

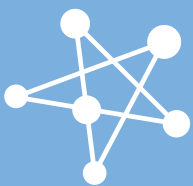
# Guidelines

## European Investigation Order

“Legal analysis and practical dilemmas  
of international cooperation”



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# EIO-LAPD

European Investigation Order  
– legal analysis and practical dilemmas  
of international cooperation

2019-2021

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## Introduction

Judicial cooperation in criminal matters is considered to be of paramount importance for the proper functioning of the European area of freedom, security and justice without internal borders. In the European Union, this objective has also been pursued by adopting legislation based on the principle of mutual recognition. **Directive No. 2014/41/EU of 3 April 2014 on the European Investigation Order in criminal matters** ("European Investigation Order Directive" or "EIO Directive") applied this principle to the collection and transfer of evidence in criminal proceedings and was introduced to improve European criminal legal cooperation on evidence. The EIO Directive applies to all Member States bound by it (25 Member States; Ireland and Denmark are not bound by it).

However, there are numerous theoretical and practical questions that have arisen with the adoption of the new directive. For this reason, seven European research centers joined forces to cooperate in a project called European Investigation Order - Legal Analysis and Practical Dilemmas of International Cooperation (EIO-LAPD Project).

The investigation has confirmed that the implementation of the directive was deficient in many Member States - despite its importance in the fight against transnational crime and for the proper functioning of the European area of freedom, security and justice in general. Although all Member States were obliged to transpose the Directive by 22 May 2017, according to the European Judicial Network (EJN), many Member States have transposed the Directive with much delay.

In particular, the EIO-LAPD project has a number of objectives: on the one hand, to deepen knowledge on the practical application of the EIO and its relation to other instruments of European judicial cooperation in criminal matters, and, on the other hand, to equip Member States using the instrument with expert knowledge on the EIO procedure, thus facilitating its practical application.

The 48th plenary meeting on the practical application

of Directive 2014/41/EU on the European Investigation Order in criminal matters, held in Malta in June 2017, indicated the "urgent need for guidelines, both at EU and national level" in order to ensure the proper training of legal practitioners on the European instrument.

The EU Agenda for Justice 2020 also explicitly states that 'the instruments agreed at EU level must be transposed by Member States, implemented and used effectively' and that 'every national legal practitioner - from lawyers [...] to judges and prosecutors [...] - should also know EU law and be able to effectively interpret and apply EU law'.

As a result, each university research center belonging to a different European country produced, in the framework of the research project "EIO-LAPD", a report consisting of a legal analysis of the domestic legislation on the implementation of the Directive on the European Investigation Order in Criminal Matters and the results of the survey of professionals (judges, lawyers and administrative staff) using the instrument.

The reports confirmed, in general, that the EIO is a very useful tool in the context of European cooperation on evidence, although they showed that it is not always a perfectly oiled mechanism, as it often has to solve difficulties that arise from various aspects.

These guidelines therefore draw attention to the issues raised in relation to the four main phases of the EIO lifecycle - the issuance phase, the transmission phase, the recognition phase and the execution phase - noting the problematic aspects that have emerged in relation to the use of the instrument. It furthermore intends to provide best practice advice and guidance to practitioners using the EIO in the light of the fieldwork conducted among judicial practitioners.

The EIO-LAPD project intends to continue to update this document as well as to facilitate its scientific dissemination through the project website [www.eio.lapd.eu](http://www.eio.lapd.eu) where it is also possible to consult additional materials (articles, podcasts, conferences etc.).

# 01.

## Scope of application of the European Investigation Order Directive

### 'Any investigative measure'(Article 3) and 'corresponding provisions' (Article 34)

On 22 May 2017, the EIO Directive replaced the "corresponding provisions" of the mutual assistance conventions, in accordance with Article 34(1) of the same Directive (the 1959 Council of Europe Convention and its two additional protocols as well as the 2000 Convention on Mutual Assistance).

The interpretation of the term "corresponding provisions" is debated, as in some Member States the national transposing legislation includes a list of measures that do not fall within the scope of the EIO Directive, while in other Member States "soft law" instruments are used (e.g. guidelines issued by a Prosecutor General).

In the absence of a common EU list, it appeared that there are different interpretations in the Member States in relation to certain measures and provisions. With the exception of Council document 14445/11, there is no comprehensive list indicating precisely which provisions will be replaced.

A joint note by Eurojust and the EJM collects the opinions of the EJM contact points on the interpretation of the term "corresponding provisions" in Article 34(1) of the EIO Directive (see "Eurojust/EJM Note on the meaning of "corresponding provisions" and the applicable legal regime in case of delayed transposition of the EIO Directive").

Article 3 of the EIO Directive, concerning the scope of application of the EIO, refers to "any investigative measure", with the express exception of the establishment of a Joint Investigation Team (JIT). The following criteria may be helpful in determining

whether the EIO Directive should apply:

- the order relates to an investigative measure aimed at obtaining or using evidence;
- the act has been ordered or validated by a judicial authority;
- the act concerns a Member State bound by the EIO Directive.

If any of these criteria is not met, the EIO Directive is not the correct instrument to use and another legal instrument should be applied instead.

