.[2310] This leads consequently to questions on fair trial, due process of law, and the idea of personal legal certainty. As an author stated, individuals who undergo several prosecutions for the same facts are placed in a situation of unforeseeability because even if they have been tried already in one country, their legal situation

2302 *Satzger,* p. 148.
2303 *Suominen*, p. 224.
2304 *Satzger,* p. 149; *Suominen,* p. 225.
2305 *Satzger,* pp. 148-149.
2306 *Satzger,* pp. 149, 163.
2307 *Satzger,* p. 150.
2308 *Suominen,* p. 225.
2309 *Satzger,* p. 150.
2310 *Satzger,* p. 150.

can still be altered in the other.[2311] And if stronger EU sanctions have already been applied, then the individual could risk greater punishment for the same set of facts. It follows that the transnational application of the *ne bis in idem* rule is to be desired especially should the single Area of Freedom, Security, and Justice be truly implemented.[2312] This is also said to be consistent with the principle of mutual recognition, which following its definition, should also include decisions writing *finis* to criminal proceedings.[2313]

There have been previous efforts however to introduce a comprehensive prohibition on dual prosecution and punishment through treaties among EU member states. For example, ten years prior to the Charter of Fundamental Rights, there is the provision found in the Convention Implementing the Schengen Area ("CISA"), Part III of which regulates the principle in the Schengen Area.[2314] Having the most impact among all available provisions in EU law, Article 54 reads:

> "A person whose trial has been finally disposed off in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced, or can no longer be enforced under the laws of the sentencing Contracting Party."[2315]

In view of the above-quoted provision, one could observe an objective legal interest – the efficiency of the transnational criminal justice – and a subjective one – the protection of the individual and freedom of movement.[2316] Moreover, there is an element of enforcement in addition to the final judgment, which does not later exist with Article 50 CFR.[2317] Despite such difference, Article 54 CISA and Article 50 CFR are held by the European Court of Justice in the Spacic judgment to co-exist with each

2311 *Lelieur,* p. 209.
2312 *Satzger,* p. 150.
2313 *Satzger,* p. 150.Lelieur cites what Schomburg said about the transnational application being a consequent extension of the principle of mutual recognition within the European Union and treating the individual as residing in a single area of justice. See *Lelieur,* p. 204.
2314 *Suominen,* p. 224.
2315 Convention implementing the Schengen Agreement, art. 54.
2316 *Suominen,* p. 224.
2317 *Satzger,* p. 150. For further discussion on these elements, see *Satzger,* pp. 153-161.

other and in light of the differences as regards the enforcement element, the CJEU held that the enforcement element must be abided with.[2318]

The Court in the abovementioned case referred to the freedom of movement of persons in its decision on the application of the *ne bis in idem* rule.[2319] The freedom of movement has direct effect and ought to be interpreted broadly given that it forms the "cornerstone of the EU legal order."[2320] As the CJEU ruled, the objective of the *ne bis in idem* rule in Article 54 CISA is to "ensure that no one is prosecuted on the same facts in several member states on account of his having exercised his right to freedom of movement."[2321] If European citizens are threatened with a new prosecution on the same facts because of a transnational offense, then their right to freely move in the European Union is not being respected.[2322] As such, Article 54 CISA and the case law on the provision continue to be the relevant law on the transnational application of the *ne bis in idem* principle in the EU.[2323]

The foregoing provisions notwithstanding, criticism still remains that there is actually no common standard in the EU for the *ne bis in idem* rule as the content and range of the foregoing provisions are "demonstrably unclear" especially taking into account the domestic perspectives.[2324] To illustrate, many countries historically recognize the transnational dimension of the principle subject to the requirement that the facts constituting the crime and judged by the foreign tribunal were not committed in whole or in part within their territory.[2325] Elements of the same can be found in Article 55 of CISA when said provision allows contracting parties to apply exceptions to Article 54 when the acts relating to the foreign judgment took place wholly or partially in the contracting party's own territory.[2326]

Furthermore, there has been application of the *ne bis in idem* rule to other situations, although normally it would be limited to final judgments.[2327] Moreover, defining the principle itself has been problematic in view of

2318 ECJ, Judgment of 27 May 2014, Case C-129/14 PPU, "Spasic", § 55; *Lelieur,* p. 209; *Satzger,* p. 151.
2319 *Lang*, pp. 182-183.
2320 *Lang,* p. 183.
2321 *Lang,* p. 183.
2322 *Lelieur,* p. 209.
2323 *Satzger,* p. 152.
2324 See *Suominen,* p. 225.
2325 *Lelieur,* p. 198.
2326 *Lelieur,* p. 198.
2327 *Suominen,* p. 225.

conflicts of jurisdiction within the EU, wherein it is hard to satisfy the "bis" (which criminal sanctions should be taken into consideration) and the "idem" (what constitutes the criminal act).[2328] Further, there are differing rules as regards issues closely related to the application of the rule of *ne bis in idem* such as the "revision of judgments, appeals after acquittal, how previous foreign judgments are taken into account when determining the penalty, whether administrative proceedings with a criminal law character but not formally classified as criminal, are effected, how decisions of prosecutors are taken into account, and on the effects of preliminary rulings and probation."[2329]

Applying the same to the EIO, the DEIO does not provide a detailed provision on how the rule of *ne bis in idem* applies. What it simply states is that the EIO may be refused execution should the same be incompatible with the principle. But as to how it would be incompatible, it was not provided for. This is unlike the EAW, which is said to be the clearest provision on the principle vis-à-vis cross-border cooperation, even to the point of distinguishing as regards member states and third states.[2330] It is a mandatory ground to refuse the EAW "if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing member state."[2331] This interestingly resonates with the CISA provision. It is an optional ground for refusal on the other hand, "if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country."[2332]

Taking into account that the DEIO considers compatibility with the *ne bis in idem* principle, then it is sound to consider the prevailing doctrine and/or provision found in the EAW instrument, CISA provision, and

2328 *Suominen,* p. 225.

2329 *Suominen,* p. 225.Questionsabouttheapplicabilityoftheprinciplearise also whenthefirstproceedingsdid not end with a traditional judgment but insteadwith a deal betweentheprosecutorandtheperpetratorthatbarsfurtherprosecutions on the same facts. Further, should the same bar apply when two different states have two different political approaches to the facts? See *Lelieur,* p. 199.

2330 *Suominen,* p. 225.

2331 Framework Decision on European Arrest Warrant, art. 3(2).

2332 Framework Decision on European Arrest Warrant, art. 4(5).

the CJEU Spasic judgment. It would be illustrative of prevailing doctrine and/or interpretation and would be further compatible to the *ratio decidendi* of the CJEU in ruling in favor of compatibility between Article 54 of the CISA and Article 50 of the CFR. Moving forward, member states which can either be an issuing or executing authority could take this into account: as an executing authority, to be equipped with a *ratio decidendi* to deny recognition or execution of an EIO; as an issuing authority, to prevent issuing the EIO at the outset to prevent triggering the principle.

Having mentioned the foregoing possible resolution, a preemptive measure actually exists in order for a member state not to raise *ne bis in idem* as a ground to refuse execution of an EIO. One can avoid in advance the *ne bis in idem* problem altogether by using the guidelines Eurojust issued as regards conflicts of jurisdiction, which suggests factors to be taken into account in multi-jurisdictional cases, especially given the increase in cross-border crime.[2333] Notwithstanding that the guidelines were published "to prevent and support the settling of conflicts of jurisdiction that could result in an infringement of the principle of *ne bis in idem*", and likewise ensure that the most effective practices are in place vis-à-vis criminal proceedings,[2334] they carry with it other issues that could possibly exarcerbate problems as regards implementation (e.g. competence issues, avoidance at the outset of exercising jurisdiction to avoid *ne bis in idem* situations).

Having observed that, the guidelines acknowledge that each case would be unique, and any decision made on jurisdiction issues should be based on the facts and merits of each individual case.[2335] All relevant factors ought to be taken into account and balanced carefully and fairly both for and against commencing a prosecution in each jurisdiction.[2336] As to what the factors that ought to be taken into consideration, Eurojust lists them as follows: territoriality; location of suspects/accused persons; availability and admissibility of evidence; obtaining evidence from witnesses, experts, and victims; protection of witnesses; interests of victims; stage of proceedings; length of proceedings; legal requirements; sentencing powers; proceeds of crime; costs and resources; and member state priorities.[2337]

Based on the sound Eurojust guidelines, any possible conundrum that could exist between member states as regards *ne bis in idem* as a ground

2333 *Eurojust*, p. 1.
2334 *Eurojust*, p. 1.
2335 *Eurojust*, p. 2.
2336 *Eurojust*, p. 2.
2337 *Eurojust*, pp. 3-4.

to refuse execution – notwithstanding the proposed resolution of adhering to how the EAW instrument or CJEU resolved the issue – can be already avoided at the outset. In the alternative, member states can invoke *ne bis in idem* as enunciated earlier above (i.e. based on EAW instrument and CJEU judgment, etc.) as the ground for refusal if needed.

iv. Substantive Considerations of Human Rights

In respect of human rights vis-à-vis the EIO, it can be discussed on both a substantive and procedural aspect. Substantively, human rights play a role with respect to grounds to refuse an EIO and in relation thereto, how obligations can play a role on whether to deny execution or not. There is correlatively an issue about taking into account severity of punishment.

1. Human Rights Obligation as Ground to Refuse Recognition or Execution

First, human rights considerations are evenly applicable with respect to grounds a requested state or executing state could use to refuse recognition and/or execution of an EIO. At the outset, there could be refusal of recognition or execution if the same shall violate the protection against double jeopardy, as discussed above. Moreover, the executing state can refuse recognition and/or execution should there be substantial grounds to believe that it would be incompatible with the executing state's obligations under Article 6 TEU (which relates to the different fundamental rights the EU and its member states abide with).[2338] An actual infringement of a fundamental right is not necessary before the executing authority can raise the ground for refusal. It is enough that there are substantial grounds to believe there could be an infringement, which concerns itself with fundamental rights the Union abides itself with.[2339] As to what these fundamental rights are, the fundamental rights provided for in Article 6 TEU refer to the Charter of Fundamental Rights and the European Convention on Human Rights, and the general principles of law applicable to the EU and its member states.[2340]

2338 Directive on European Investigation Order, art. 11(1)(f).
2339 Directive on European Investigation Order, art. 11(1)(f).
2340 Treaty on European Union, art. 6.

Although the EU member states are parties to the European Convention of Human Rights ("ECHR"), the EU is still in the process of being a party thereto.[2341] Correspondingly, the ECHR and jurisprudence of the European Court of Human Rights (ECtHR) has become indirectly applicable and binding through the Charter of Fundamental Rights wherein it is stated that the "meaning and scope of the rights of those rights in the Charter which correspond to rights in the ECHR shall be the same as those laid down in the Convention."[2342] The rights guaranteed in the ECHR were incorporated into EU law through Article 6 of the TEU as they are "constitutional traditions common to the member states" and the CJEU considers the same to be the common denominator for fundamental rights as it is applicable and legally binding to all member states.[2343]

In terms of criminal law, the fundamental rights that are related to it are the following: right to life; prohibition on torture and inhumane or degrading treatment and/or punishment; rights of arrested individuals; right to fair trial; presumption of innocence; no punishment without law; right to respect family and private life; limitations on use of restriction of rights or prevention of the misuse of power; right of appeal in criminal matters; and prohibition of double punishment.[2344] Fittingly, ECHR jurisprudence has time and time again emphasized a state's obligation to protect an individual against the probability of a serious breach of said individual's human rights in another state.[2345] In the case of Soering v. United Kingdom, the European Court of Human Rights established the principle that a state "would be in violation of its obligations under the ECHR if it extradited an individual to a state, in that case, the USA, where that individual was likely to suffer inhuman or degrading treatment or torture contrary to Article 3 ECHR."[2346] As the Court held:

> "The question remains whether the extradition of a fugitive to another State where he would be subjected or be likely to be subjected to torture or to inhuman or degrading treatment or punishment would itself engage the responsibility of a Contracting State under Article 3 (art. 3). That the abhorrence of torture has such implications is recognized in Article 3 of the United Nations Convention Against Torture

2341 See *Hecker*, pp. 67-68.
2342 *Satzger*, p. 176.
2343 *Satzger*, p. 176.
2344 *Satzger*, pp. 179, 180-214.
2345 *Alegre/Leaf*, p. 205.
2346 *Alegre/Leaf*, p. 205.

> and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that "no State Party shall ... extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture". The fact that a specialized treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 (art. 3) of the European Convention. It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3 (art. 3), would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article (art. 3)."[2347]

Obiter dicta in this case extended the principle to cover the possibility of a serious flagrant breach of one's right to a fair trial under Article 6 of the ECHR.[2348]

Given the aforementioned discussion, the same ground to refuse recognition and/or execution based on human rights consideration was not originally clear with respect to the EAW instrument, which if one would recall is the first true EU instrument adopting the principle of mutual recognition and mutual trust in criminal matters. While the relevant Framework Decision provides that "it respects fundamental rights and observes the principles recognized by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof," and that nothing in said Framework Decision "may be interpreted as prohibiting refusal to surrender a person for whom a European Arrest Warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a

2347 Soering v. United Kingdom, § 88; *Alegre/Leaf,* p. 205.
2348 *Alegre/Leaf,* p. 205.

person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons," and "no person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment," it was not ultimately clear if human rights concerns can be used to refuse recognition or execution of an EAW as no general ground for refusal has been given regarding this.[2349] At most, the CJEU in a series of cases in the area of criminal cooperation seemingly preferred the efficacy of the principle of mutual recognition based on mutual trust even if the same might have been to the detriment or infringement of fundamental rights.[2350] This is notwithstanding Article 1(3) which says that the Framework Decision "shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union," a provision which most scholars advocated to be interpreted as a general ground to refuse for non-execution of an EAW should there be infringement of fundamental rights.[2351] It was only in the joined cases of Aranyosi and Căldăraru that the CJEU addressed these issues directly.[2352]

The facts of the case are as follows. European arrest warrants have been issued against Aranyosi and Căldăraru for the purposes of criminal investigation in relation to several accounts of burglary/theft and custodial sentence of one year and eight months for driving without a license, respectively.[2353] Both were arrested by Bremen authorities in Germany and placed in pretrial detention.[2354] Subsequently, the public prosecutor in Bremen declared the surrender is permissible given the lack of concrete evidence to show violation of detention conditions.[2355] However, the Higher

2349 *Bovend'Eerdt*, p. 113.
2350 *Gáspár-Szilágyi*, p. 210.
2351 *Bovend'Eerdt,* p. 113.
2352 Joint Cases C-404/15 and C-659/15 PPU PaiAranyosi and Robert Căldăraru, 05 April 2016; *Bovend'Eerdt,* p. 113.
2353 Joint Cases C-404/15 and C-659/15 PPU PaiAranyosi and Robert Căldăraru, 05 April 2016, §§ 29, 48; *Bovend'Eerdt,* p. 113; *Gáspár-Szilágyi,* p. 199.
2354 *Gáspár-Szilágyi,* p. 199.
2355 This was despite the findings of deplorable detention conditions in Hungary and Romainia. Further, in inquiring in which detention facilities the accused would be brought in, the Hungarian and Romanian authorities were not able to provide an answer. *Bovend'Eerdt,* pp. 114, 115; *Gáspár-Szilágyi,* p. 200.

Regional Court of Bremen (*Hanseatisches Oberlandesgericht in Bremen*) harbored a different opinion altogether, believing that in case of surrender, even if all formal requirements were satisfied to enable surrender, Aranyosi and Căldăraru would be exposed to detention circumstances in violation of Article 3 of the European Convention on Human Rights and the general principles laid down on Article 6 of the same Convention.[2356]

In deciding the matter, the Court took the occasion to explain that the Framework Decision on the EAW was meant to make surrender of persons simpler, more effective, and thereby be able to contribute to the objective of the EU to create an area of freedom, security, and justice between the member states.[2357] The principle of mutual recognition, which underlies the EAW instrument, is based on mutual trust that presumes all member states are complying with their respective human rights obligations.[2358] The EAW also mentions the obligation to respect rights and thus needs to be balanced with mutual recognition.[2359] In trying to hold this balance altogether, the Court held that compliance with the prohibition of inhuman or degrading treatment or punishment is binding on the Member States and, consequently, on their courts, where they are implementing EU law.[2360] Notably, this prohibition is absolute as it is closely linked with one's respect for human dignity and no less than Article 3 ECHR confirms this, wherein no derogation is allowed at any time.[2361] The values enshrined in these relevant provisions are fundamental to the Union and its member states and thus, regardless of the conduct of the person concerned, there is the absolute prohibition of torture and inhumane and degrading treatment or punishment.[2362]

Thus, in cases where there is evidence that shows that there is a real risk that detention conditions in the issuing member state infringe Article 4 of the Charter, there ought to be a two-step assessment as follows:

> "As a result, if an executing judicial authority has evidence which demonstrates that there is a real risk that detention conditions in the

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2356 *Bovend'Eerdt,* pp. 114, 115; *Gáspár-Szilágyi,* p. 200.
2357 *Bovend'Eerdt,* p. 116.
2358 *Bovend'Eerdt,* p. 116.
2359 *Bovend'Eerdt,* p. 116.
2360 Joint Cases C-404/15 and C-659/15 PPU PaiAranyosi and Robert Căldăraru, 05 April 2016, § 84; *Gáspár-Szilágyi,* p. 207.
2361 Joint Cases C-404/15 and C-659/15 PPU PaiAranyosi and Robert Căldăraru, 05 April 2016, § 86; *Gáspár-Szilágyi,* p. 207.
2362 Joint Cases C-404/15 and C-659/15 PPU PaiAranyosi and Robert Căldăraru, 05 April 2016, § 87.

> issuing Member State infringe Article 4 of the Charter, the executing judicial authority must assess that risk using a two-stage test. First, the executing judicial authority must assess whether general detention circumstances in the issuing Member State constitute a real risk of an Article 4 violation. Such an assessment in itself is not sufficient to render surrender impermissible. During the second stage of its assessment the executing judicial authority judges whether there are substantial grounds for believing that the requested person in question will be subjected to a real risk of Article 4 violations. If, after its two-stage assessment, the executing judicial authority finds that there is a real risk of an Article 4 violation for the requested person once surrendered, the execution of the arrest warrant must be deferred until the executing judicial authority receives the information necessary to discount the existence of such a real risk. If this risk cannot be discounted within a reasonable time the executing judicial authority must then decide whether or not to terminate the procedure."[2363]

Therefore, the executing judicial authority must determine in "a specific and precise manner, whether there are substantial grounds for believing that the requested person faces a real risk of being subjected to inhuman or degrading treatment due to the detention conditions in the issuing state."[2364] The executing authority is obligated to request additional information from the issuing authority, which in turn must provide the additional information within the time fixed in such a demand.[2365] Any decision then must be postponed until such time additional information has been obtained that would enable a decision as to the existence of such risk.[2366] In cases that the risk cannot be ruled out in reasonable time, the executing authority must then decide whether it would terminate the surrender procedure.[2367]

Accordingly, the abovementioned case clarified that the presumption of mutual trust that all member states act in accordance with human rights is not absolute and unconditional.[2368] Effectuating mutual recognition in criminal matters is not inviolable especially in light of detriments or infringements to human rights. As such, even if there are no grounds for

2363 *Bovend'Eerdt*, p. 117.
2364 *Gáspár-Szilágyi*, p. 208.
2365 *Gáspár-Szilágyi*, p. 208.
2366 *Gáspár-Szilágyi*, p. 208.
2367 *Gáspár-Szilágyi*, p. 208.
2368 *Bovend'Eerdt*, p. 117.

refusal that exist per the list provided by the Framework Decision, the EAW could be denied recognition or execution should there be either a (1) real risk that detention conditions violate Article 4 of the CFR and/or (2) where there are "substantial grounds to believe that the person to be surrendered will be subjected to a real risk, execution can be deferred and eventually, terminated."[2369] Stating it differently, the CJEU seemed to have said in these joint cases that fundamental rights violations can constitute an exception to mutual trust.[2370] Secondly, the CJEU judgment in these joined cases seemed to be an effort to converge CJEU jurisprudence with that of the European Court of Human Rights.[2371] Sustaining a denial of the EAW resonates ECtHR jurisprudence such as Soering v. United Kingdom, among other case law, that imposes a positive duty upon member states to implement and protect human rights.[2372]

Having mentioned the foregoing, it is now clearly provided in the DEIO that an executing authority may refuse recognition or execution should there be substantial grounds to believe that "execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter."[2373] While these principles were originally opined to be applicable to extradition between member states as well as between member states and third party states, and the EIO does not necessarily concern the arrest and surrender of persons, the same principles apparently were carried over to the concept of an EIO, which involve criminal matters as well.[2374]

2. Applicable Human Rights Obligations vis-à-vis Ground for refusal

Taking into account the abovementioned, one could look into the rights that can be engaged in an EIO situation that could trigger said ground for refusal. An example is the obligation on non-discrimination. Under Article 21 CFR, "any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority,

2369 *Bovend'Eerdt,* p. 117.
2370 *Bovend'Eerdt,* p. 118.
2371 *Bovend'Eerdt,* p. 118.
2372 *Bovend'Eerdt,* p. 118.
2373 Directive on European Investigative Order, art. 11, 1(f).
2374 See for human rights principles being applicable to extradition cases generally *Alegre/Leaf,* p. 205.

property, birth, disability, age or sexual orientation shall be prohibited." The same article likewise prohibits generally discrimination on ground of nationality. If a member state as executing authority receives an EIO it very well knows to be issued by reason of discrimination, then acting on the same would be incompatible with its obligations under Article 6 TEU and the CFR. Thus, it would be appropriate to engage the ground for refusal based on human rights obligations.

One can further cite the obligation vis-à-vis the principle of legality and proportionality of criminal offenses and penalties under Article 49 CFR. The first paragraph of said article provides that: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable." The second paragraph provides that "this Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations." There is thus a prohibition against *ex post facto* laws. Applying to an EIO context, it can be the case that the acts and/or omissions provided in the EIO did not constitute a criminal offense when it was committed and yet it came into light that the criminal charge is being applied retroactively to the suspect or accused person. Further, at the time of commission the act and/or omission is not criminal "according to the principles recognized by the community of nations." In such a scenario, there is a blatant violation of the prohibition. In the event that an executing authority receives such kind of EIO, which is incompatible with the obligation to uphold principles of legality and proportionality of criminal offenses and penalties, then under the DEIO the executing authority would be correct in denying recognition and/or execution.

Another example of a human rights obligation is in respect of the right to life and the prohibition of inhumane, degrading treatment, which was earlier mentioned to be in relation to criminal law. The right to life and prohibition of death penalty is found in the CFR under Article 2 and herein, the prohibition against death penalty and execution is equivocally

provided.[2375] Comparing to the ECHR provision,[2376] the EU framework is more straightforward in prohibiting its member states to impose judicial execution.

In relation to this, there is the prohibition of torture as well as inhumane and degrading punishment or treatment which is provided in absolute terms (without qualifications) under Article 4 CFR and was mentioned in the Aranyosi and Căldăraru cases above.[2377] To put things in proper context, torture – as per United Nations General Assembly – connotes aggravated and deliberate forms of cruel, inhuman, and degrading treatment or punishment.[2378] It distinguishes itself from inhumane treatment or punishment in degree, wherein torture attaches a special stigma to deliberate inhuman treatment that causes serious and cruel suffering.[2379]

Inhuman treatment does not necessarily need to be deliberate, while degrading treatment does not necessarily require gross humiliation.[2380] The Strasbourg court repeatedly held:

> "Treatment has been held by the Court to be 'inhuman', because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering, and also 'degrading' because it was such as to arouse in the victims feelings of fear, anguish, and inferiority complex of humiliating and debasing them. In order for a punishment or treatment associated with it to be 'inhuman' or 'degrading', the suffering or humiliation involved must be in any event go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. The question whether the purpose of the

2375 Charter of Fundamental Rights, art. 2(2).

2376 The CFR provision is in contrast to Article 2 ECHR, which initially reserved the right of contracting parties to subject convicted criminals to the death penalty, but has since then been overridden by protocols either abolishing death penalty during peacetime (Protocol 6) or during all circumstances (Protocol 13) for example. *White/Ovey*, p. 144.

2377 The same prohibition applies in the ECHR framework wherein the prohibition under Article 3 ECHR is in absolute terms and irrespective of the victim's conduct.Chahal v. United Kingdom, (App. 22414/93), 19 November 1996, (1997) 23 EHRR 413, ECHR 1996-V.

2378 Declaration on the protection of all persons from being subjected to torture and other cruel, inhumane, and degrading treatment or punishment, art. 1;*White/Ovey*, p. 170.

2379 Ireland v. United Kingdom, 18 January 1978, Series A No 25, (1979-80) 2 EHRR 25, § 167.

2380 *White/Ovey*, pp. 172, 173.

> treatment was to humiliate or debate the victim is a further factor to be taken into account but the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3."[2381]

Within the ECHR framework, obligations under Article 2 and 3 ECHR on the right to life and the prohibition of torture, and other cruel, inhumane or degrading punishment or treatment, have extraterritorial effect. This extraterritorial application has generally been clarified and developed in case law.[2382] In the EU context however, what has been made clear through jurisprudence in the ECHR framework has been equivocally provided in Article 19 CFR wherein member states cannot remove, expel, or extradite an individual to a state where there is serious risk that he/she would be subjected to the death penalty, torture, or other inhumane or degrading punishment and treatment.

In the context of EIO situations, or even general MLA, these obligations still can find significance. At the outset, a criminal matter involving death penalty as punishment is obviously out of the question with respect to EU member states. Nonetheless, the extraterritorial application provided in Article 19 can still be kept in mind if one visualizes cross-border transfer of information and/or evidence in a broader context and involving EU member states. There ought to be then an undertaking from the issuing or executing state that the death penalty shall not be imposed. Otherwise, any request ought to be refused.

Further, situations could still exist among the member states themselves that reach the threshold on inhumane and degrading treatment or punishment such as exhibited in the Aranyosi and Căldăraru cases. An EIO

2381 T & V v. United Kingdom, (Apps. 24888/94 and 24724/94) 16 December 1999 [GC], (2000) 30 EHRR 121, ECHR 1999-IX, § 71; see also Jalloh v. Germany, (App. 54810/00), 11 July 2006 [GC], (2007) 44 EHRR 667, ECHR 1996-IX, § 68.

2382 Contracting parties ought to apply extraterritorially Article 2 on the right of life to protect those liable to expulsion not just from death penalty but also from any real risk of deliberate killing.Case law likewise ruled that if a contracting party acquiesced to Protocol 6 and extradited a person in risk of judicial execution, there would be a violation of the Protocol, and thus a commitment from the requesting state is necessitated that the death penalty shall not be applied. Akin to this, obligation under Article 3 are also given an extraterritorial effect in certain circumstances as illustrated in the Soering and Chahal judgments mentioned above. A contracting party may be held liable for violating Article 3 if its actions exposes a person to the likelihood of ill-treatment outside the jurisdiction of the contracting parties. *White/Ovey,* pp. 144, 179.

can cover transfers of persons in custody among other things. Allowing persons in custody to be transferred as an executing state to questionable facilities would violate one's obligation under Articles 4 and 19 of the CFR. It is also highly possible that in recognizing or executing an EIO, the suspect and/or accused is at risk of punishment that would expose him/her to either torture and other inhumane or degrading punishment or treatment. While no clear pronouncement is available as regards this scenario vis-à-vis the EIO, there remains the high plausibility that the threshold of "substantial grounds to believe that the investigative measure would violate obligations under Article 6 TEU and the CFR" would be met and there is sufficient reason to deny recognition or execution of an EIO.

Based on the foregoing, the ground for refusal based on human rights obligations has significance in an EIO situation. The non-discrimination obligation for example is straightforward in this regard. The same can be said for the obligation vis-à-vis the principle of legality and proportionality of criminal offenses and penalties. As regards Article 2 and 4 CFR obligations vis-à-vis Article 19 CFR, there is still the plausibility that executing or recognizing an EIO may lead to incompatibility with human right obligations. The nexus between investigative measure and punishment or treatment may not be as direct or straightforward all the time such as in arrest or extradition scenarios. Nevertheless, recognizing or executing an EIO could bring with it negative repercussions and the propensity to violate human rights undertakings provided in Article 6 TEU and the CFR.

v. Reciprocity

The principle of reciprocity is not equivocally mentioned in the EIO instrument, just like the EAW instrument.[2383] In its stead, one could see the principle of mutual recognition and mutual trust as applicable, wherein judicial decisions of a member state are accepted and recognized without further need to formalities and procedures.[2384] Despite not being explicitly mentioned, one could not help but ask whether reciprocity still exists in the context of the EIO.

2383 See *Klimek,* p. 83.
2384 See *Winter,* p. 581.

The principle of reciprocity is traditionally an important aspect of international relations.[2385] World politics, often referred to as archaic in structure, would only make cooperation achievable not through deference to a hierarchical authority or centralized enforcement but rather, through a mechanism consistent with sovereignty and self-help.[2386] Consistent with, if not originating from, the concept of sovereignty implies inter-state equality, the principle of reciprocity is a condition theoretically attached to every legal norm of international law.[2387]

In line with this, the principle of reciprocity can either have notions of specific reciprocity and diffuse reciprocity: on one hand, specific reciprocity refers to situations in which "specified partners exchange items of equivalent value in a strict delimited sequence", and existing obligations are clearly specified as rights and duties of the particular actors; on the other hand, diffuse reciprocity denotes less precise definition of equivalence, "wherein one's partners are rather viewed as a group rather than particular actors, and the sequence of events is less narrowly bounded", as well as stressing the importance of adhering to obligations and conforming to generally accepted standards of behavior.[2388]

Given these two notions, common elements of contingency and equivalence exist in the principle of reciprocity.[2389] As regards contingency, reciprocity is said to imply that "actions are contingent on rewarding reactions from others and that cease when these expected reactions are not forthcoming" – reciprocal behavior returns ill for ill as well as good for good.[2390] Equivalence, on the other hand, does not denote a strict equivalence of benefits but instead a rough equivalence: it can be characterized by changes of mutually valued but noncomparable goods and services.[2391] Thus, it is possible that there would not be any specific symmetry in performances but nonetheless both sides would gain equally valued benefits.[2392] Specific reciprocity would require bilateral balancing among actors while diffuse reciprocity focuses on an overall balance within the group.[2393]

2385 See *van der Wilt*, p. 80.
2386 *Keohane*, p. 1.
2387 *Keohane,* p. 1; *van der Wilt,* p. 71.
2388 *Keohane,* p. 4.
2389 *Keohane,* pp. 3, 5.
2390 *Keohane,* pp. 5-6.
2391 *Keohane,* p. 6.
2392 See *van der Wilt,* p. 73. See also *Klimek,* p. 83.
2393 *Keohane,* p. 7.

The principle of reciprocity has always been one of the principles on which classical judicial cooperation is based on, together with the principle of dual criminality, and of speciality, and firstly on the basis of cooperation between governments or the sovereign.[2394] They are predicated most of the time on a system of mutual performances and affording each other the widest possible assistance, while rarely containing unilateral obligations.[2395] It even can be a self-sufficient basis to grant assistance in the absence of any existing agreement.[2396]

It has been argued however that cooperation in Europe, although it began on "reciprocity in unequal obligations" or reciprocity in general,[2397] has started to abandon the said principle through the making of more and more bilateral treaties on matters such as mutual legal assistance and extradition.[2398] Within the context of the European Union, it underwent an evolution on extradition and mutual legal assistance instruments.[2399] And now with the principle of mutual recognition and mutual trust, there seems to be arguably a distortion, if not complete removal, of the principle of reciprocity.

At the outset, the principle of mutual recognition, especially with the EIO, might seem to promote the idea of reciprocity due to the mutual performance expected from both the issuing state and the executing state.[2400] But as pointed out by van der Wilt, the supposed congruity between the mutual recognition principle and reciprocity is deceptive.[2401] On a procedural aspect, if one would recall, the issuing authority in issuing an EIO needs to make sure it is necessary, adequate, and proportionate, and that the same is available in a similar domestic case.[2402] And when the executing authority receives the same, it shall recognize and/or execute the same without any further formalities.[2403] Like the EEW, the EIO completely depoliticizes the mutual assistance proceedings and judicial authorities would deal speedily with the recovery of evidence and handing over the

2394 *Nilsson,* p. 53; *van der Wilt,* p. 71.
2395 *van der Wilt,* p. 71.
2396 *van der Wilt,* p. 71.
2397 *Keohane,* pp. 6, 23.
2398 *Nilsson,* p. 54.
2399 See *Nilsson,* pp. 54-56.
2400 *Klimek,* p. 83; *van der Wilt,* p. 74.
2401 *van der Wilt,* p. 74.
2402 Directive on European Investigation Order, art. 6(1).
2403 Directive on European Investigation Order, art. 9(1).

same to the issuing authority.[2404] In the new setting of the EIO, ministers and ministries are ideally no longer involved in judicial proceedings and whether national interests would play a role vis-à-vis the EIO, the same would be reliant upon the judicial authorities' discretion.[2405] This in turn arguably distorts the principle of reciprocity or otherwise makes it difficult for member states to invoke it.[2406] More or less, the EIO and its application of the principle of mutual recognition has stood the traditional sovereign function of mutual legal assistance on its head: although the judicial authorities (executing authorities) may find that all the necessary conditions or requirements for recognition and/or execution have been fulfilled, it is a different concern altogether for the exercise of executive discretion to determine how far reciprocity on the part of the requesting state exists or is likely to exist.[2407]

On substantial issues, reciprocity is arguably equally distorted with respect to the EIO. The executing authority cannot refuse to recognize and/or execute the EIO should the latter have reasons to believe that the requirements of adequacy, necessity, and proportionality have not been met.[2408] At most, the executing authority may communicate with the issuing authority and the latter would decide whether to withdraw the EIO.[2409] While one can argue that both parties have obligations to fulfill in such a scenario, there still exists a disparity to the disadvantage of the executing authority because even if compliance to the requirements are questionable, it does not have the power to deny the EIO. Based on the tenets of the principle of reciprocity, one could conclude that its application becomes questionable in this regard. Additionally, the grounds to refuse recognition and/or execution are limited to precise causes.[2410] In connection to this, a question on reciprocity arises with respect to the limitation for dual criminality.[2411] Mirroring van der Wilt's arguments on the EAW because the same situation applies to the EIO, dual criminality was meant to assure perfect symmetry in bilateral and multilateral relations.[2412] The partial abolition of dual criminality and the introduction of a list

2404 *Nilsson,* p. 57.
2405 *Nilsson,* p. 57; *van der Wilt,* p. 77.
2406 See *van der Wilt,* pp. 76-80.
2407 See *van der Wilt,* p. 81.
2408 Directive on European Investigation Order, art. 6.
2409 Directive on European Investigation Order, art. 6(3).
2410 See *Bachmaier-Winter,* p. 53.
2411 See *van der Wilt,* p. 75.
2412 See *van der Wilt,* p. 75.

of 32 offenses with the EIO to which no refusal is allowed thwarts the symmetry in favor of those states with harsher penal law systems and to the detriment of those with more lenient penal law systems.[2413] This could result to a situation wherein some states may overall incur more obligations than others in this system.[2414] And reverting again to the principle of reciprocity, there is no reciprocity in this situation given the unequal sharing of obligations regardless if viewed from a specific or diffused reciprocity perspective.

This notwithstanding, all is not lost with the principle of reciprocity. The EIO still retains the same to a certain degree. While limited to precise causes, the different grounds for refusal, as well as grounds to postpone execution, or revert to other investigative measures, are testament to this. Reciprocity on an international level guarantees that states would not enter into unilateral obligations against their own will but national legislation often presents restrictions to satisfy the obligations a state accedes to.[2415] With regard to this, the inclusion of grounds for refusal or reservations serves as a middle ground that allows states with internal legal impediments to restrict their obligations accordingly but also allowing other states to limit their performance to the ones their counterparts are willing to engage.[2416] Thus, one can see in the EIO that an executing authority may refuse to recognize or execute an EIO, for example, either on the ground of territoriality,[2417] or when the investigative measure indicated in the EIO is restricted under the law of the executing state to a certain list of offenses, of which the subject criminal matter of the EIO is not included,[2418] or when there are substantial grounds to believe that executing the EIO would be incompatible with the executing state's obligation under Article 6 of the TEU.[2419] Moreover, the execution of the EIO may be postponed should it prejudice an ongoing criminal investigation or prosecution in the executing state, or that the objects, documents, and date requested is currently being utilized in other proceedings, unlike in the EAW wherein the executing state needs to execute an arrest warrant even in situations when it would be precluded from instituting criminal

2413 See *van der Wilt,* p. 75.
2414 *van der Wilt,* p. 75.
2415 *van der Wilt,* p. 73.
2416 *van der Wilt,* p. 73.
2417 Directive on European Investigation Order, art. 11(1)(e).
2418 Directive on European Investigation Order, art. 11(1)(h).
2419 Directive on European Investigation Order, art. 11(1)(f).

proceedings itself.[2420] Thus, a balance of performance is maintained in this situation more or less.[2421]

vi. Speciality or use limitation

The principle of speciality is one of the principles, as mentioned above, on which classical judicial cooperation has been developed.[2422] An application of the same means that the object, data, document, or any other evidence requested "can only be legally used for the request for which they are handed over."[2423] Accordingly, the DEIO is bereft of any exact general provision that the issuing authority is bound to limit its use of the evidence requested on the criminal matter indicated in the EIO. To this observation, an author notes that this raises two (2) possibilities: either the speciality rule does not apply any longer or it still tacitly applies.[2424] However, a closer look into the provisions of the DEIO would show facets of the principle are still present.

