

CROSS-BORDER CRIMINAL EVIDENCE GATHERING

The use of European Investigation Orders in Spain and England & Wales

Introduction

The last 10 to 15 years has seen a significant increase in criminal enforcement against companies, and an increase in co-operation between states when investigating and prosecuting corporate crime. As a result, multi-jurisdictional companies (and their employees) are at greater risk than ever of becoming involved in a criminal investigation, whether as a suspect or a witness. It is therefore important that companies and their employees are aware of the process that will be followed if they are required to provide evidence as part of a criminal investigation, and how best to prepare for that process.

In this paper we will outline the process of taking evidence for use in criminal proceedings in Spain and in England & Wales, specifically witness evidence. First we focus on the domestic position in each jurisdiction, but then we turn to focus on the use and execution of European Investigation Orders (EIOs). EIOs were introduced in May 2014,¹ with the aim of simplifying the process of obtaining evidence from EU member states in cross-border criminal cases. We will conclude by addressing the question of preparing and assisting witnesses for giving evidence as part of criminal investigations, particularly within the framework of an EIO.

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Domestic approach to gathering witness evidence: Spain and England & Wales

Spain

Evidence gathering

In Spain, criminal proceedings are regulated primarily by the Criminal Procedures Act (CPA), which has been in force since 1882. The CPA divides criminal proceedings into two stages: the investigative stage and the trial stage. Each stage is functionally entrusted to separate judicial bodies.

The first stage (the investigative stage) is aimed at carrying out an investigation of the suspected criminal conduct, in order to determine whether the conduct should be admitted for judgment at trial (the second stage). The first stage is when so-called "investigative measures or procedures" are carried out to establish, based on the available evidence, the possible existence of a crime, as well as the type of offence(s) and the alleged perpetrator(s).

One of the main investigative measures deployed in the first stage of Spanish criminal proceedings is that of witness depositions. This investigative measure is regulated by Articles 410 to 450 of the CPA.

Witness testimony is obtained personally from the witness. It consists of a natural person, other than the suspect, testifying to the facts as they know them. Witness testimony is based on sensorial perceptions that were acquired outside the proceedings and in relation to some past event.

Witness depositions must be ordered by a judge and their purpose is to investigate the facts, to determine who was responsible and, as appropriate, to order other measures.

As a general rule, any individual residing in Spanish territory, regardless of their nationality, may be called as a witness if they can provide some information of interest in relation to the investigation of the facts. To that end, the witness will be summoned by the court clerk via subpoena (except in urgent cases). The subpoena will include, among other information, the subject matter of the summons and the place, date and time the witness is to testify.

¹ EIO were introduced by way of Directive 2014/41/EU of the European Parliament and of the Council, dated 3 April 2014 DOEUL no. 130, dated 1 May 2014. In Spain, the directive was transposed via Act 3/2018, dated 11 June, which amended Act 23/2014, dated 20 November (regarding the mutual recognition of judicial decisions on criminal matters in the European Union) and regulated the European

Testifying constitutes a duty that, in turn, generates a number of **obligations** that arise from Article 118 of the Spanish Constitution² and which can be classified as follows:

- The **obligation to appear before the judge** constitutes the first obligation of a witness.³ Like most obligations, violation of it entails a penalty; specifically, a fine that can range from EUR 200 to EUR 5,000. In certain serious cases, it could entail arrest for the obstruction of justice or gross disobedience.
- When appearing before the court, the witness is **obliged to testify**, and refusing to do so could trigger prosecution for obstruction of justice or gross disobedience.
- This general rule has certain exceptions: (i) any person that is obliged to observe secrecy due to their office or position is exempt from testifying; (ii) said exemption is also enjoyed by the suspect's closest relatives;⁴ and (iii) individuals with physical or moral disabilities that impede them from giving a statement are also exempt.
- Finally, the witness is **obliged to tell the truth**. To such end, they will testify under oath and failure to comply with said obligation constitutes the crime of perjury.