There is common agreement that the EIO Directive does not cover the following measures:

- the establishment of a Joint Investigation Team and collection of evidence within it;
- mailing and delivery of procedural documents, unless the delivery of a document is instrumental to the investigative measure covered by the EIO, in which case a flexible approach should be taken to its inclusion in the EIO in line with Article 9(2) of the EIO Directive;
- spontaneous exchange of information (Article 7 of the 2000 Mutual Assistance Convention);
- Transfer of proceedings (Article 21 of the 1959 Council of Europe (CoE) Convention on mutual assistance in criminal matters and 1972 CoE Convention on the transfer of proceedings in criminal matters);
- Freezing of property for the purpose of subsequent confiscation (Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence and, from 19.12.2020, Regulation 2018/1805 on mutual recognition of freezing and confiscation orders);
- restitution: restitution of property to the victim (Article 8 of the 2000 Convention on Mutual Assistance);
- acquisition of extracts from criminal records/ European Criminal Records Information System (ECRIS).
- police cooperation;
- customs cooperation.

One of the provisions that raised doubts among practitioners is Article 19 of the Budapest Convention, concerning the search and seizure of stored computer data. Most operators tend to consider that this provision can still be used, as it is not a 'corresponding provision'.

## The European Investigation Order at all stages and/or beyond the trial stage

Recital 25 of the EIO Directive indicates that the Directive lays down rules on the implementation of investigative measures at all stages of criminal proceedings, including the trial stage.

The EIO therefore applies to the obtaining of evidence not only during the pre-trial stage of proceedings, but also during the trial stage. Moreover, in some Member States, the EIO also applies to measures taken during the execution of a judgment.

The approach of using the EIO beyond the trial phase is linked to national judicial systems where the concept of criminal proceedings also includes the enforcement phase.

# 02.

## Content and form of the European Investigation Order form (Article 5)

The standard form of the EIO (Annex A), available in all languages, has been introduced to promote simplicity and efficiency, underlining the spirit of the EIO Directive and the concept of mutual recognition. This form therefore meets the objective of simplifying formalities, improving quality and reducing translation costs in order to foster European cooperation.

Although it was noted that the form is fairly simple to fill in in most cases, operators encountered several difficulties in completing Annex A.



### Identified issues

Some problematic aspects are linked to the lack of information entered in the form by the authority requesting the EIO. In particular:

- imprecise description of the facts of the case (this leads, for example, to difficulties in examining the validity of the EIO in the light of double criminality);
- Insufficient information to legally classify the offence in relation to which the EIO has been issued;
- insufficient information to identify the requested investigation activity;
- lack and/or insufficiency of the personal data indicated (e.g. some issuing authorities do not indicate the person's place of birth, which makes it very difficult to identify people; or they merely refer to the fact that a person is someone's daughter, without specifying the surname).

Problems with the fields in the EIO form:

- Some issuing authorities tend to adapt the form while not using the actual annex. The standardization of the form is thereby circumvented, which can be used by the executing authority as reason for refusing cooperation.
- Some practitioners claim that the form lacks space to complete it and that one has to scroll through many pages before reading the most important information.



### Suggested best practises

- Requesting authorities should always use the form attached to the Directive and not adapt it in a free form.
- The form should be filled in accurately and carefully.
- **Section B** on urgent cases should only be filled in if there is a real situation of urgency (e.g. if a person is in detention, hearing dates are imminent, electronic evidence is about to expire, there is a risk of a statute of limitations being applied). On this point, see 09, Urgent cases.

- **Section C** includes the act or acts of investigation to be carried out and is used to describe the acts requested. The issuing authority should be as precise as possible.

When submitting a request for the hearing of a witness/victim/suspect, the issuing authority should also assist by attaching a list of questions to Section C itself or in an annex to the EIO.

- **Section D** may be used to indicate a link with previous EIOs (when more than one EIO has been sent to more than one country regarding the same case and coordination is required and/or when more than one EIO has been sent to the same country at the same time as an exception to the principle of sending only one EIO irrespective of the number of acts to be carried out), but also to provide relevant information on links with past or future requests for judicial cooperation, such as forthcoming EIOs or other mutual recognition measures (European Arrest Warrant, freezing orders, etc.), mutual legal assistance requests, etc..

Section D should be used also to provide others information. For example, if the EIO has been sent to the same country, mutual assistance requests, or JITs, including existing JITs with other States within multilateral coordination frameworks.

- **Section E** should be used to identify the person(s) concerned by the investigative measure who are not necessarily the person(s) accused/under investigation. In particular:
  - the name of the suspect(s) in the EIO should be mentioned (also to avoid violations of the ne bis in idem principle see 08 Grounds for refusal);
  - the status of the person to be questioned (witness/accused) should be specified;
  - the fields relating to the contact details of the person and identification numbers (passport number etc.) should be completed precisely.
- **Section F** should specify the type of proceedings for which the EIO is requested.
- **Section G** should provide a summary of the facts and the identity of the alleged perpetrators, a clear description of the links between the offence

and/or the alleged perpetrators, the persons concerned, and the investigative measures requested. This section must be completed in a clear and, above all, complete manner in order to allow the executing authority the fullest possible picture to verify the condition of dual criminality.