The use of the principle of speciality can be seen as regards personal data wherein it cannot be used other than the purpose to which it is requested. The DEIO provides that in its implementation, member states shall ensure that personal data are protected and processed only in accordance with Council Framework Decision 2008/977/JHA, which refers to the protection of personal data processed in the framework of police and judicial cooperation in criminal matters.[2425] This is now repealed by Directive (EU) 2016/680 of 27 April 2016 on the "protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data."[2426] Said Directive likewise covers processing of personal data in safeguarding against and the prevention of threats to

2420 Directive on European Investigation Order, art. 15(1). See also *van der Wilt,* p. 74.
2421 Cf. *van der Wilt,* p. 74.
2422 *Nilsson,* p. 53.
2423 *Boister,* p. 204.
2424 *de Silva*, p. 10.
2425 Directive on European Investigation Order, art. 20.
2426 Directive (EU) 2016/680 of 27 April 2016 on the "protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal

public security.[2427] Accordingly, the Directive provides certain principles member states ought to follow with regard processing of personal data in criminal matters.[2428] Member states ought to observe within their respective jurisdictions time limits for storage and review.[2429] In the same way, the Directive provides minimum requirements and parameters member states ought to comply with as regards transfers of personal data to other member states, third states, or international organizations,[2430] whilst ensuring that processing is to be lawful only if and to the extent necessary for the performance carried out by a competent authority for purposes set forth in the Directive.[2431] Any member state law regulating processing shall specify at the least the objectives of processing, the personal data

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offences or the execution of criminal penalties, and on the free movement of such data, art. 1(1).

2427 Directive (EU) 2016/680 of 27 April 2016 on the "protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, art. 1(1).

2428 Directive (EU) 2016/680 of 27 April 2016 on the "protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, art. 4. Such principles include but are not limited to, member states providing for personal data to be: (1) collected by the competent authorities for specified, explicit and legitimate purposes and not processed in a manner that is incompatible with those purposes (article 4.1.b); (2) adequate, relevant and not excessive in relation to the purposes to which they are processed (article 4.1.c); and (3) processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures (article 4.1.f).

2429 Directive (EU) 2016/680 of 27 April 2016 on the "protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, art. 5.

2430 Directive (EU) 2016/680 of 27 April 2016 on the "protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, arts. 9-10, 35-40.

2431 Directive (EU) 2016/680 of 27 April 2016 on the "protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal

to be processed, and the purposes of processing.[2432] The rights of a data subject ought to be respected likewise.[2433]

Speciality also applies more or less to the transfer of evidence. On one hand, the executing authority shall indicate whether it requires the evidence to be returned to the executing state as soon as it is no longer required in the issuing state.[2434] However, there is no mention whether the further need of the evidence transferred by the issuing state is on the basis of the criminal matter it indicated in the EIO. On the other hand, when the objects, data, or documents subject of the EIO become relevant to another proceeding in the executing state, the executing authority may, after request and consultation with the issuing authority, arrange for a temporary transfer of evidence conditioned on the return of said evidence as soon as it is no longer required in the issuing state or at any other time agreed by the parties.[2435]

Elements of speciality are likewise present in the specific procedures provided for certain investigative measures. One example is the safe harbor provision or the general to immunity of a person in custody who is transferred from and to either the issuing state or executing state. As per the relevant provision, he/she shall not be prosecuted or detained or subjected to any other restriction of his/her personal liberty in the issuing State for acts committed or convictions handed down before his departure from the territory of the executing State and which are not specified in the EIO.[2436] Hence, there is a limitation to the criminal proceeding indicated in the EIO. Any further than that, to be used as a ground for prosecution, detention, or any other restriction of personal liberty, is not countenanced. In connection thereto, the transfer of a person in custody is for the purpose

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offences or the execution of criminal penalties, and on the free movement of such data, art. 8(1).

2432 Directive (EU) 2016/680 of 27 April 2016 on the "protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, art. 8(2).

2433 Directive (EU) 2016/680 of 27 April 2016 on the "protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, arts. 12-18.

2434 Directive on European Investigation Order, art. 13(3).

2435 Directive on European Investigation Order, art. 13(4).

2436 Directive on European Investigation Order, art. 22(6).

of carrying out an investigative measure with a view to gather evidence for which the presence of the person in the subject territory is required.[2437] It follows that whatever practical arrangements are to be made between the issuing authority and executing authority,[2438] the pending criminal proceeding shall be taken into account, in which the assistance of the person in custody is needed.

vii. Special Offenses and National Interest Cases

The EIO provides for grounds to refuse the execution of an EIO on the basis of national or public interest of the executing authority. At the outset, one does not find the political, military, and fiscal offenses exception that one finds in the 1959 European Convention on Mutual Legal Assistance, for example. That being mentioned, there is a ground to refuse the execution of the EIO should there be an existing immunity or privilege under the law of the executing state which makes it impossible to execute the EIO or when there are rules on determination and limitation of criminal liability relating to freedom of the press and freedom of expression in other media, which make it impossible to execute the EIO.[2439] In relation to this, the DEIO additionally provides that should the power to waive the privilege or immunity lie with an authority of the executing state, "the executing authority shall request it to exercise that power forthwith." In cases where the power to waive the privilege or immunity lies with an authority of another state or international organization, it shall be for the issuing authority to request the authority concerned to exercise that power.[2440]

Secondly, the EIO may be refused should the execution of the same harm essential national security interests, jeopardize the source of the information, or relate to the use of classified information relating to specific intelligence activities.[2441] Thirdly, the execution of the EIO can be refused if the EIO was issued in proceedings brought by either administrative authorities or judicial authorities in respect of criminal infringements punishable under the national law of the issuing state, where the decision

2437 Directive on European Investigation Order, arts. 22(1); 23(1).
2438 Directive on European Investigation Order, arts. 22(5).
2439 Directive on European Investigation Order, art. 11(1)(a).
2440 Directive on European Investigation Order, art. 11(5).
2441 Directive on European Investigation Order, art. 11(1)(b).

may give rise to proceedings before a court having jurisdiction particularly on criminal matters, and the investigative measure included in said EIO would not be authorized under the law for a similar domestic case in the executing state.[2442] Fourthly, there is the territoriality ground to refuse recognition and/or execution, wherein an EIO can be refused when the criminal offense subject of the EIO was not committed in the issuing state but rather, partially or wholly in the executing state, and the subject conduct is not punishable under the national law of the executing state.[2443] Fifthly, national interests also play a role when the executing authority may decline the execution of the EIO when the same is with respect to the use of the investigative measure that is restricted under the law of the executing State to a list or category of offences or to offences punishable by a certain threshold, which does not include the offence covered by the EIO.[2444]

Previously, it was mentioned that the ground for refusing the recognition and/or execution of a request because there is substantial grounds to believe that doing so would be incompatible with obligations of the executing state under Article 6 TEU is based on fundamental human rights considerations and indeed, at first glance it is. However, upon closer scrutiny of the provision, it can equally be based on public order (or national interest in general) because, even if it takes account of fundamental rights, the same was formulated in broad terms wherein an infringement is not required but only a substantial ground to believe that it could happen.[2445]

It must be mentioned that should the aforementioned reasons be invoked in refusing an EIO, the executing authority must consult first with the issuing authority prior to refusing to recognize or execute an EIO and when appropriate, request the issuing authority to provide information as may be necessary.[2446]

In addition to how national interests play a role in denying the recognition and/or execution of an EIO, it also plays a role in the postponement of execution. The DEIO accordingly provides that the execution of the EIO may be postponed either when "(1) its execution might prejudice an on-going criminal investigation or prosecution, until such time as the executing state deems reasonable; or (2) the objects, documents, or data

2442 Directive on European Investigation Order, arts. 4(b)(c), 11(1)(c).
2443 Directive on European Investigation Order, art. 11(1)(e); *Heard/Mansell,* p. 360.
2444 Directive on European Investigation Order, art. 11(1)(g).
2445 *Bachmaier-Winter,* p. 54.
2446 Directive on European Investigation Order, art. 11(5).

concerned are already being used in other proceedings, until such time as they are no longer required for that purpose."[2447] When the ground for postponement ceases to exist, then the executing state must undertake the necessary measures for the execution of the EIO and inform the issuing authority by any means capable of producing a written record.[2448]

3. Procedural Provisions: European Investigation Order

a. Designation of Issuing and Executing Authorities

Traditional mutual legal assistance regimes would refer to a central authority which shall request and receive requests with regard mutual legal assistance. Such is built on a vertical construct of cooperation. Conversely, the DEIO provides for horizontal and decentralized cooperation via an issuing authority and an executing authority, wherein requests are not issued through and to a single authority. Thus, there is no longer a fixed 1:1 correspondence between member states in the receiving and transmitting of the EIO. The DEIO defines the issuing authority as one who is either a (1) "judge, a court, an investigating judge or a public prosecutor competent in the case concerned;" or (2) "any other competent authority as defined by the issuing State which, in the specific case, is acting in its capacity as an investigating authority in criminal proceedings with competence to order the gathering of evidence in accordance with national law."[2449] Should the EIO be issued by the latter, the EIO must be validated before it is transmitted to the executing authority, after examination of its conformity with the conditions for issuing an EIO under this Directive by a judge, court, investigating judge or a public prosecutor in the issuing State.[2450] Where the EIO has been validated by a judicial authority, that authority may also be regarded as an issuing authority for the purposes of transmission of the EIO.[2451]

As can be observed, the DEIO adopts a broad definition of "issuing authority" with the additional safety measure of requiring judicial validation should a court warrant be required in the executing state. This prevents

2447 Directive on European Investigation Order, art. 15(1).
2448 Directive on European Investigation Order, art. 15(2).
2449 Directive on European Investigation Order, art. 2(c).
2450 Directive on European Investigation Order, art. 2(c).
2451 Directive on European Investigation Order, art. 2(c).

complex issues such as needing to distinguish between investigating measures that might have actually needed judicial warrants because it could have infringed fundamental rights, and the need to enumerate and distinguish all the types of authorities on the national level that can request for investigative measures.[2452] Moreover, it takes into context the disparity among member states on coercive measures.[2453]

There might be issues arising as regards whether the requirements for being an issuing authority have been complied with. On this question the DEIO does not allow the EIO to be refused on grounds of lack of authority. At most, the executing authority is allowed to return the EIO should it not have the validation required.[2454]

On the other end of the spectrum there is the executing authority, which the DEIO provides as "an authority having competence to recognize an EIO and ensure its execution in accordance with this Directive and the procedures applicable in a similar domestic case."[2455] Accordingly, "such procedures may require a court authorization in the executing State where provided by its national law."[2456] As one would recall, a directive is meant for the member states to transpose to their respective national legal orders the provisions provided for in the directive. Subsequently, the member states would then need to determine who would have the competence to be an executing authority by either designating a central authority or authorities to receive and transmit the EIO's or allow the EIO's to be transmitted directly to the executing authority.[2457] As to how to best handle the same, each option has its pros and cons. On one hand, efficiency is better assured if the EIO is directly transmitted to the executing authority but there would be times wherein the issuing authority could be uncertain where the evidence needed is located and thus, having a central authority would be better.[2458] On the other hand, centralization could provide problems on delay and might not work properly with federal structures wherein there is no clear delineation of territorial competence.[2459]

2452 See *Bachmaier-Winter,* p. 48.
2453 *Bachmaier-Winter,* p. 48.
2454 Directive on European Investigation Order, art. 9(3); *Bachmaier-Winter,* p. 48.
2455 Directive on European Investigation Order, art. 2(d).
2456 Directive on European Investigation Order, art. 2(d).
2457 Directive on European Investigation Order, art. 7(3); *Bachmaier-Winter,* p. 49.
2458 *Bachmaier-Winter,* p. 49.
2459 *Bachmaier-Winter,* p. 49.

b. Preparation of Requests

i. Requirements for Requests

The EIO is transmitted "from the issuing authority to the executing authority by any means capable of producing a written record under conditions allowing the executing State to establish authenticity."[2460] Any subsequent communication shall then be made directly between the issuing and executing authorities.[2461] In connection to this, the DEIO allows transmittal of the EIO using the telecommunications system established by the EJN.[2462] In cases where the issuing authority is assisting the executing authority in the execution of the EIO, the former is allowed to address any supplementary EIO directly to the latter while being in the executing state.[2463] Likewise, in cases where the executing authority is unknown, "the issuing authority shall make all necessary inquiries, including via the EJN contact points, in order to obtain the information from the executing State."[2464] Additionally, where the authority in the executing state which receives the EIO has no competence to recognize the EIO or take the necessary measures for its execution, it shall, *ex officio*, transmit the EIO to the executing authority and so inform the issuing authority.[2465] Furthermore, should there be issues regarding transmission or authentication of documents in relation to the EIO, the parties are encouraged to discuss the same through direct communication with each other.[2466]

With respect to the formal requirements, the recognition of the fragmented framework for obtaining evidence while drafting the DEIO led to the creation of a single comprehensive instrument that should cover the process of obtaining evidence. The appropriate form[2467] provides that the EIO shall contain as a minimum "(1) data about the issuing authority and, where applicable, the validating authority; (2) the object of and reasons for the EIO; (3) the necessary information available on the person(s) concerned; (4) a description of the criminal act, which is the subject of the investigation or proceedings, and the applicable provisions of the criminal

2460 Directive on European Investigation Order, art. 7(1).
2461 Directive on European Investigation Order, art. 7(2).
2462 Directive on European Investigation Order, art. 7(3).
2463 Directive on European Investigation Order, art. 8(3).
2464 Directive on European Investigation Order, art. 7(4).
2465 Directive on European Investigation Order, art. 7(5).
2466 Directive on European Investigation Order, art. 7(6).
2467 Directive on European Investigation Order, Annex A.

law of the issuing State; (5) a description of the investigative measures(s) requested and the evidence to be obtained."[2468] In relation to this, member states have the obligation to indicate which official language of the Union and/or their official language(s) would be used vis-à-vis the EIO, should they be the executing state.[2469] Based on this, the issuing state shall endeavor to issue the EIO in the language(s) indicated by the applicable executing authority.[2470]

In addition to the foregoing, the issuing authority must disclose should the EIO it issues supplement a previously issued EIO.[2471] This ought to be certified, as required in the applicable provisions, and when needed, verified.[2472]

ii. Person or Authority Initiating EIO

As to whose instance an EIO can be issued, a suspected or accused person may now request the issuance of an EIO either by person or by a lawyer on his behalf.[2473] This would however be subject to the "framework of applicable defense rights in conformity with national criminal procedure."[2474] In other words, member states must ensure that any suspected or accused person has the right to avail of the EIO but it has the discretion to regulate how this would be exercised.[2475]

Although this measure is laudable as progressive with regard defense rights, there are lingering concerns that the same is problematic. Albeit the prosecution in an inquisitorial system of criminal procedure is impartial on paper, and that theoretically, a suspect or accused may apply for an EIO, in practice there had been instances of distorting the principle of equality of arms.[2476] It becomes more problematic in an accusatorial context wherein the request of the defense is subject to the discretion of an authority, which itself acts as the prosecution.[2477] Also, there are national

2468 Directive on European Investigation Order, art. 5(1).
2469 Directive on European Investigation Order, art. 5(2).
2470 Directive on European Investigation Order, art. 5(3).
2471 Directive on European Investigation Order, art. 8(1).
2472 Directive on European Investigation Order, art. 8(2).
2473 Directive on European Investigation Order, art. 1(3).
2474 Directive on European Investigation Order, art. 1(3).
2475 *Bachmaier-Winter*, p. 50.
2476 *Bachmaier-Winter*, p. 50.
2477 *Bachmaier-Winter*, p. 50.

systems that prohibit independent collection by evidence of the defense alone, thus again being subject to the discretion of the authority also in charge of prosecution.[2478]

As to whether the suspected or accused person could intervene in the issuance and/or execution of the EIO – a question that naturally arises given the foregoing imprimatur – the DEIO is actually silent and this is yet to be determined.[2479]

c. Execution of Requests

i. Applicable Law on Execution

The admissibility of evidence in the requesting state, or in terms of the EIO, the issuing state, may be determined by the rules that were applied in obtaining the same in a foreign state.[2480] Some legal systems would require that evidence should be obtained in accordance with the *lex fori*, while some would respect the admissibility as long as the *lex loci* has been followed.[2481] There are countries, on the other hand, which follow the so-called principle of non-inquiry and accept evidence coming from a foreign state without further question or inquiry.[2482]

Given this diversity, it is admittedly difficult to implement an unproblematic free circulation of evidence and ensure that defense rights would not be impaired.[2483] The EIO supposedly provides a solution to this issue. The EIO should be executed by the executing authority in accordance with the formalities and procedures expressly indicated by the issuing authority, unless the same are contrary to the fundamental principles of law of the executing state.[2484] Moreover, an issuing state may request that some of its representatives are allowed to assist in the execution of the EIO but only to the extent that they would be able to assist in the execution of the investigative measure in a similar domestic case.[2485] The executing authority is enjoined to comply with such request unless the same is contrary to

2478 *Bachmaier-Winter,* p. 50.
2479 See *Bachmaier-Winter,* p. 50.
2480 *Bachmaier-Winter,* p. 55.
2481 *Bachmaier-Winter,* p. 55.
2482 *Bachmaier-Winter,* p. 55.
2483 *Bachmaier-Winter,* p. 55.
2484 Directive on European Investigation Order, art. 9(2).
2485 Directive on European Investigation Order, art. 9(3).

its fundamental principles of law and would harm its essential national interests.[2486] Delegated authorities, if allowed, should keep in mind that they are bound by the laws of the executing state during the execution of the EIO. They would not have law enforcement powers in the territory of the executing state unless the execution of the law enforcement powers is in accordance with the law of the executing state and to the extent agreed between the issuing and executing authorities.[2487] And in effectuating the same, it is important that the issuing authority and executing authority consult each other by any appropriate means.[2488]

However, the requirement that the executing authority ought to act in accordance with the procedures and instructions given by the issuing authority in the EIO must be qualified. The DEIO equally provides that the executing authority is allowed to resort to another investigative measure should the investigative measure indicated in the EIO not be provided for in the domestic law of the executing state and/or does not apply in a similar domestic case.[2489] This is however not allowed for the following investigative measures that always need to be available under the national law of the executing authority: "(1) the obtaining of information or evidence which is already in the possession of the executing authority and the information or evidence could have been obtained, in accordance with the law of the executing State, in the framework of criminal proceedings or for the purposes of the EIO; (2) the obtaining of information contained in databases held by police or judicial authorities and directly accessible by the executing authority in the framework of criminal proceedings; (3) the hearing of a witness, expert, victim, suspected or accused person or third party in the territory of the executing State; (4) any non-coercive investigative measure as defined under the law of the executing State; (5) the identification of persons holding a subscription of a specified phone number or IP address."[2490]

The executing authority also has the option to resort to another investigative measure different from what the issuing authority provided for in the EIO when "the investigative measure selected by the executing

2486 Directive on European Investigation Order, art. 9(3).
2487 Directive on European Investigation Order, art. 9(5).
2488 Directive on European Investigation Order, art. 9(6).
2489 Directive on European Investigation Order, art. 10(1).
2490 Directive on European Investigation Order, art. 10(2).

authority would achieve the same result by less intrusive means than the investigative measure indicated in the EIO."[2491]

In either case, the executing authority needs to inform the issuing authority of these circumstances to give the latter the opportunity to decide on whether to accede or just withdraw the EIO.[2492] And in the event that the investigative measure requested in the EIO is not possible either because it does not exist under the law of the executing authority or not available in a similar case, and that no alternative measure exists, the executing authority needs to inform the issuing authority that the execution of the EIO is not possible.[2493]

ii. Applicable Procedural Rights

1. Importance of Defense Rights in the EIO

One of the aspects in which human rights are taken into account in the DEIO is its reference to defense rights vis-à-vis the applicable law in obtaining evidence by virtue of the EIO. There is acknowledgment that the transnational dimension of a proceeding must foster cooperation but the same should not be at the expense of infringing or reducing the rights of the defendant.[2494] And while there are no specific rules applicable to transnational criminal proceedings just yet, the EIO nonetheless provides that member states are obliged, without prejudice to national criminal proceedings, "to ensure that in criminal proceedings in the issuing state, the rights of the defense and fairness of proceedings are respected when assessing evidence obtained through the EIO."[2495] In other words, member states must ensure respect for defense rights and fairness of proceedings when assessing evidence obtained through an EIO, subject to their own national criminal proceedings.

In relation to this, the DEIO provides that the EIO should be implemented taking into account Directives 2010/64/EU, 2012/13/EU, and 2013/48/EU of the European Parliament and of the Council, which involve one's right to interpretation and translation, right to information,

2491 Directive on European Investigation Order, art. 10(3).
2492 Directive on European Investigation Order, art. 10(4).
2493 Directive on European Investigation Order, art.10(5).
2494 *Bachmaier-Winter,* p. 55.
2495 Directive on European Investigation Order, art. 14(7); *Bachmaier-Winter,* p. 55.

and right to access to a lawyer in criminal proceedings, respectively.[2496] Although the DEIO was silent as to how these directives ought to be operationalized in proceedings involving the EIO, these were notably the directives in place prior to the enactment of the DEIO and were geared towards the approximation of procedural law and rights in the European Union. After the DEIO, the European Parliament and Council also came up with the following Directives centering on procedural rights vis-à-vis the defense, such as Directive (EU) 2016/343 on strengthening certain aspects of the presumption of innocence and the right to be present at the trial in criminal proceedings, Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European Arrest Warrant proceedings, which shall enter into force by 01 April 2018, 11 June 2019, and 25 May 2019, respectively.[2497] Given that these directives are part of EU law which member states ought to comply with, these directives should be read and applied *in pari materia* in the implementation of the EIO. Admittedly, no guidelines on how the same are operationalized vis-à-vis the EIO are readily available. What is currently available are guidelines and toolkits on the same in general initiated by the European Judicial Training Network ("EJTN") and organizations like Fair Trials International.[2498]

2. Human Rights Considerations in Procedures Provided in the Recognition or Execution of an EIO

Human rights considerations also play a role in the specific procedures provided by the DEIO on certain specific investigative measures. First, the transfer of persons from one state to another for purposes of giving evidence or assisting in the investigative measure as either suspect or witness.[2499] Although the person involved is already in the custody of either the issuing authority or executing authority, the person's consent is still

2496 Directive on European Investigation Order, Whereas recitals, § 15.
2497 Directive on the Right to Presumption of Innocence in Criminal Proceedings, art. 14, § 1; _Directive on Procedural Safeguards for Children who are Suspects or Accused Persons in Criminal Proceedings, art. 24, § 1; Directive on the Right to Legal Aid in Criminal Proceedings, art. 12, § 1.
2498 See Fair Trials International and Council website.
2499 Directive on European Investigation Order, arts. 22, 23.

vital before he/she could be transferred to assist in giving evidence.[2500] Any lack of consent is a ground for the executing authority to refuse execution of the EIO.[2501] As to how this consent shall be obtained, or in what form should it be, the DEIO does not provide however.[2502] The DEIO also does not provide what would happen should one withdraw consent after previously giving it.[2503] In addition to the importance of consent, the executing authority may refuse to recognize and/or execute the EIO should it tend to prolong the detention of the person in custody.[2504]

In connection to this, considerations ought to be given to the age, and physical and mental condition of the person involved, including the level of security required, in the practical arrangements to be made by both the issuing authority and executing authority, and when applicable, the member state in transit, in the transfer of said person.[2505] It follows that there is no provided time limit when a person may remain in the member state to which said person is transferred to.[2506] There is also no limitation as to the transfer of minors or when the transfer may result to detention in poor prison conditions.[2507] The same shall be dependent on the arrangements between the executing and issuing authorities, and as long as the transfer does not prolong the period of detention of the person in custody. Nonetheless, it is incumbent upon the authorities to take into consideration these factors in coming up with arrangements as regards this kind of investigative measure. And importantly, the period of custody in the state to which the person was transferred shall be considered part and parcel of the time period such person must serve in custody in detention.[2508] Safe harbor provisions also apply to the person involved, subject to exceptions, as such person has immunity from being prosecuted or detained in the state to which he/she transferred to in relation to acts committed or convictions handed down before his departure from the territory of the executing State and which are not specified in the EIO.[2509]

2500 Directive on European Investigation Order, arts. 22(2), 23(2).
2501 Directive on European Investigation Order, arts. 22(2), 23(2).
2502 *Heard/Mansell,* p. 363.
2503 *Heard/Mansell,* p. 363.
2504 Directive on European Investigation Order, art. 22(2).
2505 Directive on European Investigation Order, art. 22(3), (5).
2506 *Heard/Mansell,* p. 364.
2507 *Heard/Mansell,* p. 364.
2508 Directive on European Investigation Order, art. 22(7).
2509 Directive on European Investigation Order, art. 22(8).

The same consent element equally applies to hearings by virtue of teleconference or other audiovisual transmission, as well as by telephone conference, wherein the executing authority can deny to recognize or execute an EIO should the suspected or accused person refuse to give consent.[2510] At the same time, in the conduct of any hearing by teleconference or any other audiovisual transmission, the executing authority ought to "summon the suspected or accused persons to appear for the hearing in accordance with the detailed rules laid down in the law of the executing state and inform such persons about their rights under the law of the issuing state, in such a time as to allow them to exercise their rights of defense effectively."[2511] In view of this, the suspected or accused persons "shall be informed in advance of the hearing of the procedural rights which would accrue to them, including the right not to testify, under the law of the executing state and the issuing state."[2512] With respect to witnesses and/or experts, their rights are also taken into account when they are allowed to testify with an interpreter and when they "may claim the right not to testify which would accrue to them under the law of either the executing or the issuing state and shall be informed about this right in advance of the hearing."[2513]

Moreover, human rights consideration exists vis-à-vis the protection of personal data, wherein member states are enjoined to comply with the relevant framework decision on the same in implementation of frameworks relating to criminal matters.[2514] Access to such data shall be restricted, without prejudice to the rights of the data subject, and only authorized persons may have access to such data.[2515]

3. Defendant's Participation in the Recognition or Execution of an EIO

It was discussed beforehand that the defendant or third parties now have a greater opportunity to participate vis-à-vis the EIO and this was due to a lingering concern on the protection of a defendant's rights due to the risk of imbalance between the prosecution and defense with respect to gather-

2510 Directive on European Investigation Order, arts. 22(2), 23.
2511 Directive on European Investigation Order, arts. 22(3), 23(2).
2512 Directive on European Investigation Order, arts. 22(5)(e), 23(2).
2513 Directive on European Investigation Order, arts. 22(5)(d)(e), 23(2).
2514 Directive on European Investigation Order, art. 20.
2515 Directive on European Investigation Order, art. 20.

ing of evidence abroad, which violates the principle of equality of arms.[2516] To elucidate, equality of arms encapsulates fair administration of justice in both civil and criminal cases.[2517] This implies that each party must be given the reasonable opportunity to present one's case and evidence under conditions that do not place one at a substantial disadvantage vis-à-vis his opponent.[2518] In other words, there is a "mandate for partially symmetrical procedural treatment of adversaries in the preparation and presentation of their cases."[2519] Accordingly, equality of arms is often linked to considerations that proceedings ought to be adversarial.[2520] In order for the same to work effectively, however, it is imperative that relevant material is available to both parties to the extent that security consideration would not automatically excuse blanket restrictions on the availability of such evidence, where it affects the litigant's rights.[2521]

Likewise included within the concept's penumbra is the need to have a reasoned decision in both civil and criminal cases, the opportunity to appear in person or by representative during proceedings (subject to exceptions), and effective participation in the proceedings, the last not being easily satisfied by the presence of the litigant in court.[2522]

In light of the ongoing discussion, Sidhu nicely splits the concept of equality of arms into its four (4) rudimentary elements, namely, opponents, "arms", equality, and disadvantage, in able to make the concept further understandable. Firstly, in criminal cases, it would be the accused and prosecution that are predominantly the only parties, wherein the opponent status of the prosecution derives from its capacity to prosecute cases with the cooperation of law enforcement authorities and its capacity "to discredit merits of the case for the accused" to the point of impacting the court's decision, while the accused conversely is the subject of the criminal action and placed involuntarily at risk by the possible imposition of criminal sanctions, with his position mainly reactionary and effectively one of self-preservation.[2523] In civil law systems, the Advocate General could fill the opponent status in lieu of the prosecution at the appellate

2516 *Bachmaier-Winter,* p. 50.
2517 *White/Ovey,* p. 242.
2518 *Reid*, pp. 177-178; *White/Ovey,* p. 261.
2519 *Sidhu*, p. 91.
2520 *Reid,* p. 177; *Sidhu,* p. 97; *White/Ovey,* p. 261.
2521 *White/Ovey,* p. 261. See also Rowe and Davis v. United Kingdom (App 28901/95), 16 February 2000 [GC], (2000) 30 EHRR 1, ECHR 2000-II, § 60.
2522 *White/Ovey,* pp. 264-266.
2523 *Sidhu,* pp. 91-92.

level, when aside from acting as a mere independent and impartial adviser on the law, he becomes objectively speaking as an opponent when he recommends an accused's appeal to be dismissed, especially when he participates in deliberations that afforded him good opportunity to further his opinion to the detriment of the accused.[2524]

Secondly, "arms" refers to the opportunity to prepare and present one's case through the existence of procedural rights that enable the former.[2525] As once elucidated in a case, "while a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is a sacrifice of unarmed prisoners to gladiators."[2526]

Thirdly, the concept of equality of arms introduces a comparative element wherein it is weighed whether the procedural rights afforded one party is also afforded to the other.[2527] Reasonableness is coincidentally implicit wherein a reasonable man could discern whether procedural rights have been given in equal measure.[2528] To ascertain this, one can look into the integrated Directives on procedural rights as well as Articles 47 and 48 CFR.[2529]

The fourth element of the concept of equality of arms concerns the existence of a disadvantage for there to be an infringement to be registered.[2530] In connection to this, disadvantage in light of ECHR jurisprudence could refer to *de facto* prejudice and in some cases, inevitable prejudice.[2531] This is discerned through evaluating proceedings in its entirety and determining whether procedural inequality resulted in "an adverse and material effect on the defense's case and thus influenced the reliability of an outcome."[2532]

In light of this, it is clear that the DEIO pursuant to equality of arms gives the defense an opportunity to participate in the issuance of an EIO.

2524 See Borgers v. Belgium, (App 12005/86) (1991) Series A no. 214-B; *Sidhu,* pp. 92-93.
2525 *Sidhu,* p. 95.
2526 Williams v. Twomey, 510 F2d 634, 640 (7th Cir 1975) as cited in *Sidhu,* p. 95.
2527 *Sidhu,* p. 95.
2528 *Sidhu,* p. 95.
2529 See for the ECHR frameworkJespers v. Belgium, (App 8403/78) (1981) 27 DR 61 [55], as cited in *Sidhu,* p. 101.
2530 *Sidhu,* p. 103.
2531 *Sidhu,* p. 103.
2532 *Sidhu,* p. 103.See also for illustrative cases showing existence of counterbalancing procedures that ensure equality of arms, Matyjek v. Poland, (App 38184/03) ECHR 24 April 2007 [55]; Doorson v. The Netherlands (App 20524/92) ECHR 1996-II [72].

This has been tackled under preparation of requests. However, it is a different question altogether whether the suspected or accused person could question or intervene in the issuance and/or execution of the EIO – a question that naturally arises given the foregoing imprimatur. Issues may naturally arise during the proceedings that affect a suspect's or accused person's fair trial rights among other rights. The DEIO is actually silent and this is yet to be determined.[2533]

With said open-ended question, if one puts into complete fruition the concept of equality of arms, then the natural course to be taken is to allow complete participation for the suspect or accused person or affected person to question or interfere in the issuance or execution of an EIO. It would be easier said than done however, given issues may arise which are similar to the issue of allowing the defense to request the issuance of an EIO in the first place. Further, an EIO would most likely been issued prior to formal criminal cases are filed; thus in an inquisitorial process for example, there is a slim chance to gain knowledge of an EIO being issued or executed. This notwithstanding, the DEIO provides that it is important that member states ensure that within their own national legal orders, legal remedies equivalent to those available for similar domestic cases shall be provided for in the investigative measures to be indicated in the EIO.[2534] While substantive issues surrounding the EIO may only be challenged in the issuing state, this should be without prejudice to the guarantees of fundamental rights in the executing state.[2535] This could either mean that the executing state shall ensure fundamental rights are duly respected, or the possibility to refuse execution on substantial grounds that it could cause infringements of these rights, or the possibility to consult the issuing authority on doubts about the proportionality of the investigative measures included in the EIO.[2536]

iii. Applicable Time Element on Execution

One of the principal innovations of the EIO is imposing strict deadlines on the executing states regarding both the recognition/execution of the EIO, and the subsequent conducting of investigative measures. A decision

2533 See *Bachmaier-Winter,* p. 50.
2534 Directive on European Investigation Order, art. 15(1).
2535 Directive on European Investigation Order, art. 15(2).
2536 *Bachmaier-Winter,* p. 55.

on the execution of the EIO shall be taken "no later than 30 days after the receipt of the EIO",[2537] while investigative measures shall be taken "no later than 90 days following the taking of the decision to execute."[2538] The executing authority shall recognize the EIO without any further formality being required and shall ensure that it is executed in a way and under the same modalities as if the investigative measure concerned had been ordered by an authority belonging to the executing state, unless one of the allowable grounds for refusal or postponement is invoked.[2539] Upon receipt of the EIO, the competent authority in the executing state which receives the EIO has within a week from receipt, the obligation to inform and acknowledge receipt without delay by completing and sending the form set out in the DEIO.[2540] In cases wherein a central authority has likewise been designated by the executing state, both the central authority and the executing authority to whom the EIO is finally transmitted shall have the obligation to inform.[2541] In instances when the executing state determines that it has no competence to act and transmits the EIO to the relevant executing authority to be able to inform the issuing authority, it would be both the competent authority, which initially received the EIO, and the executing authority, which finally received it, that has the obligation to inform.[2542]

Furthermore, the executing authority shall inform "(1) if it is impossible for the executing authority to take a decision on the recognition or execution due to the fact that the form provided for in the DEIO is incomplete or manifestly incorrect; (2) if the executing authority, in the course of the execution of the EIO, considers without further enquiries that it may be appropriate to carry out investigative measures not initially foreseen, or which could not be specified when the EIO was issued, in order to enable the issuing authority to take further action in the specific case; or (3) if the executing authority establishes that, in the specific case, it cannot comply with formalities and procedures expressly indicated by the issuing authority."[2543] Upon request of the issuing authority, "the information

2537 Directive on European Investigation Order, art 12(3).
2538 Directive on European Investigation Order, art 12(4).
2539 Directive on European Investigation Order, art. 9(1).
2540 Directive on European Investigation Order, art. 16(1).
2541 Directive on European Investigation Order, art. 16(1).
2542 Directive on European Investigation Order, art. 16(1).
2543 Directive on European Investigation Order, art. 16(2).

shall be confirmed without delay by any means capable of producing a written record."[2544]

As regards recognition or execution, the decision on the same shall be taken and the investigative measure "shall be carried out with the same celerity and priority as for a similar domestic case" and, in any case, within the time limits provided for.[2545] It is imperative that the executing authority takes into account in its execution any shorter time period that would be indicated by the issuing authority in the EIO, "due to procedural deadlines, the seriousness of the offence or other particularly urgent circumstances."[2546] Consideration should equally be given should the issuing authority provide for a specific date by which the EIO needs to be executed.[2547]

Given the same circumstances, the executing authority generally is obliged to take a decision on recognition and/or execution as soon as possible and not later than 30 days from receipt of the EIO.[2548] Should it be impracticable to work within the specified date in the EIO or the time limit of 30 days to take a decision, the executing authority needs to inform without delay the issuing authority of these circumstances and the reasons behind it.[2549] The time period shall then be accordingly extended to not later than 30 days. Afterwards, should a decision to recognize and execute has been taken, the executing authority has not later than 90 days to execute the EIO without delay, unless there would be grounds to postpone the execution or the subject evidence is already in possession of the executing authority.[2550] It can also happen with this circumstance that it would not be practicable to execute within the time limit provided or the specific date given by the issuing authority, and in such a case the executing authority shall again inform by any means the issuing authority of these circumstances and they shall consult one another on the appropriate timing of executing the EIO.[2551]

In view of the foregoing, the executing authority shall without undue delay also transmit the required evidence to the issuing authority.[2552] If

2544 Directive on European Investigation Order, art. 16(2).
2545 Directive on European Investigation Order, art. 12(1).
2546 Directive on European Investigation Order, art. 12(2).
2547 Directive on European Investigation Order, art. 12(2).
2548 Directive on European Investigation Order, art. 12(3).
2549 Directive on European Investigation Order, art. 12(5).
2550 Directive on European Investigation Order, art. 12(4).
2551 Directive on European Investigation Order, art. 12(6).
2552 Directive on European Investigation Order, art. 13(1).

allowed by the domestic law of the issuing authority and the EIO states such request, the evidence may be handed over the designated authorities of the issuing state who are assisting in the execution of the EIO.[2553] Transmission of evidence may however be suspended, pending a decision on a legal remedy, unless "sufficient reasons are indicated in the EIO that an immediate transfer is essential for the proper conduct of its investigations or for the preservation of individual rights."[2554] This notwithstanding, suspending the transfer of evidence shall be in order if the same "would cause serious and irreversible damage to the person concerned."[2555]

In all the circumstances, the executing authority shall convey its decision by any means capable of producing a written record without delay.[2556]

iv. Authentication of Documents

Under the DEIO, the issuing authority needs to transmit the EIO to the executing authority by means capable of producing a written record to evince authenticity.[2557] And should there be issues regarding transmission and/or authenticity, it shall be dealt with direct communication between the issuing authority and executing authority, and where appropriate, with the involvement of their respective central authorities.[2558]

v. Importance of Confidentiality

Confidentiality and protection of personal data are a paramount consideration in the implementation of the EIO. Each member state shall take "the necessary measures to ensure that in the execution of an EIO the issuing authority and the executing authority take due account of the confidentiality of the investigation."[2559] Further, the executing authority shall guarantee the confidentiality of the facts and the substance of the EIO in accordance with its national law, except to the extent necessary

2553 Directive on European Investigation Order, art. 13(1).
2554 Directive on European Investigation Order, art. 13(2).
2555 Directive on European Investigation Order, art. 13(2).
2556 Directive on European Investigation Order, art. 16(3).
2557 Directive on European Investigation Order, art. 7(1).
2558 Directive on European Investigation Order, art. 7(7).
2559 Directive on European Investigation Order, art. 19(1).

to execute the investigative measure.[2560] Should confidentiality cannot be complied with, the executing authority shall notify the issuing authority without delay.[2561] On the other hand, the issuing authority shall also, in accordance with its national law and unless provided otherwise by the executing authority, maintain the confidentiality of any evidence and information provided by the executing authority, except as may be necessary to effectuate investigative measures described in the EIO.[2562] Additionally, it is imperative for member states to assure that banks do not disclose to the bank customer concerned or to other third persons that information has been transmitted to the issuing State in accordance with Articles 26 and 27 or that an investigation is being carried out.[2563]

The protection of personal data is related to the topic of confidentiality and in this respect, member states should ensure that personal data are protected and may only be processed in accordance with the Framework Decision on protection of personal data in processed in the framework of police and legal cooperation in criminal matters and the principles of the Council of Europe Convention for the protection of Individuals with regard to the Automatic Processing of Personal Data of 28 January 1981 and its Additional Protocol.[2564] Moreover, access to such data shall be restricted, without prejudice to the rights of the data subject. Only authorized persons may have access to such data.

vi. Return of Evidence

There is no provision in the DEIO stating that the issuing authority is obliged to return any evidence obtained through an EIO. It is incumbent upon the executing authority when transmission of evidence is made to indicate "whether it requires the evidence to be returned to the executing state as soon as it is no longer required in the issuing State."[2565] When the objects, documents, and information obtained are also relevant for other proceedings, the executing authority may, "at the explicit request of and after consultations with the issuing authority, temporarily transfer the

2560 Directive on European Investigation Order, art. 19(2).
2561 Directive on European Investigation Order, art. 19(2).
2562 Directive on European Investigation Order, art. 19(3).
2563 Directive on European Investigation Order, art. 19(4).
2564 Directive on European Investigation Order, art. 20.
2565 Directive on European Investigation Order, art. 13(3).

evidence on the condition that it be returned to the executing State as soon as it is no longer required in the issuing State or at any other time or occasion agreed between the competent authorities."[2566]

vii. Specific Procedures per Type of Assistance

As mentioned in the discussion, there are specific procedures provided by the DEIO as to specific types of assistance under Articles 23 to 31 (see above).

