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NOTE

From: General Secretariat of the Council
To: Delegations
Subject: Extracts from Conclusions of Plenary meetings of the EJM concerning the practical application of the EIO

Delegations will find attached extracts from Conclusions of Plenary meetings of the European Judicial Network (EJM) in respect of the practical application of the European Investigation Order (EIO):

ANNEX I: extract from the Conclusions of the 48th plenary meeting of EJM (Malta, June 2017);

ANNEX II: extract from the Conclusions of the 49th plenary meeting of EJM (Tallinn, November 2017).

Extract from the Conclusions of the 48th Plenary meeting of EJM

(Malta, June 2017)

**Practical application of the Directive 2014/41/EU regarding the European
Investigation Order in criminal matters**

Background

On 22 May 2017, the Directive 2014/41/EU regarding the European Investigation Order in criminal matters (“EIO Directive”), had to be transposed into national legislations by 26 Member States. Although by the date of the 48th EJM Plenary meeting only few weeks elapsed from the transposition deadline, the plenary meeting offered the first occasion to discuss several aspects regarding the practical application of the EIO, based on the experience achieved so far. Moreover, the delay in transposition by some Member States added a new challenge for practitioners, i.e. in which way should the cooperation proceed when gathering evidence between Member States which have transposed the EIO Directive and Member States which have not (“the transitional period”).

Conclusions - EIO

a. Transitional period

In preparation for the late transposition of the EIO Directive by some Member States, several Contact Points stated that the legislation in their Member State has foreseen provisions which would allow for the application of the MLA Conventions with Member States that have not transposed the Directive. In Member States where such provisions have not been included, practitioners have started applying the same pragmatic approach.

Member States that have not yet transposed the EIO Directive are expected to respect the EIO regime to the extent possible, e.g. regarding time limits, when executing a request from a Member State that has transposed the Directive.

b. Scope of the EIO Directive

Regarding Article 34 of the EIO Directive which deals with the relations to other legal instruments, agreements and arrangements, participants agreed that the meaning of “corresponding provisions” replaced by the EIO Directive, is adequately described in the Note prepared by Eurojust and the EJM¹. This Note satisfactorily enumerates the measures which should be excluded from the scope of the EIO Directive.

c. Filling in the EIO form

- Participants acknowledged various difficulties when filling in the EIO form, such as when **several persons** are concerned or if **multiple competent authorities** at regional level would be involved in the Executing Member State. Participants agreed that it is the responsibility of the Executing Member State to ensure that all relevant national authorities are timely involved in accordance with the law of that State.
- In principle it was agreed that when **multiple measures** are requested, practitioners should include all of them in one EIO.
- It was also clarified that in case of freezing and/or confiscation of instrumentalities and proceeds of crime, practitioners should continue to issue the respective Freezing or Confiscation Orders. If other investigative measures falling within the scope of the EIO are necessary, then these will have to be sent in a separate EIO form.

¹ Council doc 9936/17 LIMITE, Annex II - Note on the meaning of “corresponding provisions” and the applicable legal regime in case of delayed transposition of the EIO Directive

d. In case of urgency

Participants discussed the possibility to take action immediately as an executing authority when approached by the issuing authority, while waiting for the EIO to be finalised and sent. Different opinions were expressed on this topic, i.e.:

- sending a request in advance, which would not be bound to any form (e. g. per email or even on the phone). Although this option is not provided in the Directive, participants underlined that the Directive is aiming at improving international cooperation and not to make it less efficient;
- using law enforcement channels. This option would be quick, but it may raise problems regarding the admissibility of the evidence at a later stage;
- no possibility to act before the EIO is issued.

e. Language regime

Accepting the EIO in only one language was identified as a potential problem. To avoid delays related to translation of documents, participants called upon Member States to include more than one accepted language in their national provisions, recognising that English would be the best solution as it is widely spoken among practitioners. A number of EJM Contact Points interpret Article 5(2) of the EIO Directive as obliging the executing Member State to accept other EU languages than their own.