- **Section I** must provide information on the formalities and procedures that must be complied with under the law of the issuing Member State and explain how these formalities and procedures are to be carried out and ensured also by the executing authority.

## 03.

### Language and translation in the European Investigation Order in criminal matters

Article 5(2) of the EIO Directive states that Member States shall indicate which other official EU language(s), in addition to the official language(s) of the Member States concerned, may be used when the Member State concerned is the executing State.

Most Member States have accepted an additional language (often, but not always, English), some Member States have indicated, despite the wording of the EIO Directive, that they will only accept their own official language and that they will only accept English in urgent cases.



#### Identified issues

- Poor quality of translations in particular with regard to the use of languages other than English.
- In cases where the EIO is not already translated into the language of the executing State, the executing authority often does not want to process applications that are unclear.

- Lack of availability of translators
- Lack of availability of translators with the capacity to translate technical and legal terms.



### Suggested best practises

- The official EIO form/template in the language of the executing Member State should always be used for translation. The EIO forms (Annexes A, B and C) are available in Word format in all EU languages in the legal library on the EJM website.
- The EIO should be accepted in English, at least in urgent cases.
- It would be recommendable to establish a list of authorized translators who can guarantee a certain quality of translation and who can be contacted quickly.
- Translators should have specific skills in the translation of legal texts.
- An EIO sent without translation is to be considered 'incomplete' in accordance with Article 16(2)(a) of the EIO Directive. The executing authority must therefore inform the issuing authority that the EIO is 'incomplete' and invite it to complete the translation.

## 04.

# Issuing and transmitting a European Investigation Order

## A. Competent authorities involved (issuing and validating authorities)

The EIO Directive has 'judicialised' the issuing phase by requiring that EIOs be issued by a judge, court, investigating magistrate or public prosecutor

competent in the case (judicial authority as issuing authority), or by requiring that an EIO be validated by one of these authorities (judicial authority as validating authority (Article 2(c)(ii) EIO Directive).

Under Article 7(3) of the EIO Directive, central authorities can play a useful administrative role in support of judicial authorities.

As far as verification is concerned, whether the issuing authority or the validating authority of an EIO is a competent judicial authority, can be satisfied by the fact that the issuing authority is a prosecutor, relying on mutual trust.

However, checks may be carried out in line with Article 9(3) of the EIO Directive.

The EJM document entitled '*Competent authorities, accepted languages, urgent matters and scope of application of the EIO Directive*' can be used to assess whether the EIO received has been issued or validated by a competent authority.



### Identified issues

- Some countries do not have a central authority.



### Suggested best practises

- It is recommended to designate a central authority.
- The central authority should assist the national competent authorities and the competent authorities of other Member States to establish contacts and judicial cooperation and to act as a central coordinating body.
- The central authority could be called upon to assist, "if necessary", in case of communication difficulties with the executing authority or when problems arise as to the origin and authenticity of the document, in accordance with the provisions of the Directive (Article 32 Transmission of the investigation order).



## B. Transmission of European Investigation Orders (Article 7) - Assistance provided by Eurojust and the European Judicial Network (EJN)

### Transmission (Article 7 of the EIO Directive)

Directly from the issuing authority to the executing authority (without prejudice to the designation of central authorities).

Depending on the nature, complexity and urgency of the case, different channels are used to expedite the transmission of EIOs and ensure their authenticity. These include Eurojust, EJN contact points and liaison magistrates.

Eurojust and the EJN can facilitate and provide advice during the different stages of the EIO lifecycle, including drafting, transmission, recognition and execution. A joint document called Assistance in International Cooperation in Criminal Matters for Practitioners, EJN and Eurojust has been drafted to facilitate decision-making on whether to contact Eurojust or the EJN in a concrete case.

A secure communication network allowing for the secure transmission of EIOs is of particular importance. To this end, the European Commission is currently developing a secure online portal (digital exchange of e-evidence). This portal will be a platform with a secure communication channel for the digital exchange of EIOs and responses from EU judicial authorities.

In addition, EIOs can be submitted via Eurojust's secure connection (however, not all Member States are connected and communication is only possible between a national authority and Eurojust, not between national authorities) and the secure telecommunication connection of the European Judicial Network GE (Article 9 of the EJN Decision and Article 7(4) of the EIO Directive).

However, the development of a direct platform between issuing and executing authorities is desirable since the secure connection is not suitable for direct contact between competent authorities.



### Identified issues

- The electronic EIO form is not systematically used by all respondents (transmission of the paper EIO form by traditional mail in addition to transmission via electronic channels is also common).
- Many countries do not use a certified e-mail system that guarantees the provenance and security of documents.
- When the documents requested with the EIO contain a lot of data and the documentation is voluminous, receiving them by e-mail can be problematic. In this case, there are issues related to the creation of computer media, such as CD-ROMs or USB sticks containing media, which must guarantee security standards and ease of transmission.



### Suggested best practises

- Encourage the use of an electronic EIO form.
- Encourage the use of a certified e-mail system.
- The creation of a virtual space (cloud or electronic platform) as envisaged by the European Commission would be desirable, as this will facilitate the ability of issuing and executing authorities to share data. Operators will have to be trained in the use of the platform that the European Commission is creating for the exchange of evidence.

