THE EUROPEAN INVESTIGATING ORDER

*Perspectives and Challenges for Practitioners*

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CROSS BORDER GATHERING EVIDENCE – Perspectives and Challenges

LEGAL FRAMEWORK TO USE

→ **Bilateral agreements**

→ **Regional international conventions**
  *e.g. Benelux, Schengen, Prüm, Scandinavian countries, East European countries, ...*

→ **European Union** Conventions (*e.g.: 29.05.2000 Convention*)

→ **European Union** Frame Work Decisions and Directives
  *(Mutual Recognition)*

→ **Council of Europe** conventions
  *(e.g: 20.04.1959 Convention and additional Protocols)*

→ **United Nations** Multilateral Conventions
MAIN MUTUAL LEGAL ASSISTANCE FRAMEWORK INSIDE THE EU:

1. European Convention on Mutual Assistance in Criminal Matters 20.04.1959 and 2 additional protocols

2. 27.06.1962 Benelux Treaty

3. Convention of 19.06.1990 implementing the Schengen Agreement (art. 48 to 58 – international cooperation in criminal matters)


and from 22.05.2017:


TO BE READ AND USED TOGETHER WHEN APPROPRIATE
1. REQUEST TROUGH POLICE CHANNEL (when the requested Member State gives its consent for the use of information or intelligence as evidence at the time of transmittal of the information or intelligence)

   (EU : 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 (Swedish Decision))

2. LETTER OF REQUEST (UN – CoE – EU)
   (between EU MS will be replaced by EIO)

3. FREEZING ORDER (EU)
   (will partially be replaced by EIO)

4. JOINT INVESTIGATION TEAM (UN – CoE – EU)

5. EUROPEAN INVESTIGATION ORDER (EU) - from 22 May 2017
EIO v. MLAR: WHAT WILL CHANGE?

INSTRUMENTS TO USE FOR THE GATHERING OF EVIDENCES ABROAD BETWEEN E.U. MEMBER STATES

NEW INSTRUMENT (foreseen from 22 May 2017)

European Investigation Order

go to EJN website

WHAT WILL CHANGE?

REGARDING RIGHTS AND OBLIGATIONS OF THE ISSUING MEMBER STATE AND THE EXECUTING MEMBER STATE
EIO v. MLAR : WHAT WILL CHANGE ?

**Relations to other legal instruments, agreements and arrangements**

The EIO DIRECTIVE **REPLACES THE CORRESPONDING PROVISIONS** of the following conventions applicable between the Member States bound by this Directive:

→ 20.04.1959 CoE Convention on Mutual Assistance in Criminal Matters and its two additional protocols

→ 19.06.1990 Convention implementing the Schengen Agreement

→ 29.05.2000 EU Convention on Mutual Assistance in Criminal Matters

The EIO DIRECTIVE **REPLACES**

→ Framework Decision 2008/978/JHA (European Evidence Warrant)

→ Framework Decision 2003/577/JHA provisions as regards freezing of evidence

(Article 34 of the Directive regarding the EIO)

Are excluded of the scope of the EIO Directive:

→ The setting up of a JIT and the gathering of evidence within a JIT (art. 3 EIO Directive)

→ The cross-border surveillance as referred to in the Convention implementing the Schengen Agreement (whereas (9) EIO Directive)
NEW APPROACH: 1 single instrument = European Investigation Order (EIO)

→ issued for the purpose of having one or several specific investigative measure(s) carried out in the executing State with a view to gathering evidence – including that is already in the possession of the executing authority.

→ executed on the basis of the principle of mutual recognition

→ issuing of an EIO may be requested by a suspected or accused person, or by a lawyer on his behalf, within the framework of applicable defence rights in conformity with national criminal procedure.

→ not have the effect of modifying the obligation to respect the fundamental rights and legal principles as enshrined in Article 6 of the TEU

(art. 1 EIO Decision)
EIO v. MLAR: WHAT WILL CHANGE?

