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From: European Judicial Network
To: Delegations
Subject: Presentation by the European Judicial Network (EJN)
- EJN Conclusions 2018 on the European Investigation Order

Delegations will find attached conclusions on European Investigation Order (EIO), as resulting from the EJN Regular meeting in the Hague in February 2018, the EJN Plenary meeting in Sofia in June 2018, and in several Regional EJN meetings during the year.

EJN Conclusions 2018

On the European Investigation Order (EIO)

1. Introduction

The European Judicial Network (EJN) has been working on facilitating the practical application of the Directive [2014/41/EU](#) of 3 April 2014 regarding the European Investigation Order in criminal matters¹, (“*EIO Directive*”) well before the transposition deadline of it on 22 May 2017.

At the COPEN meeting on 8 December 2017 the EJN presented the document “*Extracts from Conclusions of Plenary meetings of the EJN concerning the practical application of the EIO*”² in respect of the practical application of the EIO as discussed at the 48th Plenary meeting in June 2017 in Malta and at the 49th Plenary meeting in November 2017 in Tallinn.

The EIO continued to be a topic at several EJN meetings in 2018; at the 39th Regular meeting on 21 February 2017 in The Hague, the 50th Plenary meeting on 28-29 June 2018 in Sofia, Bulgaria and at Regional and National EJN meetings in Germany, Spain, Poland, Portugal and in Sweden.

This document provides for an overview of the experience gathered by the EJN in the course of 2018. The main aim is to identify best practices from the national experiences of handling the EIO. In the future, the experiences collected within the EJN may support the creation of an EIO Practitioners Handbook at EU level.

2. Scope of the EIO

Art 3 of the EIO Directive, which refers to “*any investigative measure*” and Art 34 of the EIO Directive, which states that the Directive replaces “*the corresponding provisions*” of the “*1959 CoE Convention*”³ and its two additional protocols, as well as “*2000 MLA Convention*”⁴ continued to be one of the main topics of discussion among the EJN Contact Points.

In order to assist in clarifying the interpretation of the scope of the EIO Directive, the EJN Secretariat has published a document “*Competent authorities, languages accepted, urgent matters and scope of the EIO Directive*”, which is available to practitioners on the EJN website.

¹ Directive [2014/41/EU](#) of 3 April 2014 regarding the European Investigation Order in criminal matters.

² Extracts from Conclusions of Plenary meetings of the EJN concerning the practical application of the EIO; Council Document [15210/17](#).

³ European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 20/04/1959.

⁴ Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union.

There is a common understanding that the **scope of the instrument does not cover the following**:

- Setting up of a Joint investigation team and collection of evidence within a JIT;
- Service and sending of procedural documents (unless if part of the investigative measure in an EIO);
- Spontaneous exchange of information (Art 7 of the “2000 MLA Convention”);
- Transfer of proceedings (Art 21 in “1959 CoE Convention” and “1972 CoE Convention”⁵);
- Freezing property for the purpose of subsequent confiscation (FD 2003/577/JHA on Freezing Order⁶);
- Restitution – return of an object to victim (Art 8 2000 MLA Convention);
- Gathering of extracts of the criminal records register/ ECRIS;
- Police to Police cooperation;
- Customs to Customs cooperation.

It should be noted that there are Member States where the EIO is applicable for gathering of evidence not only in the investigative phase of the proceedings, but also in the **trial phase** (e.g. summoning of witnesses or experts) and also for measures during the execution of the judgment (e.g. financial investigation for the purpose of identifying assets once a final decision on confiscation has been adopted). This approach is related to national judicial systems where the concept of criminal proceedings includes also the executing phase.

The EJM Contact Points have **different views how, in particular, the following measures**, are included in the scope of the EIO Directive:

a) Cross-border surveillance

According to recital 9 of the EIO Directive, it should not apply to cross-border surveillance referred to in the Convention implementing the Schengen Agreement. Most Member States consider cross-border surveillance as a matter for **police cooperation** and that an EIO should not be issued in these cases. Some Member States, on the other hand, are of the position that recital 9 is not binding and that cross-border surveillance could be a matter for **judicial cooperation**. Some Member States have also expressed views that cross-border surveillance does not fall under the EIO unless monitoring of devices, geolocation or wiretappings are involved in the process.

