EUROJUST

EUROPEAN JUDICIAL NETWORK (EJN)

Joint Note of Eurojust and the European Judicial Network on the practical application of the European Investigation Order

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This Note is a document to support the work of national authorities responsible for applying European Investigation Orders (EIOs), and is not legally binding.

Criminal justice across borders

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1. Introduction

The objective of this document is to provide guidance to practitioners on the practical application of Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order (EIO) in criminal matters (the 'European Investigation Order Directive' or 'EIO DIR')[1]. It is a compilation of information, highlighting issues/challenges, possible solutions and best practice, as gathered by Eurojust and the European Judicial Network (EJN) from meetings, documents and casework.

This Joint Note addresses identified issues related to the four main phases of the lifecycle of an EIO (the issuing phase, the transmission phase, the recognition phase and the execution phase), as well as issues related to the scope of the EIO DIR and its use vis-à-vis other co-existing legal instruments, the competent authorities, the content, form and language of the EIO and the use of some specific investigative measures.

This Joint Note is considered a living document, and Eurojust and the EJN intend to continue to update it in the future.

2. Scope of the European Investigation Order Directive

2.1. 'Any investigative measure' (Article 3) and 'corresponding provisions' (Article 34)

As of 22 May 2017, the EIO DIR replaced the '**corresponding provisions**' of the Mutual Legal Assistance (MLA) Conventions, pursuant to Article 34(1) EIO DIR (1959 Council of Europe (CoE) Convention and its two additional protocols, as well as the 2000 MLA Convention).

The interpretation of the term 'corresponding provisions' remains a point of concern. In some Member States, the national transposition legislation includes a list of the measures that fall outside the scope of the EIO DIR, while in other Member States, 'soft law' tools are being used (e.g. guidelines issued by a general prosecution office). In the absence of a common European Union (EU) list, what has become clear is that, in relation to some measures and provisions, different interpretations exist in the Member States, occasionally causing friction. With the exception of Council doc. 14445/11, no comprehensive list is available, as yet, indicating the exact provisions that will be replaced. A **Joint Eurojust-EJN Note** gathers the views of EJN contact points on the interpretation of the term 'corresponding provisions', pursuant to Article 34(1) EIO DIR (see "Eurojust/EJN Note on the meaning of "corresponding provisions" and the applicable legal regime in case of delayed transposition of the EIO Directive").

Article 3 EIO DIR on the scope of the EIO refers to '**any investigative measure**', with the exception of the setting up of a joint investigation team (JIT).

The following criteria could be helpful in assessing whether the EIO DIR should apply:

- the order concerns an investigative measure to gather or use evidence,
- the measure was issued or validated by a judicial authority, and
- the measure relates to Member States bound by the EIO DIR.

1 The EIO DIR applies to all Member States bound by it (26 Member States; Ireland and Denmark are not bound by it).

Should any of these criteria not apply, the EIO DIR will not be the right instrument to use, and another legal instrument should instead be applied. For instance, in cases in which a measure has no evidence-related implications, but rather a mere procedural objective (e.g. service and sending of procedural documents), an MLA request, and not an EIO, should be issued.

To assist in clarifying the interpretation of the scope of the EIO DIR, the EJN Secretariat has published a document entitled, 'Competent authorities, languages accepted, urgent matters and scope of the EIO Directive', which is available to practitioners on the EJN website.

A common understanding is that the EIO DIR does not cover the following measures:

- Setting up of a JIT and collection of evidence within a JIT;
- Service and sending of procedural documents, unless the delivery of a document is **instrumental** to the investigative measure that is the object of the EIO — in that case, a flexible approach should be followed to its inclusion in the EIO in line with Article 9 (2) EIO DIR;
- Spontaneous exchange of information (Article 7 of the 2000 MLA Convention);
- Transfer of proceedings (Article 21 of the 1959 CoE Convention and 1972 CoE Convention);
- Freezing property for the purpose of subsequent confiscation (Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence; and, as of 19.12.2020, Regulation 2018/1805 on the mutual recognition of freezing orders and confiscation orders);
- Restitution: return of an object to victim (Article 8 of the 2000 MLA Convention);
- Gathering of extracts of the criminal records register/ECRIS;
- Police-to-police cooperation; or
- Customs-to-customs cooperation.

One of the provisions that has cast doubts among practitioners is Article 19 of the Budapest Convention on the search and seizure of stored computer data. The majority of practitioners seem to believe that this provision can still be used, as it is not a 'corresponding provision'. (See also ***Chapter 8. European Investigation Order vs other instruments***.)

2.2. The European Investigation Order at all stages and/or beyond the trial phase

Recital 25 of the EIO DIR notes that the Directive sets out rules for carrying out investigative measures at all stages of criminal proceedings, including during the trial phase.