**TYPES OF PROCEEDINGS**

**CoE Convention 1959 – art 1**
- proceedings regarding offences punished by jurisdiction of the judicial authorities
- Not offences under military law which are not offences under ordinary criminal law

**EU Convention 2000 – art 3**
- proceedings brought by the **administrative authorities** being infringements of the rules of law, before a court having jurisdiction in particular in criminal matter
- proceedings and proceedings relate to offences or infringements for which a **legal person** may be held liable

**EIO Decision – art 4**

a) **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

b) **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**

c) **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**

d) in connection with proceedings referred to in points (a), (b), and (c) which relate to **offences or infringements for which a legal person may be held liable** or punished in the issuing State
EIO v. MLAR: WHAT WILL CHANGE?

ISSUING

CoE Convention 1959 - art. 14
Minimum requirements for the content of the request
No mandatory form to use
unformal form on the EJN website (Compendium)

EIO Decision – art 6

issuing authority:
→ has to use the EIO form (Annex A): completed, signed, and its content certified as accurate and correct (go to EJN website)
→ may only issue an EIO IF:
  1. the issuing is necessary and proportionate for the purpose of the proceedings
  2. the investigative measure(s) indicated in the EIO could have been ordered under the same conditions in a similar domestic case

executing authority:
→ may consult the issuing authority on the importance of executing the EIO if reason to believe that the conditions have not been met

issuing authority:
→ may decide to withdraw the EIO
## EIO v. MLAR: WHAT WILL CHANGE?

### TRANSMISSION

<table>
<thead>
<tr>
<th>CoE Convention 1959 art. 15, 18</th>
<th>EU Convention 2000 art. 6</th>
</tr>
</thead>
<tbody>
<tr>
<td>MoJ to MoJ (Central Authorities - CA)</td>
<td>By any means capable of producing a written record</td>
</tr>
<tr>
<td>Direct if urgency or some specific request</td>
<td>Direct between Judicial Authorities or CA for specific requests</td>
</tr>
<tr>
<td>Interpol channel can be used</td>
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### EU Convention 2000 art. 6

| By any means capable of producing a written record |
| Direct between Judicial Authorities or CA for specific requests |
| Interpol channel can be used |

### EIO Decision art 7, 8

| By any means capable of producing a written record |
| DIRECT from the issuing authority to the executing authority (CA possible) |
| issuing authority: |
| → may transmit EIO via the telecommunications system of the EJN |
| → shall make all necessary inquiries, including via the EJN contact points, in order to obtain the information from the executing State if the identity of the executing authority is unknown |
| → shall indicate when issuing an EIO which supplements an earlier EIO (form) |
| → may address an EIO which supplements an earlier EIO directly to the executing authority, while present in that State when assists in the execution of the EIO in the executing State |
EIO v. MLAR: WHAT WILL CHANGE?

**EXECUTION**

**CoE Convention 1959 - art 1, 3**

to afford each other the widest measure of mutual assistance

eexecute in the manner provided for by its law

**EU Convention 2000 - art 4**

shall comply with the formalities and procedures expressly indicated by the requesting Member State

**EIO Decision - Art 9**

executing authority

→ shall recognise an EIO 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 (unless grounds for non-recognition or non-execution or one of the grounds for postponement)

→ shall comply with the formalities and procedures expressly indicated by the issuing authority unless that such formalities and procedures are not contrary to the fundamental principles of law of the executing State

→ shall return the EIO to the issuing State EIO if has not been issued by an issuing authority as specified
EIO v. MLAR: WHAT WILL CHANGE?

**EXECUTION**

| CoE Convention 1959 | EU Convention 2000 |

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**EIO Decision art 10**

*Recourse to a different type of investigative measure*

**executing authority** shall have, wherever possible, recourse to an investigative measure other than that provided for in the EIO where:

(a) the **investigative measure** indicated in the EIO **does not exist under the law** of the executing State, or;

(b) the **investigative measure** indicated in the EIO **would not be available in a similar domestic case**;

**EXCEPT**: always have to be available under the law of the executing State:

- obtaining of **information or evidence** which is already in the possession of the executing authority
- obtaining of **information contained in databases** held by police or judicial authorities and directly accessible by the executing authority
- **hearing** of a witness, expert, victim, suspected or accused person or third party
- any **non-coercive investigative measure**
- **identification of persons** holding a subscription of a specified phone number or IP address.
EIO v. MLAR: WHAT WILL CHANGE?