# 05.

## Recognition and execution of a European Investigation Order

### **Recognition and enforcement (Article 9 of the EIO Directive)**

Rule: Obligation of enforcement (Article 1 of the EIO Directive) 'without imposing any further formalities' (Article 9(1) of the EIO Directive) but subject to recognition by the executing authority.

### **Law applicable to execution**

Execution is governed by the law of the executing Member State.

The executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority, provided that they "do not conflict with fundamental principles of the law of the executing State".

Article 2(d) of the EIO Directive defines the executing authority as "the authority competent to recognise an EIO and to ensure its execution".

If an EIO is sent to the wrong authority in the executing State, instead of being returned, it should be transmitted to the correct executing authority, in line with Article 7(6) of the EIO Directive; this situation should then be noted in Section B of the EIO form.

Some Member States have established a centralised receiving authority, i.e. a judicial authority that receives and - if competent - recognises the EIO and subsequently assigns the EIO for execution to the competent executing authority.

The EJM Atlas may be consulted in order to identify the competent executing authority and the relevant contact details.

If several orders are to be executed in different geographical areas, and the executing State does not have a central receiving authority, the issuing authority should alert the executing authority to the existence of multiple EIOs requested within the country.

With regard to the authority executing the EIO, Article 9(1) of the EIO Directive provides that the executing authority shall recognise an EIO 'without any further formality being required' and ensure its execution, while carrying out certain checks linked to the proportionality of the measure, the need to use an alternative investigative measure (Article 10(3)) and the existence of grounds for refusal (Article 11 of the EIO Directive).

# 06.

## Proportionality test (Article 6, paragraph 1 of EIO Directive)

### **Conditions to be verified by the issuing authority (Article 6 §1 of the EIO Directive):**

- The issuing Member State must verify whether the act is necessary and proportionate.
- The issuing Member State must verify whether the act could have been ordered under the same conditions in a similar domestic case.

Although the EIO Directive places the proportionality check in the hands of the issuing authority (Article 6(1) EIO Directive), if the executing authority has reasons to believe that this condition has not been met, it may consult the issuing authority (Article 6(3) EIO Directive). The assessment of proportionality is made by comparing the evidential requirements of

the investigation, the seriousness of the suspect's alleged conduct and the infringement of the suspect's fundamental rights.

The consultation mechanism can be used to provide relevant information and to avoid the risk of further delaying the execution. After consultation, the issuing authority may also decide to withdraw the EIO.

Many authorities report that, in problematic cases, executing authorities contact the issuing authority in order to identify a more proportionate investigative measure.



### Identified issues

- The description of the offence is not sufficiently detailed, or the investigative measure requested is too broad and difficult to justify, or the measure is not described in a sufficiently concrete manner to allow an adequate assessment of proportionality.
- The investigative measure is requested in execution of an EIO but the investigative framework is unknown or insufficiently outlined and the measure is particularly invasive under the procedural guarantees of the law of the executing state. If the issuing authorities do not cooperate in clarifying the investigative framework within which the measures are requested, there is a risk of having the EIO refused.



### Suggested best practises

- The issuing authority should define the investigative framework as precisely as possible.
- The request should be refused only in exceptional cases when it concerns a coercive measure and the behaviour described is not punishable.

In general, authorities avoid refusing the EIO on proportionality grounds to safeguard cooperation between countries, often without knowing the general context of the investigation.

# 07.

## Use of another type of investigative measure (Article 10)

### Use of a different investigative measure (Article 10 EIO Directive)

- if the measure does not exist in the executing Member State and is not one of the measures included in Article 10(2) EIO Directive (e.g. non-coercive measures)
- if the measure would not be available in a similar domestic case
- if a less intrusive measure would achieve the same result.

The EIO Directive places the control of proportionality in the hands of the issuing authority (see paragraph V, Control of proportionality), but also provides that the executing authority may use another investigative measure in various cases and, in general, if the latter achieves the same result by less intrusive means (Article 10(3) EIO Directive).

However, Article 10(2) of the EIO Directive refers to investigative measures which must always be available under the law of the executing Member State, including non-coercive measures as defined by the law of the executing State (Article 10(2)(d) of the EIO Directive).

Most Member States do not have a definition of "non-coercive acts" in their legislation, but consider the term to refer to acts that do not affect fundamental rights and often do not require a court order.



## Identified issues

- In the Member States concerned, there are different legal prerequisites for investigative measures.
- The issuing authority of the EIO requests the investigative measure(s) without specifying alternatives to the executing authority.



## Suggested best practises

- To avoid delays between executing and issuing authorities, the latter can use the EIO to indicate that less intrusive measures can be taken and provide a list.
- It is also desirable for the issuing and executing authorities to contact each other once it has been established that the requested measure cannot be used.

# 08.

## Grounds for non-recognition or non-execution (Article 11)

The grounds for non-recognition provided for in the EIO Directive (Article 11 and other grounds mentioned in Chapter IV of the EIO Directive) are contained in an exhaustive list, which must be interpreted restrictively, as these grounds constitute an exception to the principle of mutual recognition.

Therefore, under the EIO regime, there is no basis for refusing to execute EIOs on grounds which are not included in this list, such as, for example, the principle of expediency.