The EIO applies to the **gathering of evidence not only during the investigative phase of proceedings, but also during the trial phase**. In addition, in some Member States, the EIO also applies to measures undertaken **during the execution of a judgement** (e.g. during a financial investigation for the purpose of identifying assets after a final decision on confiscation has been adopted, or to gather evidence on the circumstances surrounding the execution of a sentence). This approach of using an EIO **beyond the trial phase** is related to national judicial systems in which the concept of criminal proceedings also includes the executing phase.

(See also **Chapter 6.2. Hearing by *videoconference*** *and* ***Chapter 8.3. European Investigation Order vs European Arrest Warrant***.)

3. Content and form of the European Investigation Order (Article 5)

3.1. Filling in the European Investigation Order form (Annex A)

The **standard EIO form (Annex A)**, available in all languages, was introduced to encourage simplicity and efficiency, underlining the spirit of the EIO DIR and the concept of mutual recognition. The objective of the form is to simplify formalities, improve quality and reduce translation costs.

Nevertheless, practitioners have encountered several challenges when filling in Annex A:

- EIOs are sometimes too short and lack fundamental information (e.g. insufficient information about why the measure is needed for the investigation, missing dates, no information about affected persons, or insufficient description of the facts under investigation rendering checks for double criminality, for example, too difficult to carry out). This situation then triggers the consultation procedure, requiring requests for additional information in line with Article 11(4) EIO DIR.

- The wording used in the Annexes to the national laws transposing the EIO DIR **does not always fully correspond** to the wording used in the official EIO Annexes. This situation may cause confusion and delays; the form in the EIO DIR should, therefore, always be used.

- The lack of a **tick box for some investigative measures**, such as searches, production orders and EIOs in relation to forensic evidence, leads to the necessity for these investigative measures to be described in the open field box.

- No **box/section** is present **to indicate** that the form includes a number of different **annexes**.

- Difficulties encountered, such as **if several persons are concerned** or if **multiple competent authorities at regional level are involved** in the executing Member State (however, the executing Member State is responsible for ensuring that all relevant national authorities are involved in a timely manner, in accordance with the law of that State).

- Difficulties encountered, if **multiple measures are requested** (especially vis-à-vis sections C and I). (See also ***Chapter 4.3. Several measures, several European Investigation Orders?***)

Best practice

- In general, issuing only **one EIO** is preferable in cases in which several measures need to be addressed to one competent executing authority. However, in some cases, issuing several EIOs might be recommended. (See also ***Chapter 4.3. Several measures, several European Investigation Orders***?)

- To avoid infringements of the ne bis in idem principle, **mentioning the name of the suspect/s** in the EIO is advised, even if the form contains no specific place for this information.

- Practitioners are advised to follow the compendium tool **on the EJN website**.

- In cases concerning **interceptions of telecommunications and/or searches**, or if the EIO refers to a **coercive measure**, the information provided in Annex A should be specific and detailed, as no supporting documents are usually attached to EIOs. Practitioners should clearly indicate, for instance, the reasons for issuing the EIO in that specific case and what is expected to be heard/found/achieved through the execution of the measures.

- **Section B** (Urgency) should only be completed after careful reasoning in cases in which a real need for urgency is present, e.g. if a person is in custody; hearing dates are imminent; electronic evidence is due to expire; a risk of application of the statute of limitations is present; coordination with other requests and measures is necessary; or preliminary measures are due to expire. In contrast, cases

should not be labelled as urgent if authorities in the issuing Member State simply like to accelerate the case. (See also ***Chapter 5.5. Urgent cases***.)

- **Section C** (Investigative measure/s to be carried out) is used to describe the measures required. The issuing authority must be as precise as possible. If a request is submitted to hear a witness/victim/suspect, the issuing authority should assist by enclosing a list of questions, either in Section C itself or in an attachment to the EIO.

- **Section D** (Relation to an earlier EIO) can be used not only to indicate previous EIOs, but — in light of a broader interpretation — also to provide relevant information about related past or future judicial cooperation requests, such as upcoming EIOs or other mutual recognition orders (European Arrest Warrants (EAWs), freezing orders, etc.), MLA requests, or JITs, including existing JITs with other States in the context of multilateral coordination frameworks. Section D should particularly be used when several EIOs have been sent to several countries in the same case and the need for coordination is present and/or several EIOs have been sent simultaneously to the same country as an exception to the principle of sending only one EIO, regardless of the number of measures to be taken.

- **Section E** (Identity of the person concerned) should be used to identify the person/s concerned by the investigative measure (not necessarily the accused/suspected person/s).

- **Section G** (Grounds for issuing the EIO) should be used to present the summary of the facts and the identity of the suspected perpetrators, using short, clear sentences to allow for an accurate verification of double criminality, and providing a clear description of the links between the offence and/or the suspected perpetrators, the concerned persons and the investigative measures requested.