**EXECUTION**

CoE Convention 1959

EU Convention 2000

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**EIO Decision art 10**

*Recourse to a different type of investigative measure*

**executing authority** may also have recourse to an other investigative measure where the investigative measure selected by the executing authority would achieve the same result by less intrusive means than the investigative measure indicated in the EIO.

!!! **executing authority** shall first inform the **issuing authority**

→ **issuing authority** may decide to withdraw or supplement the EIO.

**executing authority** shall notify the **issuing authority** that it has not been possible to provide the assistance requested when a recourse to a different type of investigative measure is not possible.
EIO v. MLAR: WHAT WILL CHANGE?

**GROUNDS FOR REFUSAL**

<table>
<thead>
<tr>
<th>CoE Convention 1959 – art 2</th>
</tr>
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<tbody>
<tr>
<td>1. political offence or connected, or a fiscal offence</td>
</tr>
<tr>
<td>2. prejudice the sovereignty, security, order public or other essential interests of its country</td>
</tr>
</tbody>
</table>

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<th>EU Convention 2000</th>
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<th>EIO Decision - art 11</th>
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<tbody>
<tr>
<td>Grounds for non-recognition or non-execution</td>
</tr>
<tr>
<td>execution of an EIO <strong>MAY</strong> be refused:</td>
</tr>
</tbody>
</table>

1. **immunity or a privilege** under the law of the executing State
   - **executing authority** shall exercise power to waive the privilege or immunity if competent
   - **issuing authority** shall request the competent authority to waive if executing authority not competent

2. harm **essential national security interests**, jeopardise the **source of the information** or involve the **use of classified information** relating to specific intelligence activities

3. **investigative measure would not be authorised** under the law of the executing State in a similar domestic case

4. contrary to the **principle of “ne bis in idem”**

5. substantial grounds to believe that the **execution would be incompatible with Article 6 TEU**
EIO v. MLAR: WHAT WILL CHANGE?

**GROUNDS FOR REFUSAL**

**CoE Convention 1959 – art. 5**

**execution of letters rogatory for search or seizure of property**: Possible conditions:

a. double criminality

b. extraditable offence in the requested country;

c. consistent with the law of the requested Party.

**EU Convention 2000**

**EIO Decision - art 11**

**Grounds for non-recognition or non-execution**

6. **criminal offence committed outside the territory of the issuing State** and wholly or partially on the territory of the executing State, and is **not an offence in the executing State**

7. **does not constitute an offence under the law of the executing State**, unless it concerns an offence listed (32 listed offences) ([Form Annex A section H](#))

8. use of the **investigative measure indicated in the EIO 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

**7 and 8: EXCEPT**: investigative measures referred to in Article 10 (2)

### !!! executing authority - before deciding not to recognise or not to execute either in whole or in part an EIO:

- shall consult the issuing authority
- shall request the issuing authority to supply any necessary information without delay.
**EU Convention 2000 – art 4**
The requested MS shall execute the request for assistance as soon as possible, taking as full account as possible of the procedural deadlines and other deadlines indicated by the requesting MS.

<table>
<thead>
<tr>
<th><strong>EIO Decision - Article 12</strong></th>
<th><strong>Time limits for recognition or execution</strong></th>
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<tbody>
<tr>
<td><strong>Decision on the recognition or execution / execution of the investigative measure</strong></td>
<td>with the same celerity and priority as for a similar domestic case and, in any case, within time limits:</td>
</tr>
<tr>
<td>1. <strong>DECISION ON THE RECOGNITION OR EXECUTION</strong>: as soon as possible and not later than 30 days after the receipt of the EIO by the competent executing authority If it is not practicable: information of issuing MS about reasons and estimated time time limit may be extended by a maximum of 30 days.</td>
<td></td>
</tr>
<tr>
<td>2. <strong>EXECUTION OF THE INVESTIGATIVE MEASURE</strong>: without delay and, not later than 90 days following the taking of the decision If it is not practicable: information of issuing MS about reasons and consultation for appropriated timing of execution</td>
<td></td>
</tr>
</tbody>
</table>
**EU Convention 2000 – art 4**

The requested MS shall execute the request for assistance as soon as possible, taking as full account as possible of the procedural deadlines and other deadlines indicated by the requesting MS.

