

## Legal and practical implications of the Directive 2014/41/EU regarding the European Investigation Order in criminal matters

### I. Legal and practical challenges and scope of the EIO Directive<sup>i</sup>

MEMBER STATE	<p>a) The <u>Issuing</u> Member State <u>implemented</u> the EIO Directive but the <u>Executing</u> Member State <u>did not implement</u> it.</p> <p><i><u>As issuing authority:</u> would you issue an EIO or send an MLA request?</i></p> <p><i><u>As executing authority:</u> would you be able to accept an EIO received from a Member State which did implement the EIO Directive? Would you treat it as an MLA request or would you deny the execution and ask the issuing authority to send an MLA request instead?</i></p> <p>b) The <u>Issuing</u> Member State <u>did not implement</u> the EIO Directive but the <u>Executing</u> Member State <u>did implement</u> it.</p> <p><i><u>As issuing authority</u> it must be assumed that there is no possibility to issue an EIO in this situation and therefore an MLA request will be sent to the executing authority.</i></p> <p><i><u>As executing authority:</u> would you be able to execute the MLA request?</i></p>	<p><b>The scope of the EIO - which investigative measures are not covered by the EIO Directive?</b></p> <p>Article 3 states that the EIO shall cover <u>any investigative measure</u> with the exception of the setting up of a joint investigation team and the gathering of evidence within such a team.</p> <p>Article 34 (1) states that EIO <u>replaces the corresponding provisions</u> of three central “MLA” conventions.</p> <p><i>Which measures would be excluded/ included within the scope of the EIO?</i></p>
Austria	a) From the date of implementation in Austria its authorities would issue an EIO form and ask the MS which has not yet implemented the directive to accept it as MLA request. Vice versa Austria would regard an EIO form as MLA request until the Austrian implementation comes into	Austria is considering whether the simple notification of procedural documents or summoning of persons can be regarded as investigative measure falling under the scope of

	<p>force.</p> <p>b) If the issuing State has not implemented the directive yet Austria will continue to provide legal assistance under the MLA regime even after having implemented the EIO (there is a Supreme Court Decision with regard to the transitional period before FD 2008/909/JAI has been implemented by most MS stating that Austrian authorities cannot oblige the issuing State to use the certificate of this FD if the issuing State has not implemented the FD).</p> <p>NB: Austria has contacted the MS which are the usual partners in MLA how to proceed in case of a delay in implementation.</p>	<p>the EIO.</p> <p>Under AT law the criminal proceedings come to an end when the sentence is final. Therefore the term “criminal proceedings” leaves room for interpretation as to the question of application, e.g. in respect of asset tracing that is conducted after the sentence has become final.</p>
<b>Belgium</b>	<p>The Belgian implementation law contains a transitional provision concerning the relationship with Member States that have not yet implemented Directive 2014/41/EU.</p> <p>The Belgian EIO-law is not applicable in case the other Member State has not implemented the Directive and the Belgian authorities will therefore continue to cooperate on the basis of MLA-requests with the Member States that are not compliant.</p>	<p>The EIO covers all investigative measures within the framework of a procedure listed in article 4 of the Directive, with the exception of:</p> <ul style="list-style-type: none"> <li>• cross-border surveillance; and</li> <li>• the setting up of JITs and the gathering of evidence with such teams – according to Article 3 of the Directive 2014/41/EU.</li> </ul>
<b>Bulgaria</b>	<p>Bearing in mind that Bulgaria hasn't transposed the EIO, we shall not be able to cooperate fully on the basis of the new mechanism.</p> <p>As Executing Authorities, any form of a request can be accepted but we would consider the EIO as a MLA request. However, the national law will be interpreted consistently with the Directive 2014/41/EU, so far as it is possible to do so.</p> <p>Bulgaria could not issue an EIO and an MLA request will be sent to the executing authority instead.</p>	<ul style="list-style-type: none"> <li>- Setting up of JIT and gathering of evidence with such teams – according to Article 3 of the Directive 2014/41/EU.</li> <li>- Freezing with a view of confiscation and the confiscation itself (Framework Decision 2006/783), taking into account that the existing legal basis for the latter is not replaced in accordance with Article 34 (1) of the Directive 2014/41/EU.</li> </ul>