II. Implementation in Member State: United Kingdom

The two next portions in the study shall look into the respective member state frameworks of the United Kingdom and Germany as regards its implementation of international cooperation mechanisms, specifically the EIO which is the applicable instrument as regards mutual legal assistance between EU member states.

First in line for examination is the United Kingdom. The following discussion shall walk one through the historical development into the UK's cross-border cooperation mechanism, including its integration and implementation of the EIO, and the substantive and procedural provisions integral in understanding better the UK's existing mechanism. Included in the discussion herein are inputs from practitioners coming from different jurisdictions in the UK that shed light into how the law in practice sometimes differ from the law in the books.

A. Historical Development

1. Bilaterial, Regional, and Multilateral Mutual Legal Assistance

The United Kingdom has many bilateral, regional, and multilateral mutual legal assistance treaties with other countries. For the bilateral MLA agreements, UK has existing agreements as of December 2019, Algeria, Antigua, Barbuda, Argentina, Australia, Bahamas, Bahrain, Barbados, Brazil,

2566 Directive on European Investigation Order, art. 13(4).

Canada, Chile, China, Colombia, Ecuador, Grenada, Guyana, Hong Kong SAR, India, Ireland, Italy, Jordan, Kazakhstan, Libya, Malaysia, Mexico, Morocco, Netherlands, Nigeria, Panama, Paraguay, Philippines, Romania, Saudi Arabia, Spain, Sweden, Thailand, Ukraine, United Arab Emirates, United States of America, Uruguay, Vietnam, some of which are restraint and confiscation and/or drug trafficking MLA's.[2567]

With respect to multilateral and regional agreements, one can give attention to key EU, Council of Europe, United Nations, and even Commonwealth instruments. With respect to the EU, the UK has adopted the following key EU measures related to MLA and extradition: European Arrest Warrant Framework Decision, 2000 Convention on Mutual Assistance in Criminal Matters between member states of the European Union and its corresponding protocol, Freezing Order Framework Decision, Confiscation Order Framework Decision, Schengen Acquis – UK Participation in Articles 48 to 53, EU-Japan Agreement on Mutual Legal Assistance Matters. Following however the exit of the UK from the European Union, as of 01 January 2021, the so-called Trade and Cooperation Agreement governs the relationship between the EU and the UK, including new applicable rules for judicial cooperation.[2568] Part of this Agreement provides the new legal basis in terms of surrender, mutual legal assistance, freezing and confiscation, and exchange of criminal record information.

With respect to the Council of Europe, the UK is part of the following Council of Europe multilateral agreements: 1957 Convention on Extradition including its additional protocols, 1959 Convention on Mutual Assistance in Criminal Matters, including its 1978 Additional Protocol and 2001 Second Additional Protocol, 1990 Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime, 2001 Convention on Cybercrime ("Budapest Convention"), and the 2005 Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime and on the Financing of Terrorism ("Warsaw Convention").[2569]

The UK is also part of many UN multilateral agreements which include MLA provisions, such as the 1988 UN Convention against Illicit Traffic in

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2567 *UK Home Office International Criminal Unit*, p. 1.

2568 For specific provisions governing law enforcement and judicial cooperation in criminal matters, one can refer to Part Four of the Trade and Cooperation Agreement Between the European Union and the European Atomic Energy Community, of the One Part, And The United Kingdom Of Great Britain And Northern Ireland, of the Other Part dated 30 December 2020.

2569

Narcotic Drugs and Psychotropic Substances ("Vienna Convention"), 2000 UN Convention against Transnational Organized Crime, and 2003 UN Convention against Corruption.[2570] As regards Commonwealth schemes, the UK is part of the 2011 Commonwealth Scheme Relating to Mutual Assistance in Criminal Matters and the 2002 Commonwealth Scheme Relating to Extradition.[2571]

In relation to the abovementioned, one can note that the UK has extended some of its agreements to its crown dependencies and overseas territories, as follows:[2572]

Agreements extended by the UK	Crown Dependencies	Overseas Territories
1957 Convention on Extradition	Channel Islands; Isle of Man	None
1959 Convention on Mutual Assistance in Criminal Matters	Isle of Man; Jersey; Guernsey	None
1978 Additional Protocol to European Convention on Mutual Assistance in Criminal Matters	Jersey	
Vienna Convention	Isle of Man; Jersey; Guerney	British Virgin Islands; Cayman Islands; Bermuda; Turks and Caicos Islands; Anguilla; Montserrat
UNTOC	Isle of Man; Jersey; Guernsey	Gibraltar; British Virgin Islands; Cayman Islands; Falkland Islands; Bermuda; Anguilla; Turks and Caicos Islands
UNCAC	Isle of Man; Jersey; Guernsey	British Virgin Islands

2570 *UK Home Office International Criminal Unit*, p. 2.
2571 *UK Home Office International Criminal Unit*, p. 2.
2572 *UK Home Office International Criminal Unit*, p. 3.

Agreements extended by the UK	Crown Dependencies	Overseas Territories
Hong Kong SAR	Isle of Man	None
Mexico	Isle of Man	None
Thailand	Isle of Man	None
Ukraine	Isle of Man	None
USA	Isle of Man	None
USA-UK and Cayman Islands on Mutual Assistance in Criminal Matters	None	Anguilla; British Virgin Islands; Montserrat; Turks and Caicos Islands
USA-Bermuda Mutual Legal Assistance Treaty	None	None

Figure 3: List of Extended Agreements to Crown Dependencies and Overseas Territories

2. Domestic Legislation on International Cooperation

The Crime (International Cooperation) Act of 2003 ("CICA") is the applicable UK law to traditional mutual legal assistance requests. Prior to this 2003 Act, there was the Criminal Justice (International Co-operation) Act 1990(d), but was amended by the former "to make provision for furthering co-operation with other countries in respect of criminal proceedings and investigations; to extend jurisdiction to deal with terrorist acts or threats outside the United Kingdom; to amend section 5 of the Forgery and Counterfeiting Act 1981 and make corresponding provision in relation to Scotland; and for connected purposes."[2573]

The UK applied the European Investigation Order, which was meant to replace traditional MLA arrangements with member states in the EU such as the Council of Europe Mutual Legal Assistance and its protocols, the Convention implementing the Schengen Agreement, and the EU MLA Convention and its protocols.[2574] While the EIO was in force, the CICA was not the applicable domestic legislation but instead, it would be the Criminal Justice (European Investigation Order) Regulations 2017, which

2573 Crime (International Cooperation) Act of 2003, Preamble.
2574 *Mitsilegas,* p. 210.

came into effect last 31 July 2017.[2575] Said 2017 Regulations was necessitated by the Directive on European Investigation Order, which requires the member states to integrate into their respective domestic legal systems the EIO and likewise fill in details left wanting by the DEIO.[2576] The same 2017 Regulations covered the three jurisdictions of the United Kingdom, namely, England and Wales, Scotland, and Northern Ireland, though normally there would be different applicable laws and regulations in these jurisdictions depending on the subject matter.[2577]

In addition, one could also refer generally to the Criminal Procedure Rules and Criminal Practice Directions that govern the "practice and procedure to be followed in all criminal courts including magistrates' courts, Crown Courts, Court of Appeal (Criminal Division) and in extradition appeal cases before the High Court."[2578]

2575 Criminal Justice (European Investigation Order) Regulations 2017, Part I, 1.

2576 *Mitsilegas,* p. 211.

2577 In light of the withdrawal of the UK from the EU, the Criminal Justice (EIO) Regulations 2017 have been revoked and the CICA is now reinstated as the applicable legislation in respect to mutual legal assistance requests between the UK and EU member states. This primary legislation for mutual legal assistance has accordingly been amended by the European Union (Future Relationship) Act 2020 and Law Enforcement and Security (Amendment)(EU Exit) Regulations 2019 to accommodate the special partnership between the UK and the EU by virtue of its Withdrawal Agreement and Trade and Cooperation Agreement. Considering however the primary objective of the present contribution to look into how mutual legal assistance can be developed within and between the ASEAN and the EU, and how the regional EIO instrument was implemented among the member states, the focal points mainly used herein for the UK are mainly still the 2017 Criminal Justice EIO Regulations. It must be noted further, that despite the non-usage of the EIO by virtue of the new Trade and Cooperation Agreement and the new UK domestic legislation, the discussion herein remains relevant considering that the discussion herein is a good point for comparison against a continental legal system such as Germany but also, the principles and practices from the EIO Directive and the EU Criminal Justice Architecture still applies in the new arrangement.

2578 *Mitsilegas,* p. 211.

B. Substantive Provisions

1. Applicability of Assistance

Three (3) things could be mentioned as regards applicability of assistance with respect to the Regulations.

At the outset, the scope of the EIO Regulations generally applied to the entire UK and its territories. An exception to the rule however is as regards Regulation No. 32 or on European investigation orders relating to HMRC matters. An EIO issued and to be executed vis-à-vis HMRC matters (any matter in relation to which the Revenue Commissioners have functions) does not apply to Scotland.[2579]

Having said this, the Regulations first have a change in nomenclature following the DEIO. From "requests" towards "orders", issuing authorities and executing authorities, there was an apparent shift from what is known to be request-based mutual assistance to something demand-based in terms of evidence gathering and cross-border exchange by virtue of the Regulations. In light of this, the Regulations contemplated an EIO as an "order specifying one or more investigative measures that are to be carried out in a participating state for the purpose of obtaining evidence for use either in the investigation or the proceedings in question or both."[2580] The EIO accordingly applied whenever an offense has been committed or that there are reasonable grounds for suspecting that an offense has been committed, and that proceedings with respect to an offense have been instituted or it is being investigated.[2581]

In relation to this supposed shift from a "request-based" instrument to one which is "order-based" or "demand-based", it could be inferred from interviews made with UK authorities from Scotland, England, and Northern Ireland jurisdictions that even if the DEIO and the applicable domestic Regulations provide a clearer structure among other things, the shift in nomenclature from "request" to "order" did not bring anything new in practice. There was no momentous change brought by the change of terms used as regards requiring assistance vis-à-vis investigative measures.

Second, the Regulations equally applied to both natural and legal persons vis-à-vis criminal matters. As commented by an interviewee who was a former head of the Home Office, which deals with all mutual legal assis-

2579 Criminal Justice (European Investigation Order) Regulations 2017, Part I, 1(3).
2580 Criminal Justice (European Investigation Order) Regulations 2017, § 6(2).
2581 Criminal Justice (European Investigation Order) Regulations 2017, §§ 6, 7.

tance and extradition requests for England and Wales, this would be in line with the objectives of the Regulations and the DEIO. In light of this, corporate criminal liability exists in the United Kingdom, regardless of whether in England and Wales, Scotland, or Northern Ireland. Corporate criminal liability can arise from different kinds of crimes, depending on the applicable law of the applicable jurisdiction.

In light of this, corporate criminal liability does not exist in all EU member states and discrepancies could thus exist. As to whether this poses any problem in facilitating assistance via the EIO, all interviewees were not much concerned that a problem could arise due to the issue of corporate criminal liability. An interviewee involved in England and Wales, for example, believes that the DEIO reconciles any discrepancy and still allows assistance to be rendered.[2582] If any problems should arise, other interviewees, who this time are involved in outgoing requests and EIOs in Northern Ireland, said that these were resolved through open communication between authorities.[2583]

Interestingly, this is how discrepancies are generally treated by the practitioners interviewed, regardless of whether the discrepancies arise from differences with corporate criminal liability, grounds for refusal, or technicalities. As an interviewee mentioned, one could look for example at the EAW and how practitioners(prosecutors and/or judicial authorities) from different member states dealt with differences among each other. Any issue was dealt with on a practitioner level and without court intervention. There was a general tolerance that member states would be homogenous in treatment. Complete harmonization is a pipe dream, he explained. As long as there are principles, which states or people sign up to, and they are able to accommodate variations, then the process would work. Further, in practice, people understand the big points to make things work and how it is supposed to work. There might be small technicalities that only matter in individual cases but they are not enough to "bring the edifice down." Authorities, as can be inferred from the interviewee's answer, as well as from the answers from other interviewees, communicate with one another and do not exist in autarky. Indeed, the interviewees stress the importance or the helpfulness of the EJN because no cooperation would work without communication and coordination, even if one may have the best instruments.

2582 Interview with Nick Vamos.
2583 Interview with Elise McGrath and Catherine Hanna.

Third, it must be clarified – or more appropriately, reiterated – as this was mentioned *en passant* earlier that the United Kingdom was covered by a specific protocol on border controls, a specific protocol on the possibility of any measure involving Justice and Home Affairs in the EU, and to specific rules vis-à-vis the Schengen *acquis*.[2584] As regards JHA measures, the United Kingdom was granted an opt-out option, including on policing and criminal law.[2585] In relation to this, the UK can instead choose to "opt in" to each measure by giving notice within a period of three (3) months from receiving the JHA proposal that it wants to opt in.[2586] Applying this to the DEIO, the UK opted in and made the EIO Regulations apply. The EIO Regulation appropriately lists down the participating states for which the EIO shall be made applicable.[2587] It also provides when it shall apply. It entered into force on 31 July 2017.[2588] It would not apply in relation to cases before the Regulation came into force, wherein certain requests have been made or received pursuant to the 2003 Crime International Cooperation Act.[2589]

The EIO Regulations annex the schedule listing the participating states from which the UK may send or receive an EIO (this list constitutes other EU member states). It becomes imperative to mention now that the United Kingdom was the first EU member state to engage Article 50 TEU and exit the European Union.[2590] While it would be interesting to discuss the entire process that led to its exit, what is more important in the discussion is that said exit dubbed as "Brexit" marks a fundamental reorientation in law and policy internally and externally – internally when it comes to structures, processes, and outputs of domestic legal systems, and externally as regards the UK's relationship with and position in the European and international legal order.[2591] There were ongoing negotiations with the remaining EU member states of a withdrawal agreement whilst legislation is being prepared locally to prepare the UK legal system for the withdrawal of the supremacy and effectivity of EU law in the national level.[2592] A with-

2584 *Peers*, EU Justice and Home Affairs Law, p. 74.
2585 *Peers*, EU Justice and Home Affairs Law, p. 74.
2586 *Peers*, EU Justice and Home Affairs Law, p. 75.
2587 Criminal Justice (European Investigation Order) Regulations 2017, Schedule 2.
2588 Criminal Justice (European Investigation Order) Regulations 2017, § 1(1).
2589 Criminal Justice (European Investigation Order) Regulations 2017, § 3.
2590 *Gordon*, p. 21; *van Wijk*, p. 155.
2591 *Dougan*, p. 1; *Gordon*, p. 16.
2592 *Gordon*, p. 21.

drawal agreement entered into force on 01 February 2020, having been entered into last October 2019, and shall cover the transition period until 31 December 2020, during which the UK and EU could move towards an amicable partnership in the future.[2593] The Trade and Cooperation Agreement became effective on January 2021 and included new rules applicable to the judicial cooperation in criminal matters between the UK and the EU.

It becomes undeniable now that criminal justice policy is affected, which necessarily include cross-border cooperation.[2594] Admittedly, the future is still uncertain despite the new form of relationship, notwithstanding the UK government talking about the many benefits brought by the EU Criminal Justice Policies after it was called to justify opting back into a list of around 35 third pillar measures (the EIO included).[2595] The willingness to remain has been expressed numerous times, such as in the following statement:

> "As we exit, we will therefore look to negotiate the best deal we can with the EU to cooperate in the fight against crime and terrorism. We will seek a strong and close future relationship with the EU, with a focus on operational and practical cross-border cooperation. We will seek a relationship that is capable of responding to the changing threats we face together. Public safety in the UK and the rest of Europe will be at the heart of this aspect of our negotiation."[2596]

Prior to what has now been agreed upon, Mitsilegas discussed that there were three (3) possible consequences from the exit: (1) to enter into special agreements with the EU in the field of criminal justice matters; (2) to enter into different bilateral agreements with the different EU member states; and (3) in the absence of such agreements, fall back to admittedly outdated Council of Europe instruments to facilitate cross-border cooperation in criminal matters.[2597] It became thereafter clearer that the first option was pursued and not only that, but the same mechanism applied with the EIO shall be followed (e.g. pro-forma MLA request to be formed by specialized committee, principle of proportionality, time limits, etc.).

2593 For reference one can refer to the provisions of the EU-UK Withdrawal Agreement.
2594 *Mitsilegas*, p. 201.
2595 *Mitsilegas*, p. 216.
2596 *van Wijk*, p. 155.
2597 *Mitsilegas*, p. 217.

In consultation with practitioners on the possible impact Brexit can make on receiving from and rendering assistance in criminal matters to other EU member states, it can be generally inferred from their answers that they are all hoping for the best out of the Brexit situation. One interviewee believes that there would be not much difference in practice given that they would still afford the same kind of assistance that has been in place already.[2598] There might be changes once again in legal basis or nomenclatures but the widest possible assistance shall be given to whatever EU state that may require it.[2599] Another interviewee also believes that the positive changes in practice that the DEIO has brought for example shall continue to be used for more effectiveness and efficiency in rendering and receiving assistance in criminal matters.[2600]

In relation to the Brexit issue, UK took its commitment to the EIO seriously. As per interviews, UK wants to show that they can handle correctly the implementation of the EIO and handle its end of the bargain. By being a good partner in the implementation of the EIO, the interviewee opines that the UK acts rather on self-interest and not necessarily due to the fear of the enforcement mechanism of the European Commission. The UK is hopeful that by showing that it is working well with the EIO and other EU Criminal Justice Architecture, they can get a good deal with the EU upon finalization of Brexit.

2. Types of Assistance

The Regulations did not discriminate as to the types of assistance that can be provided. Assistance could be provided for both coercive and non-coercive investigative measures.[2601] Furthermore, the Regulations provided that the EIO shall also be applicable to those listed under the Investigative Powers Act 2016, which involves investigative measures such as interception of communications, access to communications data, and the like, that intrudes on the privacy of an individual.[2602] Given the same, the Regulations enumerated likewise specific investigative measures the UK

2598 Interview with David Dickson.
2599 Interview with David Dickson.
2600 Interview with Ellis McGrath and Catherina Hanna.
2601 See for mention of "non-coercive investigative measures", Criminal Justice (European Investigation Order) Regulations 2017, § 28(4).
2602 Criminal Justice (European Investigation Order) Regulations 2017, § 59.

may include in any EIO that shall have other requirements needed to be satisfied aside from the generally provided ones. The Regulations likewise provided for the specific investigative measures, which may be subject to an EIO, that UK authorities might execute should it be the executing state.

This notwithstanding, there were investigative measures not covered by an EIO. An example is the use of joint investigative teams. Another example are those which generally do not involve law enforcement authorities and/or prosecutors on both ends. There are investigative measures which solely involve police authorities on the requested end, such as suspect interrogations. Further, issues or discrepancies could arise between what may be provided as corporate criminal liability issues but treated as administrative in another member state. In the alternative, issues could also arise when the requested investigative measure is not provided under the domestic law. Following the Regulations, this was in itself a ground to refuse recognition or execution.

As to how these discrepancies are being handled, practitioners in their interviews (mainly involved in the respective central authorities of their respective jurisdictions) said that requests including investigative measures not quite covered by the EIO are as much as possible still executed.[2603] Open communication between authorities is also imperative.[2604] Authorities from the central authority in Northern Ireland mentioned the importance of having liaison magistrates to resolve any issue as regards the investigative measure(s) being requested. They cited for example an issue that arose with Portugal due to a discrepancy in the investigative measure being requested. The liaison magistrates were crucial in resolving the problem. Further, they cited an issue they resolved with Spain regarding an investigative measure not covered necessarily by the domestic law. At the end of the day, through the use of open communication and liaison magistrates (at some instances), they were able to hurdle over issues.

In connection with the foregoing, another thing taken from the interviews with different UK authorities is that the EIO instrument was a relatively new instrument and not well used yet compared to the traditional MLA request. Thus, birth pains and issues would be normal. There could also still be confusion as to its application and implementation. Authorities from Northern Ireland for example noted the need to always prepare arguments for the courts, if necessitated in EIO cases. Some judicial courts

2603 Interviews with Elise McGrath, David Dickson, and Nick Vamos…
2604 Interview with Elise McGrath and Catherina Hanna.

are not that well-versed with the EIO. Therefore, it is important to always prepare good arguments if court action is necessitated in the EIO.

3. Compatibility with other Arrangements

Even if the Regulations were silent as to the existence of other agreements and the compatibility of the Regulations with other arrangements, in practice there should not be any issue of the compatibility of the EIO with other arrangements the UK is part of, as its practice on traditional MLA shows. It must be noted though that the Regulations were meant to replace older MLA arrangements the UK has with other EU member states, as mentioned above. With this in mind, it was actually encouraged to consider police-to-police inquiries or other intelligence sharing networks prior to submitting a MLA request pursuant to the 2012 Step-by-Step Guide for Requesting Mutual Legal Assistance in Criminal Matters from G20 Countries.[2605] The same shall help improve the quality of the MLA request and any subsequent service received.[2606] Thus, MLA and police-to-police cooperation and cooperation between intelligence sharing networks and other agencies is not mutually exclusive to one another and can complement one another in the collection and/or exchange of information and/or evidence in criminal matters. In other words, whilst police cooperation and judicial cooperation operate on two different spheres, there is complementarity in the same in pursuit of a criminal investigation and/or prosecution.

This was equally expected in the EIO context, which is applicable between the UK and other member states. In connection to this, the UK was involved in many EU information systems and databases that form part of the EU Criminal Justice Architecture, such as for example, the second generation Schengen Information System ("SIS II"), in which the UK is heavily invested and has helped to facilitate effective operation of the European Arrest Warrant.[2607] Significantly, there is the entire infrastructure for exchange of information on criminal records consisting of two (2) parts: first, the Framework Decision 2009/315/JHA on the "organization and content of the exchange of information extracted from the criminal record between member states" calls for the establishment of central authorities in charge of managing criminal records in each member state, with the

2605 *G20*, p. 104.
2606 *G20*, p. 104.
2607 *Mitsilegas,* p. 212.

central authority of the convicting state obliged to inform other central authorities of any convictions handed down against nationals of other member states as entered in the criminal record; second, the establishment of the European Criminal Records Information System ("ECRIS") to have a decentralized information technology system based on the criminal records databases of each member state using interconnection software enabling exchange of information and a common communication infrastructure allowing an encrypted network.[2608]

Furthermore, the UK was part of the extended and sophisticated legal frameworks enabling collection and exchange of personal data and information for law enforcement purposes such as the Prüm measures, which allow collection and exchange of DNA data, the establishment of joint investigation teams (to which UK officers actively participate in), the public-private partnerships in field of policing and surveillance as well as financial data surveillance such as the EU Passenger Name Records ("PNR") transfer system and Fourth EU Money Laundering Directive through national financial intelligence units ("FIU"), respectively.[2609]

Resorting to the foregoing database systems was not precluded in an EIO context. There may be existing information in these database systems that are no longer needed to be obtained through an EIO. Alternatively, these database systems can provide stirring or leading information to judicial authorities that would allow them to define and delineate information and/or evidence they need to obtain through an EIO, or generally construct a criminal investigation and/or prosecution.

Adding to the different information systems/databases and frameworks allowing for collection and exchange of personal data for law enforcement purposes, the UK was also part of the Eurojust and Europol, in which they have extensive participation not only in taking leadership positions in the same but actively organizing and participating in coordination meetings and coordination centers.[2610] As mentioned earlier in this study, the Europol and Eurojust are vital agencies of the Union with regard criminal matters. They constitute the network between police and judicial authorities in the Union. Through the same, the UK could take the opportunity to cooperate with police authorities which have existing information as well as judicial authorities in discerning the appropriate investigation and/or prosecution of a criminal matter.

2608 *Mitsilegas*, pp. 212-213.
2609 *Mitsilegas*, pp. 213-214.
2610 *Mitsilegas*, pp. 215-216.

4. Principles, Conditions, and Exceptions Applicable

a. Sufficiency of Evidence Requirement

The sufficiency of evidence requirement could be seen to be existing with the Regulations' provisions. At the outset, a judicial authority or prosecutorial authority is allowed to issue an EIO in the UK if (1) an offense has been committed or that there are reasonable grounds for suspecting that an offense has been committed, and (2) proceedings have been instituted in respect of the offence in question or it is being investigated.[2611]

Furthermore, when it was the UK which issues the EIO, the sufficiency of evidence requirement could be seen in investigative measures such as banking and other financial information, gathering of evidence in real time – continuously and over a certain period of time, covert investigations, and interception of telecommunications where technical assistance is needed.

When the measure involves banking and other financial information, authorities must provide in addition to the general requirements (1) reasons why the requested information is likely to be of substantial value for the purposes of the investigation and/or proceedings the EIO relates to; (2) "grounds on which the issuing authority believes that the financial institutions in the executing state hold the account, and to the extent the information is available, specify the institutions concerned;" (3) and include any further information to be able to facilitate the execution.[2612] For the other investigative measures mentioned, the issuing authorities must be able to provide reasons why the requested information is relevant to the purposes of the investigation or proceedings to which the EIO relates.[2613]

On the other hand, when the UK was the requested state, the issue of sufficiency of evidence arises in terms of provided information by the issuing state, and it is impossible for the central authority to take a decision on the recognition or execution of the EIO because the information is "incomplete or manifestly incorrect."[2614] On this account, "the central authority must, without delay – (a) notify the issuing authority, (b) request

2611 EIO Regulations, Sec. 6, 7.
2612 Criminal Justice (European Investigation Order) Regulations 2017, § 15(2).
2613 See Criminal Justice (European Investigation Order) Regulations 2017, § 16(3), § 17(2), § 19(4).
2614 Criminal Justice (European Investigation Order) Regulations 2017, § 27.

that the issuing authority provide such further information as the central authority deems necessary for it to make a decision, specifying a reasonable period for the issuing authority to do so."[2615] Further, the central authority must not take its decision on the recognition and execution of the European investigation order until the period specified under paragraph (2)(b) as above-quoted has expired.[2616]

Based on interviews with some authorities, they do not have any recollection of experiences wherein an EIO or MLA request has been questioned on the issue of relevance of the requested investigative measure. Furthermore, there has been no exact barometer in practice as to what constitutes relevance. It occurs on a case-to-case basis especially on outgoing requests.[2617]

b. Dual Criminality

Generally, dual criminality is not required in making MLA requests except for search and seizures as well as restraint and confiscation of assets.[2618] As regards the EIO, dual criminality requirement had a qualified application. Accordingly, the Regulations allowed the UK to deny recognition or execution of an offense when the offense subject of the EIO (1) does not constitute an offense under the law of the relevant part of the United Kingdom; and (2) is not among the 32 listed offenses in the DEIO for which the dual criminality requirement does not apply and punishable in the issuing state with imprisonment or another form of detention for a maximum term of at least three years.[2619]

In relation to this, the dual criminality requirement played an indirect role when the UK may refuse to execute an EIO because the "use of the investigative measure indicated in the European investigation order is restricted under the law of the relevant part of the United Kingdom to a list or category of offenses or to offenses punishable by a certain threshold, which does not include the offense covered by the order."[2620]

2615 Criminal Justice (European Investigation Order) Regulations 2017, § 27(2).
2616 Criminal Justice (European Investigation Order) Regulations 2017, § 27(3).
2617 Interview with Catharine Hanna and Elise McGrath.
2618 *G20*, p. 102.
2619 Criminal Justice (European Investigation Order) Regulations 2017, § 28(1)(d).
2620 Criminal Justice (European Investigation Order) Regulations 2017, § 28(1)(e).

In connection to the dual criminality requirement, it could also be mentioned that the EIO could not be denied recognition or execution if the offense it relates to involves taxes or duties, customs, and exchange, and the law of the relevant part of the United Kingdom does not impose the same kind of tax or duty, or does not contain a tax, duty, customs, and exchange regulation of the same kind as the law of the issuing state.[2621]

In addition, the dual criminality requirement was present as a condition before a central authority authorizes the execution of an EIO entailing search warrants and production orders: "the conduct in relation to which the EIO was issued would, if it had occurred in the relevant part of the United Kingdom, constitute an indictable offense under the law of that part of the United Kingdom."[2622] Herein there is no exception provided for the catalog of 32 offenses found in the DEIO.

Despite the foregoing provisions, dual criminality is normally not an issue according to the interviews made with practitioners. No request for example from the Northern Ireland authorities have been denied on the basis of dual criminality.

c. Double Jeopardy

The UK was allowed by the Regulations to deny recognition or execution of an EIO if the execution of the EIO would be contrary to the principle of *ne bis in idem.*[2623] However, the Regulations did not provide how the principle would apply notwithstanding the specific investigative measures for which said principle is a ground to refuse. To illustrate, a nominated court may refuse to make a customer information order or account monitoring order, give effect to the EIO, or modify or revoke a search warrant, production order, customer information and account monitoring orders, if it is of the opinion that the execution of the same shall be contrary to the principle of *ne bis in idem.*[2624]

Admittedly, it is still unclear as per interview with an expert practitioner on how UK applies the principle of *ne bis in idem* to transnational

2621 Criminal Justice (European Investigation Order) Regulations 2017, § 28(3).
2622 Criminal Justice (European Investigation Order) Regulations 2017, § 38(3).
2623 Criminal Justice (European Investigation Order) Regulations 2017, Schedule 4, § 4.
2624 Criminal Justice (European Investigation Order) Regulations 2017, § 46(1), § 39(6), § 41(5), § 48(2).

criminal matters. It is not clear-cut whether the domestic meaning could apply, or the explanation provided by the CJEU. He opines that if it is cross-border matters, then it should be the CJEU case law that should apply. However, he mentions that the issue of Brexit "comes crashing in", which could entail the need to apply domestic meaning instead. Due to the continuous uncertainty, it has yet to be resolved. Having said these, said interviewee mentions that the UK courts would continuously use the so-called "cosmopolitan approach": one cannot point simply at a certain stage in the proceedings in another member state and simply find its counterpart in the UK court proceedings. One would need to evaluate the factors carefully.[2625]

Taking the abovementioned uncertainty into account, it would then be imperative to understand *ne bis in idem* on a completely domestic level. The prohibition on double jeopardy has been an ancient common law principle which accordingly "prohibits the prosecution of an accused for a criminal offense for which he has already been acquitted or convicted following a trial on the merits by a court of competent criminal jurisdiction."[2626] As an expert interviewee explained, there are two (2) rules in relation to this that produce the same results: there is first the "strict double jeopardy", which involves the same offense; while the second involves "abuse of process", which involves the same conduct regardless of indictment or charge.[2627]

Some cite different grounds on why the prohibition exist, such as the inequity that arises from permitting retrials as follows:

> "[i]n many cases an innocent person will not have the stamina or resources effectively to fight a second charge. And, knowing that a second proceeding is possible an innocent person may plead guilty at the first trial. But even if the accused vigorously fights the second charge he may be at a greater disadvantage than he was at the first trial because he will normally have disclosed his complete defense at the former trial. Moreover, he may have entered the witness-box himself. The prosecutor can study the transcript and may thereby find apparent defects and inconsistencies in the defense evidence to use at the second trial."[2628]

2625 Interview with Nick Vamos.
2626 *Coffey*, p. 36.
2627 Interview with Nick Vamos.
2628 *Coffey*, p. 38.

There is also the proscription of the state from using its resources to make repeated attempts to convict an individual:

> "[t]he underlying idea, one that is deeply ingrained in at least the Anglo-American systems of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."[2629]

More often than not, the key principles identified to maintain a strict approach to double jeopardy are as follows: "(1) the increased risk of wrongful conviction; (2) issue of finality of criminal litigation; (3) need to have efficient investigations; (4) power imbalances and tactical advantages to the prosecution; and (5) the hardship associated with repeated prosecutions."[2630]

Given the different jurisdictions existing within the United Kingdom, which consequently have varying legal provisions and application on the prohibition on double jeopardy, each applicable law of each jurisdiction shall be discussed as follows.