- **Section I** (Formalities and procedures requested for execution) is used to provide information about the formalities and procedures that must be respected, pursuant to the legislation of the issuing Member State, and to explain how such formalities and procedures must be performed by the executing authority. Section I is also used to specify requested presence of officials of the issuing State in the execution of the EIO. This section also allows for the possibility of interested persons to be present on the spot, under Article 4 of the 1959 CoE Convention.

- **Section K** (Details of the authority that issued the EIO) is used to convey information on the issuing authority (e-mail address of the office; an alternative authority if necessary; and other useful information, e.g. language skills, authority responsible for making practical arrangements for the transfer of evidence or a person held in custody (temporary transfer)).

3.2. Information or documents to be — or not to be — provided by the issuing authority

Article 5 EIO DIR on the content and form of the EIO does not impose any legal requirement for the domestic judicial decision to be mentioned or attached to the EIO (2)[2]. Even if not required by law, it might still be useful to **attach the domestic order** for informative purposes, depending on the case in question: for example, in cases where a coercive measure is requested, in order to explain the legal grounds for this measure, in particular when the executing Member State is also required to issue a court order.

When executing an EIO, in certain cases, a minority of countries still require, under their national law, the attachment to the EIO of a domestic order by the issuing State, for example in the event of a request for interception of telecommunications. If so, pragmatic solutions need to be applied, such as keeping the EIO simple and attaching the (lengthier) domestic order, with or without a translation.

2 Unlike Article 8(1)(c) of the EAW Framework Decision (for an interpretation of this provision, see the Bob Dogi judgement, CJEU,

3.3. Language of the form and translation issues

To reduce the number of translation-related issues, Article 5(2) EIO DIR states that Member States shall **indicate which other official EU language(s)**, in addition to the official language(s) of the Member States concerned, **may be used** when the Member State is the executing State. While the majority of Member States have accepted an additional language (often, but not always, English), some Member States have indicated, despite the wording of the EIO DIR, that they will only accept their own official language, or that they will only accept English in urgent cases.

Challenges encountered: Complaints have been made about the quality of translations. In cases in which an EIO is not attached in the language of the issuing Member State, the executing authority cannot have the unclear parts of the request translated domestically.

Best practice identified: The EIO is a judicial order and therefore must be issued and signed in the language/s of the issuing Member State. For the translation, **the official EIO form/template** in the language of the executing Member State **should always be used**. Translate only the parts of the form that have been completed by the issuing authority, to avoid dubious and unofficial/inaccurate translations. The Compendium tool on the EJN website offers an automatic translation function of the 'static' parts of the form. The EIO forms (Annexes A, B and C) are available in all EU languages in Word format in the judicial library on the EJN website. (See Annex A or 'European Investigation Order — forms' to find Annexes A, B, and C.)

An **EIO sent without a translation** should be seen as 'incomplete', pursuant to Article 16(2)(a) EIO DIR. In such a situation, the executing authority should then inform the issuing authority that the EIO is 'incomplete', instead of sending the form back or treating it as 'non-existing'.

The EJN document 'Competent authorities, languages accepted, urgent matters and scope of the EIO Directive' provides useful information on accepted languages, including in urgent cases, if applicable.

4. Issuing and transmitting a European Investigation Order

4.1. Competent authorities involved (issuing and validating authority)

The EIO DIR has 'judicialised' the issuing phase by requiring that EIOs be issued by a judge, a court, an investigating judge or a public prosecutor competent in the case concerned (judicial authority as **issuing authority**), or by requiring that an EIO be validated by one of these authorities (judicial authority as **validating authority**). See Article 2(c)[3] EIO DIR.

In accordance with Article 7(3) EIO DIR, central authorities can play a useful administrative role in support of judicial authorities.

In some Member States, the central authority fulfils additional roles, for example in the transit of persons in custody and agreements on the sharing of costs.

With regard to **verification**, whether the issuing or the validating authority of an EIO is the competent body, executing authorities will usually rely upon mutual trust. However, verifications can be carried out in line with Article 9(3) EIO DIR. The EJN document entitled 'Competent authorities, languages accepted, urgent matters and scope of the EIO Directive' can serve to assist in the assessment of whether the EIO received has been issued or validated by a competent authority. (See also ***Chapter 5.5. Urgent cases***.)

3 Case - 241/15) Article 5 EIO DIR does not make any reference to an underlying judicial decision.

4.2. Proportionality check (Article 6(1))

Conditions to be verified by the issuing authority (Article 6 EIO DIR):

- The issuing Member State must check whether the measure is ***necessary and proportionate***.
- The issuing Member State must check whether the measure ***could have been ordered under same conditions in a similar domestic case***.

The EIO DIR leaves the proportionality check in the hands of the issuing authority (Article 6(1) EIO DIR), but, if the executing authority has reason to believe that this condition has not been met, it may consult the issuing authority (Article 6(3) EIO DIR).

This situation could occur if the description of the offence is not sufficiently detailed, or the requested investigative measure is too wide and difficult to justify, or the measure is not described in a manner sufficiently concrete to allow for a proper assessment.