**EIO Decision - Article 12**  
**Time limits for recognition or execution**

**issuing authority:** possibility to indicate
- a **shorter deadline** due to procedural deadlines, the seriousness of the offence or other particularly urgent circumstances,
- a **specific date** to carry out the investigating measure

**executing authority** shall take as full account as possible of this requirement.

If it is not practicable: information of issuing MS about reasons and consultation for appropriated timing of execution

**EIO Decision - Article 15**  
**Grounds for postponement of recognition or execution**

1. execution might **prejudice an on-going criminal investigation or prosecution,** until reasonable time

2. **objects, documents, or data** concerned are already being used in other proceedings, until no longer required for that purpose;

**executing authority:** execution and information of issuing MS as soon as the ground for postponement has ceased to exist,
## EIO v. MLAR: WHAT WILL CHANGE?

### CoE Convention 1959 - art 6
- Delay the handing over if connection with pending criminal proceedings
- Original returned ASAP unless return waived

### EU Convention 2000 – art 8
- Restitution to the rightful owners

### EIO Decision - Article 13

**Transfer of evidence**

*Executing authority* shall, **without undue delay**, transfer **the evidence** obtained or already in the possession of the competent authorities where requested and if possible under the law of the executing State, the **evidence shall be immediately transferred to the competent authorities of the issuing MS**.

**Transfer MAY be suspended**, pending a decision regarding a legal remedy, unless sufficient reasons indicated for immediate transfer is essential for the proper conduct of its investigations or for the preservation of individual rights. However, the **Transfer SHALL be suspended** if it cause serious and irreversible damage to the person concerned.

**Temporarily transfer possible to issuing MS**, if requested, when objects, documents, or data concerned are already relevant for other proceedings, on the condition that it be returned to the executing State ASAP or on agreed date.

*Executing authority* shall indicate whether it requires the **evidence to be returned**.
EIO v. MLAR : WHAT WILL CHANGE?

**OBLIGATION TO INFORM**

**CoE Convention 1959 - Article 19**
Reasons shall be given for any refusal of mutual assistance.

**EU Convention 2000 – art 4**
*Prompt information of issuing MS when*
- request cannot (fully) be executed – reasons and remedies
- requested deadline cannot be met – reasons and estimated time → agreement for further action or → MLAR not to be executed

**EIO Decision - Article 16**
Obligation to inform

*competent authority in the executing State which receives the EIO* shall, **ACKNOWLEDGE RECEPTION OF THE EIO (Form Annex B)** without delay, and in any case **WITHIN A WEEK** of the reception,
If CA designated: obligation for CA and executing authority
If EIO transmitted by receiving authority to other competent authority: obligation for both

*executing authority* shall inform the issuing authority immediately by any means:
(a) **impossibility to take a decision** on the recognition or execution due to the fact that the form provided for in Annex A is incomplete or manifestly incorrect;
(b) if it may be **appropriate to carry out investigative measures not initially foreseen**, or which could not be specified
(c) if **impossibility to comply with formalities and procedures expressly indicated**
(d) of **any decision taken pursuant to Articles 10 or 11**;
(e) of **any decision to postpone the execution or recognition** of the EIO, the reasons for the postponement and, if possible, the expected duration of the postponement
**EIO v. MLAR: WHAT WILL CHANGE?**

<table>
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**CONFIDENTIALITY**

**EIO Decision - Article 19**

**Confidentiality**

*executing authority* shall, in accordance with its national law, **guarantee the confidentiality of the facts and the substance of the EIO,** **except** to the extent necessary to execute the investigative measure.

*If impossible to comply with the requirement of confidentiality:* **notification without delay** to the issuing authority.

*issuing authority* shall, in accordance with its national law and unless otherwise indicated by the executing authority, **not disclose any evidence or information provided by the executing authority,** **except** to the extent that its disclosure is necessary for the investigations or proceedings described in the EIO.

