

50th Plenary Meeting of the European Judicial Network

“EJN best practices for the European Investigation Order”

I. Introduction:

The European Judicial Network has been working to facilitate the application of the European Investigation Order (EIO) even before the transposition deadline. With this aim, the Secretariat proposed several initiatives to support the EJN Contact Points in this phase. Therefore, the EJN Secretariat organised trainings on the EIO under the framework of the latest Language Trainings. Furthermore, the EJN Contact Points have provided valuable information on the application of the EIO during the transitional period; the scope of application of the EIO and national guidelines. This information is available¹ on the website and has been welcomed by all EU practitioners as it assists them in their everyday work with the new challenges posed by this legal instrument.

The EJN Contact Points have as well actively provided contributions to their colleagues at national level and to the expert group at the EU level, to enhance knowledge about the practice of the EIO e.g. developments of guidelines and on how to fill in the EIO form, as well as to the EIO in editable PDF format, which include text suggestions to fill in, especially for the purposes of collecting e-evidence.

With the experienced gathered so far, the aim of this discussion panel will be to identify best practices stemming from national experiences of handling the EIO. In the future, the information collected may constitute the blueprint for the EJN contribution to an EIO Practitioners Handbook at EU level.

¹ National Guidelines have been published under password protection

II. Discussion points:

In principle the panellists will discuss the following topics:

➤ Scope of the EIOⁱ

- *In view of latest experience, is the table “Legal and Practical Application of the EIO Directive” available on the EJM website in the EJM restricted access area still accurate – need for a revision?*
- *Some measures that, prior to the entry into force of the EIO, were executed through police cooperation could now be the responsibility of the judiciary. As consequence there would be an increased workload for the judiciary. Which is your experience?*

➤ EIO and urgent mattersⁱⁱ

- *To what extent are formalities challenging in relation to urgent matters e.g. is the signed EIO form (Annex A) received in original needed in order to start the execution (i.e. to take some first initial measures to secure the evidence)*
- *To what extent can police to police cooperation be applied?*
- *Is Art.29 of the CoE Cybercrime Convention (Budapest Convention) and its 24/7 network used instead of the EIO in urgent matters involving e-evidence?*

➤ EIO and issues related to videoconference

- *Is it possible to hear victims/third parties through videoconference, taking into account Art. 24.1 and the EIO form?*
- *Other aspects regarding videoconference?*

➤ EIO and channels of communication

The means of communication used to transmit the EIO must ensure security and confidentiality of the information. To date, with the exception for secure communication system of the EJM and Eurojust or other channels used by judicial and law enforcement authorities (Interpol?) there is no such electronic communication network for direct transmission of the EIO and the responses by the judicial authorities.

- *What channels of communication are used by the Member States?*

➤ EIO and Freezing orderⁱⁱⁱ

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 what is the purpose of securing it. In several cases the object might be needed for both purposes.

- *What problems have occurred in practice and how have they been solved?*
- *Challenges in relation to Denmark and Ireland?*

If additional time is available, the panellists will follow up with these topics:

➤ **EIO and rule of speciality^{iv}**

- *Is the rule of speciality applicable to the EIO; and how does this relate to the new Data Protection rules?*

➤ **Legal remedies in the Issuing State**

Challenging the substantive reasons for issuing the EIO? (Art.14:2)

- *Is it possible for the executing State to send to the issuing State an opinion on the substantive reasons for the issuing of the EIO, and should it wait for the ruling on its merit? This would de facto result in a postponement of the execution of the EIO and it is not one of the reasons provided for by the Directive?*

➤ **Time limits^v**

- *Are the time limits respected?*
- *Do we have the same understanding as to from when the deadline should start counting?*
- *What are the consequences of not respecting the time limits (e.g admissibility)?*

➤ **Gathering of evidence in real time**

- *What is the scope of application of Art. 28, apart from monitoring of banking or other financial operations and controlled deliveries?*

➤ **EIO and documents in annex of the form**

There are different views among the Member States on how much information needs to be included and where the information should be included - in the EIO form or in an annex to the form?