As regards England and Wales, the protection against double jeopardy presently is not an absolute right and the same is subject to qualifications made through amendments mainly introduced by Criminal Justice Act 2003 ("CJA").[2631] The said law is considered the greatest reform of England's criminal justice system in years wherein it did not only abolish the right to a jury trial in complicated fraud cases, reformed evidentiary standards, abrogated common law rules to allow hearsay evidence, and bad character evidence, and extended the search power of the police.[2632] Such statutory modification later became the model for reform in several other common law jurisdictions, which allow post-acquittal retrials based on limited circumstances.[2633]

Traditionally, when one has been tried already and convicted or acquitted on the same, it shall be a bar to any subsequent proceedings.[2634] A

2629 *Coffey,* p. 38.
2630 *Coffey,* p. 38. See also *Taylor*, pp. 208-213.
2631 *Gillespie*, p. 385.
2632 *Taylor,* p. 190.
2633 *Coffey,* p. 37.
2634 *Gillespie,* pp. 385, 490.

prosecution appeal would be different however, wherein first, the prosecution believes that "the judge erred in law and that this resulted in termination of proceedings prior to the jury retiring, then the more appropriate response will be to use the powers under Part 9 CJA 2003;" the second is "that a person can be retried even if it was the decision of the jury to acquit the defendant whereas an appeal is only possible from decisions by a judge."[2635]

As it presently stands, the state by virtue of the CJA 2003 is allowed to retry a person previously acquitted of a "qualifying offense."[2636] These qualifying offenses include almost thirty crimes, including but not limited to, "murder, attempted murder, manslaughter, rape, attempted rape, unlawful importation, exportation, or production of Class A drug, arson endangering life, directing a terrorist organization, and conspiracy to commit any of the aforementioned crimes."[2637] Significantly, the CJA 2003 retroactively applies and anyone ever acquitted of the relevant crimes may be retried subject to the provisions of the law.[2638]

Retrial upon application by the prosecutor to the Court of Appeal is then allowed by the latter on two (2) conditions: (1) when there is new and compelling evidence that suggests that acquittal should be set aside; and (2) that it is in the interest of justice to quash the acquittal.[2639] It is important that before the prosecutor lodges an appeal of this kind before the Court of Appeal to secure a written consent from the Director of Public Prosecutions ("DPP").[2640] Consent in turn could only be given if one is satisfied that "new and compelling evidence" exists and that it is in "the public interest for the application to proceed."[2641] As to what constitutes "new and compelling evidence", the same law itself provides that it is evidence which was not adduced in the proceedings in which the person was acquitted, or if in appeal proceedings, in the prior proceedings to which the appeal was made.[2642] Notably, where the "new evidence" test is met, English courts held often that "there will be a *prima facie* case that a fresh prosecution is in the interests of justice and the question for the court

2635 *Gillespie,* p. 490.
2636 Criminal Justice Act, § 75(1); *Coffey,* p. 51; *Taylor,* p. 190.
2637 Criminal Justice Act, § 75 (Schedule 5); *Taylor,* p. 190.
2638 Criminal Justice Act, § 75(6); *Taylor,* p. 190.
2639 Criminal Justice Act, § 76(1); *Gillespie,* pp. 385, 491; *Taylor,* p. 190.
2640 Criminal Justice Act, c. 44, § 76(3); *Coffey,* p. 52; *Taylor,* p. 190.
2641 Criminal Justice Act, §§ 76(4)(b), 78(1); *Coffey,* pp. 52, 54.
2642 Criminal Justice Act, § 78(2); *Coffey,* pp. 52, 54.

is whether there are good reasons to refuse the application."[2643] It would seem to appear in the law, as an author noted, that once the Court of Appeal takes hold of the appeal, it would have little discretion on deciding to quash an acquittal because when the two aforementioned conditions exist, the court then "must make the order applied for."[2644] However, it would not be too straightforward because with the second condition, there remains elbow room for the Court of Appeal to exercise discretion.[2645]

The foregoing abrogation of the prohibition against double jeopardy – though arguably not a total abrogation – has garnered a lot of criticism and one of them is that this could undermine the finality of decisions, with those acquitted always with the fear that they would not be left alone by authorities.[2646] Given such risk, the Act provides for two (2) relevant standards against repeated investigations: (1) timing of any application to quash acquittal may only be done by the prosecution once; (2) investigations into the acquitted persons are constrained wherein the power of arrest, searches, and seizures are permitted only upon written application of the DPP.[2647] Further, in relation to the first standard, it must be noted that if application is rejected or when a retrial ends on acquittal, no further application is allowed.[2648]

The provisions on retrial for "qualified offenses", including the different parameters and standards on the same as provided in the Criminal Justice Act 2003, is applicable likewise to Northern Ireland.[2649] Thus, there ought to be satisfaction of the requirements on new and compelling evidence, as well as interests of justice, as provided by English law and jurisprudence on the matter.

As regards Scottish jurisdiction vis-à-vis how the prohibition against double jeopardy applies, provisions could be found in the Double Jeopardy (Scotland) Act 2011. While there is acknowledgment of the rule that once acquitted, an accused person cannot be prosecuted for the same offense on the basis of different rationales, the Double Jeopardy Act 2011 introduces in Scottish jurisdiction three (3) limited exceptions to the rule: "(1) where the acquittal was tainted because a person committed an of-

2643 *Leverick*, p. 406.
2644 *Coffey,* p. 54; *Gillespie,* p. 491.
2645 *Gillespie,* p. 491.
2646 *Gillespie,* p. 492.
2647 *Gillespie,* p. 492.
2648 *Gillespie,* p. 492.
2649 Criminal Justice Act 2003, § 96. See also The Criminal Justice Act 2003 (Retrial for Serious Offenses)(Northern Ireland) Order 2005.

fense against the course of justice in relation to the original proceedings; (2) where the acquitted person subsequently admits to committing the original offense; (3) and where there is new evidence that the acquitted person committed the original offense."[2650] The first two exceptions apply inconsequentially of the seriousness of the offense while the last exception applies only where the original prosecution was on indictment in the High Court.[2651]

As to what constitutes "new evidence" under the Scottish law, it is evidence that was not available and "could not with the exercise of due diligence have been made available" at the original trial.[2652] Moreover, such evidence must strengthen substantially the case against the acquitted person, and that the court must be satisfied that in light of this new evidence together with the evidence presented at the original trial, a reasonable jury properly instructed would have convicted the person of the original offense.[2653] It must be mentioned that this proviso is not present in the equivalent legislation of England and Wales, but instead provides that the evidence "appears highly probative of the case against the acquitted person".[2654]

It is further provided in the Scottish legislation that the new evidence upon which the application shall be made cannot be evidence which was inadmissible at the original trial but due to changes in rules of admissibility, has become subsequently admissible.[2655] This prohibition does not apply anymore should the fresh prosecution be granted. Instead, the prosecutor is not limited to lead or present (1) evidence during the original trial and (2) the new evidence on which the application was based, but also all other "available, competent evidence", including any evidence available during the original trial that either for any reason the Crown chose not to lead, or those which were inadmissible during the original trial but due to subsequent changes to admissibility rules, has become admissible at the time of re-prosecution.[2656] Stating it simply, while a prosecutor may not use subsequently admissible evidence (due to changes in admissibility rules) during an application for retrial, he/she can use evidence led during

2650 *Leverick,* p. 404.
2651 Double Jeopardy (Scotland) Act 2011, § 4(1); *Leverick,* p. 404.
2652 Double Jeopardy (Scotland) Act 2011, § 4(7)(b); *Leverick,* p. 405.
2653 Double Jeopardy (Scotland) Act 2011, §§ 4(7), 4(7)(c); *Leverick,* p. 405.
2654 See Criminal Justice Act, § 78(3)(c); *Leverick,* p. 405.
2655 Double Jeopardy (Scotland) Act 2011; § 4(4); *Leverick,* p. 405.
2656 *Leverick,* p. 407.

the original trial, new evidence on which his/her application was based, and subsequently admissible evidence, once his/her application is granted.

In addition to the abovementioned, an application for new prosecution should only be granted if it would be in the interests of justice but the Scottish law is silent as regards what factors ought to be taken into account in assessing the same.[2657] Nevertheless, the court in the landmark case of HM Magistrate v. Sinclair, which was the first case that tackled the issue of double jeopardy after the passing of the Double Jeopardy Act 2011, provided the factors that may be considered in weighing "interests of justice" as follows: "the fact of the acquittal, the effect any publicity attendant thereon might have on a subsequent trial, the importance of the rule against double jeopardy, the importance of finality, the stress which might be caused to an accused, to witnesses, to victims or their families, the seriousness of the crime(s), the nature and strengthening effect of the new evidence and the conduct of the Crown, both at the time of the original trial and since."[2658] Consequently, the Scottish court in light of these factors followed the English courts in ruling that when the "new evidence test" is met, a *prima facie* case for fresh prosecution is in the interests of justice.[2659]

In light of the abovementioned, it remains to be seen how *ne bis in idem* in transnational criminal matters would develop further and moreover, how it would be affected by the developments in UK's exit from the European Union. In the meantime, it would be prudent to take the development nationally into mind together with the developments in the EU level (CJEU judgment).

d. Substantive Considerations of Human Rights

i. Human Rights Obligation as Ground to Refuse Recognition or Execution of EIO

General human rights are considered in the UK EIO Regulations. First, it can be seen in the different grounds to refuse recognition or execution of an EIO. The UK may deny recognition or execution of an EIO if it

2657 HM Magistrate v. Sinclair, para. 124-131; Double Jeopardy (Scotland) Act 2011, § 4(7)(d); *Leverick*, p. 405.
2658 HM Magistrate v. Sinclair, para. 103; *Leverick*, p. 406.
2659 HM Magistrate v. Sinclair, para. 133; *Leverick*, p. 406.

violates the principle of double jeopardy or *ne bis in idem*, as previously discussed. The UK may further deny recognition or execution if the investigative measures involve either the hearing of persons in the UK through telephone conference, videoconference or other audiovisual transmission and temporary transfer of a prisoner, to which the person to be heard is a suspect or accused person and has not consented to be heard, or the person has not consented to be transferred, respectively.[2660]

Furthermore, an EIO could be denied recognition or execution when the investigative measure involves a UK prisoner to be transferred to an issuing state and said transfer is liable to prolong the detention of the person in custody.[2661]

In addition, denial of recognition or execution was allowed if the EIO has been issued for the purpose of prosecuting a person on account of that person's sex, race or ethnic origin, religion, sexual orientation, nationality, language, or political opinion; or that person's position vis-à-vis the investigation or proceeding the EIO relates might be prejudiced by reason of the person's sex, race or ethnic origin, religion, sexual orientation, nationality, language, or political opinions.[2662] This was reiterated in the provisions allowing denial by a nominated court to make a customer information or account monitoring order, give effect to an EIO or to revoke or vary a search warrant, production order, or customer information and account monitoring order.[2663]

In addition, denial of recognition or execution could be done if there are substantial grounds to believe that executing the EIO shall be incompatible with any of the Convention rights within the meaning of the UK's Human Rights Act 1998 ("HRA").[2664] For purposes of the study, the aforementioned Human Rights Act 1998 adopts and makes applicable under UK law the different rights mentioned in the European Convention on Human Rights and its Protocols.[2665] Accordingly, the preamble of the EIO Regulations stated that the presumption of compliance by other

2660 Criminal Justice (European Investigation Order) Regulations 2017, § 28(1)(i, j), § 37(4), § 54(3).
2661 Criminal Justice (European Investigation Order) Regulations 2017, § 28(1)(k).
2662 Criminal Justice (European Investigation Order) Regulations 2017, Schedule 4, § 7.
2663 Criminal Justice (European Investigation Order) Regulations 2017, § 46(2), § 39(6), § 41(5), § 48(2).
2664 Criminal Justice (European Investigation Order) Regulations 2017, Schedule 4, § 6.
2665 *Gillespie,* pp. 150-151; *Spencer*, p. 526.

member states to human rights obligations is only rebuttable.[2666] This is likewise reiterated as a ground for a nominated court to refuse making a customer information and/or account monitoring order, deny giving effect an EIO or revoke or vary a search warrant, production order, or customer information and account monitoring order in relation to the same.[2667]

ii. Applicable Human Rights Obligations vis-à-vis Ground for refusal

With regard how the abovementioned ground for refusal vis-à-vis convention rights (within the meaning of the Human Rights Act 1998) is operationalized, it can be mentioned at the outset that an exact reproduction of the subject ECHR rights is provided in the Schedule 1 of the HRA, e.g. right to life under Article 2 ECHR, prohibition of torture and other cruel, inhumane and degrading punishment or treatment under Article 3, etc. Specifically, HRA (as stated in Section 1) encompasses Articles 2 to 12 and 14 ECHR, Articles 1 to 3 of the First Protocol, Article 1 of Protocol 13 (i.e. abolition of death penalty in all circumstances), as read with Article 16 and 18 ECHR (i.e. derogation and reservations).

Applying the foregoing in the context of denying recognition or execution of an EIO, it can be said that the obligation under Article 14 ECHR vis-à-vis the HRA on non-discrimination is already provided in the Regulations as a ground to refuse recognition or execution of an EIO.[2668] For this reason, UK authorities acting as executing authorities can deny recognition or execution of an EIO if it is apparent that the EIO has been issued on grounds of discrimination.

Additionally, one can also refer to the right to life and the prohibition against torture and other cruel, inhumane, or degrading punishment or treatment, which have been reproduced or referenced in the HRA as well. If under the ECHR framework these obligations have extraterritorial application, it can be gainsaid to be equally applicable in EIO situations.[2669] Therefore, the positive obligation vis-à-vis the right to life in the context of the death penalty (as provided in Protocol 13 as above-stated) precludes the

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2666 *Mitsilegas,* p. 211.

2667 Criminal Justice (European Investigation Order) Regulations 2017, § 46(2), § 39(6), § 41(5), § 46(1), § 48(2).

2668 In the UK framework, it has been argued that the principle of non-discrimination is applied together with the common law right of equality. See *Masterman*, p. 926.

2669 See *White/Ovey,* pp. 144, 179.

UK from extraditing, removing, or expelling a person outside its jurisdiction wherein there is inherent risk of judicial execution.[2670] There is also the positive duty when it involves torture, or cruel, inhumane, degrading punishment or treatment.[2671] This means the UK can deny recognition or execution of an EIO if it would violate these obligations, among other human rights obligations provided in the HRA. It can likewise be argued that pursuant to what the HRA provides, the extraterritorial application of these convention rights can go beyond the EIO and extend to general MLA situations as well. Human rights obligations would seemingly take precedent.

Additionally, the principle of proportionality can be mentioned as integral to the fruition of human rights obligations vis-à-vis recognition or execution of an EIO, wherein "any restriction of a Convention right must be proportionate to the legitimate aim to be achieved."[2672] As in the case of Soering v. United Kingdom, the Court held that it is inherent in the ECHR that "there is a search for a fair balance between the demands of the general public interest of the community and the requirements for the protection of an individual's rights."[2673] Needless to state, one must remember that even if he would have rights, these rights must be kept in context of society's rights and one should avoid being in a position creating undue problems for society.[2674] Initially, the question of assessing whether public bodies acted appropriately in accordance with proportionality was foreign to English courts, which traditionally only assessed whether a decision was illegal, procedurally improper, or irrational.[2675] Unlike Germany or France, the lack of proportionality is "not a ground upon which an administrative decision can be directly challenged" in the United Kingdom.[2676] And indeed so, proportionality differs considerably from traditional grounds, wherein (1) reviewing courts assess the balance which the decision maker has struck; (2) assessing proportionality goes beyond the four corners of traditional review as it needs to attend to the relative weight afforded values and interests; (3) the application of

2670 *White/Ovey,* pp. 144, 179.
2671 See Chahal v. United Kingdom, (App. 22414/93), 19 November 1996, (1997) 23 EHRR 413, ECHR 1996-V.
2672 *Wilson/Rutherford/Storey, et al.*, p. 219.
2673 Soering v. United Kingdom (1989) 11 EHRR 439; *Gillespie,* p. 164.
2674 *Gillespie,* p. 164.
2675 See Associated Provincial Picture Houses v. Wednesbury Corporation [1948] 1 KB 223; *Gillespie,* p. 165.
2676 *Booth QC*, p. 4.

the "heightened scrutiny test" might prove insufficient to protect human rights.[2677]

Interestingly, the "true coming" of the principle of proportionality, which was said to be only previously found on the "edges of administrative law", came in the advent of the HRA even though the word itself is not explicitly mentioned in the HRA text.[2678] With the advent of the HRA, there was an opportunity to consistently apply the doctrine especially in scenarios wherein there is conflict between rights, freedoms, and interests.[2679] Having said that, in assessing proportionality, three (3) questions had to be asked according to UK jurisprudence, namely: "(1) the legislative objective is sufficiently important to justify limiting a fundamental right; (2) the measures designed to meet the legislative objective are rationally connected to it; and (3) the means used to impair the right or freedom are no more than necessary to accomplish the objective."[2680] In Huang v. Secretary of State for the Home Department, a fourth – and overriding – requirement could be found: the need to balance interests of society with those of individuals and groups.[2681]

Being required to uphold the foregoing principle in line with its human rights obligations, UK authorities then could deny recognition or execution of an EIO if the same is incompatible with the principle. In the alternative, other investigative measures could be suggested that would be more proportionate to the objective of the EIO received (which the UK does in relation to execution of requests as discussed further below).

In summary, the Regulations were replete of human rights considerations vis-à-vis the substantive provisions. Specifically one can look into the grounds to refuse recognition or execution of an EIO. There is also the ground to refuse if it would be incompatible with human rights obligations found in the HRA. Further reading of the HRA would show a reproduction or reference of rights found in the ECHR. In an EIO framework these rights can find application vis-à-vis the investigative measures to be requested. And thus, if incompatibility exists or there are substantial grounds exist that incompatibility may arise, then an EIO may be denied

2677 R v. Secretary of State for the Home Department [2001] 2 AC 532; *Gillespie*, p. 165.
2678 *Booth QC*, p. 3.
2679 *Booth QC*, pp. 4, 5.
2680 De Freitas v. Permanent Secretary of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69; *Wilson/Rutherford/Storey, et al.*, p. 219.
2681 Huang v. Secretary of State for the Home Department [2007] UKHL 11; *Wilson/Rutherford/Storey, et al.*, p. 219.

recognition or execution. One of these human rights obligations involve considerations of severity of punishment that involves death penalty, torture, or inhumane or degrading punishment or treatment.

e. Reciprocity

It can be said that the UK application of the EIO through the implementation of its Regulations partially abrogated the principle of reciprocity on its procedural and substantive aspect.

At the outset, reciprocity was not stated in the Regulations itself as regards the issuance, recognition, and execution of an EIO. In its stead, the principles of mutual recognition and mutual trust could be found, which if one would recall, means the recognition and treatment of judgments of other jurisdictions with the same recognition and treatment as if it was issued domestically in one's own legal system. No additional treatment or step is necessary to assimilate such foreign judgment or order. Despite the lack of provision mentioning the principle of recripocity, it remains traditionally as a principle integral to international cooperation and the following discussion shows that the principle still exists more or less in its substantive and procedural aspects in the UK.

Taking a few steps back again to the discussion of reciprocity in light of the regional framework of the European Union, one learns that the principle of reciprocity, with all its aspects and different attributes, originates from the concept of sovereignty that implies inter-state equality and is traditionally imperative in the area of establishing good international relations. Also, the principle of reciprocity denotes a system of mutual performances and affording each other the widest possible assistance while rarely containing unilateral obligations, and given the same, reciprocity is often a self-sufficient basis to grant assistance in the absence of any existing agreement. The UK is an example of this, for being able to render both treaty-based and non-treaty based cooperation.

On a procedural aspect, the UK still provided for central authorities to receive an EIO while its judicial authorities and designated public prosecutors are authorized to send directly to other authorities an EIO as long as the requirements provided by the Regulations are met.[2682] Accordingly, the central authority made a referral to the executing authorities in terms

2682 In trying to make sense of the decision to retain central authorities, the interview with Nick Vamosmentioned that the unique nature of the UK criminal

of incoming EIO's. This is further distinguishable as discretionary and mandatory. Referral was discretionary when "(1) the executing authority is likely to give effect to the order," and "it is is expedient for the executing authority to give effect to the order;" whereas the referral is mandatory when "(1) the executing authority is likely to be able to give effect to the order; (2) recognition or execution of the European Investigation Order cannot be refused under the relevant provisions of the Regulations; (3) a referral is necessitated to give effect to the EIO."[2683] There is still admittedly an exercise of executive discretion, which as earlier mentioned, is integral in the concept of reciprocity.

Anent the substantive aspect of reciprocity, the Regulations did not allow refusal of recognition or execution should there be reasonable belief that the EIO was not necessary, adequate, and proportional. According to an interviewee, it would be difficult to challenge an EIO on these grounds as there is weak protection in the DEIO for such kind of argument.[2684] Furthermore, the dual criminality requirement remained applicable albeit with qualifications, wherein it shall not apply to the list of 32 offenses provided.[2685]

This notwithstanding, the Regulations enabled the UK the power to issue a variation or revocation order as well as to refrain transmission of any evidence requested via an EIO. This could be done on three (3) instances. First, as an issuing state, the judicial authority or public prosecutor who made or validated an EIO may vary or revoke said EIO at the instance of either the "(a) the person who applied for the order; (b) in relation to England and Wales and Northern Ireland, a prosecuting authority; (c) in relation to Scotland, the Lord Advocate or a procurator fiscal; (d) any other person affected by the order."[2686]

Second, there was the power to vary or revoke with respect to search warrants, production orders, and customer information and account monitoring orders on four stated grounds as follows: "(a) the execution of the European investigation order would be contrary to the principle of *ne bis in idem*; (b) there are substantial grounds for believing that executing the European investigation order would be incompatible with any of the

justice system and definition of judicial authorities was integral in its decision-making.

2683 Criminal Justice (European Investigation Order) Regulations 2017, § 51 (1) and (2).

2684 Interview with Nick Vamos.

2685 Criminal Justice (European Investigation Order) Regulations 2017, § 28(1)(d).

2686 Criminal Justice (European Investigation Order) Regulations 2017, § 10(1)-(3).

Convention rights (within the meaning of the Human Rights Act 1998); (c) there are substantial grounds for believing that the European investigation order has been issued for the purpose of prosecuting or punishing a person on account of that person's sex, racial or ethnic origin, religion, sexual orientation, nationality, language or political opinions; (d) there are substantial grounds for believing that a person's position in relation to the investigation or proceedings to which the European investigation order relates might be prejudiced by reason of that person's sex, racial or ethnic origin, religion, sexual orientation, nationality, language or political opinions."[2687]

It was notably explained by an interviewee that an application for the variation or production order mentioned herein could be made even if the subject evidence has been transmitted to the issuing authority already.[2688] In practice, the relevant central authority must be approached.[2689] Interestingly, even if the Regulations provide for the same, as of date of this writing, neither is there clear case law that elucidates this power further nor are there clear cut laws that govern said authority.[2690]

Third, the Regulations provided that transfer of evidence may be suspended on two (2) grounds. Firstly, it may be suspended "pending a decision regarding a legal remedy, unless sufficient reasons are indicated in the European investigation order that an immediate transfer is necessary for the proper conduct of the investigation or proceedings to which the order relates, or for the preservation of individual rights."[2691] Secondly, it may be suspended if "it appears to the transferring authority that the transfer would cause serious and irreversible damage to any person affected by the transfer."[2692]

In relation to the second ground to suspend, one interviewee told of the circumstances of his client who was subject of an EIO as a witness. Said witness is being treated as a hostile witness and all obtained information is being leaked to the press (albeit the same should be confidential). Given the disparaging situation the witness is being placed in, the interviewee is of the opinion that the same constitutes "serious and irreversible damage" as contemplated in the Regulations and thus has sought remedies from

2687 Criminal Justice (European Investigation Order) Regulations 2017, §§ 39, 41, 46, 48.
2688 Interview with Nick Vamos.
2689 Interview with Nick Vamos.
2690 Interview with Nick Vamos.
2691 Criminal Justice (European Investigation Order) Regulations 2017, § 31(2).
2692 Criminal Justice (European Investigation Order) Regulations 2017, § 31(3).

the relevant central authority and the court. It has yet to be known what decision has been made on this case.

Moreover, the UK still retained grounds to refuse the recognition and/or execution of an EIO. It had a list of grounds to refuse such as for example, territoriality, or when the investigative measure indicated in the EIO is restricted under the law of the executing state to a certain list of offenses, of which the subject criminal matter of the EIO is not includedr.[2693] Likewise, the Regulations provided that an EIO may be refused recognition or execution if there are substantial grounds to believe that "(a) the European investigation order has been issued for the purpose of investigating or prosecuting a person on account of that person's sex, racial or ethnic origin, religion, sexual orientation, nationality, language or political opinions;" or "(b) a person's position in relation to the investigation or proceedings to which the European investigation order relates might be prejudiced by reason of that person's sex, racial or ethnic origin, religion, sexual orientation, nationality, language or political opinions."[2694] Said ground for refusal grounded on non-discrimination is also one of the limited grounds for which a variation or revocation order could be issued.

Additionally, an EIO could be refused when there are substantial grounds to believe that executing the EIO would be incompatible with the executing state's obligation under Article 6 of the TEU. The UK only attaches a disputable presumption that an issuing authority has acted in accordance with human rights obligations under ECHR and CFR.

Moreover, the UK could postpone the execution should it prejudice an ongoing criminal investigation or prosecution in the executing state, or that the objects, documents, and date requested is currently being in other proceedings, unlike in the EAW wherein the executing state needs to execute an arrest warrant even in situations when it would be precluded from instituting criminal proceedings itself.[2695]

Based on the foregoing, it can be still said that a balance of performance is maintained in this situation more or less albeit an abrogation of reciprocity can be found.[2696] By retaining discretion, or a unilateral approach to handle issues that may arise from the recognition or execution of an

2693 Directive on European Investigation Order, art. 11(1)(f).
2694 Criminal Justice (European Investigation Order) Regulations 2017, Schedule 4, § 7.
2695 Directive on European Investigation Order, art. 15(1). See also *van der Wilt,* p. 74.
2696 Cf. *van der Wilt,* p. 74.

EIO, the UK might have abrogated reciprocity to a certain degree, but mostly retains it.

It must be mentioned that any unilateral approach the UK may have taken in relation to the EIO would not be anything new. Historically, the UK took the same kind of unilateral approach with respect to the European Arrest Warrant and added guidelines or provisions that were not found in the root Framework Decision. According to an interviewee, there was a time that people were being extradited even without a decision to proceed with trial.[2697] The UK then was of the opinion that said extraditions are premature. Thus, an amendment was made to the UK Extradition Act 2003 through the inclusion of Section 12(a) which states that extradition is barred unless there was both a decision to charge and to proceed to trial.[2698] While the effects of Section 12(a) were later neutralized according to the interviewee, this illustrates how UK deals with certain issues as regards international cooperation such as the EAW and EIO. UK does not completely waive or abandon its position on certain matters or how it finds its best to apply an international measure.

f. Speciality or Use Limitation

The Regulations were clear and unequivocal as regards the application of the principle of speciality or use limitation in terms of evidence obtained from a participating state pursuant to a made or validated EIO. The Regulations provided that the obtained evidence may be disclosed or used for the purposes of the investigation and/or proceedings in relation to which the EIO has been made or validated; and it might not be used or disclosed for any other purpose without the consent of the participating state from which it was obtained.[2699]

In connection to this, the UK has specific legislations called the Investigatory Powers Act of 2016, which sets out the extent to which certain investigatory powers may be used to interfere with privacy,[2700] and the Data Protection Act of 2018, part 3 of which implements Directive 2016/680 on "the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention,

2697 Interview with Nick Vamos.
2698 Interview with Nick Vamos; UK Extradition Act 2003, § 12(a).
2699 Criminal Justice (European Investigation Order) Regulations 2017, § 12.
2700 Investigatory Powers Act 2016, art. 1.

investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data."[2701]

Under Section 10 of the Investigative Powers Act, an order is required to be secured in relation to mutual legal assistance requests within (i.e. EIO) and outside the EU context in relation to lawful interception. Speciality or use limitation finds application herein because the safeguards provided relating to retention and disclosure of material, mandate the destruction of the obtained or retrieved data as soon as there are no longer any relevant grounds for retaining it.[2702] Therefore in the event an EIO involves intrusion or interception of privacy or private data, then it cannot be used for any other purpose than what was mentioned in the EIO.

This limitation can be found equally in the relevant provisions of Part 3 of the Data Protection Act 2018. Data protection principles and rights are listed for the processing of personal information and data in law enforcement proceedings. For example, the purpose for which the personal data or information in the law enforcement process should be provided and in general, such data or information cannot be processed for any other purpose or transferred to another member state or third state unless certain conditions are met.[2703]

g. Special Offenses or National Interest Cases

One can notice from the EIO Regulations that there were a lot of grounds to refuse to recognize or execute an EIO more or less on the basis of national interest. The UK may refuse recognition or execution on the ground of national interest when (1) execution would be impossible by reason of an immunity or privilege under the law of the part of the UK in which the requested evidence is located; (2) execution would harm essential national security interests, jeopardize a source of information, or involve the use of classified information relating to specific intelligence activities; (3) the specified investigative measure in the EIO is not authorized in a similar domestic UK case; (4) on the basis of territoriality, wherein the conduct subject of the EIO was committed outside the territory of the issuing state and wholly or partially in the United Kingdom, and the conduct is not

2701 Data Protection Act of 2018, secs. 29-31.
2702 Investigative Powers Act of 2016, arts. 53(4) and 54.
2703 Data Protection Act of 2018, secs. 35-42 (data protection principles); secs. 72-78 (transfers to third countries).

punishable under the general criminal law of the part of the UK in which it occurred.[2704] One can note at this point that the ground for refusal based on the aforementioned was to curb arbitrary or unlawful action of both issuing and executing authorities.[2705]

Additionally, there was an integrated proportionality and necessity check as regards the issuing state wherein an EIO shall only be resorted to if the same is necessary and proportionate.[2706] Interestingly, this necessity and proportionality element has been importantly stressed in traditional MLA practice to ensure that the request for assistance is proportionate to the level of crime being investigated and there is necessity of the evidence in question to the investigation or proceedings, although they may have not been explicitly provided in the law.[2707] Law enforcement agencies are not only operationally independent and handle a gamut of domestic cases aside from handling requests but also have limited resources, hence, there should be consideration of whether resorting to MLA is needed.[2708] In addition to being necessary and proportionate, the requested information must also be relevant in certain cases such as the investigation or proceedings as regards banking or other financial information, gathering of evidence, covert investigations, and interception of telecommunications where technical assistance is needed.[2709] A natural consequence of this is that resort to an EIO is not always automatic in terms of a transborder kind of investigation. Given the same, one can note however that despite the positive duty imposed on issuing authorities to ensure necessity, proportionality – and sometimes relevance – in the issuance of an EIO, UK authorities did not have much room to refuse an EIO should these requirements not be satisfied.[2710] UK authorities could revert to and inform the issuing state and hopefully the latter would supply the lacking information needed to execute or recognize the EIO.[2711] In imperative situations and

2704 Criminal Justice (European Investigation Order) Regulations 2017, Schedule 4, §§ 1, 2, 3, 5.
2705 *Mitsilegas*, p. 211.
2706 *Mitsilegas*, p. 211. See also Criminal Justice (European Investigation Order) Regulations 2017, §§ 6(4), 7(4).
2707 *G20*, p. 104.
2708 *G20*, p. 104.
2709 Criminal Justice (European Investigation Order) Regulations 2017, §§ 16-19.
2710 Criminal Justice (European Investigation Order) Regulations 2017, § 28. See also Criminal Justice (European Investigation Order) Regulations 2017, Schedule 4.
2711 See Criminal Justice (European Investigation Order) Regulations 2017, § 27.

on limited grounds, authorities could opt for the variation or revocation order, or the application to the relevant central authority to suspend transmission of evidence.

In relation to this, the issuing authority may only issue an EIO when the investigative measure indicated therein could have been ordered under similar conditions in a similar domestic case.[2712] This was to avoid fishing expeditions or allowing one to do something indirectly what it could not do directly.[2713] Additionally, the UK may refuse recognition or execution if any of the following exist: "(1) the investigative measure indicated in the EIO does not exist under the law of the relevant part of the United Kingdom, and it appears to the central authority that there is no other investigative measure which would achieve the same result; (2) the investigative measure indicated in the EIO would not be available in a similar domestic case, and it appears to the central authority that there is no other investigative measure which would achieve the same result; (3) the use of the investigative measure indicated in the EIO is restricted under the law of the relevant part of the UK to a list or category of offenses or to offenses punishable by a certain threshold, which does not include the offenses covered by the order;" and (4) the investigative measure indicated in the EIO involves covert investigations, gathering of evidence in real time, continuously, and over a certain period of time, and/or interception of telecommunications, which would not be authorized in a similar domestic case.[2714]

Provided however, that the first three immediately previously mentioned grounds to refuse recognition or execution could not be made applicable to instances wherein (1) the evidence is already in possession of the central authority, or it appears to be in possession already of an executing authority, where "it appears to the central authority that the evidence could lawfully have been obtained in the framework of a criminal investigation or criminal proceedings or for the purposes of the EIO in the relevant part of the United Kingdom; (2) the obtaining of evidence contained in databases held by police or judicial authorities where it appears to the central authority that the evidence is directly accessible by the central authority or by an executing authority in the framework of a criminal investigation or criminal proceedings; (3) the hearing of a witness, expert, victim, suspect, accused person, or third party in the relevant part of the

2712 *Mitsilegas,* p. 211.
2713 *Mitsilegas,* p. 211.
2714 Criminal Justice (European Investigation Order) Regulations 2017, § 28(1).

United Kingdom; (4) any non-coercive investigative measure; (5) or the identification of a person holding a subscription of a telephone number or IP address specified in the order."[2715] These grounds on the basis of national interest could also be seen in allowing any nominated court to give effect to an EIO.[2716]

In the same vein, the Regulations allowed the UK to deny the request of the issuing state for its representative(s) to assist in the execution of an EIO if permitting the authority of the issuing state would be (1) contrary to a fundamental principle of law or (2) harmful to essential national security interests.[2717]

In addition to the foregoing, national interest also played a role on when the UK as an executing state may postpone recognition or execution of an EIO. There could be postponement of recognition or execution if the same would prejudice a criminal investigation or criminal proceedings taking place in the UK.[2718] There could also be postponement if the objects, documents, data, or information to which the EIO relates are already being used in a criminal investigation or criminal proceedings taking place in the UK.[2719] In any event, should there be denial or postponement of recognition or execution, the central authority and/or executing authority needs to consult with or inform the issuing authority the reasons for denial or postponement, and when postponement applies, the expected duration of the postponement.[2720] Once the expected duration lapses, the central authority or executing authority needed to inform the issuing authority accordingly and proceed with its decision to whether recognize or deny the EIO.[2721]

2715 Criminal Justice (European Investigation Order) Regulations 2017, § 28(2).
2716 Criminal Justice (European Investigation Order) Regulations 2017, § 37(7, 9, 12-13).
2717 Criminal Justice (European Investigation Order) Regulations 2017, § 34(2).
2718 Criminal Justice (European Investigation Order) Regulations 2017, § 29(2).
2719 Criminal Justice (European Investigation Order) Regulations 2017, § 29(2).
2720 Criminal Justice (European Investigation Order) Regulations 2017, § 28(5), § 29(3).
2721 Criminal Justice (European Investigation Order) Regulations 2017, § 29(4).

C. Procedural Provisions

1. Designation of Central Authority

The 2017 Regulations provided for executing authorities and issuing authorities. An "issuing authority" was an authority of the issuing state competent to make or validate an EIO.[2722] On the other hand, an "executing authority" means "an authority of the executing State having competence to recognize a European Investigation Order and ensure its execution in accordance with the Directive and the procedure applicable in a similar domestic case."[2723] Correspondingly, the issuing state was the source of the EIO.[2724]

As regards issuing authorities, the Regulations allowed both a judicial authority and designated public prosecutor to make or validate an EIO.[2725] On one hand, a "judicial authority" in the UK was defined as follows: "(1) in relation to England and Wales, means any judge or justice of the peace; (2) in relation to Northern Ireland, means any judge; (3) in relation to Scotland, means any judge of the High Court or sheriff."[2726] In relation to this, it was said that an application for an EIO may be made by the following: in England and Wales and Northern Ireland, by either a prosecuting authority or a constable (but with the consent of the prosecuting authority); in Scotland, by the Lord Advocate or prosecutor fiscal; and in any case where proceedings have been instituted, by or on behalf of a party to those proceedings.[2727] On the other hand, a designated public prosecutor may make an EIO under the same conditions as a judicial authority.[2728] Said public prosecutor in England and Wales and Northern Ireland may also, at the request of a designated investigating authority, validate an EIO should the same conditions are met.[2729]

On the other hand, the Regulations designated central authorities to receive EIO from other participating states in addition to executing authorities, which ought to execute the investigative measures requested in the

2722 Criminal Justice (European Investigation Order) Regulations 2017, § 25.
2723 Criminal Justice (European Investigation Order) Regulations 2017, § 5.
2724 Criminal Justice (European Investigation Order) Regulations 2017, § 25.
2725 Criminal Justice (European Investigation Order) Regulations 2017, §§ 6, 7.
2726 Criminal Justice (European Investigation Order) Regulations 2017, § 5.
2727 Criminal Justice (European Investigation Order) Regulations 2017, § 6(3).
2728 Criminal Justice (European Investigation Order) Regulations 2017, § 7(1).
2729 Criminal Justice (European Investigation Order) Regulations 2017, § 6(2).