This **consultation mechanism** can be used to provide relevant information and to avoid the risk that execution is further delayed. After consultation, the issuing authority may also decide to withdraw the EIO.

Cost-related issues and minor offences: Cases involving costs that are 'deemed to be exceptionally high' can be resolved through the consultation mechanism included under Article 21(2) EIO DIR. Different views exist in relation to cases involving costs that are, as such, not exceptionally high, but which relate to **minor offences** and which, if repeated, could entail high costs. However, the grounds for non-recognition are covered exhaustively in the EIO DIR and cost-related considerations cannot be used as a ground for non-recognition.

4.3. Several measures, several European Investigation Orders?

When multiple measures are requested, they should, **in principle**, be included in **one EIO**. However, depending on the nature and scope of a case, a **different approach** might be advisable. The following considerations could be taken into account:

- **Confidentiality issues and risk of disclosure**: using separate EIOs to prevent certain information from being disclosed to suspects that could jeopardise the execution of other measures may be preferable.
- **Complexity of the case**: in complex cases, in which different measures are required concerning different natural and legal persons with different positions in the proceedings, the internal coherence and consistency between the different sections of Annex A (particularly between sections C, D, E, G, H and I) is a shared concern. For this reason, issuing several EIOs instead of one stand-alone EIO may be the preferred option.
- **Different authorities in charge of the execution of the EIO**: several EIOs might be needed in such a case. However, some countries consider this issue to be an internal one, and that the executing Member State should be responsible for distributing the work, rather than demanding separate EIOs.

4.4. Transmission of European Investigation Orders (Article 7)

Transmission (Article 7 EIO DIR)

Directly from the issuing authority to the executing authority (without prejudice to the designation of central authorities).

Depending on the nature, complexity and urgency of the case, **different channels** are used to speed up the transmission of EIOs and ensure authenticity. These include Eurojust, the EJN contact points and Liaison Magistrates.

A secure network of communications allowing EIOs to be transmitted in a safe manner is of particular importance. To that end, the European Commission is currently developing a **Secure Online Portal** (e- evidence digital exchange system; a test version is expected to be up and running by the end of 2019). This portal will be a platform with a secure communication channel for the digital exchange of EIOs and replies from EU judicial authorities.

Furthermore, EIOs can be submitted via the **Eurojust secure connection** (however, not all Member States are connected and communication is only possible between a national authority and Eurojust, not between national authorities) and the **EJN secure telecommunication connection** (Article 9 of the EJN Decision and Article 7(4) EIO DIR). The secure connection is not, however, suitable for direct contact between the competent authorities.

5. Recognition and execution of a European Investigation Order

5.1. Competent authorities involved

Article 2(d) EIO DIR defines the **executing authority** as the '*authority having the competence to recognise an EIO and ensure its execution*'.

If an **EIO is sent to the incorrect authority in the executing State**, instead of being returned, it should be forwarded to the correct executing authority, in line with Article 7(6) EIO DIR; this situation should be noted in Annex B.

Some Member States have created a centralised **receiving authority**, i.e. a judicial authority that receives and — if competent — recognises the EIO and afterwards allocates the EIO for execution to the competent executing authority.

Identified best practice:

- For the identification of the competent executing authority and the relevant contact details, the EJN Atlas can be consulted.
- If several measures are foreseen in different geographical areas, and the executing State has no central receiving authority, the issuing authority should make the respective executing authorities aware of the existence of the multiple measures requested within the country.

5.2. Recognition and execution (Article 9)

Recognition and Execution (Article 9 EIO DIR
Rule:

- **obligation to execute** (Article 1 EIO DIR),
- '**without any further formality required**' (Article 9(1) EIO DIR).

BUT, subject to **recognition** by the executing authority.

Applicable law for execution
Execution is governed by the **law of the executing Member State**.

BUT the executing authority shall comply with formalities and *procedures expressly* indicated by the issuing authority, 'if not contrary to fundamental principles of law of the executing State'.

Article 9(1) EIO DIR states that the executing authority shall **recognise** an EIO '**without any further formality required**', and ensure its execution. The EIO DIR thus does not allow for an extensive study of the file in the executing State. However, some checks must still be made. (See also Article 10(3) and Article 11 EIO DIR.)

The executing authorities should comply, as much as possible, with the formalities and procedures expressly indicated by the issuing authorities (Article 9(2) EIO

DIR), but the EIO should be 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' (Article 9(1) EIO DIR).

5.3. Recourse to a different type of investigative measure (Article 10)

Recourse to a different investigative measure (Article 10 EIO DIR):

- if the measure **does not exist** in the executing Member State and it is not one of the measures included in Article 10(2) EIO DIR (e.g. non-coercive measures).
- if the measure would **not be available** in a similar domestic case; or
- if a **less intrusive** measure would achieve the same result.

