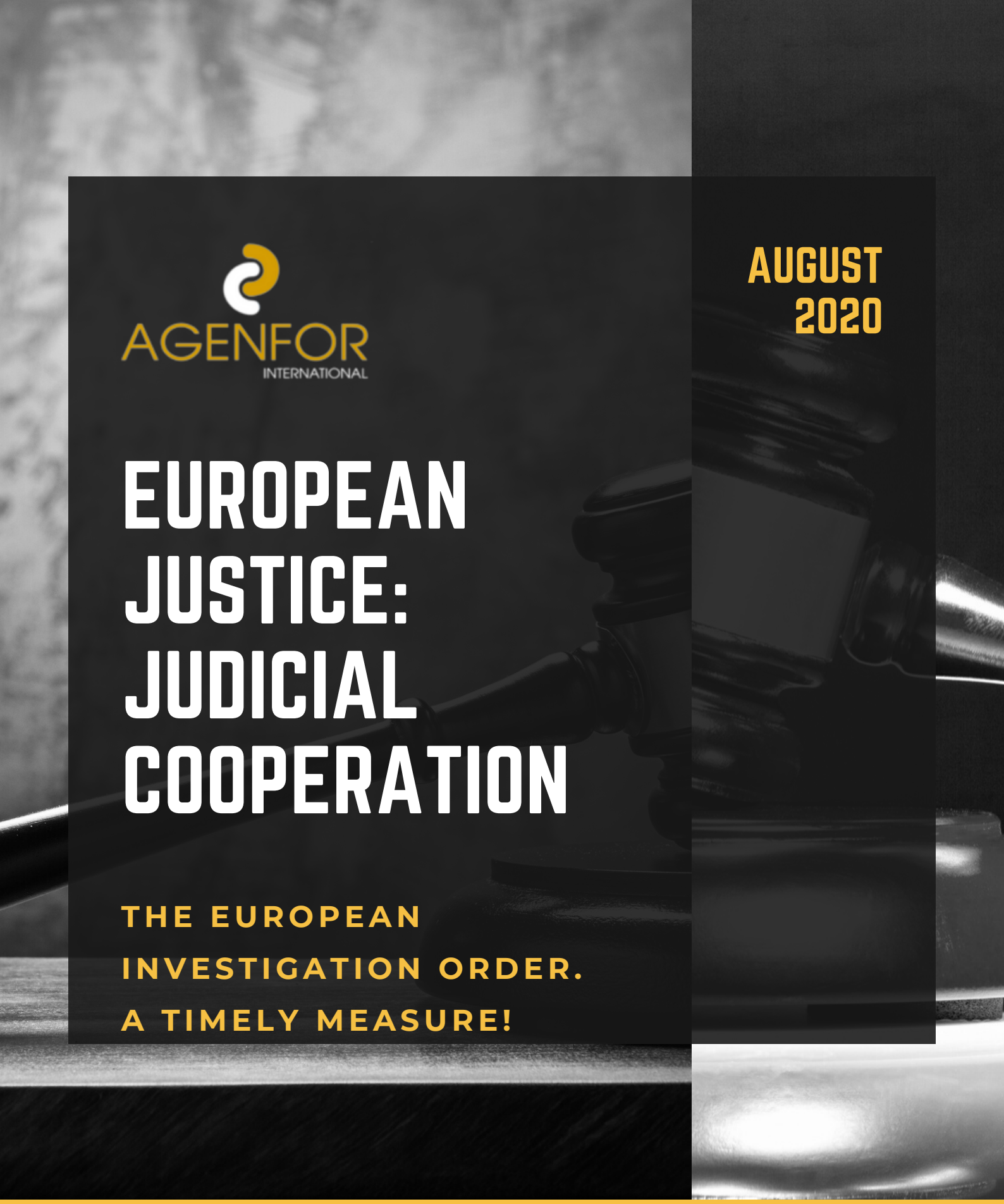


AGENFOR INTERNATIONAL

AUGUST 2020

EUROPEAN JUSTICE: JUDICIAL COOPERATION

THE EUROPEAN INVESTIGATION ORDER. A TIMELY MEASURE!

Prepared by Fabrizia Bemer

Since the Directive 2014/41/EU[1] came into force in April 2014 it has been possible to make several observations on the state of the European Investigation Order (EIO). As recognized in the Preamble of the Directive (*5), the European States needed a “new approach in cooperation” and the time was right to put the new instrument (the EIO) into action.