Participants considered that an EIO sent without translation should be seen as “incomplete” in the meaning of Article 16 (2). Thus the executing authority would have to inform the issuing authority instead of sending the form back or treating it as non-existing.

f. **Support by the EJM and Eurojust**

The support by the EJM and Eurojust, in accordance with their respective mandate, is crucial for the effective application of the EIO Directive, as in the case of other judicial cooperation in criminal matters procedures.

g. **Role of the EJM**

Considering the novelties introduced by the EIO regime, participants in the workshops concluded that the EJM should be prepared for an increase of its support, in order to avoid unnecessary delays in the issuing and execution of EIOs. Particularly, it was recommended that when filling in the EIO, practitioners should contact the EJM Contact Points and/or the executing competent authority to resolve any doubts before sending the EIO. In consequence, an increase of the workload of the EJM Contact Points is to be expected until the know-how on the EIO is widely disseminated in the Member States and through the EJM website.

To facilitate the work of practitioners, the EJM Secretariat should compile information on the issuing and validating authorities in the Member States. Additionally, EJM Contact Points should send information on problems regarding the practical application of the EIO, as well as positive experiences to the EJM Secretariat, to ensure that practitioners are made aware of the further development of this instrument. When possible, a compilation on best practices would also be of added value.

h. Particular actions regarding the EJM website

- **Designated EIO area:** The EJM website should host a specific section containing practical information on the EIO (e.g. a compilation of issuing and validating authorities, best practices, FAQ etc).
- **Status of implementation:** The EJM website provides the status of implementation of all legal instruments related to international judicial cooperation in criminal matters. It is of particular importance that the information on the transposition of the EIO Directive is accurate, since this information is needed on a daily basis in order to decide which instrument to use.
- **Fiches Belges:** The fiches belges were recognised as an essential tool for information, e.g. regarding the scope of the EIO and legal practical information. Member States should maintain the information as complete and accurate as possible.

i. Next Steps

- **Guidelines:** Participants stressed the urgent need for guidelines, both at EU level and at National level. These guidelines should be practical, clear and concise.
- **EIO electronic model form:** The initiative from the European Commission to provide an electronic model form for the EIO, with guidance on how to fill it in was welcomed. Participants stressed though that the option of using the EJM Compendium as a tool for drafting an EIO must be kept. The participants emphasised that comments from the EJM Contact Points should be collected before the electronic model form is made public.
- **Training for practitioners:** The organisation of training, including practical sessions, was found essential, both for EJM Contact Points and for other practitioners, to allow them to fulfil their function efficiently.

Extract from the Conclusions of the 49th Plenary meeting of EJN

(Tallinn, November 2017)

**Workshop III - Practical implementation of the
European Investigation Order in criminal matters**

Background

The Directive 2014/41/EU of 3 April 2014 on the European Investigation Order in criminal matters (“EIO Directive”) was a priority for the European Judicial Network (EJN) since it was adopted and several measures have been taken by the EJN Secretariat and the EJN Contact Points - before and after 22 May 2017 - in order to facilitate its transposition into national legislations and a smooth practical implementation, especially during the transition period.

At the 49th plenary meeting of the European Judicial Network, the participants in Workshop III – “Practical implementation of the European Investigation Order in criminal matters” discussed aspects regarding the practical application of the EIO Directive and shared experiences on challenges faced and solutions identified to mitigate them.

The general aim of the discussions was to know which were the main challenges the national authorities encountered as of 22 May 2017 in gathering evidence in criminal matters:

- mainly between Member States which both have transposed the EIO Directive;
- but also in relation between a Member State which transposed the directive and a Member State which did not transpose it yet.

Conclusions

1. Scope of the EIO Directive

Due to the diverse interpretation of what is meant by “corresponding provisions” of the conventions mentioned in Article 34 (1) of the EIO Directive to be replaced by this new legal instrument, the scope of the EIO Directive is still under debate. The EJM compiled the views of the EJM on this issue in the document ‘*EIO – Legal and practical implications*’. Moreover, the EJM worked together with Eurojust for the preparation of the ‘*Note on the meaning of “corresponding provisions” and the applicable legal regime in case of delayed transposition of the EIO Directive*’².