In addition to these obligations, witnesses also have certain rights, such as the right to receive adequate compensation from the party that calls them as a witness.⁵ Said compensation must be sufficient to cover travel and subsistence. However, failure to receive such compensation in advance does not absolve the witness from their obligation to appear before the court. Likewise, as part of witnesses' fundamental right to the presumption of innocence, they are entitled not to testify against themselves nor declare they are guilty, pursuant to Article 24.2 of the Spanish Constitution. Witnesses shall not be obliged to testify about facts or respond to questions that could imply criminal liability for them. If, in the course of the deposition, such circumstance becomes evident, the deposition will be suspended immediately and the legal provisions established for suspect depositions will be followed.

Practical aspects

During the deposition, a witness cannot be accompanied by a lawyer, unless they are a victim of the crime, in which case they may be accompanied by their legal representative and a person of their choice. Likewise, in the case of witnesses who are minors or who lack capacity, the examining judge may agree to have the deposition executed through the intervention of experts and the public prosecutor.

Depending on the technical capabilities of the court, the deposition will be recorded in writing (transcribed) or in an audio-visual format.

Once the witness has been summoned and has appeared before the court, they will testify, assisted by an interpreter if necessary (always in the context of executing an EIO) and, after verifying their identity by means of their national identity card, and once they have taken an oath to tell the truth, they will answer "general legal questions" regarding their personal data and their possible relationship or conflict with the other parties in the proceedings.

Investigation Order. Act 3/2018 was published in Spain's Official State Gazette (BOE) on 12 June 2018. In England & Wales, the directive was transposed via the Criminal Justice (European Investigation Order) Regulations 2017 (SI 2017/730).

² "Individuals are obliged to comply with the final judgments and decisions issued by Judges and Courts, as well as to collaborate with them in the course of the proceedings and in the enforcement of court decisions." Art 118 Spanish Constitution.

³ This duty has some exceptions, as can be expected, in the case of the King, the Queen, their respective consorts, the Crown Prince, the Regent and diplomatic agents. The other persons in the royal family, as well as presidents or members of the government will also be exempt from having to appear before the judge but not from testifying, as they can do so in writing, regarding facts that they know due to the office they hold, among others.

⁴ "The following individuals are exempt from the obligation to testify: the direct ascendant or descendent relatives of the accused, their spouse (or person holding a de facto relationship analogous to marriage), their siblings by blood or marriage, and the collateral blood relationships up to the second degree of consanguinity, as well as the relatives referred to in Article 261.3. The examining judge shall warn any witness included in the preceding paragraph that they are not obliged to testify against the accused; but that they may make such statements as they deem appropriate, and the clerk of the court shall record their response to said warning." Art. 416 CPA.

⁵ Either the prosecutor or the defendant.

The witnesses will then freely and spontaneously narrate the facts that are the subject matter of the lawsuit. Thereafter, the judge will ask the questions they deem necessary to clarify the facts, then allowing the Public Prosecutor's Office and the rest of the parties (or their lawyers) to ask their questions.

Once the deposition is over, the court clerk will inform the witness of their obligation to appear and testify again before the competent court when they are summoned to the trial to provide their part of the witness evidence. The court clerk will also warn the witnesses that they are obliged to keep their testimony confidential and that they are forbidden from disclosing its content or from making any public statement in relation thereto.

The witness deposition (whether transcribed or in audio-visual format) will be documented in the appropriate certificate, which will be legalised by the court clerk and provided to the parties.

England & Wales

Evidence gathering

The process in England & Wales for gathering evidence during a criminal investigation differs to that in Spain. In England & Wales, the police and particular regulators/prosecution authorities have their own powers to gather evidence and interview suspects or witnesses, which is then presented before a judge/jury during the course of a criminal trial.

The Police and Criminal Evidence Act 1984 (PACE) governs the powers of the police to investigate and gather evidence in relation to suspected crimes. PACE will also apply to persons other than police officers who have been charged with the duty of investigating offences or charging offenders.⁶ PACE (and its accompanying codes of practice) sets out the relevant powers (and the conditions on the exercise of those powers), including to interview suspects.

