

Cross-border Gathering of Electronic Evidence Under the EIO-Directive with Focus on Telecommunication Interception

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1. Introductory Remarks on the Directive 2014/41/EU

1.1. The Definition and Scope of Application of the European Investigating Order as Stipulated by the Directive

The Directive 2014/41/EU introduced an innovative legal mechanism – the European Investigation Order (hereinafter the EIO) – to facilitate the gathering of evidence in criminal matters across the EU. This rather new regulation is most advanced so far, for it unites and combines previously established – one might add, rather fragmented and complex – approaches, namely the flexibility of the traditional system of mutual legal assistance and the efficiency of the principle of mutual recognition of judicial decisions. The reason why the EIO-Directive was to a certain level, one dare even say, progressive is that it had the merit of pioneering a single investigative tool to be used for any type of evidence, thus replacing traditional letters rogatory, along with the Freezing Orders and the European Evidence Warrant.

As stated in the Art 1 of the Directive, an EIO is a judicial decision issued by a judicial authority of one Member State with the purpose of having one or more investigative measures executed in another Member State. Such an approach – founded on the principle of mutual legal assistance – aims to cover as many different types of evidence¹ as possible. Accordingly, the EIO covers any investigative measure, be it temporary transfer of persons in custody, hearings of witnesses and suspects by telephone conference, videoconference, or any other audio-visual transmission, gathering information on bank and other financial accounts and operations, covert investigations, house searches, etc. One of the major advantages of this new system is that - in contrast to the old regime - the EIO may be issued not only to obtain already existing evidence in possession of authorities of another Member State, but also to request the execution of new investigative measures by another Member State.

1.2. Significance of the Directive in Respect Furthering Judicial Cooperation in Criminal Matters and Protection of Fundamental Rights of Individuals

The relevance of the EIO-Directive is mirrored in substantive changes in the horizontal model of judicial cooperation it established. In order to

advance judicial cooperation in cases with a transnational element, the Directive provides for somewhat rigid formalities and deadlines when gathering and transferring evidence within the borders of the EU.

However, an expeditious gathering of evidence located in another Member State often happens to the detriment of the fundamental rights of individuals involved in the proceedings. Thus, the Directive instituted a few changes that would grant more adequate protection of fundamental rights. For example, if a requested measure is in violation of a certain fundamental right, the executing authority can now refuse the execution of the requested measure or it can recurse to another less intrusive measure not indicated by the EIO that it deems more suitable to achieve the same result. Still, these innovations do not automatically ensure the impeccable and trouble-free use of the EIO. In practice, the balance between these two conflicting principles – safeguarding fundamental rights and the effectiveness of the criminal proceedings – is not so easily attained. As could be expected, implementing the EIO could quickly lead from one extreme to the other. On one hand, the respect for fundamental rights could easily be diminished in order to gather evidence as swiftly as possible, and on the other, carrying out of a criminal investigation could be compromised by the disproportionate regard for fundamental rights. It is in this respect that the principle of proportionality as introduced by the Directive plays a crucial role in balancing out the two opposites.



Additionally, the new mechanism restricts “the former (almost) automatic effect of foreign decisions within the EU”, trying in such a manner to prevent the attempts of the issuing authority to override national laws. Ultimately, the mechanism introduced by the EIO-Directive “transforms the horizontal regime somewhere between the traditional

¹ The Directive establishes one standardised investigative order for all types of evidence, with two exceptions as stipulated in Art. 3 EIO-Directive.

inter-state cooperation and the automatism of the mutual recognition principle”.

2. Electronic Evidence under the Framework of the EIO-Directive

2.1. General Remarks

In the contemporary world, there is an ever more pressing need to develop new and improved tools that would be able to ensure a quick and efficient way to assess and subsequently collect cross-border electronic evidence. However, the exponential development of technology that is becoming intrinsic to every aspect of our everyday life does not necessarily go hand in hand with traditional legal concepts such as territoriality and jurisdiction.

As one could expect, even the European Union constantly has to face this challenge by coming up with new measures within its framework to accommodate the increasing need to obtain relevant data – e.g. ,content data’ such as e-mails, text messages, photographs, and videos, as well as subscriber data or traffic information regarding an online account – for criminal investigations. One of the solutions was offered in the EIO-Directive by introducing in its Art. 13 the possibility of collecting and transferring evidence in electronic form through the EIO. Additionally, the EIO “set forth standards that must be met if electronic data collected as part of a criminal investigation are to qualify as evidence accepted as ‘admissible’ before a court of law”.

However, even though it is now possible to acquire electronic evidence under the framework created by the EIO-Directive, the investigation order still in not placed wall to tackle the risk of data being altered or even destroyed in the meantime. Quite interestingly, in its joint report from June 2019, Europol and Eurojust reiterated their concerns stated in the report from March 2017, underlying that “the EIO framework may not provide the speed that is required to capture electronic evidence. Moreover, the EIO-Directive does not contain provisions that specifically facilitate the collection of common types of electronic evidence, meaning that additional tools need to be developed to facilitate the collection of electronic evidence under the EIO framework.”

For these reasons, the Council requested from the EU Commission to start working on a new solution. Consequently, the Regulation on European Preservation Order and European Production Order was proposed “to introduce new rules to help authorities secure and obtain electronic evidence stored by service providers, irrespective of where the evidence is stored.” However, this proposal will not be addressed in depth here.

2.2. Interception of Telecommunications as an Example of Cross-Border Collection of Electronic Evidence

Besides introducing the general framework and explicitly singling out some measures, the EIO-Directive dedicated a separate chapter on the interception of telecommunications, thus providing additional rules regarding these measures.

Considering the intrusive nature of the measure, it was guaranteed that the issuing authority has to give reasons as to “why it considers the indicated investigative measure relevant for the purpose of the criminal proceedings concerned’, which in other cases is not necessary. In this respect, the EIO-directive follows the well-established ECtHR case-law, stipulating that measures having a high potential to heavily interfere with the private sphere of an individual should be regulated by sufficiently precise rules to avoid the arbitrary decisions of public authorities. This perfectly illustrates why the proportionality check is extremely beneficial when having to safeguard the efficiency of the proceedings, however not to the detriment of the fundamental rights of an individual.

3. Concluding Remarks

The main goal of the EIO-Directive was to introduce a unique instrument that will facilitate the collection and transfer of evidence in cases with a cross-border dimension. However, shortly after the implementation date, it became obvious that, although the EIO was and still is a rather innovative and practical instrument when applied in the transnational gathering of evidence using more conventional measures, in cases where ever more relevant electronic has to be obtained swiftly and efficiently, the EIO is rather insufficient. Luckily, the European Institutions and the Member States are assiduously working together to develop more adequate instruments that will be better placed to grapple with the challenges of the modern world and ever faster-developing technology.