		<ul style="list-style-type: none"> <li>- Service of procedural documents – according to Article 5 (1) of the Convention of 29 May 2000 on mutual assistance in criminal matters between the Member States of the European Union;</li> <li>- Extracts from criminal records, to which the ECRIS applies (within a criminal investigation Directive 2014/41/EU may also be used to obtain such information/;</li> <li>- Returning of a thing to the injured party – according to Article 8 of the Convention of 29 May 2000 on mutual assistance in criminal matters between the Member States of the European Union;</li> <li>- Cross-border observation – according to the Article 40 of the Convention implementing the Schengen Agreement.</li> <li>- Cross-border pursuit – according to the Article 41 of the Convention implementing the Schengen Agreement.</li> </ul>
<b>Croatia</b>	<p>a) If the executing MS did not implement the EIO Directive the Croatian judicial authorities would apply the Conventions of the Council of Europe (EU MLA Convention 2000 and most of the provisions of the Convention implementing the Schengen Agreement have not yet enter into the force) and Act on mutual legal assistance in criminal matters.</p> <p>As executing authority: If Croatian authorities receive the EIO from the MS that has implemented the EIO Directive the received EIO shall be treated as MLA request. It is possible that in some cases the EIO will</p>	<p>The following measures will be excluded from the scope of the EIO:</p> <ul style="list-style-type: none"> <li>- setting of a JIT and gathering the evidence within such team</li> <li>-service of procedural documents</li> <li>-transfer of criminal proceedings and spontaneous exchange of information (applicable bilateral agreements and Art 21 of MLA 1959 Convention shall be applied)</li> </ul>

	<p>have to be amended or additional documents will have to be sent by the issuing MS. Namely. Some types of MLA requests cannot be executed without the judicial order (Article 5 of the European convention on mutual legal assistance in criminal matters signed on 1959). So in those cases the issuing MS will have to send to Croatian authorities the additional documentation.</p> <p>b) Regarding the MS which did not implement the EIO Directive the Republic of Croatia will apply applicable international agreements (bilateral agreements and Conventions of the Council of Europe). In other words the Croatian judicial authorities will execute the MLA requests received from the MS which did not implement the EIO Directive.</p>	<p>-freezing /seizure for the purpose of the confiscation (this measure is covered by the freezing order)</p> <p>-exchange of criminal records (this measure is covered by FD on ECRIS)</p> <p>-cross border surveillance as a type of police cooperation defined by the Article 41 of the SIS Convention</p> <p>-other specific police and custom cooperation measures</p>
<b>Cyprus</b>	<p>Cyprus may not be ready with the transposition of the EIO Directive. In such a case, Cyprus will continue with the use of the current MLA procedure and would not be able to accept EIOs.</p>	<p>EIO will cover any investigative measures with the exception of the setting up of a joint investigation team and the gathering of evidence within such a team.</p>
<b>Czech Republic</b>	<p><b>a)</b> The Czech authorities as issuing authorities would issue an MLA request.</p> <p>The Czech authorities as executing authorities would execute an EIO as a MLA request.</p> <p><b>b)</b> The Czech authorities as issuing authorities would issue an MLA request.</p> <p>The Czech authorities as executing authorities would expect to receive a MLA request.</p>	<p>Not covered by the EIO Directive (besides the JITs):</p> <ul style="list-style-type: none"> <li>- service and sending of procedural documents,</li> <li>- transfer of criminal proceedings (Art. 21 of the 1959 Convention, including of course a transfer of a criminal prosecution according to the 1972 Convention),</li> <li>- returning of a thing to the injured party (Art. 8 of the 2000 Convention and Art. 12 of the Second Additional Protocol) including a seizure only for</li> </ul>