### Refusal of execution (Article 11 EIO Directive):

- A. Immunity or privilege that makes it impossible to execute the EIO. May include protections for medical and legal professions. May also include, even if not strictly falling within the category of a privilege or immunity, *stricto sensu*, rules relating to freedom of the press and speech (recital 20).
- B. If enforcement would harm essential national security interests.
- C. In the context of administrative or other proceedings brought by the judicial authorities, if the decision may give rise to proceedings before a criminal court and the measure would not be authorised in a similar domestic case.
- D. Violation of the *ne bis in idem* principle.
- E. If an EIO relates to an offence committed in part in the executing State but which does not constitute an offence in that State.
- F. Violation of fundamental rights.
- G. Double criminality (with exceptions - Annex D).
- H. Recourse to the investigative measure is limited by the law of the executing State to a list or category of offences, or a threshold, which does not include the offence covered by the EIO.

Article 11(4), EIO Directive: obligation to consult in relation to points (a), (b), (d), (e) and (f) before deciding not to recognise or execute an EIO.



## Identified issues

- Confusion as to when the ground for refusal based on “ne bis in idem” can be invoked.
- The broad meaning of “ne bis in idem” can create problems when there are parallel investigations in two different states.
- There is no clarity as to whether the “ne bis in idem” ground for refusal can be invoked if the proceedings have been stopped at the investigation stage.
- Some countries have not implemented Article 11(1) (d) of the EIO Directive as a binding admissibility requirement.
- Often the investigative framework is unknown or poorly defined and the act is particularly invasive under national executing legislation.



## Suggested best practises

- In case of doubt about the existence of a ne bis in idem ground for refusal, it would be advisable to request further information from the issuing authority on the type of circumstances in which the trial was stopped.
- A direct exchange between the judicial authorities to decide who should proceed may be useful.
- The request for an EIO should best explain the investigative context in which the measure is requested in order to strengthen the principle of mutual trust and the appreciation of the proportionality of the measure. Otherwise, it is recommended that the issuing authority and the receiving authority of the EIO clarify the proportionality of the requested measure.

# 09.

## EIO deadlines

(Article 12, Annex B)

## Acknowledgement of receipt (Article 16 (1), Annex B) and urgent cases

### **Mandatory time limits (Article 12 EIO Directive)**

The decision on the recognition or execution of the EIO is taken and the execution of the measure is carried out “with the same speed and priority as in a national case”.

### **Mandatory time limits**

For the adoption of the decision on recognition or execution (30 days + 30 days)

For taking the measure (90 days after the recognition or enforcement decision).

### **Provisional measures (Article 32)**

Decision, if possible, within 24 hours of receipt of the EIO.

The EIO Directive provides for time limits for the recognition or execution and for the execution of one or more investigative measures. In general, time limits are considered appropriate for the recognition and execution of an EIO.

Article 12(6) of the EIO Directive provides that, in cases where it is not possible for the executing authority to comply with the time limit, it shall inform the issuing authority of the reasons for the delay and consult with the issuing authority on the appropriate time limit for carrying out the investigative measure(s). The execution of the EIO shall then be postponed. Under no circumstances should the delay be the cause or reason for non-execution.

The use of Annex B to confirm the receipt of the EIO is mandatory (Article 16(1) of the EIO Directive); in fact, Annex B must be completed and sent to the issuing authority each time an EIO is received.

When the receiving authority transmits the EIO to another authority for execution, this information must be included in Annex B and the issuing authority must then contact the latter directly.

Annex B also serves to inform the issuing authority of the date from which the deadlines are to run.

The fulfilment of the formalities required by the EIO Directive could be particularly challenging in urgent cases, which are very common in proceedings where the defendant is in pre-trial detention or when special investigative techniques are requested through the EIO.

In cases involving electronic evidence and short data retention periods, the EIO Directive provides for the possibility of a so-called provisional measure for very urgent situations (Article 32 EIO Directive), in order to temporarily prevent the destruction, transformation, removal, transfer or deletion of an item (including data) that can be used as evidence.

In this situation, the executing authority decides and communicates its decision on the provisional measure as soon as possible and, if possible, within 24 hours. Timely coordination and involvement of judicial authorities will be necessary.



## Identified issues

- Timelines may be difficult to meet when the issuing authority requires all measures to be executed simultaneously (e.g. search warrants).
- It may be difficult to find interpreters in the language of the country receiving the EIO in urgent cases.
- The execution of some specific investigative measures (e.g. obtaining bank account information and house searches) may take longer.
- The level of detail of the justification for urgency the issuing authorities give varies, some simply writing that it is necessary for a criminal or pre-criminal procedure, while others explain the need for urgency and the time limit.



## Suggested best practises

- In general, proper cooperation requires respect for the deadline for executing the EIO.
- If the deadline for recognition and execution of the EIO cannot be met, it is recommended that the executing authority immediately informs the issuing authority, explaining the reasons for the delay and providing an estimate of the time in which the EIO could be executed.
- In urgent cases, it is recommended to communicate with the executing authority to assess the different options, preferably with the early involvement of Eurojust or the EJM contact points.
- In urgent cases, requests by e-mail, fax or even telephone and similar means of communication could be accepted, before the actual EIO is sent followed by the timely dispatch of the EIO.
- In urgent cases, the EIO may be accepted in English, provided that a translation into the language of the executing country follows immediately afterwards.
- When the validation of an EIO is requested, some Member States are willing, in urgent

cases, to take some initial measures to secure evidence even before the validated EIO has been received. In such cases, an e-mail message with a short, written summary of the facts is required. In addition, some Member States will accept an e-mail confirmation from the competent validating authority when the validating authority is not available to sign the EIO.