EIO.[2730] For central authorities, there were three (3) for the UK: as regards England and Wales and Northern Ireland, the UK Central Authority ("UK-CA"); Crown Office, as regards Scotland; and Her Majesty's Revenue and Customs ("HMRC"), as regards tax and fiscal customs matters in England, Wales, and Northern Ireland.[2731] In view of this, the Revenue Commissioners may exercise the function of central authority on "HMRC matters", which involve matters the Revenue Commissioners have functions.[2732]

In relation to these central authorities, they may refer to an executing authority an EIO where the central authority considers either that: "(1) the executing authority is likely to be able to give effect to the order, and (2) it is expedient for the executing authority to give effect to the order."[2733] The central authority, however, must make the referral when "(1) the executing authority is likely to be able to give effect to the order; (2) recognition or execution of the European Investigation Order cannot be refused under the relevant provisions of the Regulation; (3) a referral is necessitated to give effect to the EIO."[2734] In any event, any referral should include a notice indicating the needed action from the executing authority in order to give effect to the EIO, the time period within which the executing authority must act in accordance with the provided time limits of the Regulations, and the details of any time period the central authority gives the executing authority to pose any objection to the former's decision to recognize or execute the EIO, or refer the same.[2735] In relation to referrals, one can further note that aside from the central authority being able to withdraw a previously made referral, the central authority was not allowed to refer to the Director of the Serious Fraud Office vis-à-vis England and Wales and Northern Ireland, unless the order relates to an offense involving serious or complex fraud. And in the event that indeed an EIO relates to a serious or complex fraud offense, then the Lord Advocate may give a direction under section 27 of the Criminal Law (Consolidation [Scotland] Act 1995 [Lord Advocate's direction] for the purposes of giving effect to the order.[2736]

2730 *European Judicial Network*, p. 23.
2731 *European Judicial Network*, p. 25.
2732 Criminal Justice (European Investigation Order) Regulations 2017, § 32(2), (5).
2733 Criminal Justice (European Investigation Order) Regulations 2017, § 51(1).
2734 Criminal Justice (European Investigation Order) Regulations 2017, § 51(2).
2735 Criminal Justice (European Investigation Order) Regulations 2017, § 51(3).
2736 Criminal Justice (European Investigation Order) Regulations 2017, § 51(5), § 52.

Given the foregoing provisions, the UK was one of, if not the only, the EU member states that retained the use of central authorities despite the aim of the DEIO to remove altogether the horizontal type of cooperation in mutual legal assistance. At first glance, this would be counter-intuitive to the objective of the DEIO to depoliticize the process of issuing and receiving EIOs as well as to hasten the entire process. According to an interviewee (who was former Head of Extradition, Head of the UK Central Authority for Mutual Legal Assistance, and liaison prosecutor in Washington DC, where he worked closely with the Department of Justice on UK/US investigations), there was a long discussion on whether the UK would in view of the DEIO retain the central authorities in receiving incoming EIOs and other MLA requests.[2737] UK decided finally to retain the central authorities not only because of the central expertise they have but also because of the different nature its courts have from other EU member states.[2738] UK follows a different criminal justice system: not only adversarial in nature (whilst most EU member states are inquisitorial), but also have a different take on what constitutes judicial authorities.[2739] Furthermore, UK courts do not want to be "administrative postboxes" as it is far from the nature of their arbitrary work.[2740] Thus, the retention of central authorities in practice and historically is the best option.[2741]

In addition, according to the head of the central authority in Scotland, having a central authority with respect to incoming requests still makes sense because of the small structure that their office has.[2742] Despite the retention of central authorities for incoming requests, UK authorities tried to act faster on incoming EIOs and execute the same as fast as possible. There is an effort to integrate the structural changes or improvements the EIO introduced, such as the time limits needed to be observed.[2743] The speed with which the central authorities work with has been seconded by an interviewee from Germany, who sits as representative in Eurojust.[2744]

2737 Interview with Nick Vamos.
2738 Interview with Nick Vamos.
2739 Interview with Nick Vamos.
2740 Interview with Nick Vamos.
2741 Interview with Nick Vamos.
2742 Interview with David Dickson.
2743 See Interview with Catharine Hanna and Elise McGrath.
2744 Interview with Gabriele Launhardt.

2. Preparation of Requests

a. Requisites for Request/EIO

When the UK acted as the issuing state, an EIO must (1) be set in the form set out in the DEIO; (2) contain the specified information; (3) contain any further information as may be required under the Regulations for specific investigative measures; (4) be signed by or on behalf of the person making or validating the EIO; and (5) include a statement certifying that the information given is accurate and correct.[2745] In connection to this, the authority making the EIO must make sure that the following conditions are met: "(1) it is necessary and proportionate to make the order for the purposes of the investigation and proceedings in question;" (2) "the investigative measures to be specified in the order could lawfully be ordered or undertaken under the same conditions in a similar domestic case;" (3) where the order is for an investigative measure in relation to which specific provisions apply, any imposed condition by virtue of said provision are satisfied.[2746] Regardless of who shall transmit the EIO to the executing state, it must be made sure that it is accompanied by a translation of the order into the language notified by the executing state under the Directive.[2747]

b. Person or Authority Initiating the EIO

The procedure of transmitting the same was dependent on which authority made or validated the EIO. In cases where the judicial authority made the EIO himself, then said judicial authority shall transmit directly to the central authority or appropriate executing authority of the executing state.[2748] Provided however, that should the judicial authority make the EIO upon application of the designated public prosecutor or constable (with consent of the designated public prosecutor), then the judicial authority shall give to the designated public prosecutor or constable, respectively, the EIO for transmission to the central authority or appropriate

2745 Criminal Justice (European Investigation Order) Regulations 2017, § 8.
2746 Criminal Justice (European Investigation Order) Regulations 2017, § 6(4), § 7(4).
2747 Criminal Justice (European Investigation Order) Regulations 2017, § 9(10).
2748 Criminal Justice (European Investigation Order) Regulations 2017, § 9(1)(c).

executing authority of the executing state.[2749] In cases where the designated public prosecutor made the EIO, he/she shall transmit the order to the central authority or designated executing authority of the executing state.[2750] In the event he/she validated an EIO on behalf of a designated investigating authority, the former could either transmit personally to the central authority or appropriate executing authority of the executing state, or give the order to the designated investigating authority to do the same.[2751]

In relation to this, the Regulations likewise provided for the variation or revocation of an EIO.[2752] Provided however, that a judicial authority may only vary or revoke upon application of either the (1) person who applied for the order; (2) the prosecuting authority in relation to England and Wales and Northern Ireland; (3) the Lord Advocate or a procurator fiscal in relation to Scotland; and (4) any person affected by the order.[2753] It must be noted that a constable by himself could not ask for the variation or revocation of the EIO. Said constable must first secure consent from the designated prosecuting authority.[2754] In any event, the amended EIO should still be in accordance with the requirements as regards form and contents and then transmitted to the central authority or appropriate executing authority of the executing state.[2755] And should the EIO be revoked instead after it has been transmitted already, the central authority or appropriate executing authority of the executing authority must be informed without delay.[2756]

In light of the foregoing, the Regulations took into account one's human rights in allowing a person to make an application for an EIO. Under the relevant provision, an application for an EIO may be made in any case where proceedings have been instituted, by or on behalf of a party to those proceedings.[2757] The applicable procedure is said to be well provided in the Regulations.[2758] Although an interviewee mentioned that he has yet

2749 Criminal Justice (European Investigation Order) Regulations 2017, § 9(1)(a), (b).
2750 Criminal Justice (European Investigation Order) Regulations 2017, § 9(2)(a).
2751 Criminal Justice (European Investigation Order) Regulations 2017, § 9(2)(b).
2752 Criminal Justice (European Investigation Order) Regulations 2017, § 10(1).
2753 Criminal Justice (European Investigation Order) Regulations 2017, § 10(3).
2754 Criminal Justice (European Investigation Order) Regulations 2017, § 10(4).
2755 Criminal Justice (European Investigation Order) Regulations 2017, § 10(6), (7).
2756 Criminal Justice (European Investigation Order) Regulations 2017, § 10(5).
2757 Criminal Justice (European Investigation Order) Regulations 2017, § 6(3)(a).
2758 Interview with Nick Vamos.

to see a case wherein the defendant requested for the issuance of an EIO, the interviewee opines that the defendant is better positioned with the EIO due to its "order" nature.[2759]

3. Execution of Requests

a. Applicable Law on Execution

There was no explicit mention in the Regulations as regards what the applicable law should be in the recognition or execution of an EIO received by the United Kingdom. It would seem however that on the basis of the specific procedures mentioned in the Regulations, the EIO should be executed by the UK in accordance with what has been provided for in the said EIO. For example, this is the case when the EIO refers to receiving evidence from a person, even if the same would entail hearing through telephone conference, or videoconference or other audiovisual transmission. The central authority in this case may nominate a court to receive the evidence for the purpose of giving effect to the EIO, provided that the person is not suspect or accused, or if one, has consented to giving evidence.[2760] However, the central authority must appoint if the person is unwilling to provide evidence in another form and if willing, the issuing state does not agree to receive the evidence in that form.[2761]

Interestingly, it would seem now given the immediately preceding sentence that the UK as an executing state has the possibility of suggesting an alternative form of taking evidence from a person even if the issuing state has provided the investigative measure it needs in the EIO. The judicial authority however must proceed as stated because first, no other grounds for refusal are present, and that the person from whom evidence shall be taken did not consent to any alternative form, or if person did, the issuing state does not want it in any other form as the one stated in the EIO. Stating it differently, even if the EIO is to be followed to the letter by the UK as an executing state, there was an elbow room for another form of taking evidence or investigative measure to be done under certain

2759 Interview with Nick Vamos.

2760 Criminal Justice (European Investigation Order) Regulations 2017, §§ 35(2), 36(2), 37(2).

2761 Criminal Justice (European Investigation Order) Regulations 2017, §§ 35(4), 36(4), 37(4).

circumstances. So even if there was no explicit mention that resort can be done to other forms of investigative measures, it can easily be read between the lines. The grounds for refusal mentioned in the Regulations themselves prove this point. The UK may refuse recognition or execution of an EIO if the investigative measure provided therein, for example, does not exist in the law of the relevant part of the UK, or does not apply to a similar domestic case.[2762] One can notice nonetheless that these grounds for refusal could only be invoked if "it appears to the central authority that there is no other investigative measure which would achieve the same result."[2763]

The applicable law could also be discussed in terms of an EIO which additionally requests an authority of the issuing state to assist in the execution of an EIO. This at the outset is generally always allowed unless permitting the same would be contrary to law or harmful to essential national security interests.[2764] Interestingly, once an authority of the issuing state is authorized to assist, certain laws shall have effect as to any liability arising from wrongful acts or omissions committed while executing the EIO: for those authorized by a chief officer of police for a police area in England and Wales, Section 88 of the Police Act 1996; by the Chief Constable of the Police Service of Northern Ireland: Sections 29 and 66 of the Police (Northern Ireland) Act 1998; by the Chief Constable of the Police Service of Scotland, Sections 24 and 90 of the Police and Fire Reform (Scotland) Act 2012; and by the Director of the National Crime Agency, paragraph 2 of Schedule 4 to the Crimes and Courts Act 2013.[2765]

b. Applicable Procedural Rights

i. Importance of Defense Rights; Principle of Equality of Arms

The principle of equality of arms generally applies vis-à-vis procedural rights. Herein procedural rights matter in the execution of the EIO and subject investigative measures. It also applies to the remedies one can take in view of the issuance or execution of an EIO. In light of this,

2762 See Criminal Justice (European Investigation Order) Regulations 2017, § 28.
2763 Criminal Justice (European Investigation Order) Regulations 2017, § 28(1)(b, c).
2764 Criminal Justice (European Investigation Order) Regulations 2017, § 34(2).
2765 Criminal Justice (European Investigation Order) Regulations 2017, § 34(5), (7), (9).

the principle of equality of arms is likewise formally incorporated in the UK legal order through the HRA.[2766] The concept in a predominantly adversarial system such as that of the UK enjoins that both the prosecution and defense should be able to "present their cases at trial by adducing their own evidence and by challenging the arguments of the opponent."[2767] It could also mean that the defense is able to adopt both a reactive and active approach in presenting its case wherein there is "more equality between the defense and its adversities once proceedings have been instituted, as the police have more powers to conduct investigations."[2768]

ii. Human Rights Considerations in Procedures Provided in the Recognition and Execution of an EIO

With the foregoing in mind, human rights elements could be seen on the parameters provided as to how certain investigative measures are to be executed, aside from being taken into account in the grounds to refuse recognition or execution of an EIO. First, in terms of transferring a UK prisoner to another state for purposes of a UK investigation, no transfer could be made if the subject prisoner does not have written consent to the same.[2769] With respect to requesting an EU prisoner to be transferred to the UK, consideration should be given to whether the said person shall consent or likely to consent to being transferred.[2770] At the same time, UK authorities needed to take into consideration the personal circumstances of the person to act on his or her own behalf.[2771] Whatever time spent by the UK prisoner in the executing state shall be counted to be as spent in custody in the place in the UK where the prisoner is liable to be detained pursuant to its sentence or order to which said prisoner is subject.[2772] Further, in relation to EU prisoners, there were safe harbor provisions applicable while said person is in the United Kingdom. This means that said person must not be prosecuted or detained or subjected to any other

2766 *van Wijk,* pp. 151-152.
2767 *van Wijk,* p. 152.
2768 *van Wijk,* p. 152.
2769 Criminal Justice (European Investigation Order) Regulations 2017, § 20(3), § 54(3), § 55(3); *Wilson/Rutherford/Storey, et al.,* p. 451.
2770 Criminal Justice (European Investigation Order) Regulations 2017, § 21(4).
2771 Criminal Justice (European Investigation Order) Regulations 2017, § 20(4), § 54(4).
2772 Criminal Justice (European Investigation Order) Regulations 2017, §§ 24, 57.

restriction of personal liberty in connection to conduct which occurred before the person's departure from the executing state and the same was not indicated in the EIO.[2773] This immunity shall not apply however should the transferred person be released from custody and refuses to leave the UK within a period of 15 days from release, or as said person left, returns to the UK.[2774]

Notwithstanding the specificities of human rights considerations mentioned above, it can be observed that there were aspects in the Regulations that lack mention or consideration of when certain procedural rights could come into play. To elucidate, some of the rights incorporated in UK Law which relate to mutual legal assistance and the application of the EIO involves rights on liberty and security and the right to a fair trial, as enunciated in Articles 5 and 6 of the ECHR and now incorporated in the Human Rights Law 1998. With respect to one's right to a fair trial, one has the right to a "fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[2775] As a minimum, one would have the right "(1) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (2) to have adequate time and facilities for the preparation of his offense; (3) 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 just so require; (4) 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; (5) to have free assistance of an interpreter if he cannot understand or speak the language used in court."[2776] Stating it differently, one should have the right to be informed, the right to adequately prepare for one's defense, the right to defend himself in person or through counsel, the right to confront witnesses against him, and the right to translation or interpretation.

On the basis of these rights, it was not clear when they could be engaged, even if they are said to be taken into account in the EIO Regulations. For example, in taking evidence from a person as a witness,

2773 Criminal Justice (European Investigation Order) Regulations 2017, § 23(2), § 56(2)
2774 Criminal Justice (European Investigation Order) Regulations 2017, § 23(3), (4), § 56(3), (4).
2775 Human Rights Law 1998, Schedule 1, Part 1, art. 6(1).
2776 Human Rights Law 1998, Schedule 1, Part 1, art. 6(3).

expert, suspect, or accused person, or hearing them through telephone, videoconference, or any other audiovisual means, there was no mention in the Regulations on whether one's right to counsel or legal representative would be applicable in such a case. What has been mentioned clearly is that should the person from whom evidence shall be heard or subjected to telephone conference, videoconference or other audiovisual means be a suspect or accused, said person cannot be examined until written consent is secured. There would then be possible scenarios that said person agrees but would be subjected to incriminating questions and issues that might need legal counseling. The same circumstances can apply to any other witness or expert, who might be at risk of being asked incriminating questions themselves. The Regulations is bereft of mentioning said protection.

Another example one can cite is the issuance of search warrants, production orders, and even customer information and account monitoring orders. There was no provision that would allow any interested person to intervene in such cases, or would be allowed to be present in the execution of search and seizures or production orders through himself or on his behalf through counsel. While the Regulations would provide that officers who unlawfully execute or purportedly execute an EIO can be held liable under the relevant laws, there was no clear-cut provision providing a person affected by such investigative measure, such as a suspect or accused, to file the case by himself/herself.

Moreover, one can look into the offense of disclosure should a financial institution or any of its employees disclose without authorization details about the EIO or any request for the issuance of customer information and/or account monitoring orders. One cannot help but inquire if the same unauthorized disclosure equally applied should the receiving end of the information be the person involved.

Based on these accounts, one can observe half-baked provisions vis-à-vis procedural rights considerations, wherein some are already automatically spelled out in the procedures to be undertaken in executing certain investigative measures while in other provisions, one needs to further read the rights into the law. An example of the latter is regarding competencies and compellability of witnesses. Relating the same to making, recognizing, and executing an EIO, this issue is important considering one of the investigative measures covered by an EIO was the taking of evidence from a person either as a witness, expert, suspect, or accused. The Regulations, as earlier noted, was silent as regards the applicability of this issue. Taking the same into account, persons who cannot understand questions and give understandable answers are considered as incompetent witnesses to

testify.[2777] At the same time, a witness may refuse or be reluctant to testify but it needs to be determined if said witness is compellable to answer or testify.[2778]

Regarding the same, the basic rule is that all persons can be required to give evidence in criminal proceedings.[2779] Where there is a competent and compellable witness who refuses to attend court to give evidence – which could be the case in the context of an EIO – then a party may apply for the issuance of a witness summons to compel attendance.[2780] A witness who fails to appear in court to give evidence despite receiving a witness summons is liable for arrest and may be brought to court.[2781] One must note however that as regards compellability, the same does not apply to the defendant, who cannot even be compelled to give evidence on behalf of a co-defendant.[2782] The same non-compellability applies to a defendant's spouse or civil partner, who cannot be compelled to testify on behalf of the prosecution or co-defendant, although may be compelled on behalf of the defendant.[2783] An exception to the exception is that the spouse or civil partner cannot be compelled to be a witness on behalf of the defendant when the case involves assault, injury, or threat of injury to the spouse or to a child, wherein it is the legal nature of the offense with which the defendant is charged that determined if it is a specified offense.[2784]

In addition, parameters are also provided should the witness involved be under the age of 18, if the quality of the witness' evidence is likely to be diminished by reason of physical or mental incapacity, if the quality of evidence is likely to be diminished by reason of fear or distress about testifying, or if the witness is a complainant in a case involving a sexual offense.[2785] Before a trial takes place, either the prosecution or defense may apply for a "special measures" direction in relation to the aforementioned witnesses, wherein special measures could entail either of the following:

2777 Youth Justice and Criminal Evidence Act 1999, § 53; *Wilson/Rutherford/Storey, et al.*, p. 449.
2778 *Wilson/Rutherford/Storey, et al.*, p. 449.
2779 *Wilson/Rutherford/Storey, et al.*, p. 449.
2780 Criminal Procedure (Attendance of Witnesses) Act 1965, § 2; *Wilson/Rutherford/Storey, et al.*, p. 449.
2781 *Wilson/Rutherford/Storey, et al.*, p. 450.
2782 Criminal Procedure (Attendance of Witnesses) Act 1965, § 1.
2783 Police and Criminal Evidence Act, § 80; *Wilson/Rutherford/Storey, et al.*, p. 450.
2784 Police and Criminal Evidence Act, § 80(3); R v. A(B) [2012] EWCA Crim. 1529; *Wilson/Rutherford/Storey, et al.*, p. 450.
2785 Youth Justice and Criminal Evidence Act 1999 (as amended), § 16; *Wilson/Rutherford/Storey, et al.*, pp. 450-451.

"(1) screening the witness from defendant; (2) giving of evidence by live link; (3) giving of evidence in private; (4) removal of wigs and gowns; and (5) the playing of pre-recorded interview with the witness to replace examination in chief."[2786] Moreover, the law allows the pre-recording of cross-examination and re-direct examination, as well as examination being done through an intermediary or that the witness be provided the appropriate device to effectuate better communication.[2787] Given these parameters and special considerations given to ordinary witnesses, the same does surprisingly not apply to the defendant himself,[2788] notwithstanding that the European Convention on Human Rights enjoins the principle of equality of arms in such a scenario.[2789] Human rights jurisprudence provided what the legislation lacked however, wherein the inherent powers of the court varies in the manner defendants give evidence to ensure that they are not disadvantaged.[2790]

The abovementioned discussion evinces the need for one to be knowledgeable of the applicable procedural rights that are not necessarily mentioned specifically in the Regulations.

iii. Defendant's Participation in the Recognition or Execution of an EIO

Having mentioned this, a question arises as to the remedy an affected person, such as a suspect or accused person, could avail of vis-à-vis the issuance or execution of an EIO. Generally speaking, redress can be sought with UK courts by virtue of the HRA and one does not necessarily need to go to the European Court of Human Rights for any redress of any contravention of the ECHR.[2791] In other words, human rights obligations on the ECHR level are municipalized through the HRA.[2792]

But then again, specifically reading the Regulations would provide that any person affected by an EIO may make an application before a judicial

2786 Youth Justice and Criminal Evidence Act 1999 (as amended), §§ 23-27; *Wilson/Rutherford/Storey, et al.*, pp. 450-451.
2787 Youth Justice and Criminal Evidence Act 1999 (as amended), §§ 28-29.
2788 See Youth Justice and Criminal Evidence Act 1999, §§ 16, 17.
2789 *Gillespie*, pp. 180,183; *Wilson/Rutherford/Storey, et al.*, p. 451.
2790 R (on application of D) v. Camberwell Green Youth Court [2005] 1 WLR 393; R (on application of C) v. Sevenoaks Youth Court [2009] EWHC 3008.
2791 See *Gillespie*, pp. 152-160.
2792 *Masterman*, p. 907.

authority to revoke or vary the same.[2793] Albeit applicable only on limited grounds based on human rights, defense rights are opined to be strengthened due to the right to apply for a variation or revocation order.[2794] Prior to the EIO Regulations, courts were not involved and thus, the said application was impossible. With the Regulations, judicial review was made possible but according to the interviewees, has yet to be witnessed.

The foregoing can be consequently related to the concept of equality of arms by giving opportunity to the defense to use the EIO mechanism. This was previously absent from cross-border evidence gathering in the UK, when the defense could neither ask foreign authorities directly for evidence to be gathered abroad nor could local authorities act upon a request of a defense lawyer to do so.[2795] At most, the defense could challenge the decision that affects the defendant personally, such as the execution of an EAW for example, as well as being invited to be part of the execution of a request such as examination of witnesses.[2796]

The availability of going to the courts for redress of rights notwithstanding, it is a different question altogether if relief can be availed. There is a caveat that needs to be pointed out however vis-à-vis the municipalization of human rights obligations in the ECHR through the HRA. The HRA instrument itself provides for derogations and reservations on the convention rights. Other than this, how the rights should be properly operationalized is subject to the interpretation of the UK courts under Section 2 HRA.

In line with this, UK courts must also take into account insofar as it may be applicable to proceedings before it, "any judgment, decision, declaration, or advisory opinion of the European Court of Human Rights" as well as the views of the European Commission and Committee of Ministers.[2797] ECHR jurisprudence is not automatically binding but more of persuasive authority to the UK courts. Admittedly, there is some ongoing discussion as regards the degree UK judges must take into account ECHR jurisprudence in their decisions, with some saying it should be followed very closely while some say there should be a more flexible approach.[2798] As it presently stands however, the Supreme Court will feel itself bound

2793 Criminal Justice (European Investigation Order) Regulations 2017, § 10(2)(a).
2794 Interview with Nick Vamos.
2795 *van Wijk*, pp. 158-162.
2796 *van Wijk*, pp. 158-159.
2797 *Dickson*, p. 56.
2798 *Dickson*, p. 57.

to follow Strasbourg jurisprudence when (1) case law seems to suggest that when there has been a recent decision of the Grand Chamber expressly addressing the very issue at point; or (2) where there is a line of Chamber decisions – without any endorsement yet to the Grand Chamber – in which the attitude of the European Court to the very issue has been made clear.[2799] Otherwise, the Supreme Court shall persist in adopting a national approach and seek to justify the same authoritatively.[2800]

In connection to this, several factors or principles play a part in judicial decisions. At the outset, UK courts exercise judicial review in the domestic context– wherein there is deference to the Parliament and the executive over some issues.[2801] Allegedly, this has been extended to HRA 1998 actions, wherein courts shall defer to the executive where there is a "fair balance" between interests of society as a whole and individual's human rights.[2802] There is an ongoing debate however on to which rights the doctrine should apply – whether there should be a distinction among rights or if judicial deference (margin of appreciation in the ECHR context) applies to all rights.[2803] Referring to the ECHR jurisprudence, the margin of appreciation doctrine (which judicial review herein follows) was either applied liberally or restrictively, depending on the right involved.[2804] In a plethora of early cases, the English courts held that rights such as, for example, the right to silence and the privilege against self-incrimination "were not absolute but rather, depending on the degree to which they were violated, and the legitimacy of the goal pursued by doing so, be qualified."[2805]

Another doctrine worth mentioning is the derogation of Convention rights, which finds itself in the Human Rights Act 1998 as well. Like the aforementioned principles of judicial deference and (as stated in the discussion on human rights in substantive provisions) proportionality,

2799 *Dickson*, p. 59.
2800 Like in the Horncastle case, when the Court was confronted with the ECHR case of Al-Khawaja and Tahery v. UK, which seemed to undermine gravely the use of hearsay evidence in criminal cases, the seven-judge bench ruled that while the UK court would follow the European Court's decision when they applied clearly established principles, it would not do so where the decision insufficiently takes into consideration particular aspects of UK's domestic legal process. *Dickson*, p. 57.
2801 *Gillespie*, p. 163.
2802 *Gillespie*, p. 163.
2803 *Gillespie*, pp. 163-164.
2804 *Gillespie*, p. 164.
2805 *Booth QC*, p. 7.

derogation ought to be considered because it affects how UK courts would decide on a certain convention right obligation. Derogation – or the non-application of Convention rights – is allowed "in times of war or other public emergency threatening the life of the nation", provided however, that no derogation is allowed for Articles 2, 3, 4(1), and 7, as well as Protocol 1 Article 13.[2806] Finding the same in the UK human rights instrument, ECHR rights find application subject to derogation or reservation and the Secretary of State has the power to issue an order designating any derogation from an article of the ECHR or any of its protocols.[2807]

Courts would therefore take the foregoing into account in the event judicial relief is sought vis-à-vis the EIO. Interests are generally balanced with each other and automatic revocation of an EIO or denial of the same does not automatically follow for an affected person (suspect or otherwise) should his/her rights have been allegedly slighted or affected. It would be a different issue however for rights that are non-negotiable and subject to non-derogation. More stringent application would be applied in these cases.

c. Applicable Time Limits

There were time limits a central authority ought to comply with in recognizing and executing EIO's received from another EU state. At the outset, if one central authority receives an EIO which involves a request for evidence involving another central authority located in another part of the UK, the former is duty bound to forward the said EIO to the relevant UK central authority and notify the issuing authority, or when applicable, the central authority of the issuing state that the EIO has been forwarded.[2808] In relation to this, the applicable central authority must notify the issuing authority, or when appropriate, the central authority of the issuing state to confirm receipt of the EIO.[2809] This shall be without delay and in any case, must be within one week beginning with the day on which the EIO was received.[2810]

2806 See European Convention of Human Rights, art. 15; *Wilson/Rutherford/Storey, et al.*, p. 220.
2807 Human Rights Law 1998, §§ 2, 14(4); *Wilson/Rutherford/Storey, et al.*, p. 220.
2808 Criminal Justice (European Investigation Order) Regulations 2017, § 26(2).
2809 Criminal Justice (European Investigation Order) Regulations 2017, § 26(3).
2810 Criminal Justice (European Investigation Order) Regulations 2017, § 26(4).

Thereafter the central authority must take its decision as soon as possible, and in any case, "before the expiry of the period of 30 days beginning with the day after the day on which the order was received."[2811] It could however happen that it is impossible to take a decision to recognize or execute an EIO because the information provided is insufficient or manifestly incorrect.[2812] In such case, the central authority needed to inform the issuing authority without delay and request that the latter provide the lacking information deemed necessary to make a decision, specifying therewith a reasonable period for the issuing authority to do so.[2813]

In addition to insufficient or incorrect information, there might be other reasons that make it not practicable to comply with the time period to make a decision to recognize or execute the EIO. In such case, the central authority needed to inform without delay the issuing authority of the reasons for the delay and additionally, the central authority should specify a date, "within the period of 60 days beginning with the day after the day on which the EIO was received, by which the central authority expects to have taken its decision."[2814]

In the event that the central authority decided to recognize or execute an EIO it must have ensured that any investigative measure indicated therein is "carried out without delay and with the same celerity and priority as for a similar domestic case, and in any event, before the expiry of the period of 90 days beginning with the day after the day on which the central authority takes it decision on recognition or execution;" provided however that this shall not apply should the investigative measure relate to evidence already possessed by the central authority, or appearing to be in possession of an executing authority.[2815] The same 90-day period is reiterated across the Regulations' provisions in the execution of certain investigative measures, such as receiving evidence from a person, hearing by teleconference or other audiovisual means, etc.[2816]

The Regulations likewise took into consideration incidents when it is not practicable to carry out the investigative measure within the given time period of 90 days. In such case, it must notify the issuing authority

2811 Criminal Justice (European Investigation Order) Regulations 2017, § 30(1).
2812 Criminal Justice (European Investigation Order) Regulations 2017, § 27(1).
2813 Criminal Justice (European Investigation Order) Regulations 2017, § 27(2).
2814 Criminal Justice (European Investigation Order) Regulations 2017, § 30(2).
2815 Criminal Justice (European Investigation Order) Regulations 2017, § 30(3), (4).
2816 Criminal Justice (European Investigation Order) Regulations 2017, §§ 35, 36, 37.

of the reasons for the delay and consult with the latter on the appropriate timing to carry out the investigative measure.[2817]

Additionally, the time limits set out by the Regulations were without prejudice to any extension caused by the postponement of recognition or execution likewise provided for by the Regulations.[2818] The issuing authority was also allowed to propose shorter time limits due to procedural deadlines, the seriousness of the offense, or other particularly urgent matter; or that the investigative measure be conducted on a specified date.[2819] Accordingly, the central authority must take full consideration as much as possible.[2820]

Other than the time limits listed for acknowledgment of receipt of EIO and recognition or execution of the EIO, there was no exact time limit provided in the Regulations as regards transfer of evidence. What the Regulations ordered was that the transfer of either the evidence obtained by executing the EIO or evidence already in possession by the central authority or executing authority should be done without undue delay.[2821] Moreover, any transfer could be suspended should there be a pending incident involving a legal remedy, unless there were sufficient reasons indicated in the EIO requiring that immediate transfer was necessary for the proper conduct of an investigation or proceeding to which the order relates, or for the "preservation of individual rights."[2822] However, a transfer of evidence must be suspended if it appeared that there should be serious and irreversible damage caused to any person affected by the transfer.[2823]

The speed and/or time efficiency required by the Regulations, together with the defense rights they reinforce and the principle of mutual recognition, makes all the difference on practitioner level, according to an interviewee. He opines that speed affects the defense as well in the entire process given that any delay prejudices the defense one way or another. Other interviewees also mentioned the benefits of the structural changes the DEIO introduced. In practice, authorities exert the highest efforts to comply with the time limits provided by the Regulations. Further, they hope that the structural changes would be continuously in place regardless

2817 Criminal Justice (European Investigation Order) Regulations 2017, § 30(5).
2818 Criminal Justice (European Investigation Order) Regulations 2017, § 30(6).
2819 Criminal Justice (European Investigation Order) Regulations 2017, § 30(7).
2820 Criminal Justice (European Investigation Order) Regulations 2017, § 30(7).
2821 Criminal Justice (European Investigation Order) Regulations 2017, § 31(1).
2822 Criminal Justice (European Investigation Order) Regulations 2017, § 31(2).
2823 Criminal Justice (European Investigation Order) Regulations 2017, § 31(3).

of whether Brexit proceeds or not, given the positive results it has made in the UK overall system.

d. Authentication of Documents

The Regulations did not provide for the process of authentication should the issuing state require the same. What the Regulations provide is the need to transmit the EIO to a central authority or executing authority by means capable of producing a written record under conditions that allows the latter to establish authenticity.[2824]

e. Importance of Confidentiality

It seems that confidentiality is important as per the Regulations. To illustrate, any unauthorized disclosure was considered an offense in relation to customer information order and/or account monitoring orders made in the United Kingdom.[2825] Such unauthorized disclosure involves information that a request to obtain customer information and/or account monitoring order or the EIO itself is received; information on an ongoing investigation in relation to the request or order; and/or pursuant to a request or order, information has been given to the authority which made the request or order.[2826] This notwithstanding, the Rules of Court may make provisions as to the practice and procedure to be followed in relation to proceedings under these Regulations.[2827]

f. Return of Documents

It would seem that the return of objects, documents, or evidence requested via an EIO was not compulsory under the Regulations. Under the relevant provision, the transferring authority must indicate "whether it requires the

2824 Criminal Justice (European Investigation Order) Regulations 2017, § 5(3).
2825 Criminal Justice (European Investigation Order) Regulations 2017, § 50(2).
2826 Criminal Justice (European Investigation Order) Regulations 2017, § 50(3).
2827 Criminal Justice (European Investigation Order) Regulations 2017, § 60.

issuing authority to return the evidence as soon as it is no longer required in the issuing state."[2828]

g. Specific Procedures per Type of Assistance

The Regulations provided for additional requirements for certain investigative measures, in addition to the general requirements one must satisfy before an EIO could be made or validated. These additional requirements existed for scenarios when it is the UK which makes the EIO or the one that receives it. In relation to this, the Regulations provided additional requirements for specific investigation measures, may it be that the UK is the issuing state or executing one, such as hearing a person by videoconference or telephone; banking and other financial information; investigative measures requiring gathering of evidence in real time, continuous, or over a certain period of time; covert investigations; provisional measures; interception of telecommunications where technical assistance is required; temporary transfer of UK or EU prisoner to a participating state for the purpose of UK investigation.[2829]

III. Implementation in Member state: Germany

The next portion focuses on Germany as a member state of the European Union. Similar to the flow of discussion made about the United Kingdom, first, a historical development of international cooperation instruments or in particular, mutual legal assistance shall be discussed. Second, there would be a discussion of the different substantive and procedural provisions common to mutual legal assistance in criminal matters and the EIO, wherein certain characteristics or idiosyncrasies can be mentioned.

In connection to this, interviews were also made with German practitioners who are involved in international cooperation, mutual legal assistance, and the EIO. They provided insights as regards their practice and experience vis-à-vis mutual legal assistance and the EIO.

2828 Criminal Justice (European Investigation Order) Regulations 2017, § 31(4).

2829 Criminal Justice (European Investigation Order) Regulations 2017, §§ 14-24, 35-61.

A. Historical Development

1. Bilaterial, Regional, and Multilateral Mutual Legal Assistance

Germany is a signatory to many bilateral, regional, and multilateral mutual legal assistance agreements.

Bilaterally, Germany has agreements on mutual legal assistance in criminal matters with the United States (also data exchange treaty), Canada, Hong Kong, and Tunisia. On the other hand, Germany has a treaty for the transfer of offenders and cooperation in the enforcement of criminal judgments with Thailand and Taiwan.

On a multilateral level, one could look into the agreements within the European Union, Council of Europe, and the United Nations. As regards the Council of Europe for example, one can see that Germany is a signatory to the 1959 European Convention on Extradition and the 1959 European Convention on Mutual Legal Assistance, including its respective protocols. In relation to the latter, Germany has supplementary bilateral treaties with France, Israel, Italy, Netherlands, Austria, Czech Republic and Poland. Moreover, Germany is a signatory to the Budapest Convention on Cybercrime; Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds of Crime; Agreement on Illicit Traffic by Sea, implementing Article 17 of the UN Convention against Illicit Traffic in Narcotic Substances and Psychotropic Substances; European Convention on the Compensation of Victims of Violent Crimes; European Criminal Law Convention on Corruption; European Convention on the International Validity of Criminal Judgments; European Convention on the Transfer of Proceedings in Criminal Matters; Council of Europe Convention on Action against Trafficking in Human Beings; Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse; Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence; Council of Europe Convention on the Counterfeiting of Medical Products and Similar Crimes Involving Threats to Public Health.

As regards the United Nations, Germany is a signatory to many conventions or treaties that include elements of international cooperation such as extradition, mutual legal assistance, etc. These include the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; UN Convention against Transnational Organized Crime (including its protocols); International Convention for the Suppression of the Financing of Terrorism; International Convention for the Suppression of Acts

of Nuclear Terrorism; UN Convention against Corruption; and the UN Convention on the Law of the Seas; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.