	<p>The Ministry of Justice of the Czech Republic will inform the courts and the Supreme Public Prosecutor's Office will inform Prosecutors about this attitude to unify our practice.</p>	<p>this purpose,</p> <ul style="list-style-type: none"> <li>- freezing/seizure for the purpose of confiscation,</li> <li>- freezing/seizure of the accused assets for the purpose of compensation of the victim,</li> <li>- exchange of criminal records (with exception of Art. 13 of 1959 MLA Convention, which has not been replaced by the ECRIS FWD and where the EIO should be sent between judicial authorities),</li> <li>- procedures of customs authorities according to the Naples II Convention,</li> <li>- cross border pursuit according to Art. 41 Schengen Implementing Convention,</li> <li>- a request for a consent to use information as evidence that has already been provided via police cooperation (the implementation of the Art 1(4) of the "Swedish initiative" and Art 39(2) of the Schengen Implementing Convention).</li> </ul> <p><i>We will use an EIO also for a cross border surveillance (we will use a MLA request only for certain aspects of cross border surveillance done only by technical devices stipulated by the bilateral treaties with AT, DE and SK that provide the higher standard than the EIO Directive).</i></p>
<b>Estonia</b>	<p>If Estonia or another Member State has not implemented the EIO, we will continue with MLA. Consultations before sending out an MLA request or EIO in such case would be highly advised.</p>	<p>Setting up JIT-s is excluded from the EIO transposition law.</p>

<b>Finland</b>	<p>Finland has implemented EIO, but as executing state will accept also MLA requests from member states that have not implemented EIO. There is a provision in the Finnish law on implementation of EIO about this. There should also be no problem in receiving an EIO from such a state and considering it MLA. Some additional questions might be posed. As issuing state Finland usually issues MLA request if the executing member state has not implemented EIO.</p>	<p>Service of procedural documents, extracts from criminal records (FD ECRIS), transfer of proceedings, dual criminality requests would not fall in the scope of EIO.</p> <p>EU MLA agreement Article 8 (restitution) and Schengen agreement 40 article (cross border surveillance) would also be out of the scope.</p>
<b>France</b>	<p>From the 22 May 2017 the requests for assistance to the Member States will be sent in accordance with the formalities provided for in the Directive on the EIO, even to those states who have not transposed. The requests received by those Member States will be treated as requests falling under the EIO directive and in conformity with the provisions from the Code of criminal procedure resulting from the EIO Directive.</p> <hr/> <p>a) <u>As issuing authority</u>: We would send an EIO.</p> <p>b) <u>As executing authority</u>: Yes.</p>	<p>In accordance with the provisions of Article 694-18 of the French Criminal procedure code transposing the EIO Directive, "An EIO is not issued:</p> <ul style="list-style-type: none"> <li>• For the setting up of a Joint Investigation Team;</li> <li>• On freezing orders of assets susceptible of confiscation, when the request is not also made for obtaining evidence;</li> <li>• When a request for cross-border observation is made on the basis of Article 40 of the Convention of 19 June 1990 Implementing the Schengen Agreements."</li> </ul>
<b>Germany</b>	<p>Existing MLA instruments will be used. It should be possible to treat an EIO as an MLA request</p>	<p>According to German law the following investigation measures are <u>not covered by an EIO</u>:</p> <ul style="list-style-type: none"> <li>• Setting up of a JIT and gathering evidence within such a team</li> <li>• Cross-border surveillance</li> <li>• Hearing of a suspect by telephone conference</li> </ul> <p><u>Also not covered by the EIO is:</u></p> <ul style="list-style-type: none"> <li>- sending and service of procedural documents</li> <li>- ECRIS</li> </ul>