*Each Member State* shall take the **necessary measures to ensure 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**
**EIO v. MLAR: WHAT WILL CHANGE?**

**LEGAL REMEDIES**

| CoE Convention 1959 | EU Convention 2000 |

**EIO Decision - Article 14**

**Legal remedies**

**Member States** shall ensure that legal remedies equivalent to those available in a similar domestic case, are applicable to the investigative measures indicated in the EIO.

**Member States** shall ensure that the time-limits for seeking a legal remedy shall be the same as those that are provided for in similar domestic cases.

**Issuing authority** and **executing authority** shall take the appropriate measures to ensure that information is provided about the possibilities under national law for seeking the legal remedies.

**Issuing authority** and **executing authority** shall inform each other about the legal remedies sought against the **issuing**, the **recognition** or the **execution** of an EIO.

**Issuing State** shall take into account a successful challenge against the recognition or execution of an EIO in accordance with its own national law.

A legal challenge shall not suspend the execution of the investigative measure, unless it is provided in similar domestic cases.
EIO v. MLAR: WHAT WILL CHANGE? 

**COSTS**

CoE Convention 1959 – art 20
MLA shall not entail refunding of expenses **except** those incurred by the attendance of experts or the transfer of a person in custody.

**EU Convention 2000**

EIO Decision – art 21

1. **executing State** shall bear all costs undertaken on the territory of the executing State which **are related to the execution of an EIO**.

2. **executing authority** - when the costs for the execution may be deemed exceptionally high, **may consult with the issuing authority** on whether and how the costs could be shared or the EIO modified.
   
   **executing authority** shall inform the issuing authority **in advance** of the detailed specifications of the part of the costs deemed exceptionally high.

3. In exceptional situations where no agreement can be reached with regard to the costs **issuing authority** may decide to:
   
   (a) **withdraw the EIO** in whole or in part
   
   (b) **keep the EIO, and bear the part of the costs** deemed exceptionally high.
EIO v. MLAR: WHAT WILL CHANGE?

SPECIFIC PROVISIONS FOR CERTAIN INVESTIGATIVE MEASURES

1. Temporary transfer to the issuing State of persons held in custody for the purpose of carrying out an investigative measure

EIO Decision - Art 22 / EU Convention 2000 - Article 9 / CoE Convention 1959 – art 11
Specific ground for refusal: missing consent / prolongation of detention

2. Temporary transfer to the executing State of persons held in custody for the purpose of carrying out an investigative measure

EIO Decision - Art 23
Specific ground for refusal: missing consent / prolongation of detention

3. Hearing by videoconference or other audio – visual transmission

EIO Decision - Art 24 / EU Convention 2000 - Article 10
Specific ground for refusal: missing consent / contrary to the fundamental principles of the law

4. Hearing by telephone conference

EIO Decision - Art. 25 / EU Convention 2000 - Article 11

5. Information on bank and other financial accounts

EIO Decision - Art. 26
EIO v. MLAR : WHAT WILL CHANGE ?

SPECIFIC PROVISIONS FOR CERTAIN INVESTIGATIVE MEASURES

6. Information on banking and other financial operations
   EIO Decision - Art. 27

7. Investigative measures implying the gathering of evidence in real time, continuously and over a certain period of time
   EIO Decision - Art. 28 / EU Convention 2000 - Article 12 (controlled deliveries)
   Specific ground for refusal: not be authorised in a similar domestic case

8. Covert investigations
   EIO Decision - Art. 29 / EU Convention 2000 - Article 14
   Specific G f R : not be authorised in a similar domestic case : not possible to reach agreement on arrangements

9. Interception of telecommunications with technical assistance of another Member State
   EIO Decision - Art. 30 / EU Convention 2000 - Article 18
   Specific ground for refusal: not be authorised in a similar domestic case

10. Notification of the Member State where the subject of the interception is located from which no technical assistance is needed (Form Annex C)
    EIO Decision - Art. 31 / EU Convention 2000 - Article 20

11. Provisional measures
    EIO Decision - Art. 32