In addition, specific bodies charged with the investigation of financial and business crimes have their own powers to investigate offences that fall within their remit. Such bodies include the Serious Fraud Office (SFO), which investigates (and also prosecutes) serious or complex fraud, bribery or money laundering, in respect of offences committed by both individuals and corporates. Section 2 of the Criminal Justice Act 1987 grants certain investigative powers to the SFO ([section 2 powers](#)), which include powers to:

- search property
- compel a person to provide information or documents to it
- compel a witness or suspect to attend an interview

In respect of (b) above, the SFO will issue what is known as a section 2 notice to an individual who it believes holds any information relevant to its investigation, thereby compelling it to produce this to the SFO. If the section 2 notice is being issued in respect of documents or evidence held by a company, it will usually be personally addressed to the most senior member of the organisation who is aware of or responsible for the matters under investigation. A deadline for compliance will ordinarily be set in the notice. It is a criminal offence to fail to comply with a section 2 notice without a reasonable excuse. A section 2 notice will supersede any obligations of confidentiality, but legally privileged material does not have to be provided.

In respect of (c), the SFO can compel a potential witness to attend an interview in order to answer all questions on any matters relevant to the investigation fully and accurately. As above, it is a criminal offence to fail to do so, without a reasonable excuse, or to make a statement recklessly or deliberately that is known to be false or misleading.⁷ However, the witness is otherwise protected against self-incrimination, meaning that anything said in the interview cannot (in most circumstances) be used as evidence against them,⁸ and the interview cannot be used as a means to obtain material subject to legal professional privilege.

⁶ Section 67(9) of PACE.

⁷ Section 2(14) of the Criminal Justice Act 1987.

⁸ The main exception here is where the witness is later prosecuted for a separate offence and the evidence the witness gives for the separate offence contradicts the evidence previously given for the earlier interview.

As in Spain, anyone who is required to attend the SFO's premises to be interviewed as a witness may be entitled to seek reasonable expenses from the SFO (but this does not apply to any legal representative accompanying them).

Finally, it is worth noting that, in relation to suspected offences under the UK Bribery Act 2010, the SFO can request the disclosure of information under its section 2 powers even before an investigation has commenced.

Practical aspects

If the SFO elects to interview a particular witness during an investigation, it may be as simple as a phone call or an invitation to attend the SFO offices on a voluntary basis. However, as explained above, the SFO also has the option to compel a witness to attend an interview by issuing a section 2 notice.⁹ Once the notice is issued, the recipient must attend the interview at the time and place specified¹⁰ and answer all questions truthfully on any topics relevant to the investigation.

The SFO has the discretion to allow a lawyer to accompany the witness to the interview. Accordingly, on receipt of a section 2 notice, it is important for the recipient to promptly seek legal advice; especially as the lawyer is required to apply to the SFO in order to attend the interview. The SFO will approve the request in the event that they consider the lawyer will either assist the purpose of the interview or provide essential assistance to the witness (whether to give legal advice or provide pastoral support). An additional legal representative is also able to attend to take notes by hand, though the interview is not allowed to be recorded or transcribed by the attendees.¹¹ If the lawyer in any way obstructs the interview process or prevents the free flow of information, the SFO is able to exclude the lawyer from the interview. The SFO retains discretion to refuse the presence of a legal representation at the interview, for example if the lawyer's attendance would cause a delay to the interview.

During the interview process, the SFO is required to uphold certain standards including treating the witness fairly, explaining the investigation process and ensuring the witness is protected from undue influence or intimidation. Once the interview is completed, the witness is required to keep all matters discussed confidential (though discussions are, of course, permitted between lawyer and client). The confidentiality requirement is to ensure the investigation is not disrupted (and disruption of an investigation could amount to a criminal offence). This is of particular importance when employees are called as witnesses in respect of an investigation into their employer (or facts relating to their employer). In these situations, it is of particular importance that the employee has its own independent legal advisor, separate to the company's lawyers. Finally, the SFO may also ask the witness to provide a written statement, though it cannot compel the witness to do so.

In the context of a police investigation, a person may be brought to a police station under arrest (if they are a suspect) or otherwise attend the station voluntarily. The police must allow for proper breaks (at least 15 minutes every two hours).

Importantly, in the case of voluntary attendance, the attendee is free to leave at any time.

