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NOTE

From:	General Secretariat of the Council
To:	Delegations
Subject:	Comments and Conclusions of the 59th Plenary Meeting of the European Judicial Network (EJN) (Prague, 9 – 11 November 2022)

Delegations will find in the Annex the above-mentioned document.



59th Plenary Meeting of the European Judicial Network

Prague, Prague Congress Centre

9 – 11 November 2022

Comments and conclusions

following the discussion on a model case
on application of cross-border surveillance, controlled delivery,
and interception of telecommunication

Background information

One of the **biggest problems in international cooperation is related to the cross-border surveillance of persons and items**, where, unlike hot pursuit and controlled delivery, the main purpose is not to arrest and seize them but to track them, and sometimes to make an audio or video recording of their movement, sometimes including recording the conversation of persons.

In some States, these records are used solely for operative/intelligence purposes and not as evidence in criminal proceedings, which is why these States handle them within the frame of police, and not judicial, cooperation.

There are States that authorize cross-border surveillance only on judicial level or only on police level, or they have the option to authorize it both on the police and judicial level. However, since it was an EJN conference, the topic of the conference was not cross-border surveillance carried out only for operational police purposes but cross-border surveillance solely **for the purpose of evidence gathering in criminal proceedings**.

In current practice, cross-border surveillance is mostly carried out with technical means that make a recording (either just the movement or even the conversation) – sometimes the vehicle being tracked is followed by police officers crossing the border, but sometimes not and very often the State carrying out the surveillance does not need technical, personal or organizational assistance from the other State. If the surveillance is carried out only by technical means and no detention of persons is planned, very often only after a while the police finds out that the object of surveillance has crossed the border.



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It is clear that, on the one hand, it is necessary to preserve the possibility for the police to carry out surveillance in practice in real time, but at the same time it is necessary to keep a certain judicial control to ensure that evidence is gathered, respecting the rule of law and human rights.

Moreover, it is also clear that in case of surveillance by technical means, the judicial authorities are mostly aware of the case after the surveillance has already taken place. For this reason, some Member States have concluded bilateral agreements with each other that provide for the possibility, that if police carry out surveillance only by technical means and does not need any technical, personal or organizational assistance of a foreign State, it may carry out such surveillance even across borders based solely on an authorization from the judicial authority of its own State. However, the police should notify the authority of the other State that it has crossed the border. If, at a later stage, the recording made during surveillance in the territory of the other State is needed as evidence, the judicial authority may ask the judicial authority of this State to provide a consent to use this recording as evidence.

A similar notification procedure is provided in Article 31 of the EIO Directive that provides the rules for cross-border interception of communications without technical assistance of the other State. However, the EIO Directive provides no possibility to ask and grant consent to use an already made record as evidence in criminal proceedings.

However, unlike cross-border interception of telecommunications, cross-border surveillance is a more commonly used investigative measure. Yet it does not have its own specific regulation in the EIO Directive, let alone the possibility of submitting information and subsequent consent. While some States have attempted to use the notifications in Annex C of the EIO Directive for cross-border surveillance that also records the conversation of persons in a vehicle, this practice is often rejected by other Member States, as Article 31 concerns cross-border interception of telecommunication calls and not areal voice recording, where persons do not talk to each other through telecommunication equipment but directly (face to face).

Item 9 of the preamble of the EIO Directive only provides that "This Directive should not apply to cross-border surveillance as referred to in the Convention implementing the Schengen Agreement (hereafter CISA)". However, Article 40 of CISA only regulates the procedure of police authorities conducting surveillance. It does not regulate the procedure of judicial authorities authorizing the surveillance, which is crucial for States which use the records of surveillance as evidence in criminal proceedings.

Moreover, certain States have implemented the EIO Directive in such a way that they have expressly precluded cross-border surveillance, i.e. they do not issue EIOs



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concerning this type of measures (e.g. DE), while in other States (e.g. CZ), judicial authorities are by contrast obliged to issue EIOs regarding cross-border surveillance, since for them this is undoubtedly an action of evidence collection.

