



49th plenary meeting of the European Judicial Network

Tallinn, 22-24 November 2017

COVER NOTE

From: EJM Secretariat

To: EJM Contact Points

Subject: Discussion paper for the Workshop III – “Practical implementation of the European Investigation Order in criminal matters”

The EJM Contact Points will find hereunder a discussion paper for the Workshop III – “Practical implementation of the European Investigation Order in criminal matters” at the 49th plenary meeting of the European Judicial Network.

Discussion paper for the Workshop III – “Practical implementation of the European Investigation Order in criminal matters”

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. These measures were presented in detail in a [supporting document](#) for the 9th National Correspondents meeting.

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” will have the possibility to discuss aspects regarding the practical application of the EIO Directive starting with 22 May 2017, and sharing experiences on challenges faced and solutions identified to mitigate them.

The general aim is to know which were the main challenges the national authorities¹ 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.

To this end, this paper aims to facilitate the discussion, on the basis of several questions.

Question 1 Have your competent authorities encountered problems regarding the scope of the EIO Directive, namely the corresponding provisions from the MLA legal instruments which are replaced by the EIO Directive?

Taking into account that the meaning of the expression “*corresponding provisions*” of the conventions mentioned in Article 34 (1) of the EIO Directive to be replaced by this new legal instrument is not unanimously agreed, the scope of the EIO Directive still leaves room for debates.

The EJN Secretariat compiled the views of the EJN National Correspondents on this issue (among others) in the document ‘[EIO – Legal and practical implications](#)’. Moreover, it 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](#)’.

¹ From the 26 Member States which are bound to transpose the EIO Directive.

However, it is important to share experiences from the practice of these few months since the entry into force of the EIO Directive.

Question 2: Is the 'rule of speciality' applicable for the European Investigation Order?

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 the EU Convention 2000 on MLA).

The EIO Directive does not expressly regulate this rule.

The EIJN Contact Points are invited to discuss whether the evidence obtained following a European Investigation Order is subject or not to the rule of speciality and if yes, would it only apply to situations where double criminality needs to be met.

Question 3: In urgent matters:

- **Are you sending an e-mail or other informal request before sending the EIO? In that case, has the executing authority acted on your informal urgent request? Would you act on an informal urgent request?**
- **Have you encountered problems regarding translation of the EIO in the language accepted by the executing Member State?**
- **Where validation is needed, do you accept the validation by e-mail or with an electronic signature of an EIO? Is an actual signature of the validator needed if their decision can be verified in another way?**

The EIO Directive does not regulate the need for provisional measures to be taken before an EIO can be issued. Art 32 of the EIO Directive on provisional measures requires that an EIO is issued and is therefore not solving this issue.

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. The fact that some Member States did not notify English as accepted language might also be a problematic aspect.

In some urgent cases, especially during public holidays or weekends, it might not be possible to obtain the handwritten signature of the validating authority. The question is whether this problem can be mitigated by an e-mail confirmation from the competent validating authority or

at least with an electronic signature, as the idea of the EIO was to enhance cooperation and not make it slower or more difficult.

Question 4: Does your Member State check if the issuing or validating authority of an EIO is competent to do it. If so, have your executing authorities faced problems in assessing whether the EIO received has been issued or validated by a competent authority? To this end, was the document ‘Competent authorities and accepted languages’ prepared by the EJM Secretariat and published on the EIO area of the EJM website useful/used?

This is a recurrent problem for all mutual recognition instruments and, in this respect, the formal notifications of the Member States represent the official reference.

Question 5: Have your issuing authorities encountered difficulties in finding the competent executing/receiving authority of an EIO? To this end, is the information already available in the EJM Atlas adequate?

The EJM Atlas is being adapted to the EIO Directive for the Member States which transposed this instrument. For the purposes of the Atlas, the directive coexists with other legal instruments as potential legal basis, depending on the status of implementation of the EIO Directive. The information available in the Atlas is provided by the EJM Tool Correspondents.

Question 6: Are you aware of any problems regarding compliance with the time limits for recognition or execution provided for in the EIO Directive?

As other mutual recognition instruments, the EIO Directive provides time limits for recognition or execution, and this is one of the most important added values to the ‘traditional’ system.