The EIO DIR leaves the proportionality check in the hands of the issuing authority (see ***Chapter 4.2. Proportionality check***), but it also provides that the executing authority can have **recourse to another investigative measure, if the latter would achieve the same result by less intrusive means** (Article 10(3) EIO DIR), e.g. a production order instead of a house search.

Challenge identified: When different legal prerequisites for investigative measures exist in the Member States involved.

Best practice: To avoid unnecessary consultations and delays between the executing and issuing authorities, the latter may use the EIO to indicate that less intrusive measures (that lead to the same result) may be adopted.

Article 10(2) EIO DIR refers to the investigative measures which always have to be available under the law of the executing State, such as **non-coercive measures**, as defined under the law of the executing State (Article 10(2)(d) EIO DIR). Most Member States do not have a definition of 'non-coercive measures' in their legislation, but they see the term rather as a common concept that is defined in everyday legal language, incorporating measures that do not affect fundamental rights, and often not requiring a court order (see also Recital 16).

5.4. Grounds for non-recognition or non-execution (Article 11)

Grounds for non-recognition/non-execution (Article 11 EIO DIR):

a) **Immunity or privilege**, rendering the EIO **impossible to execute**. May include protections to medical and legal professions. May also include, even if not privileges or immunities, *stricto sensu*, rules relating to freedom of the press and freedom of speech (Recital 20).

b) If execution would harm **essential national security** interests.

c) In administrative proceedings or other proceedings brought by judicial authorities, if the decision may give rise to proceedings before a criminal court and the **measure would not be authorised** in a similar domestic case.

d) Violation of the ***ne bis in idem*** principle.

e) If an EIO relates to an offence **partially committed** in the executing State but does **not constitute a criminal offence** there.

f) Violation of **fundamental rights**.

g) **Double criminality** (with exceptions — Annex D).

h) The use of the investigative measure is restricted under the law of the executing State to a **list or category of offences, or to a threshold**, that does not include the offence covered by the EIO.

Article 11(4) EIO DIR: **Obligation of consultation** in relation to (a), (b), (d), (e) and (f) before deciding not to recognise or not to execute an EIO.

The grounds for non-recognition provided for by the EIO DIR (Article 11 and other grounds mentioned in Chapter IV of the EIO DIR) are contained in an **exhaustive list**, which needs to be interpreted restrictively, as these grounds constitute an exception to the principle of mutual recognition. Therefore, under the EIO regime, no margin is available to refuse the execution of EIOs on grounds that are not included in this list, such as, for example, the principle of opportunity.

5.5. Urgent cases

The fulfilment of the formalities required by the EIO DIR might be particularly challenging in urgent cases, for example ensuring that a signed EIO form is sent in the original language and translated into the language accepted by the executing Member State, or that the validation process is respected during public holidays or weekends. The EIO DIR does not regulate provisional measures to be taken before an EIO is issued.

Best practice in relation to urgent matters

- In urgent cases, communication with the executing authority as soon as possible to assess the different options is recommended, preferably with the timely involvement of Eurojust or the **EJN contact points**.
- In some Member States, e-**mail, fax or even telephone requests** are accepted in urgent cases, before the actual EIO is sent. Article 7 of the 2000 MLA Convention on the spontaneous exchange of information could offer a solution in some situations.
- Some Member States that have not indicated acceptance of another official language pursuant to Article 5(2) EIO DIR will, nevertheless, **accept an urgent EIO in English**, provided that the translated EIO follows soon after.
- When the validation of an EIO is required, some Member States are willing, in urgent cases, to take some **initial measures to secure evidence** before the validated EIO has even been received. In those cases, an e-mail is required, with a brief written summary of the facts. Furthermore, some Member States will accept an e-mail confirmation from the competent validating authority when the validating authority is not available to sign the EIO.
- The EJN document 'Competent authorities, languages accepted, urgent matters and scope of the EIO Directive' includes information about urgent matters in each Member State, e.g. on the extent that the English language can be used and the use of e-mail as a first step.

5.6. Acknowledgment of receipt (Article 16 (1), Annex B) and time limits (Article 12, Annex B)

Use of **Annex B** to acknowledge receipt of the EIO is mandatory (Article 16(1) EIO DIR); indeed, Annex B must be completed and sent to the issuing authority every time an EIO is received. When the receiving authority transmits the EIO to another authority for its execution, this information should be included in Annex B and the issuing authority should contact the latter directly thereafter. Annex B also serves to inform the issuing authority from which date time limits should run.

Mandatory deadlines (Article 12 EIO DIR):

The decision on the recognition or execution of the EIO shall be taken and the execution of the measure shall be carried out '**with the same celerity and priority as for a national case**'.

- **Mandatory deadlines**
  - For taking the decision on recognition or execution (30 days + 30 days), and
  - For taking the measure (90 days after the decision on recognition or execution).
- **Provisional measures** (Article 32)
  - Decision, if possible, within 24 hours of receipt of the EIO.