The EIO, although it is clearly outlined, was first thought of by certain member states as an instrument used to impose homogenization of judicial systems within the EU. However, this was the exact opposite of what it was intended to do, since the real scope of the EIO is to speed up procedures within diverging Member State (MS) judicial systems[2].

The innovate element of the EIO consists in the fact that the issuing State, with the help of the executing State, conducts investigations “Extra Regnum” under certain guarantees[3]. It is not subject to the rules of the MLA requests.

But why was this change needed? It is well explained in the opening address of the final conference for the e-Evidence project led by the European Commission, DG Justice and Consumers.

The European Commissioner for Justice, Didier Reynder, stated *“Our day-to-day life is more and more determined by digital tools of all kinds: instant messages, geo localization services, digital signatures, electronic financial transactions and he list goes on. These are making our life easier. This is unfortunately, equally true for wrongdoers[4].”* Hence, the challenge is to keep up with the criminals and investigate more quickly.

I will not examine the Directive in detail here, but I will try to highlight some considerations on how the instrument is used and what it has accomplished up until now.

The first consideration is that the Commission has financed, and is supporting, different projects on the EIO in order to gain a better understanding of the European Investigative Order. We will have the first final considerations from the Commission at end of the year. I am speaking from my experience working daily on EIOs coming from all MSs and as someone involved in the different relevant projects[5]. I have also written a previous article on the same subject for the occasion of the EISIC Conference 2019[6].

[1] Official Journal of the European Union L130.
[2] Official Journal of the European Union – Directive 2014/41/UE (Preamble *5).
[3] Official Journal of the European Union – Directive 2014/41/UE Art. 4.
[4] Opening Address by European Commissioner for Justice, Didier Reynders; final conference Evidence 2 / e-codex Project , January 21-22 2020.
[5] https://www.agenformedia.com/projects/sat-law/; https://www.ceps.eu/ceps-publications/jud-it-handbook/.
https://www.agenformedia.com/projects/sat-law/; https://www.ceps.eu/ceps-publications/jud-it-handbook/.
[6] EISIC (European Intelligence and Security Informatics Conference) CONFERENCE 2019 – Short Paper Contribution by Fabrizia Bemer

The Directive was indeed timely when it was introduced but it is already becoming a somewhat dated, despite the fact that the last European country to implement it did so as late as July 2018. While, on the one hand, it has been successful in speeding up investigations, it has been criticized for a number of reasons. In all the projects referenced above, the main criticisms raised are largely the same, as too are many of the suggested remedies. However, in my opinion some important points remain to be defined and discussed.

First of all, the European Investigation Order is a general instrument and the Directive does not clearly specify whether the procedural "iter" can be used at the pre-trial or trial phase. Though it is said in *18 of the Preamble "this Directive does not have the effect of modifying the obligation to respect the Fundamental Rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union (TEU) and the Charter", in practice it is not so, because the weak ring in the chain is the defense of the accused[7]. Another important point is the filling in of the EIO Form: The form is freely accessible in word format in all MSs languages on the EJN website, complete with explanations. Nevertheless, Judges and Prosecutors have difficulties filling it in, both from a practical point of view but also from a formal point of view. This is especially true for the final section of the form, when they are asked to define the validating authority[8]. This issue became evident through the Sat-Law Project which is now being elaborated in the TREIO Project dedicated to the EIO training.