While discussing the scope of the EIO Directive, the EJM Contact Points had different views on whether issuing an EIO for hearing of the accused person by videoconference during a trial and allowing the accused person to be present through the trial by videoconference is possible. Some Member States stated that according to their national law, they can only accept using videoconference for gathering evidence.

However, several other issues were mentioned by the participants as not falling under the scope of the instrument. Firstly, the participants agreed that if the request is not about gathering evidence it is not covered by the EIO. Secondly, it was commonly agreed that service of documents falls, in principle, out of the scope of the EIO, except when it is part of the investigation measure requested in an EIO. However, no particular problems had occurred in practice in this respect. Finally, it was also argued that the provisions regarding police cooperation measures are replaced by the EIO when these are used for judicial cooperation.

With regard to the relation between the EIO and the EAW, the EJM Contact Points concluded that what was possible under the MLA framework should be possible under the EIO. Recitals 25 and 26 of the EIO Directive could be of help in this regard.

² Both documents available in Council Doc 9936/17 LIMITE

2. Applicability of the ‘rule of speciality’

Apart from its specific role in extradition and transfer of sentenced persons matters, the ‘rule of speciality’ traditionally applies also to rogatory letters for gathering evidence; see for instance Art. 23 of Convention 2000 on Mutual Assistance in Criminal Matters (2000 Convention). The EIO Directive however does not expressly regulate this rule.

The EJM Contact Points discussed whether the evidence obtained following an EIO is subject to the rule of speciality or not and if yes, would it only apply to situations where double criminality needs to be met. Article 19 of the Directive that gives provisions on confidentiality was brought forward as an argument for the rule of speciality to be applied. It was also argued that EIO is issued with respect to specific proceedings and using obtained evidence in other proceedings should not be automatically possible as other grounds for refusal might occur in the latter. In conclusion, the participants had different opinions whether the rule of speciality is applicable to the EIO, since it is not expressly mentioned in the Directive.

It was also mentioned that in order to ensure that no problems occur, a request should be made, preferably by using EIO form before using the evidence for other purposes than what was stated in the original EIO.

3. EIO in urgent matters

The EIO Directive does not regulate the need for provisional measures to be taken before an EIO is issued.

With regard to sending an e-mail or other informal request before sending the EIO, the Contact Points explained in the Workshop that in some Member States e-mail or even phone requests are accepted in urgent cases before receiving the actual EIO. In this case, the EIO is expected shortly after. Article 7 ‘Spontaneous exchange of information’ of 2000 Convention could be a solution in some situations. Contact Points pointed out that more coercive measures could be considered troublesome to handle before the EIO is received.

In urgent situations, some Member States might be willing to act on the basis of an EIO before it has been translated into one of the languages accepted.

With regard to the validation, in some urgent situations, especially during public holidays or weekends, it might not be possible to obtain the handwritten signature of the validating authority. The question discussed by the EJM Contact Points was whether this problem can be mitigated by an e-mail confirmation from the competent validating authority or at least with an electronic signature, which could be accepted by some member states. It was suggested by the participants that the EJM Contact Points could intervene in circumstances like these by assisting in situations when the validating authority is not available to sign the EIO, e.g. vouching for the identity and decision by their national colleague.

4. Competent issuing authorities

With regard to verification whether the issuing or validating authority of an EIO is competent, it became clear during the discussions that normally national authorities rely upon mutual trust, however verifications are done on random basis.

With regard to assessing whether the EIO received has been issued or validated by a competent authority, the EJM Contact Points confirmed that the document ‘Competent authorities and accepted languages’ prepared by the EJM Secretariat and published on the EIO area of the EJM website was useful.

5. Identifying the competent executing /receiving authorities:

According to the EJM Contact Points, there are no particular difficulties for the issuing authorities to find the competent executing/receiving authority of an EIO. The information available in the EJM Atlas was considered very useful and the timely adaptation of the Atlas to the EIO Directive of great importance as soon as the EIO Directive is transposed in the respective Member State.