⁵ European Convention on the Transfer of Proceedings in Criminal Matters, Strasbourg, 15/05/1972

⁶ Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence

The different interpretation on the scope of the EIO regarding cross border surveillance may create problems. One issue is the limitation to use evidence received through cross-border surveillance. In some Member States evidence gathered using this measure can be used in court, in others not.

In some Member States, where it is not possible to issue an EIO for cross-border surveillance, as it is excluded from the scope in their national legislation, the execution of an incoming EIO regarding this measure can still be effected, since the national legislation takes into account possible differences in national law of other Member States.

b) Freezing and confiscation

An object can be needed both as evidence and for the purpose of confiscation. At the stage of securing the object, either the EIO (evidence) or the Freezing order (subsequent confiscation) is used, depending on the purpose of securing it. In several cases the object might be needed for both purposes.

There is a common view among the EJM Contact Points that the EIO should be used if the **primary aim is evidence gathering**.

Most Contact Points agree that freezing and confiscation of property for the **restitution** to an injured party is not within the scope of the EIO Directive. Instead an MLA request should be used. It was also expressed by some that when an EIO is issued (for evidentiary purposes) and the property is later handed over to the issuing State, without any restrictions on the use of it (including returning it back to the executing State), the issuing State may, in accordance with its national legislation, decide on restitution.

3. Urgent Matters/ Time Limits

The time limits provided for in the EIO Directive for the recognition/ execution of the EIO and for carrying out the investigative measure is seen as a major improvement.

a) Time limits

The EJM Contact Points in general have not encountered any particular difficulties in practice to comply with the time limits. In some Member States there is a practice, as an executing authority, to inform the issuing authority if the time limits cannot be respected.

The use of Annex B is considered very helpful as it confirms to the issuing authority that the EIO has been received and is taken care of, which gives some certainty in the respect of the time limits. However, it was also expressed that Annex B is not always used.

b) Urgent matters

In relation to urgent matters, the formalities required by the EIO Directive are **challenging**: the signed EIO form (Annex A) received in original and translated into the language accepted by the executing Member State. An additional challenge, especially during public holidays or weekends, is when the validation of the EIO is needed; it might not be possible to reach the validating authority or to obtain a handwritten signature of the validating authority within the time required.

The EJM Contact Points have identified several “**best practices**” in relation to urgent matters:

- In case of urgency it is recommended to communicate with the executing authority as soon as possible (using the EJM if needed), to see what is possible to do.
- If the EIO is urgent, the issuing authority could consider sending the EIO via electronic channels. The EJM Secure Telecommunication Connection could be used.
- In Some Member States originals are not needed and copies transmitted via email or fax are sufficient to proceed with the execution.
- Most EJM Contact Points are of the opinion that the handling of urgent cases can be speeded up if the executing state accepts the EIO in English. Some Member States, which have not indicated English according to Article 5(2) of the EIO Directive, nevertheless accept an EIO in English in urgent matters provided that the translated order follows soon after. However, in some Member States, the execution is said to be faster if the EIO is translated into the languages that are accepted, instead of sending the EIO in English.
- When the validation of an EIO is needed, some Member States are willing, in urgent matters, to take some initial measures to secure the evidence already before the validated EIO has been received. In those cases, an e-mail is required with a brief written summary of the facts.
- Some Member States accept an e-mail confirmation from the competent validating authority when the validating authority is not available to sign the EIO. Also the EJM Contact Points could assist in these situations, e.g. vouching for the identity and decision by their national colleague.

It has to be noted, that **in a number of Member States there is no possibility to act before a signed and translated EIO is received, and validated in relevant cases**. Therefore, the above-mentioned “best practices” are not applicable to all Member States.

Other alternatives for handling urgent situations have also been discussed, such as the use of a draft or simplified form for urgent matters. However, there is a risk that such a form would not be accepted by the executing authority. Another solution that has been mentioned is to initiate a criminal investigation in the executing Member State and decide on coercive measures within that investigation. However, this solution may be hampered by lack of jurisdiction or that the necessary information/evidence is not available for the support of such an investigation in the executing Member State.

The EJM document “*Competent authorities, languages accepted, urgent matters and scope of the EIO Directive*” is available to practitioners on the EJM website. This document includes information about urgent matters in each Member State. e.g. to what extent the English language can be used or the use of email as a first step.

4. Translation

The fact that many Member States do not accept any other languages than the official national languages raises concerns. The EJM Contact Points continue to **call upon Member States to include at least one other language than their official language/s to be used for the EIO**; English being the best solution as it is widely spoken among practitioners. A number of EJM Contact Points continue to interpret Article 5(2) of the EIO Directive as obliging the executing Member State to accept one or several other EU languages than their own.