International approach to gathering witness evidence: EIOs

Entering the international arena, the principle of mutual recognition is a cornerstone of European cooperation in criminal matters and a principle based on the mutual trust of the member states in the European Union. In particular, the development of cooperation around the gathering of witness evidence has been both fast and positive.

In contrast to the previous fragmented system of transnational evidence gathering, the EIO regime provides a coherent instrument for cooperation that allows a member state (the issuing state) to request

⁹ Pursuant to section 2 of the Criminal Justice Act 1987. Importantly, the SFO does not need to obtain a court order to issue this notice.

¹⁰ In practice, the time and location is usually agreed by the SFO and the recipient in advance.

¹¹ For this reason, digital devices are not allowed in the interview room. However, the SFO are likely to digitally record the interview and will explain this procedure in advance of the interview.

evidence to be gathered and investigative measures to be taken by another member state (the executing state) in order to use them in the issuing state's domestic criminal proceedings. An EIO may also be issued to serve process or evidence that is already in the executing state's possession, or even to take measures to secure evidence or conduct an investigation.

EIOs may be issued with respect to any criminal proceedings or other proceedings before a court having jurisdiction in criminal matters in an issuing state.

This very broad regulation makes it possible, in principle, to request any investigative measure allowed in the issuing state's legal system to be performed in another member state, including the gathering of evidence.

The procedure for issuing an EIO is based on the principles of proportionality and need. The measure to be taken must be consistent with the purpose of the proceedings for which it is requested and it must be possible for the same measure to be carried out under like conditions in comparable domestic proceedings of the executing state. In addition, an executing state may refuse to execute an EIO on certain grounds (for example, if execution would violate the principle of double jeopardy, or, broadly speaking, if the dual criminality test is not met).

Special features of execution of an EIO in Spain

In Spain, the competence to issue an EIO is shared by judges and public prosecutors; the competence to receive EIOs from other member states is held by public prosecutors.

Although the necessary harmonisation among the different national Spanish laws regarding investigation and gathering evidence is currently insufficient, the EIO's general rule is that the investigative and evidential measures requested by the issuing authority will only be carried out by the executing state if they can be ordered in a "comparable domestic case" in the executing state. In this regard, article 206.1 of the Spanish Act on Mutual Recognition of Judicial Judgments in Criminal Proceedings in the European Union¹² lists a number of "privileged measures" that competent authorities will order in all cases, one of which is the measure involving witness depositions.

As for the procedure to execute depositions, the Directive 2014/41/EU of the European Parliament (**Directive**) is clear in Article 9.1, where it indicates:

The executing authority shall recognise an EIO, transmitted in accordance with this Directive, without any further formality being required, and ensure its execution 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 [...].

In practice, this means that the procedure followed will be that of the executing state. For example, in the case of Spain, the procedure entails testifying under oath — with no lawyers present — with the help of an interpreter and the obligation to tell the truth in line with the process outlined above.

However, particular attention should be paid to Article 9.2 of the Directive, which provides for exceptions and which will ultimately allow some flexibility in the procedure to try and ensure that certain specific features of the issuing state's legal system are admitted:

The executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority unless otherwise provided in this Directive and provided that such formalities and procedures are not contrary to the fundamental principles of law of the Executing State.

Thus, in order to hear witness testimony in the framework of an EIO, the procedure of the executing state (in this case, Spanish law) must be followed, notwithstanding the fact that exceptions may be admitted if: (i) the issuing state requests some special feature; (ii) said special feature is expressly stated in the application form (although, in practice, it is possible that the authority of the issuing country may submit an addendum, or contact the authority of the executing country directly, to address the exceptional circumstance if it is not

¹² "The competent Spanish authority shall carry out requested investigative measure if such measure exists under Spanish law and is established for a comparable domestic case. In particular, without prejudice to the provisions of the following Article, the competent authority shall in any case order the execution of the requested investigative measure if it were any of the following [...], (c) testimony from a witness, expert, victim, suspect or accused, or from any third party in Spanish territory" Act 3/2018, dated 11 June (Spanish Act on Mutual Recognition of Judicial Judgments in Criminal Proceedings in the European Union).

expressly requested in the form); and (iii) the request is not contrary to the principles governing the legal system of the executing state and does not violate the fundamental rights that are established therein.