Within the context of the European Union and with respect to mutual legal assistance, Germany is part of the following: the 2000 MLA Convention, including its 2001 Protocol; 2003 MLA Treaty between the European Union and the United States of America; 2007 Agreement between the European Union and the United States of America on the Processing and Transfer of Passenger Name Record Data by Air Carriers to the United States Department of Homeland Security; 2010 Agreement between the European Union and the United States of America on the Processing and Transfer of Financial Messaging Data from the European Union to the United States for the Purposes of the Terrorist Finance Tracking Program; 2004 Cooperation Agreement between the European Community and its Member States and the Swiss Confederation to Combat Fraud and Any Other Illegal Activity to the Detriment of Their Financial Interests; 2008 Agreement between the European Union and Australia on the Processing and Transfer of EU-sourced Passenger Name Record Data by Air Carriers to the Australian Customs Service; 2010 Agreement between the European Union and Japan on Mutual Legal Assistance in Criminal Matters; Council Framework Decision 2003/577/JHA of 22 July 2003 on the Execution in the European Union of Orders Freezing Property or Evidence; Council Framework Decision 2008/978/JHA of 18 December 2008 on the European Evidence Warrant; Council Framework Decision 2008/829/JHA of 23 October 2009 on the Application, between member states of the European Union, of the Principle of Mutual Recognition to Decisions on Supervision Measures as an Alternative to Provisional Detention; Council Framework Decision 2006/960/JHA of 18 December 2006 on Simplifying the Exchange of Information and Intelligence between Law Enforcement Authorities of the Member States of the European Union; Council Framework Decision 2009/315/JHA of 26 February 2009 on the Organization and Content of the Exchange of Information Extracted from the Criminal Record between Member States; Council Framework Decision 2009/316/JHA of 06 April 2009 on the Establishment of the European Criminal Records Information System ("ECRIS"); Council Framework Decision 2008/977/JHA of 27 November 2008 on the Protection of Personal Data Processed in the Framework of Police and Judicial Cooperation in Criminal Matters, which is now repealed by the Directive (EU) 2016/680 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of

the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data; and the Council Decision 2008/633/JHA of 23 June 2008 Concerning Access for Consultation of the Visa Information System by Designated Authorities of Member States and by Europol for the Purposes of the Prevention, Detection, Investigation of Terrorist Offenses and of other Serious Criminal Offenses.

2. Domestic Legislation on International Cooperation

Germany's governing law on international cooperation is the Act on International Cooperation in Criminal Matters ("AICCM" or Gesetz über die internationale Rechtshilfe in Strafsachen ["IRG"]), which has been last amended on 27 August 2017 (BGBl. I. S. 3295). By virtue of the DEIO and incorporating the EIO in German law, the fourth amendment of the AICCM happened on 05 January 2017.[2830]

B. Substantive Provisions

1. Applicability of Assistance

Three (3) things can be mentioned as regards applicability of assistance.

First, there is the change of nomenclature from being "request based" to being "order-based", which denotes the minimization of discretion to decide on the recognition or execution of an EIO.[2831] According to interviews made with practitioners and experts on this topic, the change of terminology from "request" to "order" is a big step theoretically. However, in practice, there is not much difference between the ordinary MLA request and an EIO.[2832] In fact, it is a common misconception that the EIO would mean automatic recognition or execution due to its terminology.[2833] The principle of mutual recognition has been existing more or

2830 See Act on International Cooperation in Criminal Matters, 1982, Federal Law Gazette I, p. 2071; *Schomburg/Lagodny*, p. 765.
2831 See *Heard/Mansell*, p. 354.
2832 Interview with Christian Schierholt. See also *Schomburg/Lagodny*, p. 766.
2833 Interview with Till Gut.

less in practice even before the EIO became applicable.[2834] Authorities are generally willing to afford each other the assistance required. Furthermore, as one interviewee mentioned, the obligations from MLA treaties and the EIO are similar when applied in practice. Despite the choice of "order" as terminology, there is still more or less discretion in play on whether the EIO received would be recognized or executed.[2835]

Second, it must be mentioned that the AICCM shall generally govern the relations with foreign states regarding legal assistance in criminal matters, which refer to include "proceedings relating from an offense which under German law would constitute a regulatory offense sanctionable by a fine or which pursuant to a foreign law is subject to a similar penalty, provided that a court of criminal jurisdiction determines the sentence."[2836] Provisions of international treaties shall accordingly take precedence over the provisions of the AICCM to the extent that they have become directly applicable national law.[2837] Part 10 of the same AICCM applies to the support in criminal proceedings involving EU member states, including the EIO which is covered by the law's Section 91.[2838] Sections 92 to 92b shall also apply in the context of legal assistance to those States who apply the provisions on the Schengen Acquis on the basis of an association agreement with the European Union on the implementation, application and development of the Schengen Acquis (Schengen-associated States).[2839]

Third, the EIO shall be applicable to both natural and legal persons. In relation to this, the issue of corporate criminal liability arises, which Germany does not have. Due to this, discrepancies may arise as regards how assistance shall apply. According to the interviews made, there would be no issue if the investigative measure subject of the EIO is non-coercive in nature. It would be allowed and executed. However, if coercive measures are involved, then one would need to look into the relevant law to see if the EIO can be executed notwithstanding involving legal persons and the matter is not necessarily a criminal matter in Germany due to the absence of corporate criminal liability.

2834 Interview with Christian Schierholt.
2835 See also *Schomburg/Lagodny,* p. 766.
2836 AICCM, § 1(1, 2).
2837 AICCM, § 1(1, 2).
2838 AICCM, §§ 91-98.
2839 AICCM, § 91(3).

2. Types of Assistance

It could be discerned that the EIO shall be applicable to both coercive and non-coercive measures, wherein measures not specifically mentioned in the sections implementing the DEIO shall be governed by the other applicable provisions of the AICCM.[2840] As an interviewee explained, it involves generally measures between two judicial authorities.[2841] It also does not contemplate for example scenarios wherein prosecutors are involved on one end but police authorities on the other, as well as police to police cooperation.[2842] And another interviewee mentioned that the present law does not use an enumerative list of measures.[2843] However, the EIO shall not apply to the formation and creation of joint investigation teams and any evidence that shall be obtained or secured through the same; cross-border observations; and the interrogations of the accused through telephone conference.[2844]

There are initial difficulties posed by the non-application of the EIO on certain investigative measures, for which practicioners often find solutions. Interviewees were asked in relation to the types of assistance that can be rendered or requested, what would happen if there is an overlap of coverage, wherein an investigative measure is included in the EIO although it is covered by another instrument or law; or situations where it is questionable whether the subject investigative measure is within the penumbra of the EIO (e.g. information exchange, voluntary disclosure of information, cross-border surveillance). In response, interviewees said that as much as possible, they would work with the relevant issuing authority to execute the EIO.[2845] Feedback from most practitioners according to an interviewee would show that they would cover everything being asked for.[2846] Instead of going back and forth with the EIO and any amendments it necessitates to accommodate the investigative measures requested, some believe it is better to execute the EIO concerned.[2847] Some practitioners would also in times of uncertainty communicate with the relevant issuing authority and see possible solutions or measures, if some of those requested investigative

2840 AICCM, § 91a(4).
2841 Interview with Christian Schierholt; Interview with Till Gut.
2842 Interview with Christian Schierholt.
2843 Interview with Till Gut.
2844 AICCM, § 91; *Schomburg/Lagodny*, pp. 773-774.
2845 Interview with Christian Schierholt; Interview with Till Gut.
2846 Interview with Till Gut.
2847 Interview with Till Gut.

measures are not possible through the EIO.[2848] This is a pragmatic measure being used by German authorities to facilitate the execution of EIOs received from other member states.[2849] In line with this, an interviewee mentioned that it only can become tricky when the investigative measure needs to course through the courts and the latter denies the request.[2850]

It is worth mentioning at this juncture that open channels of cooperation exist among authorities, even before the EIO was implemented.[2851] The existence of contact points through the EJN or Eurojust are helpful, as well as the existence of liaison magistrates for example between France and Germany.[2852] In connection to this, some practitioners would draft questions before making an EIO or MLA request. As an interviewee mentioned, it would be inefficient to go to the trouble of drafting an MLA request or EIO only to figure out that it would not work.

3. Compatibility with other Arrangements

The AICCM is silent on the compatibility of other arrangements with the use and implementation of the EIO. It would be safe to say however that the EIO is not mutually exclusive. Being part of the EU Criminal Justice architecture itself, it co-exists with other EU instruments that may be applicable in the investigation and prosecution of crimes. As mentioned already earlier, the EU would have cooperation mechanisms at the police, prosecutor, and judicial level through the existence of the Europol, Eurojust, European Prosecutors' Office, and European Judicial Network. There is also an existing legal framework for exchange of information and intelligence, including that of exchange of information about criminal records, as well as those involving border controls, etc. These are all readily available to German authorities in pursuit of an investigation and/or prosecution of criminal matters. Having said these, what has been previously highly recommended is to initiate contact with German authorities first, especially in high profile cases, to coordinate whether a particular measure is acceptable in German law.[2853] Based on interviews made, when German

2848 Interview with Christian Schierholt.
2849 Interview with Christian Schierholt.
2850 Interview with Till Gut.
2851 Interview with Till Gut. See also *Schomburg/Lagodny,* p. 769.
2852 See Interviews with Christian Schierholt, Till Gut, and Gabriele Launhardt.
2853 *G20*, p. 40.

authorities are on the requesting end, they utilize existing liaison points and other arrangements in fulfillment of their duties.[2854]

4. Principles, Conditions, and Exceptions Applicable

a. Sufficiency of Evidence Requirement

Sufficiency of evidence more or less exists in the German EIO framework. The law provides that judicial authorities in issuing an EIO must use the *pro forma* EIO provided in the DEIO.[2855] The issuing authority must be able to fill in the required information vis-à-vis the investigative measure and/or cross-border transfer of information or evidence stated in the EIO. The information must be sufficient enough to enable the executing authority to be able to decide on whether to recognize or execute the EIO. As illustrated by the EIO form, factual and legal basis ought to be provided. Likewise, the German law underlines the importance of proportionality: when it is an administrative authority making the request, the EIO must be approved by the public prosecutor's office before issuance.[2856] In its decision, one of the things the public prosecutor ought to consider is whether the request complies with the principle of proportionality.[2857] Hence, the facts of the case must be commensurate to the issuance of the EIO.

In connection to this, interviewees stated that there is no exact guide or barometer that determines what is relevant evidence.[2858] The same is determined by the issuing authority.[2859] German authorities follow a continental European approach wherein one does not need to lay down all the facts.[2860] According to an interviewee, the question on "relevance" is more common with Anglo-American countries.[2861] Thus, facts establishing probable cause, for example, only matters when German authorities deal with countries such as the United States of America.[2862] Significantly, there

2854 See for example Interview with Christian Schierholt.
2855 AICMM, § 91j(1).
2856 AICMM, § 91j(1).
2857 AICMM, § 91j(1); RiVASt, § 25(1)(3).
2858 Interview with Christian Schierholt; Interview with Till Gut.
2859 Interview with Christian Schierholt.
2860 Interview with Till Gut.
2861 Interview with Christian Schierholt.
2862 Interview with Till Gut.

are hardly raised questions on whether the investigative measure subject of the EIO is relevant.[2863] In practice, what is more considered as regards the execution of an EIO are three (3) matters: (1) legal provision for the investigative measure concerned is being used only for certain offenses; (2) there is strict or obligatory rule on investigating cases; and (3) mutual legal assistance or execution of EIO only happens if it is proportionate.[2864]

b. Dual Criminality

Generally, the dual criminality requirement shall apply as regards the surrender of objects and search and seizures.[2865] As regards surrender of objects, it could refer to objects that either (1) serve as evidence in foreign proceedings; (2) obtained by the person concerned or accomplice "for or through the offense which a request is based;" (3) obtained by the person concerned or accomplice "through the sale of such object, or as a replacement for it being destroyed, damaged, or taken away, or on the basis of a right accrued to them or as usufruct;" (4) which were created by or used or meant to be used in the commission or preparation of the offense on which the request is based."[2866] Surrender is generally not admissible, unless "the offense on which the request is based contains elements of the actus reus and mens rea of a criminal offense or of an offensepermitting the imposition of a fine under German law or unless mutatis mutandis it would be such an offense in German law."[2867]

With respect to the EIO, the dual criminality requirement does not need to be proven in the following offenses: "(1) participation in a criminal organization; (2) terrorism; (3) trafficking in human beings; (4) sexual exploitation of children and child pornography; (5) illicit trafficking in narcotic drugs and psychotropic substances; (6) illicit trafficking in weapons, munitions and explosives; (7) corruption; (8) fraud, including that affecting the financial interests of the European Union within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests; (9) laundering of the proceeds of crime; (10) counterfeiting currency, including of the euro;

2863 Interview with Christian Schierholt.
2864 Interview with Christian Schierholt.
2865 AICCM, §§ 66(2)(1), 67(1).
2866 AICCM, § 66(1).
2867 AICCM, § 66(2)(1).

(11) computer-related crime; (12) environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties; (13) facilitation of unauthorized entry and residence; (14) murder, grievous bodily injury; (15) illicit trade in human organs and tissue; (16) kidnapping, illegal restraint and hostage-taking; (17) racism and xenophobia; (18) organized or armed robbery; (19) illicit trafficking in cultural goods, including antiques and works of art; (20) swindling; (21) racketeering and extortion; (22) counterfeiting and piracy of products; (23) forgery of administrative documents and trafficking therein; (24) forgery of means of payment; (25) illicit trafficking in hormonal substances and other growth promoters; (26) illicit trafficking in nuclear or radioactive materials; (27) trafficking in stolen vehicles; (28) rape; (29) arson; (30) crimes within the jurisdiction of the International Criminal Court; (31) unlawful seizure of aircraft/ships; and (32) sabotage."[2868] It is provided however that the double criminality requirement need not be checked in the aforementioned crimes if the same is punishable with a custodial sentence or freedom-restricting sentence of at least three (3) years."[2869] This same non-applicability of dual criminality can also be said as regards searches and seizures.[2870]

In relation to this, it can be mentioned that dual criminality plays an indirect role in limiting and/or refusing execution of an investigative measure subject of the EIO if such investigative measure is limited to a list of offenses to which the offense referred to in the EIO is not part of said list (*Grundsatz für Vergleichbarkeit*).

At this juncture it ought to be clarified that dual criminality does not require 1:1 equivalence of the elements defining the criminal offense in the issuing state and the requested state.[2871] The requirement is sufficiently satisfied when the conduct investigated can be sanctioned with either a criminal penalty or a regulatory fine.[2872]

It must also be mentioned that an EIO regarding the taxes, duties, customs or monetary affairs is allowed even if there would be no equivalent German law providing the same liability or offense subject of the EIO.[2873]

2868 AICCM, § 91b(4); *Schomburg/Lagodny,* pp. 782-784.
2869 AICCM, § 91b(4); *Schomburg/Lagodny,* pp. 782-784.
2870 AICCM, §§ 67(1), 91b(4), 94(1); *Schomburg/Lagodny,* p. 783.
2871 *G20*, p. 39. See in general *Schomburg/Lagodny,* pp. 782-784.
2872 *G20*, p. 39. See in general *Schomburg/Lagodny,* pp. 782-784.
2873 AICCM, §§ 91b(2), 94(1)(2).

In light of the foregoing, interviewees would give the idea that dual criminality is not much an issue in practice. They can generally execute notwithstanding the lack of dual criminality, except in cases wherein coercive measures are involved.

c. Double Jeopardy

The prohibition against double jeopardy is present in the AICCM. Accordingly, the AICCM provides that the EIO can be refused if the person subject of the EIO or legal assistance has been convicted in a state other than the issuing state, and the sentence has already been enforced, is being enforced, or by reason of the law of the sanctioning state can no longer be enforced.[2874] One can note from this provision that the double jeopardy requirement extends not only to convictions made and executed in Germany but also covers EU member states.

The same prohibition of double jeopardy has been mirrored in terms of freezing evidence, wherein the relevant provision provides that the recognition or execution of an EIO can be refused if the subject person under the same act on which the EIO or request was based, had already been judged in a state other than the issuing or requesting state, and said judgment has already been satisfied, about to be satisfied, or by reason of the judging state, cannot be satisfied or executed anymore.[2875]

In light of the foregoing, one must understand that the prohibition on double jeopardy, as enshrined in Article 103 (3) GG, is meant to protect an offender "who has been already punished or finally acquitted, against repeated prosecution and punishment for the same act."[2876] Accordingly, German constitutional law provides that the "first final criminal judgment creates a comprehensive bar to proceedings for any subsequent trial concerning the same fact."[2877] This is however limited to an internal effect within the respective legal order given the autonomy of legal systems.[2878] Due to the need to develop an European area of criminal justice, there was a consequent need to develop a transnationally applicable principle of *ne*

2874 AICCM, § 91e (1) 2.
2875 AICCM, § 94(3).
2876 *Satzger*, p. 148.
2877 *Satzger*, p. 148.
2878 *Satzger*, p. 149.

bis in idem.[2879] This occurred in the regional level through the integration of the provisions stated in Article 54 CISA and the Spasic judgment of the CJEU.[2880]

In relation to this, Germany has taken into account the provisions provided in Article 54 CISA, the CJEU judgments, and the decisions of its courts altogether. The transnationally applicable principle can now be found in the AICCM instrument under Section 91(e)(2) as an optional ground for refusal, when a request may be refused recognition or execution when the subject person has been convicted already in another state other than the requesting or issuing state and the corresponding execution element is met, wherein the judgment has been executed, about to be executed, or by reason of the law of the judging state, can no longer be executed.[2881] Accordingly, Germany based on an EU-legal approach, as the same cannot only affect decisions of German courts regarding grants or refusal of a mutual legal assistance, but also the decisions of other member states, insofar the person concerned will be affected by it.[2882]

Schomburg and Lagodny explain that as an optional ground to refuse recognition or execution of an EIO, the authorization should in principle not be refused if the procedure being carried out in the issuing state is also intended to determine whether a violation of this principle has occurred is present.[2883] In this case, it should not be the responsibility of the German executing authority to clarify (in a possibly complex procedure) whether an infringement has occurred.[2884] Rather, this decision is best left to the issuing authorities in the relevant procedure in the issuing state.[2885] In line with this, the information or evidence to be obtained by the measure for which it is requested can be of crucial importance to whatever decision the issuing authorities will make.[2886] Nonetheless, in cases where one's right against double jeopardy would be clearly affected, then the deferment of any discretion to the issuing authority can be reduced accordingly.[2887]

As to how the principle of *ne bis in idem* is applied in practice, this has been clarified through interviews with German authorities. Accordingly,

2879 *Satzger*, p. 149.
2880 *Schomburg/Lagodny*, p. 793.
2881 *Schomburg/Lagodny*, p. 792.
2882 *Schomburg/Lagodny*, p. 793.
2883 *Schomburg/Lagodny*, p. 793.
2884 *Schomburg/Lagodny*, p. 793.
2885 *Schomburg/Lagodny*, p. 793.
2886 *Schomburg/Lagodny*, p. 793.
2887 *Schomburg/Lagodny*, p. 793.

authorities disclosed that in applying the prohibition on double jeopardy, judicial authorities are given the discretion to decide whether the prohibition could be used to deny an EIO or mutual legal assistance request.[2888] A denial of the EIO or any mutual legal assistance request does not automatically follow should double jeopardy exist.[2889] In assessing whether double jeopardy exists however, an interviewee mentions issues as regards determining whether the execution element is met (as provided in the AICCM). There is uncertainty, for example, on whether an issued EAW or request for extradition prior to the issuance of an EIO, constitutes the execution element pertained to by the law, i.e. first part of executing a sentence or not.[2890] There is no clear-cut determination as regards this question.

In connection hereto, an interviewee mentioned that authorities act under the principle that no crime should go unpunished. There is the principle of mandatory prosecution and this is weighed against the principle of *ne bis in idem*. This could result to simultaneous proceedings in different EU member states concerning the same act or omission, or the same suspect or accused. Often the evidence needed in the German proceedings is found in another member state where similar proceedings are ongoing. This necessitates issuance of numerous EIO's to obtain the evidence or information required. To preempt this scenario or avoid the *ne bis in idem* principle altogether, certain factors are considered on whether to proceed with prosecution or investigation by German authorities. One needs to take into consideration the country where the victims are located, the pieces of evidence and where they could be found, etc.

Furthermore, one considers whether the case can be pursued and is connected to Germany. If there are many factors connected to Germany, then proceedings therein shall be initiated or continued. To illustrate, the interviewee cites a case involving the Mafia. Trial has already commenced in Germany but the accused was later extradited to Italy.[2891] More factors are connected to Italy thus deference was given to the proceedings there. However, since there is no legal basis to stop proceedings in Germany once a case started in another country, the trial proceedings in Germany only

2888 Interview with Till Gut.
2889 Interview with Till Gut.
2890 Interview with Christian Schierholt; see for explanation on the conviction element is in the principle of mutual recognition, *Schomburg/Lagodny*, p. 793.
2891 Interview with Christian Schierholt.

ended upon the cessation of trial proceedings in Italy by virtue of double jeopardy.

d. Substantive Considerations of Human Rights

i. Human Rights as a Ground to Refuse Recognition or Execution of an EIO

Human rights are considered and integrated in the AICCM substantive provisions vis-à-vis the EIO. At the outset, it is present as a basis to refuse recognition or execution of an EIO in five (5) instances. First, double jeopardy or the principle of *ne bis in idem*, as mentioned above, may be used to refuse recognition or execution of an EIO.

Second, consent of the person to be examined or transferred for foreign proceedings is a primordial consideration. Audiovisual examination as provided in Section 91(c) vis-à-vis Section 61c of the AICCM or temporary transfer from foreign country for foreign proceedings to Germany under Section 91(c)(3) vis-a-vis Section 62(1), respectively, shall not be allowed if the person to be examined refuses to give consent to the same.

Third, human right considerations are a factor likewise in the denial of requests involving the transmission of personal data information in relation to the Framework Decision on information and intelligence exchange between law enforcement authorities in the EU member states. Transmission of data is prohibited if the same would be disproportionate or unnecessary for the purposes for which they are to be transmitted.[2892]

Fourth, any request shall be denied if the same shall put the body, life, freedom of a person in danger.[2893]

Fifth, there is also the prohibition on recognition or execution of an EIO if there are reasonable grounds to believe that the investigative measure shall make Germany liable under Article 6 of the European Convention on Human Rights and the Charter of Fundamental Rights of the EU.[2894] This coincides with the limitation on assistance should the same conflict with the basic principles of the German legal system.[2895]

2892 AICCM, § 92(3).
2893 AICCM, § 92(4).
2894 AICCM, § 91b(2).
2895 AICCM, § 73.

Article 6 of the European Convention on Human Rights refers to one's right to a fair trial. Said right is found in the German Constitution under Article 103 as follows: "(1) in the courts every person shall be entitled to a hearing in accordance with law; (2) an act may be punished only if it was defined by a law as a criminal offense before the act was committed; and (3) no person may be punished for the same act more than once under the general criminal laws."[2896] Under one's right to fair trial, one can find the right also not to be punished by an *ex post facto* law and the abovementioned rule on *ne bis in idem*. In the same vein, the German Constitution also provides for rights as regards deprivation of liberty, wherein the liberty of a person may only be restricted pursuant to a formal law and in compliance with the prescribed procedures.[2897] Persons in custody may not be subjected to physical or mental maltreatment.[2898] Coincidentally, the Federal Constitution provides that it would be the judge who determines the permissibility and continuation of any deprivation of liberty in the sense that if deprivation was not in accordance with any judicial order, said judicial order must be obtained without delay.[2899] The same applies to persons provisionally detained for being suspected of committing an offense.[2900] In any event, a relative or person enjoying the confidence of the person taken into custody shall be notified without delay of any judicial decision imposing or continuing a deprivation of liberty.[2901] Aside from one's right to fair trial and on deprivation of liberty, the German Federal Constitution further gives guarantees in respect of the criminal process one's right to life and bodily integrity,[2902] inviolability of the home,[2903] prohibition of maltreatment of prisoners and detainees,[2904] freedom of movement,[2905] as well as the right to secrecy of communication.[2906]

2896 German Constitution, art. 103. For the applicability of the German Constitution or Basic Law in EIO proceedings, one can refer to the commentary in *Schomburg/Lagodny,* pp. 468-477.
2897 German Constitution, art. 104(1).
2898 German Constitution, art. 104(1).
2899 German Constitution, art. 104(2).
2900 German Constitution, art. 104(3).
2901 German Constitution, art. 104(4).
2902 German Constitution, art. 2.
2903 German Constitution, art. 13.
2904 German Constitution, art. 104.
2905 German Constitution, art. 2, § 2(2).
2906 German Constitution, art. 10.

ii. Applicable Human Rights Obligations vis-à-vis Ground for refusal

Anent the human rights obligations provided under the CFR, one can look into for example the obligation to the right to human dignity (Article 1), right of life vis-à-vis the death penalty (Article 2), the prohibition against torture and other cruel, inhumane or degrading punishment or treatment (Article 4), non-discrimination (Article 21), among others. The CFR accordingly provides the extraterritorial application of the right to life and prohibition of torture or inhumane or degrading punishment or treatment in Article 19 CFR wherein a member state is not allowed to remove, expel or extradite anyone to another state where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

Applying these human rights obligations to the context of the ground for refusal stated above, German authorities are obliged to deny recognition or execution of an EIO if the same involves an *ex post facto* law (the criminal offense was defined after the act or omission occurred) because German authorities would otherwise violate their obligation vis-à-vis rights to fair trial. Denial is also in order in cases where it is apparent that the EIO was only issued for purposes of discrimination against the subject person. As regards the prohibition of inhumane and degrading treatment or punishment, there is reason for denial if, for example, the investigative measure being sought is transfer of persons in custody to give assistance or information, and the said person shall be exposed to inhumane or degrading facilities and/or treatment.

In connection to the abovementioned, there is as well the well-ingrained principle of proportionality in the German legal order which finds great significance in criminal law.[2907] An important principle of constitutional law that was eventually developed through jurisprudence of the Constitutional Court, proportionality is said to be complied with as regards any measure that interferes with fundamental rights as long as the following conditions are met: "(1) it has to be based upon a legitimate purpose; (2) it must be suitable; (3) necessary; and (4) adequate (proportionate in the strict or narrower sense) to that end."[2908]

As regards criminal law, the Federal Constitutional Court has been able to develop yardsticks specifically applicable: on one hand, the principle of proportionality in respect of substantive criminal law mainly applies

2907 See *Albers/Beauvais/Bohnert, et al.*, pp. 213, 215.
2908 *Albers/Beauvais/Bohnert, et al.*, pp. 213-214.

to *Schuldprinzip*, wherein personal guilt and blameworthiness are determinants of liability and punishment, as well as to a necessary restrictive interpretation of elements of a crime; on the other hand, the principle of proportionality in procedural criminal law limits the ordering, enforcement, and duration of intrusive measures, such as remand detention, bodily intrusions, searches and seizures.[2909] In other words, one can see a balancing of interests with said principle.

Applying it to the German criminal justice system, the principle of mandatory prosecution ("*Legalitätsprinzip*"), which, although contemplates many exceptions ("*Opportunitätsprinzip*") that gives prosecutors elbow room to exercise discretion such as not pursuing minor cases, always need to adhere to the proportionality principle.[2910] The same rings true for the use of intrusive measures, where some provisions call out the need to assess if less intrusive measures are available, and that courts and law enforcement authorities need to always do a proportionality check on the use of the same; otherwise, any violation could lead to rendering evidence as inadmissible in trial.[2911]

It is imperative with how the EIO shall be operationalized given that proportionality is a constitutional principle and thus must apply to investigative measures contemplated in an issued or received EIO.[2912] The relevant AICCM provision notably provides that the procedural safeguards in domestic criminal proceedings equally apply.[2913] Furthermore, no less than the guidelines on international cooperation in criminal matters (*Richtlinien für den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten*), together with other parameters, provide that "mutual legal assistance is subject to the principle of proportionality."[2914] Hence, now it becomes clear that with respect to the EIO, it is important to take into consideration and follow accordingly the constitutional principle of proportionality. This applies to both incoming and outgoing EIO's.

2909 *Albers/Beauvais/Bohnert, et al.*, p. 215.
2910 *Albers/Beauvais/Bohnert, et al.*, p. 217.
2911 *Albers/Beauvais/Bohnert, et al.*, pp. 217-218.
2912 See *Albers/Beauvais/Bohnert, et al.*, p. 220.
2913 AICCM, § 91e(1). See also for applicability of procedural safeguards for domestic proceedings to the EAW *Albers/Beauvais/Bohnert, et al.*, p. 249.
2914 *Albers/Beauvais/Bohnert, et al.*, p. 220.

e. Reciprocity

The principle of reciprocity is generally applicable in Germany with respect to extradition. It is less applicable with respect to mutual legal assistance wherein Germany can provide MLA either based on treaty or non-treaty basis.[2915] Execution or recognition of incoming MLA requests without bilateral or multilateral agreements is allowed as long as the essential principles of German law are not violated.[2916] Specifically, Section 76 gives the assurance of reciprocity, when it mentions that in connection with German requests for legal assistance, a foreign state may be given an assurance that requests made by it shall be honored to the extent it would not be in conflict with the AICCM.[2917]

Given the abovementioned, an interviewee opined that the principle of reciprocity does not exist any longer due to the principle of mutual recognition.[2918] A closer look however would show that reciprocity more or less still exists in the German law as regards the EIO.

In previous chapters an argument was forwarded that the principle of mutual recognition distorts, if not completely removes, the principle of reciprocity on both procedural and substantive aspects. There is distortion through the lack of executive discretion to determine whether to deny or approve an EIO. There is likewise the apparent absence of prerogative on the part of an executing authority to determine the adequacy, necessity, or proportionality of an EIO. This remains a one-sided responsibility on the part of the issuing authority. That being said, Germany has on mostly a substantive level retained the rudiments of the reciprocity principle.[2919]

On a procedural aspect, German law provides the exchange of EIO's to be directly made between executive and issuing authorities. There is no central authorities to speak of with respect to the EIO, as explained earlier. Notwithstanding the fact that the executing and issuing authorities are mostly judicial authorities, in the German context exercise of executive discretion still exists.

In relation to Articles 1 and 2 of the DEIO, German law applies in general Article 32, para. 1 of the German Constitution, which states that

2915 *G20*, p. 39.
2916 *G20*, p. 39.
2917 AICCM, § 76.
2918 Interview with Till Gut.
2919 See for discussion of how mutual recognition in criminal matters distorts or removes reciprocity *Nilsson,* p. 57; *van der Wilt,* pp. 76-81.

relations with foreign states shall be conducted by the Federation. Accordingly, Section 74 (2) of the AICMM in connection with the agreement of exercise of jurisdiction ("*Zuständigkeitsvereinbarung*") of 28 April 2004 between the German federal and state governments provides that the German federal government delegates its power to decide, with certain exceptions, on foreign requests for legal assistance and to request foreign state for legal assistance to the state governments.[2920] This power to request and decide on requests for legal assistance is then typically conferred by the state governments to the German public prosecutor's offices and to the courts; and henceforth it would be the public prosecutor's offices that usually act as recognition and execution authorities ("*Bewilligungs- und Ausführungsbehörde*").[2921] Based on this, notwithstanding the lack of central authorities in respect to Germany (with direct contacts between judicial authorities being practiced), it would not be accurate to state that reciprocity on a procedural aspect has been abrogated due to lack of executive discretion.[2922] Executive discretion still exists albeit conferred and/or delegated to the judicial authorities themselves.

Having mentioned this, the fundamental aspects of reciprocity can be seen on the substantive aspect of cooperation. At the outset, Germany was one of the EU member states which did not automatically transpose the principle of mutual recognition completely as seen on how it implemented instruments with mutual recognition elements in their respective domestic laws.[2923] Germany is an example, wherein its Federal Constitutional Court held previously that the first German Act on the Implementation of the European Arrest Warrant ("EuHbG"), which integrated the Framework Decision on the EAW on its entirety, was unconstitutional and violated certain fundamental rights.[2924] Accordingly, the decision cited that the constitutional right that nationals should not be extradited was violated, wherein the said right is subject to reservation allowing extradition of Germans inside the EU or to an international court as long as fundamental constitutional principles are upheld.[2925] There ought to be consideration as a ground for refusal of those crimes with a "significant domestic factor" to protect the fundamental right against extradition. As the Court elucidated,

2920 *Schomburg/Lagodny,* p. 522.
2921 See in general *Schomburg/Lagodny,* pp. 521-526, 767. See also AICMM, § 91(d), para. 1, § 91(j), para. 2 to 4; RiVASt, §§ 7, 22, 27.
2922 See *Nilsson,* p. 57; *van der Wilt,* p. 77.
2923 *Satzger,* pp. 141-142.
2924 *Satzger,* p. 142.
2925 *Satzger,* p. 142.

the cooperation placed into practice in the third pillar of the EU as regards police and judicial cooperation in criminal matters in the shape of limited mutual recognition is a way of preserving national identity and statehood in a single European judicial area, particularly in accordance with the principle of subsidiarity.[2926] The German Constitutional Court believes that the principle of mutual recognition improves international cooperation in criminal matters but it cannot be without any limitations.[2927]

Furthermore, the Court held that the first implementing law was a violation of Article 19(4) – or the general right of access to courts – due to the lack of judicial review in Germany of the grant of extradition under the EuHbG.[2928] In light of this, a new EuHbG entered into force which took into account all of the Constitutional Court's findings such as integrating the reservation of a "significant domestic connecting factor."[2929]

Further, while the DEIO says that the EIO cannot be refused recognition or execution on the ground that there are reasonable grounds to believe that the EIO is not necessary, adequate, and proportional, German authorities cannot comply with the same as otherwise, it would be a violation of German fundamental principles. Accordingly, German law provides that not only can an EIO be denied recognition or execution if there are reasonable reasons to believe that the same shall cause Germany to violate its obligations under the ECHR or Charter of Fundamental Rights, but also when the same is violative of the fundamental principles of the country. Proportionality is a constitutional principle that all authorities, regardless of executive, judiciary, or legislative, should comply with and integrate into their decisions and actions. Any finding that this has not been complied with leads to negative consequences. As such, in the event that there is no proportionality in an EIO, German authorities ought to deny recognition or execution, or otherwise communicate with the relevant issuing authority about the same. Further, the requirement of dual criminality, which is inherent in the concept of reciprocity together with speciality, under German law on the EIO still applies albeit with qualifications that it shall not apply to offenses included in the list of offenses provided above.

Given these provisions that authorities ought to comply with, interviews with authorities reveal that should there be conflict, the resolution of the issue would depend on the receiving authority. Accordingly, should

2926 *Satzger,* p. 142; *Wahl*, p. 117.
2927 *Wahl,* p. 117.
2928 *Satzger,* p. 143.
2929 *Satzger,* p. 143.

the matter reach the German courts, the German courts would apply the national law in settling the same.

Based on the foregoing, it can be said that while the principle of mutual recognition in criminal matters is commonly believed to replace the principle of reciprocity, the German domestic law and principles themselves provide the buffer to not forego the same altogether. This matters on the substantive level wherein German authorities are mandated to consider proportionality among other things, if they are executing authorities.

f. Speciality or Use Limitation

Previously, the G20 guide on mutual legal assistance provided that generally, evidence that Germany provides may only be used for the specific purpose stated in the request.[2930] The exception is, as the G20 guide provides, when there is a special regulation stated in the subject bilateral or multilateral agreement that foregoes the use limitation.[2931] This more or less still applies in the context of the EIO. To illustrate, one could look into Bundesdatenschutzgesetz or the Federal Data Protection Act ("BDSG") on the processing of personal data and the implementing German law on Regulation (EU) 2016/679 and Directive (EU) 2016/680, the latter of which relates to the "processing of personal data by public bodies competent for the prevention, investigation, detection or prosecution of criminal or administrative offences or the execution of criminal or administrative penalties, as far as they process data for the purpose of carrying out these tasks," as well as the protection against and prevention of threats to public security."[2932]

Public bodies in general shall only be permitted to process personal data for the purpose for which it was collected and could only process the same for other purposes if it is necessary for public bodies to perform their duties and if certain conditions are further met.[2933] In case of criminal matters, processing for other purposes is only allowed if it is still within the purposes of criminal matters (as defined in Section 45 of the law) and the processing is necessary and proportionate to the purpose.[2934]

2930 *G20*, p. 42.
2931 *G20*, p. 42.
2932 Federal Data Protection Act, Section 45.
2933 Federal Data Protection Act, Section 23.
2934 Federal Data Protection Act, Section 49.