As with other mutual recognition instruments, the EIO DIR provides **time limits** for recognition or execution and for carrying out investigative measure/s. Article 12(6) EIO DIR provides that, in cases in which it is not practicable for the executing authority to meet the time limit, it shall inform the issuing authority of the reasons for the delay and consult with the issuing authority about the appropriate timing to carry out the investigative measure/s. The execution of the EIO is thus postponed. Under no circumstances should the delay be the cause or reason for non-execution.

Cases involving e-evidence and short data retention periods: The EIO DIR provides the possibility for a so-called **provisional measure for very urgent situations** (Article 32 EIO DIR), with the view to provisionally preventing the destruction, transformation, removal, transfer or disposal of an item (including data) that may be used as evidence. In this situation, the executing authority shall decide and communicate the decision on the provisional measure as soon as possible and, whenever practical, within 24 hours. Early coordination and the involvement of judicial authorities will be required.

6. Specific investigative measures (Articles 22-31)

6.1. General

The EIO DIR foresees several specific investigative measures under Articles 22-31 EIO DIR.

Chapters 6.2 to 6.7 incorporate the experiences gathered by Eurojust and the EJN in relation to some investigative measures. However, they do not contain a comprehensive overview, since limited information is available in relation to certain investigative measures, such as the temporary transfer of persons held in custody (Article 22 EIO DIR) and covert investigations (Article 29 EIO DIR).

6.2. Hearing by videoconference (Article 24)

Article 24 EIO DIR foresees the possibility of **suspects/accused persons being heard via videoconference**. Some national implementation laws only allow the hearing of a suspected or accused person by videoconference if the person consents ('shall' refuse; mandatory ground for non- recognition) while other national implementation laws are less rigid ('may' refuse; optional ground for non-recognition).

Article 24(1) EIO DIR also allows the possibility for **'witnesses' or 'experts' to be heard by videoconference**. Although 'victims' are not explicitly mentioned and, according to some national legal systems, 'victims' are not 'witnesses' (different procedural rights and obligations; no obligation to testify or to speak the truth), most Member States seem to accept that they fall within the remit of Article 24 EIO DIR.

Hearing by videoconference in the trial phase: The question has been raised as to whether the EIO could be used for the hearing of accused persons during trial and thus as a way to guarantee the participation of the accused in a criminal trial instead of a temporary transfer. Recital 25 confirms that the EIO DIR covers all stages of criminal proceedings, including the trial phase. Hearing by videoconference in the trial phase — in this specific context — will certainly not be used by those Member States whose domestic law requires the actual presence of the accused at trial. This same measure might also not be used, in the same circumstances, by those Member States that can only use videoconferences for the gathering of evidence. These countries may, however, execute such EIOs coming from Member States in which those videoconferences are allowed, provided that the rights of the accused person were guaranteed and to do so was not considered contrary to the fundamental principles of law of the executing Member State (see Article 24(2)(b) EIO DIR).

Best practice:

- If the person to be heard has a different status in the issuing Member State (witness) than the executing Member State (suspect), the person should, when heard, be informed of his/ her rights both as a witness and a suspect that he/she has under the law of each of the two Member States.

- Similarly, in the case of a videoconference, a suspect/accused person is protected by the rights granted by both legal systems, i.e. the rights that exist in both the executing and the issuing Member States, and witnesses and experts may claim a right not to testify, should this right be afforded by either of the legal systems (see Article 24(5)(e) EIO DIR).

6.3. Hearing by telephone conference (Article 25)

The EIO DIR foresees the possibility of **witnesses and experts being heard by telephone conference**, but seems to exclude this possibility for suspected and accused persons, since the wording of Article 25(2) EIO DIR does not make any reference to paragraphs 1 and 2 of Article 24 EIO DIR.

6.4. Information on banking and other financial operations (Article 27)

Article 27 EIO DIR provides for the possibility of executing an EIO to obtain financial evidence concerning accounts, of whatever nature, held in any bank or any non-banking financial institution by a person subject to criminal proceedings. The article is thus not limited to suspects or accused persons, but also comprises **any other person** in respect of whom such financial information is found necessary, as long as the request is sufficiently motivated for use in the course of criminal proceedings (proportionality; *see also* Recital 27).

6.5. Gathering of evidence in real time (Article 28)

Most Member States consider that the wording of Article 28 EIO DIR is sufficiently broad to leave room for measures such as video surveillance, tracking or tracing with the use of technical devices (GPS) and accessing a computer system.

6.6. Interception of telecommunications **with** technical assistance (Article 30)

Different views prevail concerning whether Article 30 EIO DIR could be applied to a request to install a covert listening device (e.g. 'bugging' of a car).

6.7. Interception of telecommunications **without** technical assistance (Article 31)

Article 31 EIO DIR regulates the **notification of a Member State where the subject of the interception is located from which no technical assistance is needed** (Annex C). A **lack of notification and/or a lack of approval** could lead to concerns about the admissibility of the evidence. In some Member States, the central authority is held as competent to receive Annex C, while in other Member States, the recipient is the local authority, if identified.