For the purposes of the Atlas, the EIO Directive coexists with other legal instruments as potential legal basis, depending on the status of implementation of the EIO Directive and in relation to Denmark and Ireland.

The importance of keeping the Atlas up-to-date and the crucial role of the EJM Tool Correspondents in this regard was underlined.

6. Time limits

Like other mutual recognition instruments, the EIO Directive provides time limits for recognition or execution. This is one of the most important added values to the ‘traditional’ MLA system. From a practical point of view, the EJM Contact Points did not highlight any particular problems regarding compliance with the time limits for the recognition or execution of the EIO.

7. Proportionality/Necessity

The EJM Contact Points were invited to assess how the proportionality and necessity aspect had been handled in practice so far and what would have been the consequences if the executing authority found that the requirement of proportionality and necessity are not respected by the issuing authority (bearing in mind that this is not a ground for refusal according to the EIO Directive).

It was commonly agreed that if this requirement was not respected, it technically could not be viewed as a ground for refusal. In case of doubt, the executing authority should ask for an explanation and additional information from the issuing authority. It was nevertheless acknowledged that execution could be refused in exceptional cases.

One reason mentioned for why the executing authority might raise the question of proportionality and necessity is that the description of the offence sometimes is not detailed enough or the requested investigative measure is too wide and difficult to justify or not concretely described to make a proper assessment. Member States stressed that the requested measure has to be relevant and no “phishing expeditions” are allowed.

Additional problems in assessing the proportionality and necessity might be generated by different words used for “necessary” in other language versions of the EIO Directive. The EJM Contact Points admitted that sometimes problems indeed had been raised by the translation of the words “proportionality” and “necessity” in some languages. It was agreed that when in doubt, practitioners should check the English version of the EIO Directive.

8. **Previous MLA requests**

The EJM Contact Points discussed possible interpretation of Article 35 (1) of the EIO Directive, namely in a situation where both cooperating Member States have transposed the Directive, but they have an ongoing case that started before both or one of them transposed the EIO Directive and therefore have been handling MLA requests between each other. The question raised was whether a Member State may send an additional MLA request as a continuation to a previous MLA request after both cooperating States have transposed the EIO Directive.

The EJM Contact Points shared the view that a supplemental EIO should be issued instead of continuing with MLA.

9. **Other problems in the practical application of the EIO**

In addition to the above-mentioned aspects of practical application of the EIO, the Contact Points were invited to highlight any other problem encountered. Issues that were mentioned were the following:

- New competent executing authorities compared to the MLA framework, in some cases.
- Situations when a national decision in the Issuing Member State is required by the Executing Member State, although the EIO normally should be regarded as the “national decision” (e.g. in cases of a request for interception of telecommunications).

The EJN Contact Points also shared views on how to deal with these issues. One of the solutions highlighted was a document on Frequently Asked Questions (FAQ) to answer to particular questions of national authorities in a Member State regarding the practical application of the EIO Directive.

10. EIO on the EJN website

The information on the EJN website on the EIO was considered very useful, provided that it is updated on regular basis. The important role of the EJN Tool Correspondents with regard to updating the website was underlined. One of the suggestions made by the participants was the creation of a FAQ (see above) as an additional feature for the EIO section. Alternatively, information suitable for an FAQ, could be provided in the Fiches Belges.

11. Transitional period

The question raised was how the requested/executing authorities from a Member State, which has not transposed the EIO Directive, treat an EIO sent from a Member State which has transposed the Directive.

Most Member States, which did not transpose yet the EIO Directive treat EIOs as MLA requests.

It was also noted that in some cases, judicial authorities from Member States which have transposed the EIO Directive, still issue MLA requests. Such practice should be avoided and executing authorities are encouraged not to execute such MLA requests as this could at a later stage create problems with admissibility of evidence in the issuing Member State.

EJN Contact Points underlined the importance of relevant training and of updated information about the EIO Directive.