Moreover, Section 25 of the same law provides that the "transfer of personal data by public bodies to public bodies shall be permitted if it is necessary for the transferring body or the third party to whom the data are transferred to perform their duties and the conditions are met which would permit processing."[2935] The provisions continue to provide that "the third party to whom the data are transferred shall process the transferred data only for the purpose for which they were transferred."[2936] Furthermore, the law provides the parameters and conditions that must be met in cases of transfer of data to third countries and to international organizations,[2937] including the consent of the member state from which the personal data or information originally came from.[2938] Transfers ought to be made with appropriate safeguards,[2939] and in the absence of which, certain conditions are still ought to be complied with.[2940]

Additionally, certain principles for data processing vis-à-vis criminal matters and rights of the data subject ought to be respected and protected at all times.[2941] Rights specifically referring to processing of personal data in the context of criminal matters is likewise provided for.[2942]

The aforementioned parameters are consistent with other forms of cooperation Germany implements. To elucidate, information, including personal data, transmitted under Framework Decision on information and intelligence exchange between law enforcement authorities in the EU member states may only be used for purposes for which it was transmitted or to counter a current or significant public security risk.[2943] Any other use shall only be allowed upon consent of the executing or requested state and under conditions the same may determine.[2944]

As to how this is operationalized in practice, practitioners have mentioned in interviews that they would appreciate that should the evidence transmitted or given by virtue of a MLA request or EIO be used for another criminal matter, a short request be forwarded to them again re-

2935 Federal Data Protection Act, Section 23.
2936 Federal Data Protection Act, Section 23.
2937 Federal Data Protection Act, Section 78.
2938 Federal Data Protection Act, Section 78(3).
2939 Federal Data Protection Act, Section 79.
2940 Federal Data Protection Act, Section 80.
2941 Federal Data Protection Act, Sections 32-37.
2942 Federal Data Protection Act, Sections 47, 55-60.
2943 AICCM, § 92b.
2944 AICCM, § 92b.

garding the same.[2945] The same courtesy shall be given should German authorities be the issuing or requesting state. As to why another request is important, one interviewee explained that there is the possibility that the requirements shall be satisfied for one criminal matter may not be satisfied with another, for which the evidence transmitted or requested may also applicable. Thus, it is important to ensure that requirements are once again satisfied before any permission of using the evidence for another criminal matter is given.

g. Special Offenses or National Interest Cases

One can notice that there are grounds to refuse recognition or execution of an EIO, which are more or less based on special offenses or national interest or public order. First, there is the reason to refuse recognition or execution when the same is in conflict with principles of the German legal system, which, as mentioned in the immediately preceding section, goes hand-in-hand with a human rights-based ground for refusal of being in conflict with Article 6 ECHR and the Charter of Fundamental Rights.[2946] These principles could be found mainly in Articles 1, 20, and 20a of the German Federal Constitution and are accordingly protected against legal changes by Article 79 III of the same Constitution. One can take note that proportionality is one of the principles mentioned, which has been previously discussed above.

Second, the EIO or any request for assistance may not be recognized or executed if the same would compromise essential security interests, endanger sources of information, or require the use of classified information on specific intelligence activities.[2947] The same ground for refusal is also proferred as regards transmission of personal data by virtue of the Framework Decision on information exchange and intelligence between law enforcement authorities of the member states of the EU (so-called Swedish Initiative), wherein transmission of personal data shall not be allowed if the same shall compromise or impair essential security interests.[2948]

2945 Interview with Till Gut.
2946 AICCM, §§ 73, 91b(3).
2947 AICCM, § 91e(1)(2).
2948 AICCM, § 92(3); *Schomburg/Lagodny,* p. 792.

A refusal can be highly expected if essential security interests are endangered.[2949] Depending on the weight of the allegation on which the foreign proceedings are based, recognition or execution could also be considered especially if the threat to national security interests cannot be ruled out with certainty.[2950] Additionally, it is checked whether the risk can be mitigated or removed altogether through agreements with the issuing authority, e.g confidentiality of the findings.[2951] The same applies if the classified information from intelligence sources has to be used in processing the EIO.[2952] Interestingly, compromising essential security interests and requiring use of classified information on specific intelligence activities, in practice, is seldom used as a ground to refuse recognition or execution of an EIO, except in terrorism accounts.[2953]

In respect to endangering sources of information, this plays a huge role in practice especially in criminal proceedings involving organized crime as the same involves a transborder dimension.[2954] Hence, the Regulation serves the purpose of protecting sources either through the possibility of privileged information ("*Vertraulichkeitszusage*") or blocking declaration ("*Sperrerklärung*") in accordance with Section 96 of the Code of Criminal Procedure.[2955] Having said this, weighing of interests is done in practice through considering other investigative measures that could also meet the same result or obtain the needed information or evidence.[2956]

Third, in facilitating or effectuating legal assistance in general, which includes an EIO, it can only be provided "in those cases which German courts and executive authorities could render mutual legal assistance to each other,"[2957] which includes but not limited to, information on accounts held with a financial institution; information about individual account transactions or other transactions made in connection with an account; investigations for a certain duration, specifically requests for information on monitoring of individual account transactions, execution of controlled deliveries, use of undercover agents, and the surveillance of

2949 *Schomburg/Lagodny*, p. 792.
2950 *Schomburg/Lagodny*, p. 792.
2951 *Schomburg/Lagodny*, p. 792.
2952 *Schomburg/Lagodny*, p. 792.
2953 *Schomburg/Lagodny*, p. 792.
2954 *Schomburg/Lagodny*, p. 793.
2955 *Schomburg/Lagodny*, p. 793.
2956 *Schomburg/Lagodny*, p. 793.
2957 See AICCM, § 59(3); see also AICCM, § 91c(2).

telecommunication.[2958] In connection to this, the AICCM authorizes the use of another (if sometimes, less intrusive) investigative measure other than that indicated in the EIO if the same results can be obtained.[2959] Another investigative measure could also be used if the investigative measure indicated in the EIO or request does not exist in German law or the same is inapplicable in a similar domestic case.[2960] In any event, before any resort can be made to another investigative measure, the issuing or requesting state ought to be informed priorly.[2961]

Fourth, an EIO or any legal assistance in general, may be refused if the act(s) subject of the offense on which the EIO or legal assistance is based did not occur in the territory of the issuing state but partly within the German territorial jurisdiction, and the same is neither a criminal offense with punishment nor administrative offense with fine in German criminal law.[2962] Notably, German policy considers this territoriality clause compatible with the principle of mutual recognition,[2963] although said application of territoriality admittedly was not taken into account by German legislators in the EAW in the beginning.[2964] It finds itself now present in the AICCM as amended by virtue of the DEIO, which consequently allows "states to allocate prosecution to the best country which the seriousness of the offenses can be best assessed."[2965]

It bears mentioning likewise that in a previous paper tackling the same clause in its application in the EAW, it was noted that prosecutors and judges seem to apply this carefully and its application is not as big in practice as it was expected.[2966] Some adopt the view that possibilities to conduct own preliminary proceedings in Germany should not be stumbling blocks to the obligation to hinder extradition.[2967] Conversely, some case law acknowledges the possible hindrance caused if a case demands prosecution under German jurisdiction since the prosecutor must initiate prosecution under the principle of mandatory jurisdiction.[2968] In such

2958 AICCM § 91c(2).
2959 AICCM, § 91f(1).
2960 AICCM, § 91e(3).
2961 AICCM, § 91f(3), (5).
2962 AICCM, § 91e(3); *Schomburg/Lagodny,* p. 793.
2963 *Schomburg/Lagodny,* p. 793.
2964 See *Wahl,* p. 127.
2965 *Wahl,* p. 127.
2966 *Wahl,* pp. 127-128.
2967 *Wahl,* p. 128.
2968 *Wahl,* p. 128.

case, it is irrelevant whether formal proceedings have been initiated when the EAW was received, but rather, the facts of the EAW provides the basis for the proceedings.[2969] Nonetheless, clashes based on jurisdiction rarely happen in practice: interviewed practitioners did not feel the urge to initiate proceedings just to deny execution of an EAW.[2970]

With that being said, the fifth instance wherein national interests could be said to play a role is when the investigative measure indicated in the EIO is limited to certain offenses, and the offense subject of the EIO is not included as one of them.[2971] Sixth, recognition or execution of an EIO is not allowed if it violates diplomatic or consular immunity in accordance with the Vienna Convention on Diplomatic Relations and Vienna Convention on Consular Relations, respectively.[2972] Additionally, national interest plays a role in the request for the use of undercover agents wherein it may be refused recognition or execution if there is no agreement with respect to the duration of the operations, the precise conditions, and status of the investigators.[2973]

In addition to the abovementioned, national interest can also form the basis of asking the deferment of executing an EIO or any legal assistance: when the same could interfere with ongoing criminal investigations or the evidence requested is already being used in another procedure.[2974] One must note however, that should there be any postponement, the duration of the postponement should be specified and communicated duly to the issuing or requesting state.[2975] In relation to ongoing criminal investigation as a reason to postpone, one must note however that in respect to transmission of personal data information, the request shall be refused should it compromise the success of an ongoing investigation.[2976]

2969 *Wahl*, p. 128.
2970 *Wahl*, p. 128.
2971 AICCM, § 91b(1)(1).
2972 AICCM, § 91b(1)(2)(b).
2973 AICCM, § 91e(1)(5).
2974 AICCM, § 91e(2).
2975 AICCM, § 91e(4).
2976 AICCM, § 92(4).

C. Procedural Provisions

1. Designation of Central Authority

In Germany, the issuing authorities are the same authorities authorized to receive and execute an EIO. These authorities are as follows: "(1) any judicial authority (Federal Prosecutor General of the Federal Court of Justice, the prosecutor's offices, the prosecutor general's offices, the central authority in Ludwigsburg [for the investigation of National Socialist crimes], any criminal court) depending on the allocation of competences."[2977] Also, administrative authorities may also be issuing and executing authorities for prosecuting and punishing administrative offences. As regards independently conducted criminal investigations pursuant to section 386 (2) Tax Code, German fiscal authorities do not require validation by a judicial authority or a court.[2978] In the scenario that the fiscal authorities exercise the rights and responsibilities of a prosecutor's office in accordance with section 399 (1) Tax Code in conjunction with section 77 (1) of the Act on International Cooperation in Criminal Matters and themselves act as judicial authority within the meaning of article 2(c) EIO directive.

With respect to the designation of issuing and executing authorities, interviewees mentioned that it is more time-intensive if there are no direct contacts. Other than the issue of time, there is not much difference in dealing with vertical or horizontal cooperation, or coursing through central authorities in some jurisdictions. Interviewees understand as well that in some jurisdictions, while having direct contacts is more favorable, central authorities are retained in general due to the difference in criminal justice systems or architecture.

Moreover, an issue was mentioned in the interviews as regards the designation of issuing and executing authorities for the EIO. Interviewees mentioned the problem with the list Germany provided. Whilst under German domestic law, some authorities are considered "judicial authorities", they are not "judicial authorities" as contemplated in the DEIO. This leads to problems as regards EIOs issued by said "judicial authorities" and problems as to whether the same can be executed or not. Some member

2977 See Notification of the transposition of Directive 2014/41/EU by Germany, pp. 1-4.

2978 See Notification of the transposition of Directive 2014/41/EU by Germany, pp. 1-4.

states are more receptive than others. So according to the interviews, it would be dependent on the receiving authority.

2. Preparation of Requests

a. Requisites for the Request/EIO

At this juncture it must be mentioned that as regards when Germany is the issuing state, there was apparently a mixed response to the *pro forma* EIO that ought to be filled up when issuing one. According to one interviewee, there has been complaints from veteran MLA authorities because the relevant forms are too cumbersome and complex.[2979] Further, there is feedback that some practitioners felt constrained due to the forms.[2980] Comparing to the EAW, which is more concise as it involved only one (1) measure, the EIO form contains too many pages and too many measures, when generally, 80% of EIOs sent involve only witness statements and search and seizures.[2981]

Furthermore, with a MLA request before, it sufficed to send a letter plus an enclosed warrant.[2982] However, with the *pro forma* EIO, the same would not suffice any longer.[2983] Thus, the form may not be helpful especially in urgent cases. As illustrated by another interviewee, there was a witness that was flying from Madrid to Latin America and it was urgent to get the statement from said witness.[2984] Following the procedure laid down for the EIO, the authorities would not make it in time.[2985] Therefore, arrangements were made with the Madrid authorities to be able to secure the needed witness statement such as police cooperation, communicating through email, etc., which strictly speaking are against the requirements

2979 Interview with Till Gut.
2980 Interview with Till Gut. Prior to the prescribed form of the EIO, practice involves sending written requests, which would be sent with original papers; and in cases of urgent matters, there is the possibility to send the request by fax, email, or through phone. See RiVASt §§ 8, 10, 27(1).
2981 Interview with Till Gut.
2982 Interview with Till Gut.
2983 Interview with Till Gut; See for formal requirement to use the pro-forma EIO, AICCM, § 91(d)(1), (3).
2984 Interview with Christian Schierholt.
2985 Interview with Christian Schierholt.

for the preparation and issuance of an EIO.[2986] In other instances, there would be the possibility of sending the request already and send the EIO afterwards but this, according to the interviewee, would be dependent on the receiving end of the EIO.[2987] Stating it simply, practitioners needed to innovate to overcome stumbling blocks that the EIO procedural requirements presented during urgent cases. In light of the problems encountered such as the aforementioned, an interviewee mentioned that it might be a good idea to revise the certificates and forms.

On the other hand, there would be some practitioners who appreciate the *pro forma* EIO, especially those who are new to MLA practice.[2988] Moreover, the *pro forma* EIO is beneficial for those who are at the receiving end of the EIO.[2989] Previously, it has been diversified and the same posed sometimes problems for practitioners who needed to execute a request.[2990]

Another requirement ought to be satisfied in the preparation of requests to Germany is a German translation.[2991] Outgoing requests or EIOs on the other hand require that it be in the official language of the country concerned. Failure to include the required translation can be considered "incomplete" in the meaning of Article 16, paragraph 2 of the DEIO. This language requirement poses a problem sometimes for German authorities, especially in urgent cases that need to be dealt with. Although they may have readily made translations for the common types of EIOs, translation in general requires time and effort. The same could affect the efficiency of the entire process. Some interviewees were of the opinion that the language requirement should not be a hard and fast rule given that most EU member states are perfectly comfortable in using the English language.

In addition to the foregoing, Germany has additional requirements vis-à-vis an EIO involving transit of a person in custody. Based on the provisions of its national law, Germany likewise requires the following documents : "(1) the document which forms basis for the detention in the executing state, as this is the basis for the German arrest warrant; (2) a document stating that a temporary transfer will be recognized and enforced by the executing state, as Germany will only act as a transit state provided there is such recognition; (3) a document calculating the period of detention, since

2986 Interview with Christian Schierholt.
2987 Interview with Christian Schierholt.
2988 Interview with Till Gut.
2989 Interview with Till Gut.
2990 Interview with Till Gut.
2991 See EIO Form; *G20*, p. 42.

if the detention period has exceeded the person in custody may have to be released."[2992]

b. Person or Authority Initiating the EIO

Requests to Germany shall be made by a judicial authority or any other authorized issuing authority in accordance with the form(s) provided for in the DEIO.[2993] In the event that the EIO is incomplete or lacks the information that would enable the executing state to recognize or execute the EIO, then the issuing state shall be informed as soon as possible in a manner that enables it to produce a written record.[2994]

As to whose instance the EIO can be issued, the AICCM or other applicable German laws are bereft of provisions allowing the defense to file a motion or request for the issuance of an EIO on his/her behalf. According to interviews made with practitioners, this is not possible in a continental legal system such as Germany. At most, victims or third persons could suggest and/or give leads to prosecuting authorities, although this is more likely for the benefit of the prosecution rather than the defense. This notwithstanding, the defense can participate in the proceedings in general, according to interviewees, but this is of course in accordance with the parameters provided by law. In an inquisitorial system and in accordance with German Criminal Procedure, the defense, as a general rule, could only challenge some instances. With respect to the EIO, most of the time, the defense is not apprised of whether an EIO has been issued. In this case, the most the defense could challenge is the evidence itself obtained through an EIO.

3. Execution of Requests

a. Applicable Law on Execution

The AICCM provides that the investigative measures, including any coercive measure, subject of the EIO or any request for legal assistance shall

2992 See Notification of the transposition of Directive 2014/41/EU by Germany, p. 2.
2993 AICCM, § 91d(1).
2994 AICCM, § 91d(3); RiVASt, Nr. 18.

be carried out using the same rules as if the request has been made by a German authority.[2995] Stating it differently, there shall be no distinction under procedural law whether the hearing of a witness, for example, is conducted on the basis of a MLA request or EIO, or in the context of a national criminal investigation.[2996] Further, as long as the DEIO does not provide for anything else to be followed, and there is nothing that would violate the fundamental principles of the German legal system, the formalities provided for by the issuing state in making and executing an EIO shall be followed and that all responsible authorities are requested to comply.[2997] Should the special formalities or requirements cannot be satisfied, the corresponding authority of the requesting state shall be accordingly notified.[2998] In addition, there is the possibility of requesting the presence of the issuing state's authorities during the execution of the EIO.[2999] Notably, there are no readily available measures regarding this but German authorities would instead act or decide on the basis of the request by the issuing state.[3000]

As regards audiovisual interrogations, it shall be made under the direction of the competent body and on the basis of the right of the requesting/issuing state.[3001] The German authority shall participate in the hearing, take notes on the person's identity and must take note of compliance of the hearing with the essential principles of German law.[3002] Further, the accused shall be advised or told of his rights at the beginning of the hearing, which shall be according to the law of the requesting/issuing state and under German procedural law.[3003] Witnesses or experts shall on the other hand be advised on their right to refuse to give evidence ("*Zeugnisverweigerungsrecht*") and/or right to remain silent ("*Auskunftsverweigungsrecht*").[3004] The same standards apply to hearings of persons through telephone.[3005]

2995 AICCM, § 91e(1).
2996 *G20*, p. 39.
2997 AICCM, § 91h(2); *Schomburg/Lagodny*, pp. 806-807.
2998 AICCM, § 91h(2).
2999 *Schomburg/Lagodny*, p. 807.
3000 *Schomburg/Lagodny*, p. 807.
3001 AICCM, § 91h(3).
3002 AICCM, § 91h(3).
3003 AICCM, § 91h(3).
3004 AICCM, § 91h(3).
3005 AICCM, § 91h(4).

b. Applicable Procedural Rights

i. Defense Rights in the Context of Fair Trial Rights

Human rights are also considered in the procedural aspects of the EIO. As mentioned earlier in the discussion of human rights vis-à-vis substantive aspects, Article 6 ECHR obligations are taken into account as regards grounds to refuse recognition or execution of an EIO. These same fair trial rights also have a part in ensuring that procedural rights are upheld. To recall, there is the right to hearing in accordance with law, prohibition against physical or mental maltreatment, etc. In relation to criminal matters, the Article 6 ECHR and CFR obligations must be read together with the rights provided by the Federal Constitution as regards right to life and bodily integrity, inviolability of the home, prohibition of maltreatment of prisoners and detainees, freedom of movement, as well as the right to secrecy of communication.

Not all significant rights are provided by the Federal Constitution and one would need to make a cross-reference to other significant rights that could be found in the Code of Criminal Procedure, such as but not limited to the following: right to refuse testimony on personal or professional grounds,[3006] right of professional assistants to refuse testimony,[3007] refusal of information,[3008] right to examine or confront witnesses,[3009] right to refuse to give testimony under oath,[3010] assignment of legal counsel for witnesses.[3011] In addition to whatever may be provided as standards in the implementation of investigative measures vis-à-vis the EIO, these rights ought to be equally taken into consideration.

To illustrate, the lastly mentioned right about assigning counsel for witnesses gains significance in relation to EIO's calling for taking of testimonies or statements from a witness. According to the relevant provision, witnesses may avail themselves of an assistance of legal counsel, who shall be permitted to be present in general, unless there are reasons to believe that the latter's presence shall negligibly hinder the orderly taking of evidence.[3012] As regards witnesses who do not have the assistance of legal

3006 German Code of Criminal Procedure, §§ 52, 53.
3007 German Code of Criminal Procedure, § 53(b).
3008 German Code of Criminal Procedure, § 55.
3009 German Code of Criminal Procedure, § 58.
3010 German Code of Criminal Procedure, § 61.
3011 German Code of Criminal Procedure, § 68b.
3012 German Code of Criminal Procedure, § 68b.

counsel at his/her examination and whose interests needing protection cannot be done any other way, shall be assigned a counsel for such duration of the examination if it becomes apparent that the witness is unable to exercise his rights himself at the examination.[3013]

Furthermore, something also interesting can be said as regards the right to refuse to give evidence or right to remain silent as not all kinds of examination is subject to this right. According to the relevant provision of the Code of Criminal Procedure, it is allowed to subject an accused (and an ordinary witness) to physical examination or bodily intrusions such as a blood test if the same is for the purpose of establishing certain facts in relation to proceedings.[3014] The said examination is ordered by either the judge or under exigent circumstances, by the public prosecution service, and shall be admissible even without the consent of the accused.[3015] Nonetheless, any results shall only be used for the purpose of the criminal proceedings for which they were taken.[3016] Molecular and genetic examinations, photographs, fingerprints, measurements and other similar measures can also be taken against the accused (and any other witness).[3017] These exceptions notwithstanding, the right to remain silent or refuse to give evidence would still apply as for example, the AICCM mentions that the EIO or any request in general for legal assistance shall be denied in the event it relates to the right to refuse to give evidence or remain silent.[3018]

Human rights are also taken into account in the preparation of requests or EIO. To illustrate, in terms of search and seizures and the items to be seized need to be surrendered there ought to be an assurance that the rights of third parties shall remain unaffected by reason of said surrender.[3019] The same goes with the enforcement of orders allowing confiscation of criminal proceeds, wherein one of the requirements is proof that in the proceedings on which the foreign decision was based to confiscate, the sentenced person had both the opportunity to be heard and adequate defense, and the decision must have been taken by an independent judicia-

3013 German Code of Criminal Procedure, § 68b(2).
3014 German Code of Criminal Procedure, §§ 81a(1), 81c.
3015 German Code of Criminal Procedure, § 81a(1), (2).
3016 German Code of Criminal Procedure, § 81a(3).
3017 German Code of Criminal Procedure, §§ 81b, 81e, 81f, 81g, 81h.
3018 AICCM, § 91b(1)(2)(a).
3019 *G20*, p. 41. Several other safeguards are provided for searches and seizures in the Code of Criminal Procedure, see for example StPO, §§ 101-110.

ry.[3020] Further, as an interviewee mentioned, should the investigative measure subject of a request or EIO would relate to conditions of detention for example, authorities would require guarantees regarding the same.[3021]

It is interesting to note that the human rights considerations vis-à-vis preparation of requests are not one-sided and only applicable to incoming requests and EIO. The same safeguards are provided for outgoing requests or EIO. With respect to outgoing EIO or requests, German issuing authorities ought to ensure that the request complies with the proportionality principle and that the investigative measure indicated in the EIO could be ordered under the same conditions in a comparable domestic case.[3022] This could be thought of as a protection against arbitrary action as well as prevention of undertaking something indirectly what cannot be done directly. In the same vein, the *Oberlandesgericht* or higher regional court may revisit or remand an EIO should it think that the requirements for providing legal assistance, or in the case of the EIO, executing the investigating measure, has not been complied with, or that there has been a misuse of powers.[3023] Pending any decision on the same, any transmission of evidence may be suspended.[3024]

ii. Human Rights Considerations in the Procedures Provided

Considerations of human rights are equally present in the execution of the investigative measure(s) requested in the EIO. For example, there is an applicable safe harbor provision for temporary transfer to a foreign country for foreign proceedings, wherein under the relevant provision, a person in pretrial detention or serving a prison sentence or detained under custodial measure of rehabilitation and incapacitation on German territory may be transferred upon request to the issuing state's territory in order to testify as a witness or for the purpose of identification or inspection by the court in pending proceedings, provided that said person shall not "during the period of transfer, be punished or subjected to any sanction

3020 *G20*, p. 41. One can likewise see relevant provisions on freezing of assets in view of Council Framework Decision 2003/577 / JHA of 22 July 2003 on the enforcement of decisions to freeze property or evidence in the European Union, AICCM, §§ 94-95.
3021 Interview with Christian Schierholt.
3022 AICCM, § 91j(3); *Schomburg/Lagodny,* pp. 815-816.
3023 AICCM, §§ 61(1),(2); 91i. See also *Schomburg/Lagodny,* pp. 811-813.
3024 AICCM, § 91i.

that cannot be issued in absentia, and that in the case of his release, he may leave the issuing state" and it should be ensured that the person shall be returned immediately after evidence has been taken, unless said requirement has been waived.[3025] The safe harbor provision shall not apply, however, when the person has left but has returned to the issuing state, or after not being needed any further, has failed to left the territory of the issuing state within 15 consecutive days.[3026]

iii. Defendant's Participation in the Recognition or Execution of an EIO

As mentioned in the section tackling preparation of requests, the AICCM is bereft of provisions tackling participation of a suspect or accused person in the issuance of an EIO. Following what the interviewed persons said, there are limitations to what the defense could do vis-à-vis an EIO, especially when the EIO is normally issued and executed without knowledge of the defense or prior to the commencement of formal proceedings. At most, the AICCM provides that the transmission of evidence to the issuing state may be placed on hold pending appeal in the issuing state against the EIO, or within the scope of the AICCM.[3027] As to how this kind of appeal is lodged by a suspect or accused persons in German proceedings, no further details are provided.

Notwithstanding no clear-cut provisions as to remedies vis-à-vis the EIO, the accused is not without further relief. It also does not mean that the principle of equality of arms does not exist. On the contrary, a defense counsel in behalf of the suspect or accused is given certain rights to not only safeguard his/her position but also to adhere to equality of arms. Among other rights, a defense counsel has the right to be present in judicial and public prosecution hearings, as well as in judicial witness hearings (StPO § 168); right to request evidence in preliminary and main proceedings, the right to inspect files (StPO § 147) and the right to appeal, however, not against the will of the accused (StPO § 297).

Moreover, the issuance or execution of an EIO does not preclude the accused from questioning the admissibility of evidence in the trial itself. The Code of Criminal Procedure provides for certain rules that apply thereto. For purposes of this discussion, evidence under criminal procedure can

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3025 AICCM, § 62(1)(3, 4).
3026 AICCM, § 91c(3).
3027 AICCM, §§ 61, 66, 91i; *Schomburg/Lagodny,* pp. 811-813.

be prohibited based on its nature, the method of how it was obtained, or when certain evidence is prohibited to be used to clarify certain facts.[3028]

c. Applicable Time Limits

Time limits are provided for in the applicable German law for the EIO. And while the time limits the law provided are stated in mandatory terms ("*Sollfristen*"),[3029] according to interviews, these time limits are not mandatory but they are beneficial and there is an effort to recognize or execute in accordance with said time limits.[3030]

First, the executing state ought to confirm receipt of the EIO not later than one week from receipt of said EIO by the appropriate executing authority.[3031] When the EIO has been sent to the wrong authority, then the receiving authority needs to send it to the appropriate one, and the same should be indicated in the confirmation receipt to be sent to the issuing authority.[3032] In connection to this, an interviewee mentioned that confirmation of receipt is one of the new features introduced by the EIO. According to feedback received by said interviewee from other prosecutors or judicial authorities, confirmation of receipt of an EIO is a big relief because there would be some requested states or executing authorities which did not give any confirmation or acknowledgment of receipt prior to the EIO's implementation.[3033] This was likewise confirmed by other interviewees who were practitioners: at least they know the other party has received the EIO they sent and easily follow up, if necessary.[3034]

Furthermore, German authorities ought to decide on whether to recognize or execute an EIO or any other form of legal assistance not later than

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3028 StPO, §§ 52, 53, 54, 81c, 136; BZRG, § 51 I. It might also be interesting to note herein that there is judicial review of admissibility of mutual legal assistance in the respective criminal matter by the District Court by the Federal Constitutional Court Decision of 24 June 1997, 2 BvR 1581/95, for instance: court decisions with respect to order of seizure (Section 98, para. 2), court decision with respect to covert measures (Section 101), or appeal against an issued search and seizure order of a court (Section 304).

3029 See AICCM, § 91g; see also *Schomburg/Lagodny*, p. 802.

3030 Interviews with Till Gut, Christian Schierholt, and Klaus Hoffman.

3031 AICCM, § 91d(2), *Schomburg/Lagodny*, pp. 788-789.

3032 AICCM, § 91d(2).

3033 Interview with Till Gut.

3034 See Interviews with Christian Schierholt and Klaus Hoffman.

30 days from receipt of the EIO or request.[3035] When the subject of the EIO or legal assistance request involves securing or obtaining evidence, it should be decided on as much as possible within 24 hours from receipt of said EIO or legal assistance request.[3036] Provided further, when there is no reason to postpone execution or recognition, the investigative measure subject of the EIO (or legal assistance request) ought to be done not later than 90 days from date when decision to recognize or execute has been made.[3037] These stated time periods are without prejudice to the issuing state requesting for a different time period for practical reasons.[3038] Further, should it be not practical to work within the stated time periods or the requested shorter time by the issuing state, German authorities are obliged to inform the issuing state of the same and the foreseen period of time, within which the investigative measure subject of the EIO or request can be executed.[3039] The same required disclosure applies when there are any grounds to refuse recognition or execution, or postpone the same.[3040] In any event, any decision to grant, execute, or postpone ought to be justified.[3041]

A time period is also provided for when the EIO or request calls for the cross-border surveillance of telecommunications without the need for technical assistance from German authorities. When the same is not provided in a comparable domestic case, German authorities ought to inform within 96 hours from receipt of EIO or request the issuing state that the monitoring cannot be done, and that any findings already collected while the person under surveillance is within the territorial jurisdiction of Germany, cannot be used or could only be used under certain conditions, which shall be accordingly communicated.[3042]

In addition to the foregoing, the transmission of evidence may be postponed until such time that a legal remedy has been decided in cases when an application or submission has been made in the requesting state against the issuance of EIO or within the scope of the applicable law.[3043] In any

3035 AICCM, § 91g(1).
3036 AICCM, § 91g(1).
3037 AICCM, § 91g(2).
3038 AICCM, § 91g(3); see also *Schomburg/Lagodny,* p. 769.
3039 AICCM, § 91g(4), (5).
3040 AICCM, § 91e(4).
3041 AICCM, § 91e(3).See for discussion *Schomburg/Lagodny,* pp. 802-803.
3042 AICCM, § 91g(6).
3043 AICCM, § 91i(1).

event that the question is about the scope of the applicable law, then the requesting state shall be accordingly notified of the same.[3044]

d. Authentication of Documents

Although the German law does not provide specific provisions about authentication, it provides that the EIO or any request for legal assistance shall be made in a manner capable of producing a written record. At the outset, one must accomplish the same kind of form provided in the DEIO. It is also important in German law and practice that should there be inquiries vis-à-vis the EIO being incomplete or lacking the information that would enable the executing state to recognize or execute the EIO, then the issuing state shall be informed as soon as possible in a manner that enables it to produce a written record.[3045]

e. Importance of Confidentiality

The existence and nature of requests for assistance, the EIO included herein, are subject to confidentiality in Germany.[3046] It is possible however that disclosure would be necessary, especially in cases involving compulsory measures.[3047] The requesting or issuing state ought to expressly state in the request or EIO that the case is particularly sensitive, should the same be the situation.[3048]

Outside the EU, Germany has asked for guarantees of confidentiality from countries such as Turkey and the United States in some MLA cases, according to one interviewee.

f. Return of Documents

It seems that evidence seized should be returned should the surrender of the same be included in any MLA request or EIO. In such case, there

3044 AICCM, § 91i(2).
3045 AICCM, § 91d(3).
3046 *G20*, p. 42.
3047 *G20*, p. 42.
3048 *G20*, p. 42.

ought to be an assurance that not only rights of third parties will remain unaffected, but also that the objects surrendered subject to reservation shall be returned immediately upon request.[3049]

g. Specific Procedures per Type of Assistance

The relevant German law contains specific provisions tackling specific forms of investigative measures, including the transmission of information, including personal data;[3050] application of the framework decision on information and intelligence exchange between law enforcement authorities in EU member states;[3051] transmission of data without formal requests;[3052] telecommunications surveillance without technical assistance from German authorities;[3053] joint investigation teams (for which the DEIO shall not apply);[3054] and search and seizures, which includes freezing or confiscation orders.[3055]

It must be noted herein that not all of the abovementioned are covered by the EIO, such as the information exchange (Council Framework Decision 2006/960/JHA on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union) and transmission of data without formal requests, which the DEIO does not mention.

IV. Comparing the United Kingdom and Germany with the Regional Framework

A. Historical Development of Mutual Legal Assistance: Existence of Domestic Legislation

One could notice with respect to historical development the continuous development of cross-border cooperation in the regional framework, which is part and parcel of the criminal justice infrastructure the EU is

3049 RiVASt, Nr. 76.
3050 AICCM, § 92.
3051 AICCM, § 92b.
3052 AICCM, § 92c.
3053 AICCM, § 92d.
3054 AICCM, § 93.
3055 AICCM, §§ 94, 95.

building and developing. Notably, this criminal justice infrastructure did not have its roots in the EU organization. Traces of cross-border cooperation agreements could already have been seen in the beginning among the EU member states even before the First and Second World Wars. These however were mostly intergovernmental in nature and informal. During this time period, the conditions have not yet been met to merit acquiescence and willingness from the nation states to head towards supranationalism or a singular framework for criminal matters and international cooperation in relation to the same. There was the prevalent thought that criminal matters are a matter of sovereignty and individual decision making.

The Council of Europe was historically responsible, if not the most favored forum, in producing different agreements involving the different aspects of cross-border cooperation such as the European Conventions on Extradition and Mutual Legal Assistance in Criminal Matters. These eventually became core European instruments and paved way to different new agreements rooted on their provisions.

One can look into the Schengen Agreement and the extradition and MLA agreements later agreed within the Union's framework. Additionally, one can look into the shifting from intergovernmental to supranational handling of criminal justice affairs in the regional framework, happening at each phase of development the EU since the Maastricht Treaty.

The European Union became an active and participative forum for matters involving international cooperation in criminal matters after the Amsterdam Treaty. Now, in the era of the Lisbon Treaty, more developments can be attributed to the criminal justice architecture of the EU. In connection to this, the EU has developed and continues to develop a sophisticated infrastructure that not only spans information sharing through different database systems, but also includes the establishment or revamping of Union agencies such as the Europol, Eurojust, and EJN that are all integral EU machineries in cross-border cooperation in criminal matters. There is also development along the alley of substantive and procedural rights through the different EU enactments, directives, regulations, etc.

Additionally, there is the existing principle of mutual recognition in criminal matters. Such mutual recognition is grounded on the mutual trust among EU member states that they are complying with their obligations as members of the EU such as regards the protection of human rights. The European Arrest Warrant is the first international cooperation instrument that applied this principle. As to how this principle is operationalized in international cooperation matters, there is supposedly no

extra step necessary to determine the contents of a request, etc. – there is a trust that what is contained in a request or European Investigation Order (as the applicable instrument for mutual legal assistance among the member states) was issued in compliance with the requirements of sufficiency, necessity, and proportionality and more importantly, human rights obligations as defined in Article 6 of the TEU. In fact, the EAW reflects the principle of mutual recognition in criminal matters by changing the nomenclature from "requests" to "orders" giving the idea that regional cooperation has shifted from a request-based system to an order-based one. This later caused confusion that an EAW means automatic extradition. It became later apparent that this was not the case as member states are beholden to certain obligations under their respective constitutional systems. Thus, the EAW instrument was later amended to cater to national constitution court judgments tackling certain issues such as extradition of own nationals, etc.

The principle on mutual recognition underlies also the current European Investigation Order. Notably, the UK and Germany are two EU member states which integrated into their respective domestic legal systems the EIO by legislating or amending existing law accordingly. One could note in light of this development that even before the DEIO, both the UK and Germany have not only been concluding treaties with other states, and being participative in the EU Criminal Justice Architecture, but they also have their own domestic legislation on international cooperation in criminal matters, which includes mutual legal assistance. With the DEIO and then integrating it to their respective legal systems, the UK came up with a new law such as the EIO Regulations to implement the EIO while Germany made amended the AICMM to integrate therein the applicable provisions relating to the EIO.

B. Substantive Provisions

1. Applicability of Assistance

With respect to applicability of assistance, four (4) main points can be identified.

First, as regards the obligation to render assistance, there was theoretically a shift from a request-based to demand-based system in both the regional and member state frameworks by virtue of the EIO. Before, traditional mutual assistance contemplates the sending of requests and although states

would have the obligation to render the widest possible assistance, it is pretty much still discretionary on the receiving state whether to extend mutual legal assistance or not. However, nowadays with the EIO the regional and member state frameworks provide theoretically a more limited elbow room to deny any request. As it should theoretically be applied, there should be a paradigm shift. If before the question sounded more like "may I have this evidence from your country?", then now it is more like "I need the evidence from your country so hand it over to me. Trust that I have done everything in order." Practitioners in the UK and Germany who were interviewed would however say that despite such a change in nomenclature and in theory, the practice of cross-border collection and exchange of evidence remains the same. The EIO may have introduced fundamental structural changes, to which practitioners are grateful for, the change of terminology from "request" to "order" did not affect much as historically, practitioners would make sure to extend the assistance required from them.

Second, criminal matters to which the EIO applies are not defined. Instead, the proceedings that the DEIO covers are enumerated as follows: (1) with respect to criminal proceedings that are brought by, or that may be brought before, a judicial authority in respect of a criminal offence under the national law of the issuing State; (2) in proceedings brought by administrative authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law and where the decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters; and (3) in proceedings brought by judicial authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters. Germany provides additionally a definitive list in its law of what is not covered by the EIO, e.g. joint investigation teams, cross-border surveillance, hearing by teleconference.