		<ul style="list-style-type: none"> <li>- transfer of proceedings</li> <li>- spontaneous exchange of information</li> <li>- seizure of objects/freezing of assets in view of confiscation</li> <li>- requests according to Art. 39 (2) CISA</li> <li>- Customs/police cooperation</li> </ul>
<b>Greece</b>	If the EIO Directive is not transposed they return to the MLA and domestic legislation. If the EIO Directive is not transposed in Greece in due time, it cannot be executed by the Greek authorities.	
<b>Hungary</b>	Hungary should be ready in time with the transposition of the EIO Directive, but if not, they will be able to receive EIOs and treat them as MLA requests. In such a situation, they will not be able to use the whole EIO system, but just to handle it as MLA. In case the issuing Member State did not transpose the Directive, one solution could be to broaden the scope of the provisions in the draft law concerning the cooperation with Denmark and Ireland as to be applicable also to Member States which did not transpose the EIO Directive.	
<b>Italy</b>	Italy will consider the provisions of the existing MLA instruments “replaced” <u>only once both the Member States involved in the specific case have transposed the EIO Directive into national laws</u> . If not, the existing MLA instruments will consequently apply.	Only “investigative measures”, except the setting up of a JIT, fall in the scope of EIO Directive.
<b>Latvia</b>	<p>As issuing authority: Latvian authorities would check whether executing Member State has implemented EIO Directive. If the EIO Directive is implemented, Latvian authorities would issue an EIO. If not, a MLA request.</p> <p>As executing authority: we are flexible on this issue. If we receive an EIO</p>	The EIO Directive would apply only for “investigative measures”, excluding JIT’s (Article 3), the cross-border surveillance (Recital 9 of the Directive) and spontaneous exchange of information.

	from the Member State that has not implemented EIO Directive, we will consider it as a MLA request (consultations on legal basis would be highly advised).	
<b>Lithuania</b>	<p>Lithuania would follow the flexible approach on this issue.</p> <p>A)</p> <ul style="list-style-type: none"> <li>As issuing authority: we would probably issue an EIO and in addition inform the executing authority that we accepted to be treated as an MLA request.</li> <li>As an executing authority: we would treat the received EIO as an MLA request.</li> </ul> <p>B) as executing authority: we would treat it as an MLA request.</p>	<p>As pointed out in the EIO Directive under Article 3, setting up of a JIT and gathering evidence within such a team is out of the scope.</p> <p>Recital 9 of the Directive (exclusions of cross-border surveillance as referred to in the Convention implementing the Schengen Agreement) shall also be respected.</p>
<b>Luxembourg</b>	<p>A)</p> <ul style="list-style-type: none"> <li>As issuing authority: Luxembourg would issue an EIO and ask the executing MS to accept it as an MLA.</li> <li>As executing authority: Luxembourg would accept the EIO and treat it as MLA.</li> </ul> <p>B) Luxembourg would continue to provide assistance under the MLA regime.</p>	<p>Out of the scope of the EIO:</p> <ul style="list-style-type: none"> <li>The setting up of a JIT. However, when a competent authority participating in a JIT requests assistance from another MS than those participating in the JIT, an EIO may be issued to this end.</li> <li>Cross boarder observation according to Art. 40 Schengen Implementing Convention.</li> </ul>
<b>Malta</b>	Malta should be ready with the transposition of the EIO Directive according to its deadline. Until such time the current system under the MLA regimes will remain in place.	
<b>Poland</b>	Polish draft law implementing the EIO Directive has been amended and it foresees that in a transitional period the existing instruments of cooperation shall be applied.	Any investigative measures would be included within it, except for the ones not covered by the



	<p>Additionally, our Bureau started works on detailed guidelines for prosecutors on how to proceed in the transitional period in order to align practice in the whole country. An ad hoc meeting of the Polish contact points is planned yet in May devoted in full to the EIO and the rules of procedure in the transitional period.</p>	<p>EIO Directive (e.g. setting up of JITs and the gathering of evidence within such teams)</p>
<b>Portugal</b>	<p>If the Directive is not transposed into the Portuguese legal order, an EIO would be treated as MLA. If the Directive is not transposed in time by other Member States, Portugal should apply the Convention of 29 May 2000 or other conventions in its cooperation with such countries.</p>	<p>Service of documents is also included as part of the scope of the EIO.</p>
<b>Romania</b>	<p>This draft law contains a provision which clarifies that the EIO procedures will be applicable only in relation with the Member States of the European Union bound by the EIO Directive and which transposed it. She mentioned that if the EIO Directive is not transposed in time, Romania will continue to apply the MLA regime. Although direct effect may be considered, there is a clear difference between directives and regulations and, consequently, the EIO Directive needs transposition and it is not directly applicable.</p>	<p>In our view, apart from the measures expressly regulated in Chapter IV and in Chapter V of this directive, the Directive 2014/41/EU on the European Investigation Order in Criminal matters obviously covers any other investigation measure except</p> <ul style="list-style-type: none"> <li>- setting up of Joint Investigation Teams and gathering of evidence with such teams, expressly excluded from the EIO scope in according to Article 3 of the directive <i>and</i></li> <li>- the freezing with a view of confiscation and the confiscation itself , taking into account that the existing legal basis for the latter is not replaced in accordance with Article 34 (1) of the directive.</li> </ul> <p>In addition, we believe it <u>does not apply to:</u></p>