Incidentally, Article 28 of the EIO Directive only lists **examples** of actions involving the collection of evidence in real time, continuously and over a certain period of time (account monitoring and controlled deliveries). Thus, if the issuing authority e.g. in Prague were to request the surveillance of persons and items only in the territory of another State (e.g. on route from Vienna to Graz) with the intention to use the surveillance records as evidence in criminal proceedings, there should be no doubt that this is not cross-border surveillance and at the same time that this is a real-time measure to which Article 28 of the EIO Directive should clearly apply.

But what is the difference between such surveillance within one executing State and cross-border surveillance? From the view of the interference with the human rights of the person being surveilled, they are the same acts and the difference is only that in one case the surveillance is carried out only by the executing authorities in the executing State, whereas in the other case the border is crossed by the authorities conducting the surveillance (or the monitoring device) from one State to another.

Therefore, if an amendment to the EIO Directive is to be considered in the future, the question is whether the issue of cross-border surveillance would deserve its own regulation, either under Article 28, or under a separate provision.

This could alleviate any doubts as to:

- whether or not to use EIO for this measure,
- whether surveillance records under Article 40 of the CISA can be used as evidence in criminal proceedings (in many countries it is not the task of police authorities to procure evidence abroad, it is a task only for judicial authorities),
- introduce a notification procedure also for this measure, etc.

Since the EJM meetings provide the opportunity for the practitioners from all Member States to meet each other and to discuss the matters related to the judicial cooperation, it was decided to bring the problem described above for the discussions at the 59th EJM Plenary meeting under the Czech Presidency where Contact Points could reflect on the possible solutions, using their experience and diverse legal background. In the format of small workshops, the Contact Points analysed the case study (Annex 1 of this document) that illustrates practical and legal nature of the issues practitioners come across when dealing with the cross-border surveillance. The conclusions prepared at each workshop are attached as Annex II to this document.

Summary of conclusions

1) Cross-Border Surveillance

There is **no uniform legal regulation of cross-border surveillance at the EU level if the surveillance records are to be used as evidence** in criminal proceedings. It is desirable **to have special provisions for cross-border surveillance** (in the EIO Directive).

2) Urgent Cross-Border Investigative Measures with Subsequent Authorization

Except for Article 31 on cross-border interception without technical assistance which is rarely used in practice, **there is no regulation of urgent cross-border investigative measures with subsequent authorization in the EIO Directive**. This lack of regulation is evident especially in the area of cross-border surveillance.

3) Article 1(4) of the Council Framework Decision 2006/960/JHA

It is **useful to have implemented the procedure under Article 1(4) of the Council Framework Decision 2006/960/JHA ("the Swedish Initiative")**, as it is **an important way to use as evidence in criminal proceedings information already obtained in the framework of operational cooperation between law enforcement authorities** (e. g. a footage from a CCTV camera placed in a public area).

4) Role of the EJN/Contact Points

In the number of criminal investigations, cross-border surveillance often is the key measure to track the perpetrators, and, as a result, to ensure that justice is served. With the ever-growing movement of persons and goods, there is reason to believe that this investigative measure will be demanded even at a larger extent. The EJN meetings is the opportunity for the practitioners not only to share their experience and best practices, but also to express their concern about the efficiency of the existing legal instruments in the area of judicial cooperation. Therefore, the EJN invites the legislator to analyse the current legal framework to ensure that it is corresponding to the development of the modern technologies and meet the needs of practitioners.



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In addition, the EJN is committed to continue support the national authorities and:

- Keep **updated information on the EJN website** (Fiches Belges), including information about the implementation of Article 1(4) of the Swedish Initiative.
- Provide **advice to the national authorities, consult** the problems **with the fellow EJN Contact Points** (be open to different approaches and try to find the way).
- Provide **the practical point of view** for **possible EU legislative initiatives**.

Case study
for the EJM plenary, 9-11 November 2022

Criminal offense:

Cocaine trade involving at least two states.

Participating States – neighboring States that share borders:

- State A – State conducting criminal proceedings for drug-related criminal offense – trade with cocaine
- State B – State that does not yet conduct criminal proceedings in the case at hand, but merely provides assistance in the matter of surveillance of persons.

Description of the situation:

State A is conducting criminal proceedings for drug-related criminal offense – however, no person has been charged yet.

Based on the previous investigation it is suspected that a consignment of cocaine is to be shipped by air to State A for distribution to other EU Member States. On the basis of previous findings in this case, persons who might be involved in the organization of this criminal activity and persons involved as individual couriers in the distribution have been identified.