Another issue mentioned is that due to the extensive mandatory form provided for in the EIO Directive, translating EIOs is costly.

There have also been complaints about the quality of the translations and since normally the EIO in the language of the issuing Member State is not attached, it is not possible for the executing authority to have the unclear parts of the request translated domestically.

5. Rule of Speciality

The EIO Directive does not expressly regulate the rule of speciality.

The EJM Contact Points have continued the discussions on whether they have experienced the issue of the applicability of the rule of speciality in the EIO framework (as issuing or as executing authority) and which approach is taken. **The opinions differ among the Contact Points.**

Views have been expressed that the rule of specialty is a basic principle in international cooperation and therefore it is also applicable to the EIO. On the other hand, the majority of the EJM Contact Points seem to be of the position that it is not applicable and that evidence obtained can be used for other purposes than the one the EIO is based on. Some Contact Points argue that the evidence can be used for other purposes as long as the executing Member State has not expressly limited the use of the evidence.

In order to avoid problems, it has been concluded that a separate request is advisable before using the evidence for other purposes than what was stated in the original EIO.

6. National decision adopted in the Issuing State

In some Member States, when executing an EIO, a **national decision** adopted by the Issuing State is **required**. For example, in cases of a request for interception of telecommunications a national decision may be required in some Member States. Since this requirement is not provided for in the EIO Directive, it causes delays in the execution.

7. Non-recognition/ non-execution and recourse to an alternative, less intrusive measure

The EJM Contact Points have discussed the issue of non-recognition/execution and consultations in relation to the choice of less intrusive measures; there is not much practice though.

A **best practice** has been identified: to avoid unnecessary delaying consultations between the executing and issuing authority, the latter may already in the EIO indicate that less intrusive measures that lead to the same result may be used.

If consultation takes place, the **time** within which the issuing authority must reply before the executing authority proceeds with the less intrusive measure must be sufficiently long. 10 days, as stipulated in the legislation of one MS, was considered too short by some Contact Points.

Another point that have been discussed is whether it is necessary to consult with the issuing authority when the investigative measure is to interview a person, who does not come voluntarily to the interview, before coercive measures are used to force the person to the interview (in case this measure is not mentioned in the EIO). The EJM Contact Points were of the opinion that **consultation** is not needed in such cases, since such a coercive measure is to be considered part of executing the interview and not a measure on its own.

8. Proportionality

The provisions in Art 6 in the EIO Directive on proportionality cause problems in the practical application. The point of departure is that the EIO should not be used for minor offences. The problem is to find a common understanding of what is to be considered minor. Even if it is for the issuing authority to assess whether or not it is proportionate to issue an EIO in a specific case, the executing authority will nevertheless do its own assessment in this respect. It is considered unsatisfactory in case the issuing and executing authority have different opinions and the issuing authority does not withdraw the EIO.

9. Competent authorities and issuing and transmitting of an EIO

The EJM Contact Points have discussed the impact of the change of competent executing authorities in some Member States as a result of the introduction of the EIO in the legal system.

Addressing the EIO to the **wrong executing authority** delays the procedure, and therefore, keeping the EJM Atlas up-to-date and the crucial role of the EJM Tool Correspondents was underlined. A suggestion to indicate the EIO specialisation in the EJM Contact Points list on the EJM website was also considered useful.

EJM Contact Points have experienced that an EIO that was sent to the wrong executing authority was returned to the issuing authority. In line with Art 7(6), instead of being returned, the EIO should be forwarded to the correct executing authority and this should be indicated in Annex B.

The practice differs when it comes to situations where **several measures in the same case** are to be taken in different geographical areas of one Member State. In some Member States the EIO can be sent to one executing authority, which will coordinate the execution in the country. In other Member States such a coordinating role is not foreseen, which means that each competent executing authority deals only with the measure/s falling within its primary competence. In those latter cases it is always a good practice, as issuing authority, to make the respective authorities aware of the existence of the multiple measures asked for within the country.

As a conclusion, before proceeding, the issuing authority should **make use of the EJM Contact Points** of the executing Member State in order **to determine what is best to do in any given situation**. It was also suggested to add information in the EJM Atlas for these situations.