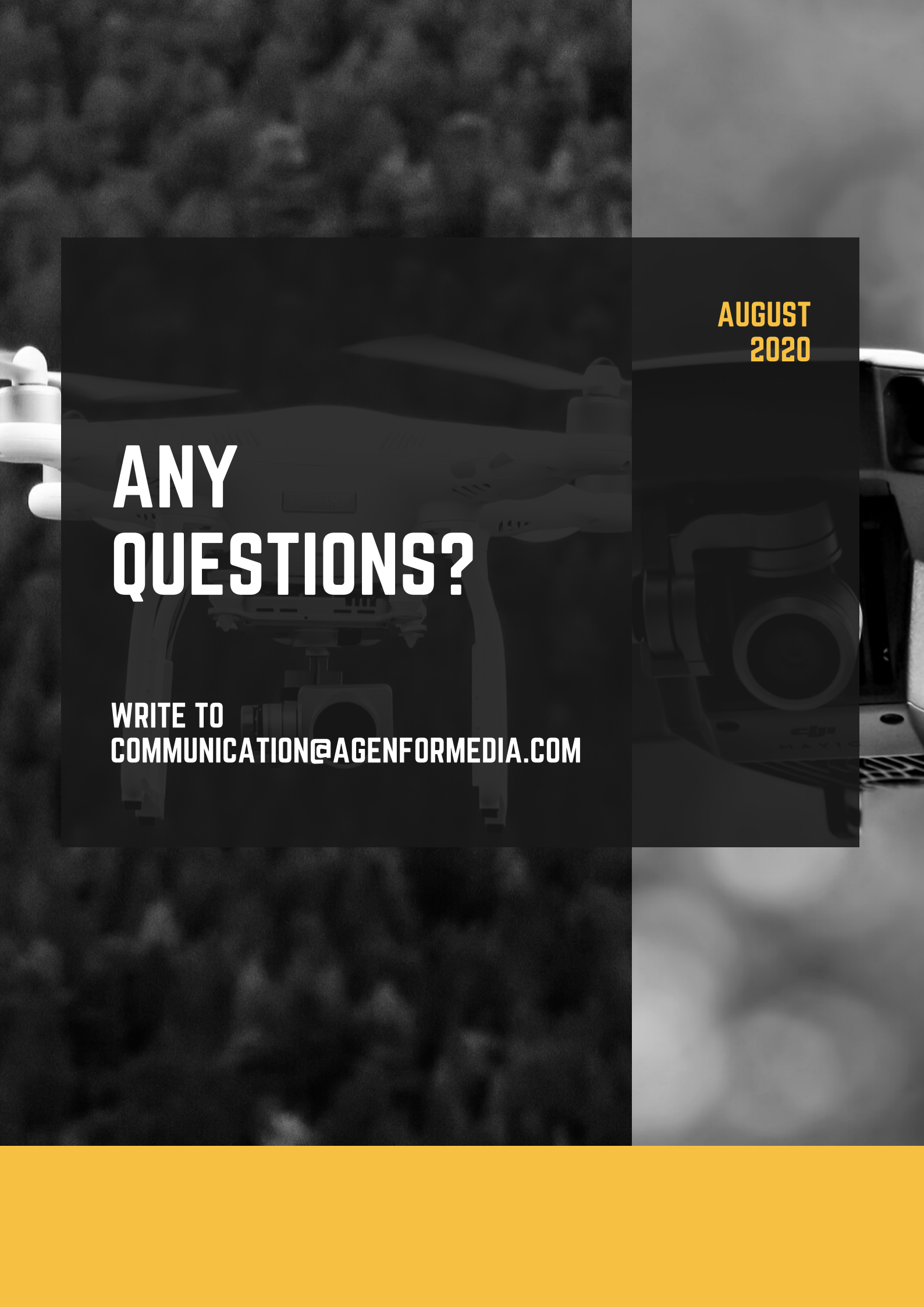
For many States, another important question concerns the request for videoconferences [9]. In order to guarantee the protection of the rights of the accused, it is necessary to be able to offer rooms with adequate privacy standards and the required equipment, which is not always possible at present.

One final comment concerns the possible development of the EIO into an evolved form, which could be called **"EIO +"**. In the near future, the Commission foresees the exchange of EIOs among Courts through a secure platform instead of personal e-mails or post service. Everything related to MLAs in general will be able to be exchanged on that platform. In this case, all MLA requests could be made in this way, including the requests that are listed in the European Protection and Preservation Order. I have personally had the occasion to express my point of view in the presence of a representative of the Commission during the Task Force Meeting for the JUD-IT Project[10] in Brussels at CEPS on December 18th 2018

[7] See: https://www.ceps.eu/ceps-publications/jud-it-handbook/
page 30 and following ones .
[8] Directive 2014/41/UE Annex A- Page 31. See also https://www.agenformedia.com/projects/sat-law/.
[9] Directive 2014/41/UE Annex A
Section C (hearing by video conference)
[10] https://www.ceps.eu/ceps-publications/jud-it-handbook/.in

I will repeat here what I emphasized then: the European and Preservation Order should not be separate, but included in the EIO so that the synthesis of the two Orders (to be transformed in a new version of the form or to simply create a new one) could give rise to a complete, new and, above all, functional instrument of judicial cooperation. All stakeholders could benefit from this form, especially law enforcement, because all actions would be enshrined in the framework of a judicial tool. This is an argument that I will elaborate on in another article in the next issue of the bulletin.

**The opinions expressed in the articles are those of the authors and do not necessary reflect those of Agenfor, however they are important insights for the public debate.*



AUGUST
2020

ANY QUESTIONS?

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