

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)**
- 4. Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29.05.2000**
- 5. Frame Work Decision 2003/577/JAI of 22.07.2003 on the execution in the European Union of orders freezing property or evidence**

and from 22.05.2017 :

- 6. Directive 2014/41/EU of the European Parliament and the Council of 03/04/2014 on the European Investigation Order**

TO BE READ AND USED TOGETHER WHEN APPROPRIATE

INSTRUMENTS TO USE

1. REQUEST THROUGH 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

Directive 2014/41/EU of the European Parliament and the Council of 3/4/2014

(*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)

EIO v. MLAR : WHAT WILL CHANGE ?

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

- 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
- 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**
- 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**
- 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

CoE Convention 1959 - art. 14

Minimum requirements for the content of the request

No mandatory form to use

unformal form on the EJM website (Compendium)

EU Convention
2000

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 EJM 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

CoE Convention 1959 art. 15, 18

MoJ to MoJ (Central Authorities - CA)

Direct if urgency or some specific request

Interpol channel can be used

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**
execute **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

CoE Convention 1959

EU Convention 2000

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.

CoE Convention 1959

EU Convention 2000

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**

CoE Convention 1959 – art 2

1. political offence or connected, or a fiscal offence
2. prejudice the sovereignty, security, order public or other essential interests of its country

EU
Convention
2000

EIO Decision - art 11 Grounds for non-recognition or non-execution

execution of an EIO MAY be refused :

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**

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.

CoE
Convention
1959

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

Decision on the recognition or execution / execution of the investigative measure
with the **same celerity and priority as for a similar domestic case**
and, in any case, within time limits :

1. DECISION ON THE RECOGNITION OR EXECUTION: **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 limit may be extended by a maximum of 30 days.
2. EXECUTION OF THE INVESTIGATIVE MEASURE : **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

CoE
Convention
1959

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 ?

TRANSFER OF EVIDENCES

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

CoE Convention 1959

EU Convention 2000

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

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