The EJM document 'Competent authorities, accepted languages, urgent matters and scope of the EIO Directive' includes information on urgent matters in each Member State, e.g. on the extent to which the English language can be used and the use of e-mail as a first step is possible.

# 10.

## Specific investigative measures (Articles 22-31)

The EIO Directive provides for several specific investigative measures in Articles 22 to 31.

### Interception of communications (Article 30)



#### Identified issues

The provision of different duration periods for interceptions may give rise to coordination problems between the issuing and executing authorities.

- In case of a request to carry out interception of telecommunications and/or searches, or if the EIO refers to coercive acts, the fact that the request is usually not accompanied by supporting documents may prevent the executing authority from assessing the measure.
- Differences between States concerning the period of retention of interception results.



#### Suggested best practises

- Accurate and detailed completion of section B of the EIO form.
- Preventive check for time-limits of interceptions of communications in the executing State.

### Interception of telecommunications without technical assistance (Article 31)

Article 31 of the EIO Directive governs the notification to the Member State in which the subject of the interception is located and whose technical assistance is not required (Annex C).

In this case, a simple notification to the Member State of interception is stipulated, although some national transposing legislation provides that, even in this case, the judge of the State notified of the operations must order their "immediate cessation" if the interception has been ordered in relation to offences for which it is not allowed. There are different interpretations, ranging from a mere procedural check to a substantive examination for which additional information is required in order to make an assessment that may lead to the termination of the interception and/or the adoption of a decision preventing the use of the interception results as evidence.

### Interviewing by videoconference (Article 24)

Article 24 of the EIO Directive provides for the possibility to hear suspects/defendants by videoconference. Article 24(1) of the EIO Directive also provides for the possibility to hear "witnesses" or "experts" by videoconference.

Some national transposing laws allow for a person under investigation or accused to participate in a hearing by videoconference. Since the EIO Directive applies to all stages of criminal proceedings, including the trial stage, holding a hearing by videoconference at the trial stage can be used, except by those Member States whose national law requires the physical presence of the accused person at the

trial (e.g. Portugal does not allow the accused person to be heard by video conference outside that State).

These countries may nevertheless execute such EIOs from Member States where such videoconferencing is allowed, provided that the rights of the accused are guaranteed and that this is not considered contrary to the fundamental principles of the law of the executing Member State (see Article 24(2)(b) of the EIO Directive).

Concerning "victims", although they are not "witnesses" (different procedural rights and obligations; no obligation to testify or to tell the truth), most Member States seem to accept that victims fall within the scope of Article 24 of the EIO Directive.

Videoconferencing is therefore mainly used during the hearing.



### Identified issues

- Lack of adequate equipment in the courts to ensure videoconferencing.
- Little experience with hearings by videoconference.

### Hearing by teleconference (Article 25)

The EIO Directive provides for the possibility of hearing witnesses and experts by means of teleconferencing but seems to exclude this possibility for persons under investigation or accused persons, as the wording of Article 25(2) of the EIO Directive does not refer to Article 24(1) and (2) of the Directive.

### Information on banking and other financial transactions (Article 27)

Article 27 of the EIO Directive provides for the possibility of executing an EIO aimed at obtaining financial evidence concerning accounts of any kind held by the person subject to criminal proceedings with a bank or financial institution other than a bank.

Article 27 therefore is not limited to suspects or accused persons, but also includes any other person in respect of whom such financial information is deemed necessary, provided that the request is sufficiently justified for use in criminal proceedings.

# 11.

## Principle of speciality

In addition to its specific role in extradition and transfer of sentenced persons, the "speciality rule" traditionally also applies to requests for the collection of evidence in the context of the MLA (e.g. Article 23 of the 2000 MLA Convention).

However, the EIO Directive does not expressly regulate the speciality rule and Member States have divergent views on whether the speciality rule applies in the context of the EIO Directive.



### Identified issues

- Some countries also allow evidence transferred with the EIO to be used for other purposes.
- In general, EIOs intended for non-evidentiary purposes cannot be accepted.



### Suggested best practises

- It is recommended to obtain the prior consent of the executing state for the use of evidence in other proceedings or for other purposes than those for which it was obtained, in line with Eurojust's recommendation.
- The use of the EIO for non-evidential purposes does not correspond to its nature and alternative means of international cooperation should be proposed. In this case, it is advisable to inform the issuing State in order to solve the problem by means of communications.