Beyond the general principle of mutual trust between member states that characterises this novel system, the Directive establishes certain precautions, in case the requested measure does not meet the minimum standards of legal certainty in the executing state or if the measure exceeds what is allowed for said executing state with regard to its interference in fundamental rights. Thus, the Directive allows the executing state to "have recourse to another type of investigative measure where it would achieve the same result as the investigative measure indicated in the EIO by means that imply less interference with the fundamental rights of the person concerned."

Finally, the system also allows an EIO to be issued for the purpose of appearing before the court via videoconferencing or some other means of audio-visual transmission, in order to hear testimony from suspects, witnesses or experts that are located in the territory of another member state. This is regulated under Article 24 of the Directive which, regarding applicable law, reiterates: "the hearing shall be conducted directly by, or under the direction of, the competent authority of the issuing state in accordance with its own laws." However, in practice, the authorities of the issuing state always prefer to send a committee to the executing state, in order to be present at the deposition and to ask any questions¹³ they deem necessary, once the questions have been verified and authorised by the public prosecutor or the judge in charge of executing the EIO, in order to avoid a violation of fundamental rights.

Special features of execution of an EIO in England

Relevant authorities

In England & Wales, outbound EIOs must be issued by a court or a designated prosecuting authority (such authorities include the Bank of England, the director of the SFO and the Financial Conduct Authority).

The Home Office (and specifically the UK Central Authority) deals with all inbound EIOs requested by other member states, save for EIOs relating to tax and fiscal customs matters, which are handled by Her Majesty's Revenue and Customs.

An application for an EIO can be made to a judicial authority (meaning any judge or justice of the peace) by: (i) a prosecuting authority; (ii) a police officer acting with the consent of a prosecuting authority; or, importantly, (iii) a party to extant proceedings relating to an offence (which will include defendants).¹⁴

Grounds for refusal of an EIO requesting witness deposition

The Criminal Justice (European Investigation Order) Regulations 2017 ([EIO Regulations](#)) set out an exhaustive number of grounds on which execution of an EIO requested by another member state may be refused. These include that the investigative measure would not be authorised in a similar case in England & Wales, or that execution of the EIO would violate the rule of "double jeopardy" (i.e., trial for the same crime twice).

However, a number of grounds for refusal set out in the EIO Regulations do not apply to EIOs requesting witness deposition. For example, the fact that the underlying conduct does not constitute an offence in England & Wales (i.e., that the dual criminality is not met) would be a ground for refusal for an EIO requesting bank account monitoring, but not for an EIO requesting witness deposition.

There are two main circumstances where a witness cannot be compelled to give evidence under an EIO:

- where doing so would prejudice the security of the United Kingdom¹⁵

¹³ Depending on the authority that is in charge of executing the EIO, it is possible that (i) either the questions are submitted in writing by the issuing authority, for prior verification by the executing authority (as is customary); or (ii) the issuing authority is allowed to intervene in the questioning by asking the relevant questions, under the control of the executing authority, which will ensure that no rights are infringed.

¹⁴ This is also the case in Spain.

¹⁵ Schedule 5(6)(c) of the Criminal Justice (European Investigation Order) Regulations 2017 (SI 2017/730).

- where the person would not be compelled to give the same evidence in criminal proceedings in England & Wales¹⁶

Where a witness is unwilling to provide evidence and it is therefore necessary to secure that witness' attendance at court, the applicant has the option to apply to the court to issue a witness summons.¹⁷

Witness deposition in person

In England and Wales, the legal framework governing the procedure for obtaining witness evidence requested under the EIO regime primarily consists of the EIO Regulations supplemented by the CPRs.

In most cases, the first step in the process will be for the relevant UK authority to nominate a court to hear the deposition. The court then has a period of 90 days to give effect to the EIO (although a different period can be agreed between the court, the executing authority and the issuing authority).