Thus, Article 12 (1) requires that *‘The decision on the recognition or execution shall be taken and the investigative measure shall be carried out with the same celerity and priority as for a similar domestic case and, in any case, within the time limits provided in this Article.’*

There are two main time limits imposed by Article 12:

- Deadline for recognition or execution: no later than 30 days after the receipt of the EIO by the competent executing authority (Article 12 (3)). This can be extended with 30 days (Article 12 (5));

- Time-frame for carrying out the investigative measure: no later than 90 days from the date of the decision for recognition or execution (Article 12 (4)).

Moreover, according to the provisions of Article 12 (2), *'Where the issuing authority has indicated in the EIO that, due to procedural deadlines, the seriousness of the offence or other particularly urgent circumstances, a shorter deadline than those provided in this Article is necessary, or if the issuing authority has indicated in the EIO that the investigative measure must be carried out on a specific date, the executing authority shall take as full account as possible of this requirement.'*

In addition, the grounds for postponement of recognition or execution provided for in Article 15 have to be taken into account.

Question 7: Could you assess how the proportionality and necessity aspect has been handled in practice so far? What are the consequences if the executing authority finds that the requirement of proportionality and necessity are not respected by the issuing authority? Could this be interpreted as a ground of refusal?

Article 6 (1) of the EIO Directive states: *'The issuing authority may only issue an EIO where the following conditions have been met: (a) the issuing of the EIO is necessary and proportionate for the purpose of the proceedings referred to in Article 4 taking into account the rights of the suspected or accused person; (...).'*

These provisions are explained in recital 12 of the EIO Directive: *'When issuing an EIO the issuing authority should pay particular attention to ensuring full respect for the rights as enshrined in Article 48 of the Charter of Fundamental Rights of the European Union (the Charter). The presumption of innocence and the rights of defence in criminal proceedings are a cornerstone of the fundamental rights recognised in the Charter within the area of criminal justice. Any limitation of such rights by an investigative measure ordered in accordance with this Directive should fully conform to the requirements established in Article 52 of the Charter with regard to the necessity, proportionality and objectives that it should pursue, in particular the protection of the rights and freedoms of others.'*

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. We would like to know the criteria applied when assessing whether the EIO is "proportionate" and

“necessary”.

Question 8: May a Member State send an additional MLA request as a continuation to a previous MLA request after both cooperating States have transposed the EIO Directive?

Article 35 (1) of the EIO Directive stipulates that “mutual assistance requests received before 22 May 2017 shall continue to be governed by existing instruments relating to mutual assistance in criminal matters”. *Per à contrario* the EIO should be used after this date².

The question refers to the interpretation of this Article in case 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.

Thus, is the (additional) request merely complementing a previous MLA request that was sent before the EIO entered into force in both member States and therefore can be drafted as a complementary MLA request? Or is the request to be considered “new” in the sense of Article 35 and therefore should be drafted as an EIO? The concrete examples could for instance be interception of telecommunication that has to be either extended in time or extended with new telephone numbers or suspects within the same criminal investigation. Or complementary questions to a witness that was first heard under the MLA regime.

Question 9: Are you aware of other problems in the practical application of the EIO?

In addition to the aspects above-mentioned, the Contact Points will have the occasion to share any other problems encountered in the practical implementation of the EIO.

Question 10: Is the information available about the EIO on the EJM website sufficient and up-to-date? Which, if any, other information of practical interest, would you like to find on the EJM website?

² In practice, bearing in mind that Member States are continuing to use the MLA conventions in case one of the cooperating Member States did not transpose the EIO Directive, the relevant date for the discussion is not 22 May 2017 (in case of delay of transposition) but the date when both the issuing and the executing Member State have transposed the EIO Directive. (See also the *Note on the meaning of “corresponding provisions” and the applicable legal regime in case of delayed transposition of the EIO Directive.*)

Question 11: How did the requested/executing authorities from a Member State which had not transposed the EIO Directive react when they received an EIO from a Member State which had transposed the directive:

- treated it as an MLA request and executed according to the provisions of the applicable MLA convention
- or
- treated it as an MLA request and executed within the deadlines and in accordance with the specific requirements of the EIO Directive
- or
- sent it back and asked to submit an MLA request?

Provide arguments behind each of these possible solutions and share your views on which option represents a good practice in light of general principles of international judicial cooperation and of the EIO Directive.

At this workshop, the Contact Points are invited to share what happened in practice starting with 22 May 2017, bearing in mind the different moments when the directive entered into force in the Member States.