## Further reading

Council of the European Union, Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters - Guidelines and editable pdf version of the forms annexed to the Directive, Doc. No. 5291/20, COPEN 9, JAI 25, EUROJUST 5, EJM 5

Council of the European Union, European Investigation Order in criminal matters – List of provisions of currently existing legal instruments that may be affected, Doc. No. 14445/2011, COPEN 228, EUROJUST 138, CODEC 1479, EJM 11

Council of the European Union, Extracts from Conclusions of Plenary meetings of the EJM concerning the practical application of the EIO, Doc. No. 15210/17, JAI 1141 COPEN 390 EUROJUST 194 EJM 80

EIO-LAPD International Comparative Report, April 2021

EIO-LAPD National Report: Austria, September 2020

EIO-LAPD National Report: Croatia, October 2020

EIO-LAPD National Report: Germany, October 2020

EIO-LAPD National Report: Italy, October 2020

EIO-LAPD National Report: Portugal, October 2020

EIO-LAPD National Report: Slovenia, October 2020

EJM, Competent authorities, languages accepted, urgent matters and scope of the EIO Directive

EJM/Eurojust, Joint Paper on Assistance in International Cooperation in Criminal Matters for Practitioners by the European Judicial Network and Eurojust: What can we do for you?, January 2018

Eurojust/EJM, Joint Note of Eurojust and the European Judicial Network on the practical application of the European Investigation Order, June 2019

Eurojust/EJM, Note on the meaning of “corresponding provisions” and the applicable legal regime in case of delayed transposition of the EIO Directive

Eurojust, Report on Eurojust's casework in the field of the European Investigation Order, November 2020

European Commission, Report from the Commission to the European Parliament and the Council on the implementation of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, COM/2021/409 final

Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters, OJ C 165, 24.6.2010, p. 22–39

Stajnko, J., M. Šepec & I. Szijártó, Conference European Investigation Order - Practical Dilemmas and Theoretical Considerations - Book of Extended Abstracts, 8. & 9. December 2020, University of Maribor, University Press: Maribor 2021

# Project Coordinator

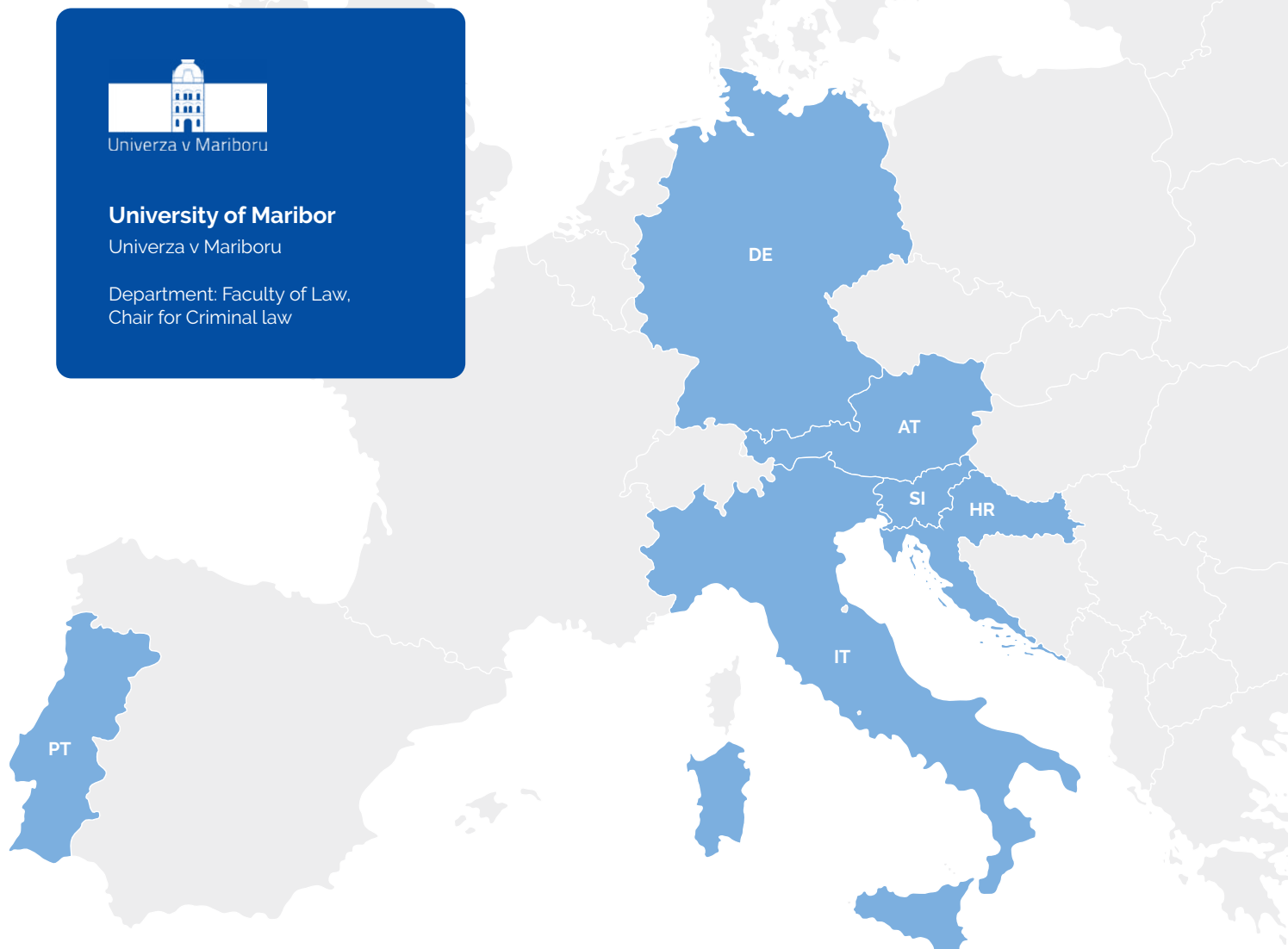


Univerza v Mariboru

## University of Maribor

Univerza v Mariboru

Department: Faculty of Law,  
Chair for Criminal law



# Project Partners



## Jožef Stefan Institute

Institut "Jožef Štefan"