Most of the organizers are long-term residents of State B, but there is no evidence that they have directly trafficked drugs in State B. However, these persons very often change not only cars but also SIM cards.

Requested action of international cooperation:

1) A meeting is to take place on the following day, in State B between the main organizer and the persons organizing the distribution of drugs in State A. There is no evidence that these persons will also be transporting drugs to State B for this meeting.

Judicial authority of State A has authorized surveillance of the vehicle with a voice recording (recording of conversation inside the vehicle). The record of this surveillance is usable as evidence in criminal proceedings in State A. The judicial authority of State



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A has further issued a EIO in which it has requested both an authorization for the continuation of the surveillance including the voice recording and the surveillance of the meeting itself in the territory of State B, where audio and visual recordings are requested. The issuing judicial authority also filled in section H5 of the EIO, as these are investigative actions involving the gathering of evidence in real time, continuously and over a period of time, and the outcome of the international cooperation needs to be evidence in criminal proceedings usable before a court in State A (i.e. a combination of physical and technical surveillance – a very common variant in practice).

Questions:

If you are from State B, do you have a specific authority in your state, where the decision-making process on the authorization of cross-border surveillance would be concentrated (irrespective of where the State border is crossed)?

If the same EIO/request for legal assistance involves both a request for cross-border surveillance and a request for surveillance of the meeting in the territory of State B (see the case described above), are both actions authorized by the same authority?

If you are from State B, is authorization of cross-border surveillance secured in the 24/7 regime?

2) Judicial authority in State A has authorized surveillance of persons and items. There are no plans to arrest these persons, as there is not yet sufficient evidence to charge them with a crime. The vehicle used by the organizers from State A has been fitted with a technical device that only monitors the movement of the vehicle, not the conversation inside the vehicle. It is therefore considered a surveillance by technical means only. In the course of the evaluation of the technical records, it was established on the following day that the surveilled vehicle had crossed the state border into State B. State A needs neither technical nor personnel assistance from State B to acquire the surveillance record. The record of the movement of the vehicle in State B will subsequently need to be used as evidence in criminal proceedings in State A.

Questions:

If you are from State A, how do you handle the usability of the surveillance record as evidence in criminal proceedings in these cases? In your view, is it possible to use EIO? Do you have international treaties with neighboring States, which allow you to seek consent with using the record as evidence in criminal proceedings?



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If you are from State B, is it possible to grant an ex post-facto consent with using the surveillance record as evidence in criminal proceedings or to authorize the cross-border surveillance after the fact?

If you are from State B, do you have a specific authority in your state, where the decision-making process on the authorization of cross-border surveillance after the fact or granting of ex post-facto consent with using the surveillance record as evidence in criminal proceedings would be concentrated (irrespective of where the State border is crossed)?

3) Judicial authority in State A has authorized surveillance of persons and items. There are no plans to arrest these persons, as there is not yet sufficient evidence to charge them with a crime. The vehicle used by the organizers from State A is physically followed by police officers and unexpectedly crosses the border into State B. The officers conducting the surveillance notify the crossing of the border to the competent authority of State B and continue the surveillance. Subsequent authorization of cross-border surveillance must be requested. The record of the vehicle surveillance in State B will need to be used as evidence in criminal proceedings in State A.

Questions:

If you are from State A, do you use EIO, or request for legal assistance to request subsequent authorization of cross-border surveillance?

If you are from B, is there a time limit, in which this subsequent authorization must be issued? Can this deadline be realistically met in practice?

If you are from State B, do you have a specific authority in your state, where the decision-making process on the subsequent authorization of cross-border surveillance would be concentrated (irrespective of where the State border is crossed)?

4) Based on previous cooperation of police authorities, police officers of State A acquire from police officers of State B a CCTV recording depicting a meeting of persons involved in this criminal activity. After evaluation of additional context of the case in State A, one month after the recording was made, the judicial authority of State A wishes to use this recording as evidence in criminal proceedings. However, it is not possible to request the recording via EIO, since it was erased one week after the event took place due to compliance with personal data protection legislation.



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Questions:

If you are from State B, are police authorities of your State obliged, when handing over such record, to indicate limitation of its use as evidence? If so, which authority in your State can be requested to grant consent with using the record as evidence in criminal proceedings? Should information on this form of cooperation be included in Fiches Belges?