		<p>- service and notification of documents, on the one hand because this is not an investigation measure <i>per se</i>, and, on the other hand, the “service by post” rule established in Article 5 (1) of the Convention of 29 May 2000 on mutual assistance in criminal matters between the Member States of the European Union represents a much easier procedure than the EIO itself, so Article 34(2) of the directive allows its application.</p> <p>- extracts from criminal records, to which the FD 2009/315/JHA (ECRIS) will continue to apply. Nevertheless, within a criminal investigation, the EIO directive may also be used to obtain information from criminal records;</p> <p>- Specific police and custom cooperation measures.</p>
<b>Slovakia</b>	<p>A. SK authorities as issuing ones would issue an MLA request.</p> <p>SK authorities as executing ones would execute an EIO requests by the same way as MLA request are being executed now.</p> <p>B. SK authorities as issuing ones would issue and MLA request.</p> <p>SK authorities as executing ones would expect to receive an MLA request.</p>	<p>EIO will cover any investigative measures with the exception of the setting up of a joint investigation team and the gathering of evidence within such a team.</p>

<b>Slovenia</b>		
<b>Spain</b>	<p>1. - Meanwhile the EIO DIR has not being transposed in Spain any request/EIO received from a Member State shall be executed in accordance to the existing conventions or European legal instruments. Prosecutors shall accept an EIO and treat it as an MLA. Moreover whilst applying the MLA rules, Prosecutors will do it as much as possible in light of the (non-transposed) EIO DIR (deadlines, acknowledge receipt,...).</p> <p>2.- Once the domestic transposition law should be in place, any incoming MLA request received from a Member State that had not implemented the EIO DIR would accepted and executed by the Spanish Prosecutor as MLA request and according to the relevant conventions, unless the transposing Spanish law would provide any other solution to this situation.</p> <p>3.- In all the above mentioned scenarios the Public Prosecutor will try to interpret the Spanish national law, as far as possible, in light of the EIO DIR, even if Spain has not yet implemented it in the Spanish legislation, taking into account the CJEU case law.</p> <p>4.- From the active viewpoint and meanwhile the EIO DIR has not being transposed in Spain, the Spanish Prosecutors shall ensure that any outgoing MLA request aimed to gathering evidence shall be issue in accordance with the existing relevant MLA conventions. Likewise this Opinion expressly remembers that without prejudice to the application of EIO DIR existing legal instruments at EU and national level should continue to apply to JITs.</p>	<p>EIO DIR will not replace, among others, the following provisions:</p> <ul style="list-style-type: none"> <li>- Service and sending of procedural documents (Article 5 of the MLA 2000 Convention);</li> <li>- Spontaneous exchange of information (Article 7 of the MLA 2000 Convention);</li> <li>- Transfer of criminal proceedings (Article 21 of the MLA Convention and the CoE Convention 1972 on the Transfer of Proceedings);</li> <li>- Returning of an object to the injured party (Article 8 of the 2000 Convention) including a seizure only for this purpose;</li> </ul>