Extent to which a notified authority should check whether 'the interception would not be authorized in a similar domestic case' (Article 31(3) EIO DIR): Differing opinions exist, ranging from a merely formal procedural check to a substantive examination, for which additional information is requested to make an assessment that could potentially lead to the termination of the interception and/or the issuance of a decision preventing the intercepted material from being used as evidence. In any case, national authorities cannot be required to provide more information than the information requested in Annex A. The notification does not constitute an order to recognise an investigative measure (Annex A), but is a mere reflection of respect for the sovereignty of the other country.

Material scope of Article 31 EIO DIR: Differing views exist as to whether this provision also applies in the case of a covert listening device (e.g. 'bugging' of a car).

7. Rule of speciality

Apart from its specific role in matters concerning the extradition and transfer of sentenced persons, the 'rule of speciality' traditionally applies also to MLA requests for gathering evidence (e.g. Article 23 of the 2000 MLA Convention). The **EIO DIR does not expressly regulate the speciality rule**, however, and the Member States have diverging views regarding whether or not the specialty rule applies in the context of the EIO DIR.

These differing views lead to different approaches to issuing or executing EIOs. From the perspective of the executing Member State, some explicitly mention that, when executing an EIO, evidence may only be used for the purpose of that specific investigation; other Member States do not mention anything, but assume that the evidence will not be used for another purpose. From the perspective of the issuing Member State, some consider that permission must always be sought from the executing Member State before evidence is used in a different case; others consider that this step is not required, as the issuing authority decides and Member States will transfer the evidence accordingly, subject to the applicable legal framework on data protection.

Identified best practice

- In cases in which both a JIT and an EIO have been applied in parallel, mentioning explicitly in EIOs that the evidence obtained with the EIO (outside the JIT) can be shared with the members of the JIT is advisable.
- To avoid problems, a separate request from the issuing Member State is advisable before using the evidence for purposes other than the purpose/s stated in the original EIO.

8. European Investigation Order vs other instruments

8.1. European Investigation Order vs freezing instruments

An object can be needed both as evidence and for the purpose of confiscation. If an object is secured for **evidence gathering**, the **EIO** applies. For the **securing of an object for subsequent confiscation, a freezing order** is required (see also Framework Decision 2003/577/JHA). If an object is needed for both purposes, the common view is that the EIO should be used if the primary goal is evidence gathering. The issuing authority must make this assessment and clarify the purpose of the freezing measure.

Freezing and confiscation of property for restitution to an injured party is not within the scope of the EIO DIR (Article 8 of the 2000 MLA Convention remains applicable; see also ***Chapter 2.1. Any investigative measure and corresponding provisions***). An MLA request should be used instead. When an EIO is issued (for evidentiary purposes) and the property is later handed over to the issuing State, without any restrictions on its use (including returning it to the executing State), the issuing State may, in accordance with its national legislation, decide on restitution.

8.2. European Investigation Order vs joint investigation teams

Generally speaking, EIOs and JITs are different tools and assessment should be made on a case-by-case basis concerning which instrument is best used in which circumstance (e.g. countries involved, complexity of the case, type and number of investigative measures needed, expected costs, etc.). Sometimes, **both tools can be combined** and the evidence obtained by one JIT country with an outgoing EIO to a country outside the JIT can be shared within the JIT (with an explicit clause in the EIO that enables the sharing of evidence). In countries in which enforcement authorities play an important role, JITs may be the preferred option, rather than a 'judicialised' EIO regime.

8.3. European Investigation Order vs European Arrest Warrant

Recital 25 of the EIO DIR underlines that, if a person is to be transferred to another Member State for the purpose of prosecution, including bringing that person before a court for the purpose of standing trial, an EAW should be issued.

However, the EIO DIR could be used for the **transfer of persons with a view to obtaining evidence from the person concerned**. Since this measure concerns the deprivation of liberty, a judge in the issuing Member State should be involved in the practical arrangements under Article 22(5) EIO DIR.

8.4. Cross-border surveillance

According to Recital 9 of the EIO DIR, the Directive should not apply to the cross-border surveillance referred to in the Convention implementing the Schengen Agreement. Most Member States consider that cross-border surveillance is a matter for police cooperation and that an EIO should not be issued in these cases. For other Member States, cross-border surveillance is a matter for judicial cooperation. Some Member States have also expressed the view that cross-border surveillance does not fall under the EIO unless the monitoring of devices, geolocation and/or wiretappings are involved in the process. The different interpretations of the scope of the EIO regarding cross-border surveillance may create problems. One issue is the limitation on the use of evidence obtained through cross-border surveillance. In some Member States, evidence gathered using this measure can be used in court, while in other Member States it cannot.

In some Member States in which the issuance of an EIO for cross-border surveillance is not possible because it is excluded from the scope of their national legislation, this measure contained in an incoming EIO can still be implemented, since the national legislation takes into account possible differences in the national legislation of other Member States.