In terms of the deposition itself, the following general principles apply:

1. The nominated court has the same powers for securing the attendance of a person as it has for the purposes of securing the attendance of a witness in other proceedings (for example, by issuing a witness summons).
2. The nominated court may take evidence on oath.
3. The nominated court may generally conduct proceedings in public or in private, and/or in the presence of such other persons as the court allows. The normal rule is that criminal proceedings should be conducted publicly unless there is a compelling reason to hear the case in private (for example, if the safety of the deponent will be compromised by an open hearing).
4. A person cannot be compelled to give any evidence which that person could not be compelled to give in criminal proceedings in England and Wales, or (generally speaking) in proceedings in the issuing Member State. For example, a person cannot be compelled to give evidence that would expose them to a criminal charge (the so-called privilege against self-incrimination).
5. Otherwise, the court must conduct the proceedings as if the witness were giving evidence at a trial in England and Wales. This means that the general criminal law principles as set out in Parts 24 and 25 of the CPR relating to (amongst other things) the process for examination-in-chief, cross-examination and re-examination of the witness will apply to the deposition.

Witness deposition by telephone or videoconference

The EIO Regulations and the Criminal Procedure Rules permit deposition via telephone or videoconference if requested under an EIO. However, if (i) an EIO requests deposition by videoconference (ii) the deponent is a suspect or accused person and (iii) the deponent does not consent to deposition by videoconference, this is a ground for refusal of the EIO under the EIO Regulations.

Special procedural rules apply to witness depositions conducted via telephone or videoconference. The deposition will take place in the presence of the nominated court, but under the supervision of the court of the issuing State and in accordance with the laws of the issuing State. The nominated court is also responsible for arranging the use of interpreters where necessary, and drawing up a record of the hearing.

However, subject to those considerations, the nominated court will conduct the proceedings as if the witness were giving evidence at a trial in England and Wales (and again, the general principles set out in Section 3 above would apply).

Brexit

Notwithstanding the UK's departure from the EU on 31 January 2020, the UK continues to participate in the EIO regime by virtue of the transitional arrangements contained in the Withdrawal Agreement.

¹⁶ Schedule 5(6)(a) of the Criminal Justice (European Investigation Order) Regulations 2017 (SI 2017/730).

¹⁷ A witness summons is issued by the court requiring a proposed witness to provide information or produce evidence to the court. This procedure is governed by section 17 of the CPR.

The UK's participation in the EIO regime beyond the end of the transitional period (i.e., from 1 January 2021 onwards, unless extended) depends on the nature of any future arrangements agreed between the EU and the UK.

In the event of a "no deal" Brexit, the default position is that the UK will lose access to the EIO regime, although we expect that inbound or outbound EIOs transmitted before the end of the transition period will be accepted and acted upon.

Conclusion

In recent years, there has been a marked increase in global co-operation between enforcement agencies. Within the European Union, EIOs are an ambitious instrument which help to facilitate this cross-border collaboration between member states in criminal proceedings. They allow almost every aspect of an investigation to be conducted effectively in an international context and their broad reach means that, in effect, the criminal investigative powers of one member state can be performed in another. Their increasing importance is demonstrated by the SFO's announcement in its most recent annual report that the number of requests it had issued for Mutual Legal Assistance and European Investigation Orders had increased by 37% from the previous year.¹⁸

While in some jurisdictions, the COVID-19 pandemic has led to a slowdown in evidence gathering, once normality resumes, it is safe to assume that this growth will continue.

For large multinational corporates, or companies that conduct business on a cross-border basis, this is yet another reminder of the need to consider the global nature of law enforcement today. At the outset of a criminal investigation, companies must be aware of the fact that investigators and prosecutors have EIOs at their disposal and therefore consider the global nature of any alleged misconduct and seek legal advice on the likelihood of additional agencies outside of their jurisdiction becoming involved in any subsequent investigation.

Baker McKenzie's global white collar crime team specialises in complex cross-border criminal matters, including the operation of EIOs. For further information, please contact Mr. Mark Banks, Ms. Lucy Player-Bishop or Ms. Eleanor Wallis (UK)¹⁹ and Mr. Juan Pedro Cortés Labadía (Spain).²⁰

¹⁸ Serious Fraud Office Annual Report and Accounts 2018-19 published on 14 February 2020

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