	<p>5. - Once the EIO DIR would be implemented and in place in Spain only EIOs should be issued towards Member States bounded by the EIO DIR spite of the executing member State has not implemented it, unless the transposing Spanish law would provide any other solution to this situation.</p> <p>6.- Spanish Prosecutors shall take into consideration that Art. 34 of the EIO DIR does not repeal but replace traditional MLA Conventions within the EU and the CoE that will retain their relevance in situations in which the EIO DIR is not applicable, such as for instance in the relations with Denmark and Ireland, as well as in situations of non-transposition.</p>	
Sweden	<p><b>A)</b>  <u><b>As issuing authority:</b></u> <i>We would send an MLA request.</i>  <u><b>As executing authority:</b></u> <i>An EIO cannot be executed in accordance with the provisions of the EIO-directive before the directive has been implemented into Swedish law. However, if a Swedish prosecutor och court receives an EIO it should be possible to treat it as an MLA request.</i>  <b>B) <u>As executing authority:</u></b> <i>Yes</i></p>	<p>It is not possible to state the Swedish position regarding the scope of the directive before the law which is implementing the directive into Swedish law has entered into force. However, from a Swedish point of view it is clear that service of documents and transfer of criminal proceedings (which were two examples mentioned in the Discussion paper) are not covered by the directive.</p>
The Netherlands	<p>About the situation and way of working with or without the EIO in the NL:  Implementation is on its way, most statutory steps have been made and implementation is foreseen as per 1 January 2018.</p> <p>A. Before (foreseen) 1 January 2018 three situation are possible:</p> <ol style="list-style-type: none"> <li>1. NL and another country both did not implement the EIO: both countries will have to rely on the usual MLA procedures.</li> </ol>	

	<ol style="list-style-type: none"> <li>2. The other country has implemented and NL has not and NL is requesting by MLA: NL will use the usual MLA procedure and hopefully the national legislation of that other county allows execution.</li> <li>3. The other country has implemented and is requesting by EIO, NL has not implemented: NL will act according the MLA procedure but will stay as close as possible to the EIO Directive (terms of execution, etc.).</li> </ol> <p>B. After (foreseen) 1 January 2018, also three situations:</p> <ol style="list-style-type: none"> <li>1. NL and other country both did implement the EIO: only the EIO procedure will be accepted on Dutch side.</li> <li>2. NL did implement and is requesting, but the other country did not: depending on the national legislation of that country, NL will send an EIO or a MLA.</li> <li>3. NL did implement but the other country did not and that country is requesting: NL will accept the MLA from that other country and execute.</li> </ol>	
<b>United Kingdom</b>	<p>The UK can provide MLA without requiring a treaty basis. This means that they would be able to continue to cooperate with states that do not transpose the EIO.</p> <p>They will look at the EIJN website and if one Member State did not transpose the EIO, UK will use MLA in relation with the respective Member State.</p> <p>It would not matter if in scenario (b) the issuing member state sent the request using the form of an EIO or as a letter of request.</p> <p>Using MLA in case of delay in transposition of the EIO Directive is the</p>	<p>Article 1 confirms that an EIO is a judicial decision ... <i>“to have one or several specific investigative measures carried out ... to obtain evidence”</i>.</p> <p>It would therefore appear that:</p> <p>Service of Procedural Documents (Art 5 MLAC 2000) – not covered by the EIO</p> <p>Spontaneous Transmission (Art 7 MLAC) – not covered by the EIO</p>

	<p>only reasonable way in view of the purpose of the Directive and the general obligation between states to cooperate.</p> <p><i>In Scotland</i> so long as the Crown Office are satisfied the request has been issued by an authority competent to issue such a request, the request shall be executed wherever possible. The authorities in Scotland shall execute the request under the MLA conventions where possible. If this is not possible, the request shall be executed on the basis of reciprocity. There may therefore be benefit in reciprocity being offered in any such request.</p>	<p>Transfer of Proceedings (Art 21 of the 1959 Convention) – not covered by the EIO</p> <p>Restraint – not covered by the EIO. FD 2003/577 will still apply for freezing property for the purpose of subsequent confiscation, as per Article 34(2) EIO only replaces it as regards freezing of <u>evidence</u>.</p> <p>Confiscation – not covered by the EIO, still under Framework Decision 2006/783.</p>
--	---	--

---

<sup>i</sup> Information provided by the EJM Contact Points (National Correspondents). Compilation prepared by the EJM Secretariat.