9. Assistance provided by Eurojust and the European Judicial Network

9.1. General remarks

Eurojust and the EJN can facilitate and advise during the different phases of the life cycle of an EIO, including during the drafting, transmission, recognition, execution and follow-up phases. For assistance in deciding whether to contact Eurojust or the EJN in a concrete case, please refer to the Joint Paper — Assistance in International Cooperation in Criminal Matters for Practitioners, EJN and Eurojust.

Before the EIO is issued, Eurojust and the EJN may, for instance, assist in: (i) drafting the EIO and clarifying legal issues; (ii) identifying the competent receiving/executing authority; (iii) playing an advisory role in the choice of the use of the EIO in relation to other (mutual recognition) instruments; (iv) developing a possible cooperation strategy (including scheduling the time line).

After the EIO is issued, the issuing or the executing authority can request the assistance of Eurojust and the EJN in relation to questions such as whether: (i) the EIO has been received in good order; (ii) the EIO is ready for execution (Article 9(6) EIO DIR); (iii) any obstacles have been identified (Article 7(7) EIO DIR); and (iv) any additional information/documents are required (Article 11(4) EIO DIR).

Whenever a consultation procedure is triggered, or whenever additional feedback is needed, Eurojust and the EJN can play the **role of bridge-maker**. The EIO provides for several consultation procedures, whereby a request can be submitted to Eurojust and the EJN to ask for their assistance, for example, to:

- check the relevance of the EIO (proportionality check) (Article 6(3) EIO DIR);

- clarify any bottleneck or check the authenticity of any document (Article 7(7) EIO DIR);
- facilitate the recognition and execution of EIOs (Article 9(6) EIO DIR);
- consult on whether recourse to a different type of investigative measure is possible and on the option to withdraw the EIO (Article 10(4) EIO DIR);
- consult on the provision of any necessary information if grounds for refusal to recognise or execute an EIO are present before taking a decision (Article 11(4) EIO DIR);
- discuss the appropriate timing needed to carry out the particular investigative measure in cases in which meeting time limits is not practicable (Article 12(6) EIO DIR);
- consult on the temporary transfer of evidence (Article 13(4) EIO DIR);
- exchange feedback on legal remedies (Article 14(5) EIO DIR);
- decide on whether and how to share extraordinary costs (Article 21(2) EIO DIR); and
- clarify issues in relation to the completion of the form contained in Annex C (notification of interceptions that do not require technical assistance) (Article 31 EIO DIR; Annex C).

9.2. Eurojust

The EIO DIR is essentially a tool for bilateral cooperation. It does not address multilateral/multi-jurisdictional coordination or the multidisciplinary dimension of the fight against transnational organised crime.

In **complex multilateral cases**, in which measures affect different parts of the national territory, and also require simultaneous coordination with other measures in the issuing Member State and/or in other Member States or non-EU third States, Eurojust can be of assistance. Likewise, issuing authorities can rely on Eurojust when they foresee that they will issue an EIO in multi-jurisdictional cases. These cases require multiple steps to be taken in different Member States, particularly when the investigative measures must be carried out on a concrete common action day, in a **coordinated and simultaneous** manner in different States, taking into account the existing **coordination mechanisms offered by Eurojust** (coordination meetings and coordination centres).

Draft EIOs are often provided before a coordination meeting or before an action day to enable the executing authorities to give feedback to ensure smooth execution of the final EIOs.

9.3. The European Judicial Network

The **EJN contact points** act as '**active intermediaries**' and assist the issuing and executing authorities in establishing direct contacts. As described above, the EJN contact points provide EIO assistance on a daily basis. Contacting the EJN contact points has proved particularly valuable in urgent cases as well as when a competent validating authority in an issuing Member State has not been available to sign an EIO, to explore how to proceed. Another situation in which contact with the EJN contact points is recommended is if several measures need to be taken in different geographical areas of a particular executing Member State.

The EJN website contains information and tools for the practical application of EU legal instruments, including the EIO DIR. Here, practitioners can find the EIO DIR in all EU languages, information on the status of the transposition of the EIO DIR (e.g. the date of entry into force in respective Member States, notifications and links to national legislation), competent authorities, languages accepted in the respective Member States and Annexes A, B and C in all EU languages in Word format, etc.

The website provides the following practical online tools:

- The **Compendium**, which enables an EIO to be drafted online and the static parts of the EIO form to be immediately translated into an any official EU language;
- The **Judicial Atlas**, used to identify the locally competent authority to receive the EIO;
- The '**Fiches belges**', which supply concise practical and legal information on a number of investigative measures; and
- The **Judicial Library**, which contains many useful documents, e.g. Word versions of the three EIO annexes and national EIO handbooks, if available. These national EIO handbooks, if shared with the EJN, are uploaded on the EJN website, with restricted access.

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