EJM Contact Points admitted that although the EIO Directive is in place in all 26 Member States bound by it, **mutual legal assistance requests** are still received in cases where the EIO should have been used. Different approaches as to what to do in those situations were identified; either the MLA request is refused and returned back to the issuing authority or it is executed based on its content.

10. Secure Communication

The means of communication used to transmit the EIO must ensure security and confidentiality of the information. To date, there is no overall electronic communication network for direct transmission of the EIO and the responses by the competent authorities.

The EJM Contact Points have discussed the following **options for transmitting an EIO**:

- EJM secure telecommunication connection (Art 9 of the “EJM Decision”⁷ and Art 7(4) of the EIO Directive). This system is considered less practical to use and still only a limited number of EJM Contact Points are making use of it. In addition, it is not a system for direct contacts between the competent authorities.
- Eurojust secure connection with the respective Member States. The disadvantage of this option is that not all Member States are connected and that it only allows for communication between a national authority and Eurojust (and not between national authorities).
- COM secure online portal (e-evidence digital exchange system). This new system, which is very welcome, is still to be set up by the Commission and implemented in the Member States. It may take considerable amount of time and efforts before it is fully functional.
- eMLA (Interpol)
- Schengen Information System (SIS)
- The use of modern techniques for encryption, such as S/mime and PGP (Pretty Good Privacy).

⁷ Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network.

11. EIO Forms (Annex A, B and C)

The EIO form (Annex A) is considered by some Contact Points as complicated and burdensome to fill in. In this respect the Compendium tool on the EJM website is praised as a good tool for guiding the practitioners.

A problem mentioned is that many EIOs lack fundamental information, e.g. on why the measure is needed for the investigation, dates missing, no information on the affected persons etc.

Another problem is that the forms in the EIO Directive and in the national legislation are not always identical. This may cause confusion and risk delaying the execution; thus the form in the EIO Directive should be used.

It has also been pointed out that there is no box/place to indicate that the form has different annexes enclosed to it. Such a section in the form should be added.

a) Annex A

“Best practices” identified by the EJM Contact Points in relation to filling in Annex A:

- It is preferable to issue only one EIO in those cases where there are several measures to address to one competent executing authority.
- The suspect/s should always be mentioned in the EIO even if there is no specific place in the form for this.
- Section B is used to indicate urgency. This option should be used only in cases where there is a real need for urgency, duly reasoned.
- Section C is used to describe the measures to be taken. It is important that the issuing authority is as precise as possible. When the hearing of a witness is requested, it is helpful if the issuing authority enclose a list of questions.
- Section D should be used to indicate not only previous EIOs, but also other previous requests related to the same case (EAW, freezing etc).
- Section E should be used to identity the person/s concerned by the investigative measure (which is not necessarily the accused/suspected person).
- Section G should be used to present the summary of the facts, using short and clear sentences and making a clear description of the links between the offence, the concerned person and the investigative measure requested.

b) Annex B

Acknowledgment of receipt of the EIO by using Annex B is mandatory (Art 16.1). 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 thereafter contact the latter directly.

In practice, the problem is that **Annex B is often not sent back** by the executing authority to the issuing authority. As a result, the issuing authority has no information whatsoever on the execution of the EIO, including on from which date the time limits should be counted.

c) Annex C

Some EJM Contact Points have argued that Annex C should be used also for notifications regarding covert listening devices ('bugging'), for instance in a car that crosses the border. Others have expressed that the notion "telecommunications" does not include bugging.

12. Training and Support

The following training and support are considered important by the EJM:

- Training: Continuous training and support at national level for the legal and practical application of the EIO is necessary, leading to homogenous handling of the EIO among the competent authorities in the country. Training sessions should be of a practical nature and involve sharing of best practices and identifying main problems on the EIO. Simulations of concrete cases have proven to be a very successful format, since it activates the participants in the different roles of the procedure, e.g. the EIO seminars offered by the EJM with the assistance of EJM Contact Points.
- National and Regional EJM meetings are considered a very valuable way of disseminating information and raising awareness of the EIO.
- National guidelines/ handbooks/ compendium of practices: Several Member States have issued such documents, which provide guidance to practitioners on how to interpret and apply the EIO Directive and the national legislation implementing it.
- Frequently Asked Questions (FAQ): Some Member States find it useful to draw a national list of recurrent issues regarding the practical application of the EIO. The feasibility to include such national FAQs in the EJM Fiches Belges tool should be explored.
- An EU Handbook on the EIO, developed by the Commission, is highly desirable. The EJM should be involved in the drafting of such a handbook.