If you are from State A, how would you request consent with using this record as evidence in criminal proceedings?

Irrespective of what EU Member State you come from, has your State implemented art. 1 (4)¹ of the Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union (OJ: L 386 of 29.12.2006, p. 89)? If so, what practical experience do you have with the use of this legislation?

¹ Article 1(4): This Framework Decision does not impose any obligation on the part of the Member States to provide information and intelligence to be used as evidence before a judicial authority nor does it give any right to use such information or intelligence for that purpose. Where a Member State has obtained information or intelligence in accordance with this Framework Decision, and wishes to use it as evidence before a judicial authority, it has to obtain consent of the Member State that provided the information or intelligence, where necessary under the national law of the Member State that provided the information or intelligence, through the use of instruments regarding judicial cooperation in force between the Member States. Such consent is not required where the requested Member State has already given its consent for the use of information or intelligence as evidence at the time of transmittal of the information or intelligence.

Conclusions from the Workshops

Workshop 1

a) Overview:

- Different legal basis (CISA, MLA Convention, EIO, international agreements)
- Differences between the police and judicial cooperation due to the differences of legal systems and different legal conditions for conducting concrete investigative measures
- Question of admissibility of evidence (different practice between MSEU)

b) Good practice:

- one 24/7 contact point
- specialized authority for giving authorization which is competent in all the cases in which it is impossible to establish the competent authority
- Although there is a different practice (authorization given on the basis of the legal provision /practice) most of the countries are trying to find the legal solution in order to give authorization/consent
- The importance of personal contact especially EJM (using EJM in the cases of CBS and other cross-border urgent cases)

c) Proposal: Regulation, or at least Directive, proscribing the CBS and other forms of cross-border investigative measures, especially the procedure and conditions for giving subsequent authorization for using records on investigative measures that have already been conducted without the prior authorization as well as using intelligence and information provided through police cooperation as evidence. The proscribed procedure should be effective, flexible and applicable in very short time limits.

Workshop 2

Conclusions

1. The majority of the CPs reported that in their countries the authorization of cross-border surveillance is granted by the PO and in few (SE, FI and NL) it is the police;
2. EJM Contact Points could exchange information on national law and procedural prerequisites in the national procedures on authorizing on CBS;
3. No common approach as to the use of EIO or MLA for the requests for authorization of cross-border surveillance but EIO is not refused but usually executed/interpreted as a MLA;



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4. Ex-post-facto consent: no common approach and no legal basis in the international legal framework. Some countries do not have it regulated in their laws (RO) or could be granted just for specific type of measures (ES);
5. Information on the implementation of Art. 1(4) FD 2006/960 could be included in the EJM Fiches Belges – subsequent consent to use police information as evidence in the judicial proceedings. The provision is seen as useful bridge between the police and judiciary;
6. EJM CPs support potential harmonization of the rules / procedures / requirements / definitions on CBS on the EU level.

Workshop 3

General approach

- Welcome the initiative of the CZ Presidency for the discussions of these topics
- The EJM Contact Points have limited experience with the measures
- However, the EJM has had a very interesting discussions that provided the following conclusions for the topics

Points observed

- Differences in definition of measures:
 - Observation
 - CBS
 - interception of tele(?)-communication
 - Use of ANNEX C (EIO)
- Difference in required type of cooperation
 - Police
 - Judicial
- Differences in the legal instruments applied
 - Schengen
 - CoE Convention/2nd additional protocol
 - EIO Directive

Urgent cases: what to do?

- Notify immediately the other State
 - Phone
 - e-mail
- Subsequent request
 - Written (EIO/MLA)
- Ex-post authorization
 - EIO or MLA



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Findings

- Legal difference in the EU which could generate problems for cooperation – not always a flexible approach could overcome these issues.

Some solutions

- Clarification of definitions of the measures and broaden of the scope of the EIO
- Need for regulation of the measures in line with the new technologies
- Centralised authority or not? EJM Atlas provides with all the necessary information

Role of the EJM/Contact Points

- Keep updated the information in the Fiches Belges/website
 - Advice would be helpful to raise awareness of the information included in the EJM website;
- Provide advice to national authorities (EJM is not a 24/7 Network but there are other channels for this);
- Provide practical point of view for possible EU legislative initiatives