Third, the EIO applies to both natural and legal persons. The regional and member state instruments explicitly provide this. Said provision could raise questions however as regards corporate criminal liability. Germany for example does not follow this concept. Should discrepancies arise however, practicioners are able to smooth out and resolve any concerns. Some opine that the EIO can still be effectuated notwithstanding any difference in viewpoint with respect to corporate criminal liability.

Fourth, there was the going concern about the UK leaving the EU and the consequences it shall bring. As mentioned earlier, the UK was the first country to decide to leave the EU. And even if the UK authorities intimated their desire to stay in the justice and home affairs of the EU, it is too soon to determine the future of the new relationship forged between the EU and the UK as regards judicial cooperation in criminal matters. This is notwithstanding the fact that certain elements, principles, and practices from the EIO are carried over to the new partnership. Having said this, the UK is said to be politically motivated to perform well in its commitments such as with the EIO. Not necessarily because it is wary of the enforcement mechanism of the European Commission but because the UK needs to show they can make good their endeavors to get the best possible withdrawal agreement with the EU.

2. Types of Assistance

Given the shift to a demands-based system of cross-border obtaining and transferring of information and evidence, there is no distinction as to what types of assistance can be provided. This was the intention of the EU with the EIO instrument. Regardless of whether it is coercive or non-coercive, or whether the evidence is readily available or not, it can be the subject of an EIO. In spite thereof, this does not readily happen because even the DEIO allows parties to conclude agreements with each other as regards mutual legal assistance or what could be the subject thereof. Further, there are not only exceptions to which the EIO is not applicable, such as joint investigative teams for example or exchange of information on personal data, but there are also no clear-cut demarcations or even guidelines regarding how the DEIO replaces older mutual legal assistance instruments.

Indeed, there could be instances wherein an investigative measure is not covered by the EIO but could still be requested, or alternatively, the EIO includes investigative measures that are not all covered by the instrument. The member state legal frameworks would provide investigative measures that they can extend in mutual legal assistance or cross-border exchange and transfer of evidence, but some of these types of assistance are not subject of the EIO. Addressing these concerns of possible overlaps or confusion as regards applicability of the EIO for such kind of investigative measure, authorities from Germany and the UK have been consistent in answering that they would still as much as possible execute the EIO even if there is uncertainty or a question on whether a particular investigative

measure is covered or not. They are more inclined to executing an EIO as much as possible. And when they are the issuing states, interviews reveal that this would be dependent on the receiving authority or party. Herein the contact points and liaison persons of each member state or the networking system provided by the European Judicial Network or Eurojust become useful.

Additionally, something could be mentioned about the birth pains connected with the EIO instrument. The EIO is relatively new and issues could arise as to how it applies or is implemented. There was experience for example with Northern Ireland authorities who needed to prepare argumentations and explanations as regards EIOs which go through the courts.

In line with the abovementioned, there might also be discrepancies that could arise due to certain investigative measures being unavailable in an executing member state. In connection to this, discrepancies could also arise due to the application of the DEIO to both natural and legal persons and not all EU member states, like Germany for example, espouse corporate criminal liability. In settling discrepancies in general, which includes the aforementioned incompatibilities, it was learned through interviews that open communication is imperative and the existence of liaison magistrates to smooth out any issues is helpful in resolving stumbling blocks. Additionally, there could be issues that might arise as regards the EIO and corporate criminal liability matters in Germany if the investigative measure involved is coercive in nature. As per advice of an interviewee, it would be wise to check the relevant domestic law or procedure to determine if the same is allowed. Otherwise, there would be no issue encountered as regards non-coercive measures, even if Germany does not have corporate criminal liability.

3. Compatibility with Other Agreements

As regards the compatibility of the EIO with other existing arrangements, the EIO was meant to replace a lot of earlier EU instruments on cross-border cooperation vis-à-vis exchange of information and evidence, to the exception of some instruments such as the one on joint investigation teams. Despite this, as mentioned above, problems and issues arise regarding possible overlaps or inapplicability that are addressed by practicioners.

Further, it must be remembered that the EIO is only a part of the big criminal justice infrastructure scheme the EU has for itself now, and the

EIO is envisaged to be one of the useable tools but not mutually exclusive to the other tools available to authorities, i.e. SIS, Eurojust, EJN, Europol, and other parts of the criminal justice infrastructure of the EU. Both the UK and Germany are included in said criminal justice architecture, and the UK has opted in many of its related measures – even actively participating in most – albeit it must be remembered that the UK has a special opt-out status in the EU vis-à-vis the area of freedom, security, and justice.

In light of this, it must be stressed herein the importance of the EJN, Europol, and Eurojust for the efficacious handling of criminal matters. As mentioned earlier, the liaison persons or contact points through the EJN are helpful in practice. The Europol might be the network of the police units of the member states but it likewise has useful database systems that can be helpful in the investigation and prosecution of criminal offenses. Whilst the EIO is an exchange between judicial authorities, this does not preempt information or evidence to be obtained through other means. The Eurojust as well is integral for being the coordination hub and network of judicial authorities for cooperation in criminal matters. In respect to these, earlier guides vis-à-vis MLA encourage the use of other forms of cooperation alongside MLA or in the EIO context. This is meant to improve the efficiency and effectiveness of investigations and prosecutions.

4. Principles, Conditions, and Exceptions

A lot of principles, conditions, and exceptions exist within the EIO regime, which traditionally were also part of the traditional MLA regime. For purposes of this study, focus is given to seven, to wit: (1) sufficiency of evidence requirement; (2) dual criminality; (3) double jeopardy; (4) substantive considerations of human rights; (5) reciprocity; (6) speciality or use limitation; and (7) special offenses or national interest.

One can begin with the principle involving a sufficiency of evidence requirement which exists in both the regional and member state framework. It can be seen that in general, the more coercive or intrusive a measure is, the more requirements are needed to be provided by the issuing authority. One can cite as examples investigative measures involving search and seizures and surveillance methods, which require the issuing state to provide information as to the necessity and relevance of the information or evidence to be obtained.

In relation to this, both member state frameworks through interviews show that there is no exact barometer in determining "relevance" of a certain information or evidence that maybe subject of an EIO. This would happen in a case-to-case basis and is determined personally by the issuing authority. Germany, for example, is different from Anglo-American jurisdictions which need to abide with certain evidentiary requirements such as probable cause, for example. In light of these revelations, interviewees from both Germany and UK cannot recall any particular incident wherein an EIO or MLA request has been questioned on grounds of relevance.

Second, there is the dual criminality requirement which on a regional-level, is meant to be retained although with serious limitations. It does not apply to a list of 32 offenses. This is applied in UK and Germany as well in their respective domestic laws prior to the EIO, they more or less forego the dual criminality requirement depending on the investigative measure and/or criminal offense involved. Dual criminality in Germany, for example, applies in search and seizures in general. The dual criminality likewise plays a role when one reads through different sanctions to which a catalog of offenses is made available. Like Germany, the UK traditionally applies the requirement to search and seizure cases, as well as restraints and confiscation of assets. Also like Germany, dual criminality plays an (indirect) role in terms of denying the EIO because the investigative measure is limited to a catalog of offenses, to which the subject matter in the EIO is not included in.

Third, the protection against double jeopardy can be added to the existing principles or conditions involving the EIO. At the outset, it was a bit questionable how the same applies on transborder cases especially since the protection traditionally had an internal effect within the relevant legal system, may it be national or EU level. At most, there was only consideration of prior judgments in imposition of punishment or penalties. There was however the dire need to set in motion the transborder application of the principle of *ne bis in idem* given the desire to build an own area of justice and home affairs within the EU and with this, there was the greater risk for a person to suffer double, if not more, punishment based on the same set of facts. In view of the CJEU Spasic judgment, it was held that Article 54 of the CISA and Article 50 of the CFR are compatible with each other. The enforcement element is considered in the transnational application of the *ne bis in idem* principle.

Despite this resolution however, there are certain issues that still remained vis-à-vis the principle of *ne bis in idem*. Some of these pertain to application of the principle to other matters, albeit only with regard

final judgments. There are other member states likewise that adhere to the transnational application as stated above but also take into account whether there are elements of the crime committed wholly or partly in their respective territories.

Having mentioned this, the DEIO considers compatibility with the *ne bis in idem* principle but does not provide anything further. This is in stark contrast to the EAW instrument, which is consistent with Article 54 CISA and the CJEU judgment, albeit the EAW instrument distinguishes between a mandatory and optional ground to refuse: mandatory, if the other state is another member state; optional, if a third state. In terms of the EIO it is henceforth sound to consider the prevailing doctrine and/or provision found in the EAW instrument, CISA provision, and the CJEU Spasic judgment. It would be illustrative of prevailing doctrine and/or interpretation and would be further compatible to the *ratio decidendi* of the CJEU. Moving forward, member states which can either be an issuing or executing authority could take this into account: as an executing authority, to be equipped with a *ratio decidendi* to deny recognition or execution of an EIO; as an issuing authority, to prevent issuing the EIO at the outset to prevent triggering the principle.

As it should then stand, the transborder element of double jeopardy involves an enforcement element wherein no one shall be prosecuted or punished twice for the same offense based on same facts and the judgment therein has been executed, to be executed, or there is something in the national law that disallows execution. The same enforcement element is applied in the German law in its protection against double jeopardy vis-à-vis the EIO while it is not so clearly provided for in the UK law. Germany has done so in integrating the *ne bis in idem* principle in its implementing law as an optional ground for refusal. Accordingly, Germany decided to follow the EU legal approach as it recognizes that this can influence not only the decisions of German authorities as regards legal assistance but likewise those of other member states in relation to persons to whom the principle may apply vis-à-vis legal assistance requests. On the other hand, it becomes more questionable or uncertain for the UK on how the transnational application would be given the issue of its exit from the EU. One has yet to determine whether the UK should apply the jurisprudence of the CJEU or follow its own domestic application. It was opined that should the proceedings be held in the UK, then it might be prudent to apply UK domestic law and jurisprudence while EU legal approach would apply in proceedings or criminal matters in other member states.

As an optional ground to refuse recognition or execution of an EIO for Germany, German authorities do not automatically refuse should the principle apply. Instead, German authorities in practice would need to weigh the application of the principle with the principle of mandatory prosecution, or whether the crime was partially or wholly committed in Germany, with evidence readily available therein. Furthermore, German authorities would refrain from refusal should there be already an issue of whether the principle applies (or there is a violation of the prohibition) in the proceedings being held in the issuing state. It is posited that German authorities should not be the ones determining whether the prohibition exists, but rather, the matter is better left to the discretion of the issuing authorities, especially in cases when the requested information or evidence is highly determinant of the issue. Nonetheless, if there is an apparent risk to the person involved of his/her right being violated, then this delegation of discretion to the issuing authorities can be said to be reduced.

Given these concerns, there is a way to preempt or avoid in advance *ne bis in idem*. Eurojust released guidelines as to how to resolve matters involving conflicts of jurisdiction. It is interesting to note that in practice, judicial authorities from Germany for example are aware of the possibility of simultaneous proceedings in different member states for the same criminal offense or same accused. In deliberating whether to initiate or continue proceedngs that also involve other member states, different factors are taken into account, which more or less follow the factors provided in the Eurojust guidelines. In relation to this, the existence of *ne bis in idem* does not automatically result to inaction or cessation of investigation or criminal proceedings in Germany. This needs to be balanced with the principle of mandatory prosecution.

Fourth, there are substantive considerations of human rights in an EIO framework. Human rights are considered in many grounds for refusal that the DEIO provides. An example is if the EIO violates the principle of *ne bis in idem* or the protection against double jeopardy, as earlier discussed. UK and German laws also provide specifically the denial of recognition or execution of an EIO when there is no consent from the person being requested to give information or evidence. Additionally, UK law provides violation of non-discrimination as a ground to refuse recognition or execution of an EIO.

Likewise, the executing state can refuse recognition and/or execution should there be substantial grounds to believe that it would be incompatible with the executing state's obligations under Article 6 TEU (which relates to the different fundamental rights the EU and its member states

abide with). The operative phrase herein is "substantial grounds to believe", which means that an actual infringement of a fundamental right is not necessary before the executing authority can raise the ground for refusal. In connection thereto, German law would provide the same ground for refusal but in terms of human rights obligation under Article 6 ECHR and the CFR. UK on the other hand provides human rights obligations vis-à-vis the HRA.

Interestingly, the said ground for refusal based on human rights obligations was not available in the EAW instrument. Being a mutual recognition instrument, there was no mention of human rights obligations as a ground for refusal but then again, the EAW instrument also mentions the need to protect human rights. Thus, it was posited by many that it ought to be considered as a ground for refusal. The CJEU in the Aranyosi and Căldăraru cases made it clear that the principle of mutual recognition ought to be balanced with human rights obligations. Even if not explicitly provided, executing authorities were duty-bound to deny the EAW against Aranyosi and Căldăraru as there was the serious risk that both would be exposed to inhumane and degrading treatment in the facilities of the issuing authorities.

Having said this, certain human rights obligations come into play in the EIO framework that could merit denial of recognition or execution of an EIO. Common in both regional and member state frameworks for example is the principle of non-discrimination. If the EIO is apparently issued for purposes of discrimination, then denial of the same is in order. The same can be said for violating principles of legality and proportionality of criminal offenses and punishment (in German law, this falls under fair trial rights) or the prohibition against *ex post facto* laws. If the acts or omissions covered by the EIO are not criminal offenses at the time of its commission or omission, or the criminal offense was defined by law after the acts/omissions were done, then executing authorities are duty bound to refuse recognition or execution of the EIO.

One could look into the obligations in relation to the right to life vis-à-vis death penalty and the prohibition against torture, or cruel, inhumane, degrading punishment or treatment which have extraterritorial application. The CFR makes it clear that no person shall be removed, expelled or extradited to another state to which there is serious risk of death penalty, torture, or inhumane or degrading punishment or treatment. In terms of an EIO, an investigative measure could entail the transfer of persons in custody to give information or evidence. If the detention facilities are questionable and there is a risk of exposing the person to inhumane or

degrading treatment or punishment, then like in the cases of Aranyosi and Căldăraru, there ought to be denial of recognition or execution of the EIO.

It can likewise be mentioned at this juncture that due to the prohibition of death penalty in the EU and among its member states, and the extraterritorial application as mentioned above, then they are likewise duty bound not to cooperate in a general MLA framework as a requested or executing state if doing so would expose the affected person to serious risk of death penalty, torture, or inhumane and degrading punishment or treatment. A commitment is then necessary, for example, that the death penalty shall not be imposed by the requesting state. Alternatively, transfer of persons in custody would not be allowed if it would subject them to deplorable prison conditions bordering inhumane or degrading treatment or punishment.

Additionally, proportionality matters as a human rights obligation, especially in respect of Germany which considers it as a constitutional principle imperative to all government actions and decisions. It is integral in both instances of issuing and executing EIO's. Considering this, violations of the same can trigger the ground for refusal based on human rights obligations as well. In the alternative, another measure could be suggested, like what is provided in German law, that would be less intrusive and proportionate to the information required.

Fifth, reciprocity has been a traditional principle in mutual legal assistance and as regards the EIO, its application is not quite easily discernible anymore given the existence of the principle of mutual recognition in criminal matters. On a member state level, the UK and Germany would be able to provide assistance even without any existing treaty or agreement. With the introduction of instruments like the EIO, which are based on the principle of mutual recognition, it is argued that reciprocity is lost or seriously abrogated. The removal of executive discretion is a reason, as well as the lack of opportunity to deny an EIO should the same not be necessary and proportionate, and the limitation of the grounds to refuse recognition or execution. In light of this discussion, it must be said that UK and Germany still apply the principle of reciprocity with the way they handled the EIO's implementation domestically. UK still retains executive discretion, which the EIO instrument intended to take away from the equation of mutual legal assistance between EU member states by stressing the nature of an EIO as a judicial decision. The UK applies a lot of grounds for refusal, which arguably are more than what the regional instrument provides (the UK includes discrimination for example which is not in the DEIO), and retains the use of central authorities which have conditions

to be satisfied before it being allowed to transmit the EIO further to an executing authority. Mutual legal assistance or the EIO in the context of the UK is thus not completely depoliticized.

On the other hand, executive discretion in Germany still exists although it allows direct contacts between judicial authorities. The executive discretion that generally belongs to the Federal Government has been delegated to state governments, which then delegated the same to the public prosecutors' offices and courts. As it currently stands, public prosecutors' offices are the authorities imbued with this discretion through delegation. Germany then illustrates a point wherein executive discretion can still exist albeit there is non-usage of central authorities. Moreover, Germany retains the substantive aspects of reciprocity by not transposing the principle of mutual recognition in its entirety domestically. Well, its authorities tried to do in the beginning with the EAW but were quickly reprimanded by the German Federal Constitutional Court, whose inputs were taken into consideration into the new amendments. Accordingly, the principle of mutual recognition is good but it cannot be done without limitations. Authorities need to look into the domestic effect and the rights that may be infringed, as well as the consideration of the different constitutional principles such as proportionality, for example.

Sixth, speciality or use limitation is another traditional principle or condition in mutual legal assistance or international cooperation in general, together with the abovementioned reciprocity and dual criminality. At first glance, the DEIO is bereft of any mention of this rule. Although a further reading of the specific provisions of the DEIO would show that speciality still applies. Moreover, the EU framework has Directive (EU) 2016/680 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, which is relevant in the discussion of use limitation.

As to how the UK and German laws take this into account, they provide clearly for its existence. The evidence or information requested ought to be only used in respect of the subject matter indicated in the EIO, nothing more and nothing less. German authorities for example would appreciate that another request be made should the evidence or information obtained from them need to be used for another criminal matter. This is to ensure that there is still compliance with the requirements for the EIO and parameters provided by German law. Significantly, both Germany and the UK apply the Directive 2016/680 domestically, wherein the UK

integrated its provisions in Part 3 of its Data Protection Act 2018 while Germany has its own Federal Data Protection Act. Both laws provide the conditions, parameters, and requirements that ought to be followed in relation to processing of personal data as regards criminal matters and the transfer thereof to fellow member states, third states, and other international organizations. Further, the UK has specific legislation called the Investigative Powers Act of 2016 which covers investigative measures of law enforcement authorities that intrude on the privacy of individuals or private persons. The Investigative Powers Act of 2016 provides the needed safeguards and parameters anent interception of communications and data, as well as the retention and disclosure of such overseas by virtue of an EIO or MLA. It mandates the destruction of data if the purpose for the same has been fulfilled or there is no longer need for the information obtained. This finds application as in light of speciality and use limitations it means that data or communications vis-à-vis privacy obtained between the UK and another state, need to be destroyed unless meritorious grounds exist for its continuous use and custody. Similar principles are reflected in the Data Protection Act 2018, which applies data protection principles and rights to law enforcement proceedings, including general restrictions and requirements ought to be met before any processing and/or transfer is allowed.

The last principle, condition, or exception that can be mentioned is the existence of special offenses and national interest. While the EIO in both the regional framework and member states like the UK and Germany is over the idea of raising political offenses, military offenses, and the like as grounds to refuse, public order or national interest still does play a role in allowing a country to refuse an EIO. Both the DEIO and its implementing member state legislations provide for grounds to refuse the execution of an EIO on the basis of national or public interest of the executing authority. These include, but not limited to, immunity or privilege (under the law of the executing state that makes execution impossible), essential national security interests, territoriality, etc.

In relation to the foregoing, the ground of refusing the recognition and/or execution of a request because there are substantial grounds to believe that doing so would be incompatible with obligations of the executing state under Article 6 TEU could be considered equally as grounded on state interest. Even if it is easy to classify the same as slowly based on fundamental human rights considerations, it can equally be based on public order (or national interest in general) because, even if it takes account of fundamental rights, the same was formulated in broad terms wherein an

infringement is not required but only a substantial ground to believe that it could happen. Hence, it might as well be a political judgment call.

National interests also play a role in the postponement of recognition and/or execution of an EIO, when its execution might prejudice an ongoing criminal investigation or prosecution, or the objects, documents, or data concerned are already being used in other proceedings, until such time as they are no longer required for that purpose.

In addition to substantive provisions, there are procedural ones like the preparation of requests and execution of requests, the latter of which involve the applicable law, time limits, confidentiality, return of documents, and specific procedures for specific investigative measures.

C. Procedural Provisions

1. Usage of Horizontal Cooperation; Designation of Authorities

Interestingly, DEIO follows through with the paradigm shift from normal vertical cooperation and use of central authorities that occurs within a traditional MLA regime to a more horizontal form of cooperation, wherein issuing authorities and executing authorities directly correspond to one another as regard the EIO. The use of horizontal cooperation and direct contacts between authorities was first seen with the 2000 MLA Convention. In connection to this, there is as such no fixed 1:1 correspondence and instead exchange of EIO's occur directly between judicial authorities, which decide by themselves to recognize or execute the EIO. It removes the involvement of ministers or the use of executive discretion.

As to how this was brought in the respective legal systems of the UK and Germany, which both have central authorities for MLA requests, the UK designated issuing authorities (judicial authorities and prosecutors) and then central authorities to receive EIO's and decide on whether to transmit the same to the executing authorities; while Germany foregoes the central authorities vis-à-vis the EIO altogether and those designated authorities can be either issuing or executing ones. As to why the UK decided to retain central authorities for the EIO, this was in tune with the unique system it has compared to other EU member states. Its courts serve a different function and were hesitant to become administrative postboxes that would handle incoming EIOs or MLA requests. Moreover, the retention of central authorities work better traditionally for the UK as they have the needed expertise to handle both MLA requests and the EIO.

2. Preparation of Requests

As per the preparation of the requests, the DEIO provides minimum requirements to what information ought to be provided, which shall be accomplished in the official language indicated in the registry of the respective executing state and transmitted accordingly to the executing authority or central authority, when applicable, in a manner capable of producing a written record. The member states are also allowed to make use of the EJN to determine the appropriate executing or central authority. In cases wherein the receiving authority does not have competence to act on the EIO, the DEIO provides that the said authority transmits it *ex officio* to the authority-in-charge. Furthermore, open communication among authorities is encouraged to facilitate inquiries regarding the issued EIO. Additionally, the DEIO provides that the issuing authority ought to indicate whether the EIO issued is a supplement of an earlier EIO. The member state frameworks more or less mirror these, wherein the UK and Germany require that an EIO be issued in accordance with the form included in the DEIO, among other things.

In light of this, UK law gave out a reminder that issuing authorities ought to make sure of the EIO's necessity, as well as its applicability in a similar domestic case, and that should special requirements need to be met, that these have been accordingly complied with. In practice, UK benefits from liaison magistrates and the use of available networks between authorities in handling the preparation and issuance of requests. As regards German law and practice, it was clarified by interviewees that a complete set of facts is not required but sufficient information to allow recognition or execution of the EIO.

Moreover, German interviewees made interesting inputs as regards the prescribed form of the EIO. Given the *pro forma* EIO, it can sometimes be a stumbling block to the speediness required in a request or EIO. Most of the time, an EIO would involve taking of witness statements or searches and seizures and yet the form would contain matters that are not necessarily needed. For most old-timer MLA practitioners, the prescribed form is constraining when previously, MLA requests could simply constitute an email or a simple letter with the attached warrant. Further, the prescribed procedure for issuing requests might not be compatible with urgent cases as some interviewees experienced. This notwithstanding, practitioners found a way through open communication and coordination with the other authorities to make urgent cases work. There is also a possibility of

having the formal EIO transmitted later on, although this would depend on the receiving authority.

On the other hand, there are some who are appreciative of the prescribed EIO form. This is especially true for new practitioners and those who are in the receiving end of EIOs. It makes it easier to know and understand what the EIO constitutes.

Another thing which could be mentioned under this section is the participation of a private person, suspect or accused in the preparation of an EIO. In the advent of the EIO, there is a greater opportunity to participate given to the defendant and third parties, who may be affected by the issuance, recognition, or execution of an EIO. There has been a lingering concern on the protection of a defendant's rights due to the risk of imbalance between the prosecution and defense with respect to gathering of evidence abroad, which violates the principle of equality of arms.

Through the DEIO, a suspected or accused person may now request the issuance of an EIO either by person or by a lawyer on his behalf. This would however still be subject to the "framework of applicable defense rights in conformity with national criminal procedure." As regards how this is implemented, the UK criminal proceedings would allow the defense to file a motion for the issuance of an EIO on its behalf. According to some interviewees, this has been long existing in UK practice wherein one could request for the issuance of an MLA request. Having said this, interviewees have yet to encounter a situation wherein the same has actually been done. It is different however with Germany because as interviewees explained, a defendant or accused requesting that an EIO to be issued cannot be accommodated in an inquisitorial kind of system. The relevant law or the Code of Criminal Procedure also does not provide any provision regarding this. At most, one could expect victims or third persons requesting or suggesting the issuance of an EIO for a particular kind of evidence. But of course, there is no guarantee that their requests shall be accommodated. In line with this, one can then say that Germany is falling short of its positive duty by not giving the defense the rightful participation it arguably deserves in the issuance of an EIO. If one would recall the principle of sincere cooperation, adherence of Germany to its obligation would be then questionable because the aim of the DEIO is not being realized. But then again, Germany cannot be completely faulted in this regard due to the underlying incompatibility of its existing inquisitorial system with the aim of the DEIO. Whilst participation of the defense is ideal and ought to be realized in pursuit of defense rights, there ought to be a reevaluation

of how it would truly be put into fruition while considering differences in criminal justice systems and proceedings per member state.

3. Execution of Requests

a. Applicable Law on Execution

As regards execution of requests, the DEIO seeks to provide a solution to the diversified requirements for cross-border evidence to be admissible among member states. Some would follow *lex fori*, some *lex loci*, while some follow the principle of non-inquiry, which makes it difficult to put in place a uniform system as regards admissibility of evidence obtained elsewhere. The DEIO, as a solution, now provides that the EIO should be executed by the executing authority in accordance with the formalities and procedures expressly indicated by the issuing authority, unless the same are contrary to the fundamental principles or laws of the executing state. Additionally, the DEIO allows an issuing state to request for the presence of its own authorities in the execution of an EIO. This is however subject to the provision that the executing state may suggest other investigative measures should the requested investigative measure and/or formalities be unavailable in the executing state.

This notwithstanding, member states ought to have investigative measures on the following: (1) the obtaining of information or evidence which is already in the possession of the executing authority and the information or evidence could have been obtained, in accordance with the law of the executing state, in the framework of criminal proceedings or for the purposes of the EIO; (2) the obtaining of information contained in databases held by police or judicial authorities and directly accessible by the executing authority in the framework of criminal proceedings; (3) the hearing of a witness, expert, victim, suspected or accused person or third party in the territory of the executing state; (4) any non-coercive investigative measure as defined under the law of the executing state; and (5) the identification of persons holding a subscription of a specified phone number or IP address.

As to how the foregoing is transposed in the member state level, there was no explicit mention in the Regulations as regards what the applicable law should be in the recognition or execution of an EIO received by the United Kingdom but it would seem however that on the basis of the specific procedures mentioned in the Regulations, the EIO shall be

executed by the UK in accordance with what has been provided for in the said EIO. This notwithstanding, the UK authorities had the elbow room to suggest other investigative measures which could be less-intrusive but would still get the job done, provided there is permission from the issuing state, among other requirements to be satisfied. It must be noted further that UK law allowed authorities from issuing states to be present under certain conditions, including that these authorities can be held liable under the applicable police laws in the applicable jurisdiction the execution of an EIO takes place. Thus, for all intents and purposes, authorities from issuing states allowed to be present in the UK should abide by applicable UK law and act accordingly.

German law provides that the investigative measures, including any coercive measure, subject of the EIO or any request for legal assistance shall be carried out in the same rules as if the request has been made by a German authority, which means, there shall be no distinction under procedural law whether the hearing of a witness, for example, is conducted on the basis of a request or EIO, or in the context of a national criminal investigation. Given the same, the issuing state may provide the formalities that ought to be followed in the execution of the EIO and as long as the same would not violate the fundamental principles of the German legal system, the formalities provided for in making and executing an EIO shall be followed and that all responsible authorities are requested to comply with. Should the special formalities or requirements be not satisfied, the corresponding authority of the requesting state shall be accordingly notified. Additionally, the presence of the issuing authorities during the execution of the EIO may be requested.

This mirrors the solution forwarded by the DEIO. German law moreover provides for specific investigative measures and the intricacies that ought to be followed. As regards audiovisual interrogations, for example, it shall be made under the direction of the competent body and on the basis of the right of the requesting/issuing state. At most, the German authority shall participate in the hearing by taking notes on the person's identity and of the compliance of the hearing with the essential principles of German law. It is imperative likewise to advise the accused as well as the witnesses at the beginning of the hearing of their respective rights, which shall be according to the law of the requesting/issuing state and under German procedural law. The same standards apply to hearings of persons through telephone.

b. Applicable Procedural Rights

Human rights are equally considered with regard the procedures in an EIO framework. At the outset, the DEIO gives the idea that defense rights are given paramount consideration in obtaining evidence through the EIO. The DEIO acknowledges that the transnational dimension of a proceeding must foster cooperation but it should not compromise the rights of the defendant. Member states also have the positive duty "to ensure that in criminal proceedings in the issuing state, the rights of the defense and fairness of proceedings are respected when assessing evidence obtained through the EIO" but without prejudice to what the national criminal proceedings shall provide.

This positive duty is fleshed out and specified even further at the many aspects of implementing the EIO. First, the DEIO integrates the directives on procedural rights, in particular, the one on the right to interpretation, right to information, and the right to access a lawyer in criminal proceedings. While the DEIO was silent as to how these directives would come into play, these directives were meant to approximate procedural law and rights among the member states. In addition to these directives, there are also directives focusing on one's presumption of innocence, the right to be present during trial in criminal proceedings, the right to legal aid for suspects and persons included in criminal proceedings and those subject to the EAW. In relation hereto, the European Judicial Training Network and Fair Trials International came up with toolkits and guidelines as to how these directives should apply in practice.

As to how these directives and the respective procedural safeguards they tackle apply on a member state framework, there are human rights considerations in the specific procedures provided by the DEIO on specific investigative measures and the execution of the same. To illustrate, one could look into provisions involving the transfer of persons from one state to another for purposes of giving evidence or assisting in the investigative measure as either suspect or witness and hearings by virtue of teleconference or other audiovisual transmission, as well as by telephone conference. There is also the primordial consideration of protecting personal data, wherein member states are enjoined to comply with the relevant framework decision on the same in implementation of frameworks relating to criminal matters. Access to such data shall be restricted, without prejudice to the rights of the data subject, and only authorized persons may have access to such data. Notably, the foregoing considerations vis-à-vis specific investigative measures are carried over in the member state frameworks of

the UK and Germany. Simultaneously, the UK and German legislations would provide for what needs to be taken into account as regards preparing the EIO itself and issuing the same.

Nonetheless, there are other procedural rights considerations that are not explicitly mentioned in the UK and German laws that ought to be taken into account. One would need to look into other sources of their respective laws such as the basic law, code of procedures, or other legislation to find out how the aforementioned procedural rights could apply. To illustrate, UK has laws in respect of competency and compellability of witnesses that matter in an EIO framework. Having said this, there is generally no 1:1 congruity between the UK and Germany as regards how procedural rights play out in their respective criminal law systems. This is understandable because while the UK follows an adversarial kind of system, Germany follows an inquisitorial one. In line with this, one comment from an interviewee comes to mind wherein he mentioned how the UK follows a cosmopolitan approach in determining whether procedural rights have been respected or infringed. One cannot simply look into the counterpart proceedings of another member state and say that this is the equivalent of a certain stage in UK criminal proceedings. One needs to weigh certain factors to determine and cannot haphazardly conclude.

In connection to this, there is the question on whether the suspected or accused person could intervene in the issuance and/or execution of the EIO – a question that naturally arises given the foregoing imprimatur. The DEIO mostly provides provisions that require remedies to be taken up in the issuing state and not the executing state. This would be consistent with the principle of mutual recognition that limits executing states to further inquire or question the propriety of an EIO issued. To illustrate, one could only ask a remedy from the issuing state in issues of necessity, adequacy, and/or proportionality. Not even the executing state can refuse recognition or execution on these issues. At most, it could communicate with the issuing state regarding the same.

In connection to this, member states must ensure that within their own national legal orders, legal remedies equivalent to those available for similar domestic cases shall be provided for in the investigative measures to be indicated in the EIO. While substantive issues surrounding the EIO may only be challenged in the issuing state, this should be without prejudice to the guarantees of fundamental rights in the executing state. This could either mean that the executing state shall ensure fundamental rights are duly respected, or the possibility to refuse execution on substantial grounds that it could cause infringements of these rights, or the possibility

to consult the issuing authority on doubts about the proportionality of the investigative measures included in the EIO.

Despite the DEIO provision that states that remedies ought to be taken in the issuing state, one could seek remedies in UK proceedings vis-à-vis issuance and/or execution of the EIO. As an executing state, one may not have the remedy of questioning the necessity, proportionality, or adequacy of an EIO issued but as learned from interviewees, it might still be possible to raise questions on the same, or on the general propriety of the said EIO with the UK courts or the UK central authority involved. There has yet to be a case law on it but one expert states this scenario is possible, though he believes that courts would probably take a strict approach and decide on stringent circumstances.

Furthermore, the UK law allowed the suspension of transmittal of evidence or information subject of an EIO pending resolution of a legal remedy or the existence of serious and irreparable damage. Interestingly, the UK traditionally allowed authorities to revoke consent to transmit evidence, albeit the said evidence has been transmitted already. It has yet to be determined whether this applies further in the context of the EIO.

This notwithstanding, one can find something similar in the EIO Regulations of the UK, which provides for a so-called application for a variation or revocation order. This is based on a limited number of grounds, which are grounded on human rights. Said application is available to a suspect, accused, or any other affected person. An interviewee mentioned that there is no exact legal basis for this variation or revocation order and one has yet to encounter case law about it. Nonetheless, it is a remedy not equally found in German proceedings. Moreover, an EIO is normally issued without the knowledge of the suspect, accused, or any other person. It happens usually during the investigation stage and thus, the defense would not be apprised. It follows that it would be difficult, if not impossible, for the defense to question the issuance of the EIO. Based on interviews, it was learned that what would be possible for the defense is to question the evidence acquired through the EIO later on.

c. Applicable Time Limits

In addition to the abovementioned, there are time limits placed on both the regional and member state instruments as regards the confirmation of receipt, decision to recognize or execute an EIO, executing the investigative measure indicated in the EIO, and delivering the evidence to the

issuing authority and/or state. There is consistency as to the number of days the executing authority ought to abide with, as well as the reasonable grounds and circumstances wherein postponement of making a decision to recognize or execute, as well as the time to execute the EIO and delivering the information or evidence. Should there be non-compliance or undue delays, it is possible for member states to inform the Eurojust, although the Eurojust does not have adjudicatory powers. At most, it would send reminders or notices to the member state in question or help in finding a solution to the delays. So far, authorities who were interviewed have not encountered a situation wherein they raised concerns on delay with the Eurojust. Significantly, this brings into light what one interviewee from the UK mentioned about practitioners fixing generally issues among themselves and without court interventions. Practitioners would generally look into the bigger picture and while small details or certain questions would be relevant for certain cases, they would try to make the system work.

With this remark in mind, both UK and German authorities acknowledge that while these time limits are not mandatory, they provide good motivation to act swiftly on requests or EIOs. Interviewees have been consistent in pointing out that the speed element the EIO has structurally introduced in MLA practice as something positive. Interestingly, the UK is said to act speedily or at least make an effort to make good its endeavors. As mentioned earlier, there is allegedly a political aspect to this and promotion of self-interest.

Other than this, there is appreciation from German authorities for example, that the EIO requires the requested authority to confirm receipt of the EIO. Prior to this, they would sometimes need to second guess whether the other authority received its EIO. With a confirmation of receipt, one can discern the amount of time an EIO has been with the executed authority and gauge when a follow up is needed.

d. Authentication of Documents

The regional and member state frameworks are in agreement as to the requirement of transmitting the EIO in a manner producing a written record. German practice further requires that should there be inquiries post-transmission as to the correctness of the EIO or the incompleteness of the same to enable execution or recognition, then it should be made also in the same manner of being able to produce a written record.

e. Confidentiality

It can also be said procedural-wise that confidentiality, including protection of personal data, is of paramount importance in dealing with EIO or general mutual legal assistance requests on both regional and member state levels. Parameters and safeguards are in place to ensure protection of the same. The UK, for example, penalized unauthorized disclosure in relation to account monitoring orders, etc. German law acknowledges however that while confidentiality is essential and needs to be protected, there would be instances that disclosures might be needed in furtherance of the execution of an EIO or request.

f. Return of Documents

Adding to the procedural provisions is the return of documents, which is related to the substantive principle of speciality or use limitation. Accordingly, the regional and member state frameworks do not provide for such requirement, unless the executing authority or state communicates to the issuing authority the need to return of the evidence to the former once the criminal matter has been resolved or finished. Should the return of evidence be required, the German law additionally requires an assurance that not only rights of third parties will remain unaffected, but also that the objects surrendered subject to reservation shall be returned immediately upon request.

g. Specific Procedures

Lastly, the regional and member state legal frameworks are replete of specific provisions addressing specific investigative measures. These specific provisions provide the additional requirements that ought to be satisfied as well as how the same should be carried out in execution.