Department: Laboratory for Open  
Systems and Networks



University of  
Zagreb

## University of Zagreb

Sveučilište u Zagrebu

Department: Faculty of Law



## Portugalense University (UPT)

Universidade Portugalense Infante D. Henrique

Department: Department of Law



## University of Graz

Karl-Franzens-Universität Graz

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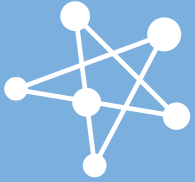
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## University of Göttingen

Georg-August-Universität Göttingen

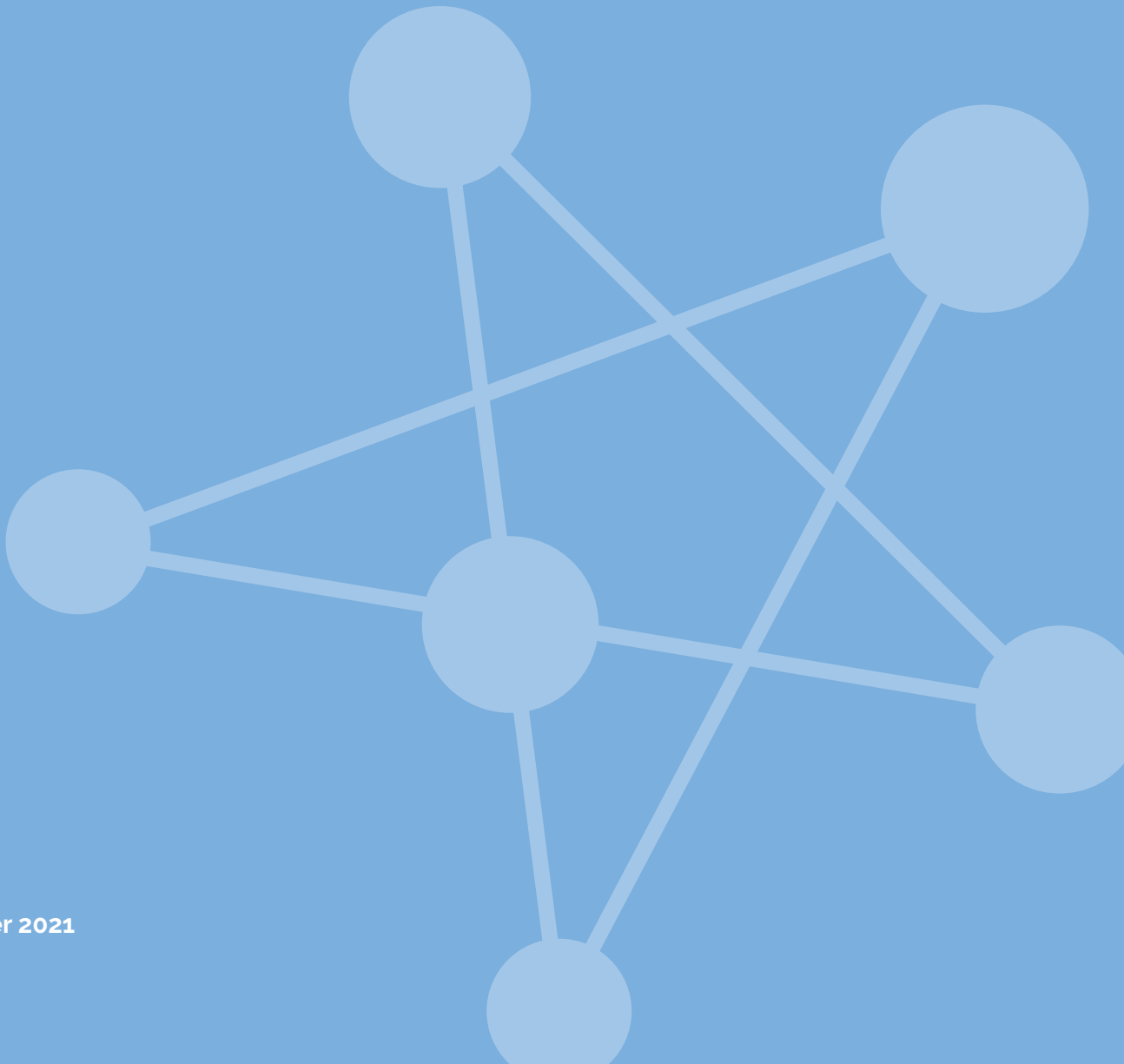
Department: Institute for Criminal Law and  
Criminal Justice, Department for Foreign and  
International Criminal Law



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– legal analysis and practical dilemmas  
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