➤ **EIO and issues related to information on bank accounts**

- *Can bank account information be obtained through an EIO when it regards a person that is not (yet) investigated/suspect, i.e. how may the concept “subject to criminal proceedings” in Art. 26(1) be interpreted?*

➤ **EIO and costs**

- *What may be considered “exceptionally high costs” (Art.21.2)? Can the executing authority base its considerations on how costs are treated in a domestic case?*
- *What is the practical experience of where the issue of costs results in non-execution of an EIO?*

➤ **Non-recognition/execution and non-communication^{vi}**

- *Choice of less intrusive measures (Art.10.3 and 10.5). How does it work in practice?*
- *Practices observed - How to improve the situation?*
 - i) *e.g. non-recognition/execution of the EIO without consulting with the issuing authority to try to solve the issue (see Art.9:6 and 11:4); Does the consultation process create problems, e.g. delays?*
 - ii) *e.g. non-recognition/execution of the EIO based on the principle of necessity and proportionality that, according to the executing authority, have not been met by the issuing State.*
- *Some Member States do not send Annex B to the issuing authority. The result is that the issuing authority doesn't receive any feedback on the execution of the EIO. How to address this?*

➤ **EIO interception of “telecommunications” vs interception of “other communications”**

- *What is the scope of application of Art. 31 and Annex C?*
- *Does the receiving authority have to report back to the notifying authority only if the interception is not accepted?*
- *What about interception of other communications, e.g. via a device in a car that crosses the border?*

➤ **Training and support at national level for the legal and practical application of the EIO**

- Training offered in the Member States
- National guidelines, circular, handbooks
- Working groups or other *fora* where EIO issues are discussed, leading to homogenous handling of the EIO among judicial authorities in the country, both as issuing and as executing Member State
- Bilateral meetings and arrangements
- The Belgium approach
- Role of central authorities
- Other?

All participants are welcomed to intervene and share their views, experiences, suggestions, ensuring an active interaction with the discussion panel!

ⁱ Topic discussed at the 48th Plenary meeting in Malta (ref: Practical application of the Directive 2014/41/EU regarding the EIO in criminal matters / conclusions: b. scope of the EIO Directive) and at the 49th Plenary meeting in Estonia (ref: Workshop III – Practical implementation of the EIO in criminal matters / conclusions: 1. Scope of the EIO Directive); reported in Council document 9936/17 and discussed at the 39th Regular Meeting of the EJC (ref: EIO: practice, actions taken and to be taken, the EIO editable PDF form/Guidelines, trainings and guidelines / section: I Scope of the EIO)

ⁱⁱ Topic discussed at the 48th Plenary meeting in Malta (ref: Practical application of the Directive 2014/41/EU regarding the EIO in criminal matters / conclusions: d. In case of urgency); at the 49th Plenary meeting in Estonia (ref: Workshop III – Practical implementation of the EIO in criminal matters / conclusions: 3. EIO in urgent

matters) and at the 39th Regular Meeting of the EJM (ref: EIO: practice, actions taken and to be taken, the EIO editable PDF form/Guidelines, trainings and guidelines / section: iii Urgent cases and validation issues)

ⁱⁱⁱ Topic touched upon at the 49th Plenary meeting in Estonia (ref: Workshop III – Practical implementation of the EIO in criminal matters / conclusions: c. Filling the EIO form – “it was also clarified that in case of freezing and/or confiscation of instrumentalities and proceed 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”)

^{iv} Topic discussed at the 49th Plenary meeting in Estonia (ref: Workshop III – Practical implementation of the EIO in criminal matters / conclusions: 2. Applicability of the ‘rule of speciality’) and at the 39th Regular Meeting of the EJM (ref: EIO: practice, actions taken and to be taken, the EIO editable PDF form/Guidelines, trainings and guidelines / section: ii. Applicability of the Rule of Speciality)

^v Topic discussed at the 49th Plenary meeting in Estonia (ref: Workshop III – Practical implementation of the EIO in criminal matters / conclusions: 6. Time limits) and at the 39th Regular Meeting of the EJM (ref: EIO: practice, actions taken and to be taken, the EIO editable PDF form/Guidelines, trainings and guidelines / section: iv Time limits)

^{vi} Topic touched upon at the 49th Plenary meeting in Estonia (ref: Workshop III – Practical implementation of the EIO in criminal matters / conclusions: 7. Proportionality/Necessity) and in the 39th Regular Meeting of the EJM (ref: EIO: practice, actions taken and to be taken, the EIO editable PDF form/Guidelines, trainings and guidelines / section: iv Time limits. It was mentioned during the discussion that” Annex B would be of help in executing the EIO: this will provide information that the EIO was received and e.g. redirected to another authority.