Council of the European Union

Brussels, 29 October 2024
(OR. en)

14321/1/24
REV 1

LIMITE

COPEN 442
JAI 1480
CATS 87
EJN 29
EVAL 24
EUROJUST 79

NOTE

From:	General Secretariat of the Council
To:	Delegations
Subject:	**DRAFT FINAL REPORT ON THE TENTH ROUND OF MUTUAL EVALUATIONS on the implementation of the European Investigation Order (EIO)**

1. In line with Article 2 of Joint Action 97/827/JHA of 5 December 1997[1], the Coordinating Committee in the area of police and judicial cooperation in criminal matters (CATS) agreed after an informal procedure following its meeting on 10 May 2021, that the tenth round of mutual evaluations would focus 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 (the Directive).

2. The draft final report, prepared by the General Secretariat of the Council on behalf of the Presidency, summarises the key findings, conclusions and recommendations of the individual country reports and formulates recommendations to the Member States and to the EU institutions and bodies. The draft final report also highlights some best practices identified in the context of the evaluations that can be shared among Member States.

[1] Joint Action of 5 December 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime.

According to the findings of the tenth round of mutual evaluations, the Directive is frequently used by Member States and works well in practice. The commitment of the Member States to enhance the efficient functioning of this instrument is evident from the numerous best practices identified in the evaluations. However, key areas for improvement and development have been identified.

One of the main conclusions of the draft final report is that some critical issues concerning the application of the EIO should be addressed through legislation at EU level. In particular, the EU legislator should clarify whether the rule of speciality is applicable in the context of the EIO, given the different approaches adopted by the Member States on this topic. The need for a legislative amendment is also highlighted with regard to certain surveillance measures, such as GPS-tracking and bugging of vehicles, which, in the view of experts and practitioners should be assisted by a notification mechanism similar to that provided for in Article 31 of the Directive. This topic relates to further issues concerning the meaning and scope of the notion of 'interception of telecommunications' and the relationship between the Directive and the Convention implementing the Schengen Agreement, on which Member States have diverging views.

Moreover, during the evaluations, some Member States highlighted that the Directive does not provide for the possibility to request consent to use information previously shared between law enforcement authorities and by way of spontaneous exchange as evidence in criminal proceedings. Practitioners from several Member States also proposed legislative amendments to Annex A, aimed at making it more user-friendly and improving communication between issuing and executing authorities.

A further issue with significant practical implications which, according to the findings of the draft final report, should be addressed at legislative level concerns the use of videoconferencing to ensure the remote participation from another Member State of the accused person in a trial.

The draft final report also contains several operational recommendations addressed to the Member States with a view to further enhancing the efficient application of the EIO. Some of them are based on best practices identified during the evaluations. They cover a variety of aspects including a flexible language regime, specialisation of competent authorities, timely execution of EIOs, compliance with formalities requested by issuing authorities, promoting direct contact and full implementation of the consultation procedures as envisaged in the Directive.

3. On 8 October 2024 the draft final report on the tenth round of mutual evaluations was published and distributed to delegations for their written comments[2].

Based on written submissions, the revised version of the draft final report is enclosed in the Annex, incorporating those comments and observations that aimed to clarify issues and findings already emerged and addressed during the tenth round of mutual evaluations[3]. The Presidency believes that the report takes due account of the comments submitted so far. However, in the interest of facilitating the debate during the CATS meeting, if there are any remaining issues that are both unresolved and of an absolute priority, provided that they fit the criteria of being relevant in this round, please send them to the Presidency (copen@mfa.gov.hu), as well as to the General Secretariat (jai.criminal.justice@consilium.europa.eu), by **midday on 4 November**.

Additions to the previous version are indicated in '**bold'** and deletions in ~~'crossed out'~~.

The Presidency will present the draft final report, as set out in the Annex to this document, at the CATS meeting on 5 November 2024, for the endorsement of CATS with a view to submission to the Council on 13 December 2024, and invites delegations to have an exchange of views. In order to facilitate the discussion on the endorsement of the draft final report, the Presidency invites delegations to share their views on the questions below.

Questions for delegations

1. *Do you endorse the draft final report on the tenth round of mutual evaluations?*
2. *Among the findings of the draft final report, which do you consider particularly important?*
3. *The draft final report highlights several best practices implemented by Member States and contains related operational recommendations addressed to Member States. Which one(s), in your opinion, would it be particularly useful to implement in order to enhance the efficient functioning of the EIO?*

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[2] ST 14321/24.
[3] ST 14321/24 REV 1.

ANNEX

DRAFT FINAL REPORT ON THE

TENTH ROUND OF MUTUAL EVALUATIONS

on the implementation of the European Investigation Order (EIO)

Table of Contents

1. EXECUTIVE SUMMARY

The tenth round of mutual evaluations focused on Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (the Directive).[4] The Directive was a response to a well- identified practical need for a comprehensive system, based on mutual recognition, for obtaining evidence in cases with a cross-border dimension. It replaced the previous fragmented evidence-gathering system while taking into account the flexibility of the traditional system of mutual legal assistance (MLA).

The aim of the evaluation was to consider not only the legal issues but also the practical and operational aspects linked to the implementation of the Directive. It has provided a valuable opportunity to identify areas for improvement, as well as best practices to be shared among Member States.[5]

This round of evaluations has shown that the Directive is frequently used by Member States and generally works well in practice, primarily due to the pragmatic and flexible approach of the competent authorities in applying the European Investigation Order (EIO). The commitment of the Member States to ensure the efficient functioning of this instrument is evident from the numerous best practices identified during these evaluations, all aimed at enhancing judicial cooperation in evidence gathering.

However, key areas for improvement and development have been identified that need to be addressed at national and EU level.

One of the main conclusions of this evaluation is that the following critical issues would benefit from clarification or intervention in EU legislation.

[4] The Directive was amended twice, under Directive (EU) 2022/228 as regards its alignment with Union rules on the protection of personal data, and under Directive (EU) 2023/2843, as regards digitalisation of judicial cooperation.

[5] The EIO does not apply to Denmark and Ireland**,** therefore they were not a part of this evaluation round.

Application (or not) of the rule of speciality. At present, some Member States consider it necessary to obtain the consent of the executing State to use the evidence gathered through an EIO in different criminal proceedings; other Member States are of the opinion that the rule of speciality does not apply in the context of the EIO. In order to ensure consistency on this important question, the Directive should be amended to clarify whether or not the rule of speciality applies in the context of the EIO.

Interception of telecommunications. The evaluations have confirmed that Member States have diverging approaches on the question of whether surveillance measures conducted by technical means, such as GPS-tracking and the bugging of vehicles, fall within the notion of 'interception of telecommunications'. This uncertainty causes significant difficulties, especially in the application of the notification mechanism provided for in Article 31 of the Directive. Therefore, the evaluation teams have invited the Commission to submit a legislative proposal to amend the Directive and clarify the notion of 'interception of telecommunications'. However, the large majority of practitioners and experts expressed the view that surveillance measures such as GPS-tracking and the bugging of vehicles should be assisted by a notification mechanism similar to that provided for in Article 31 of the Directive for cases where no technical assistance is required from the Member State where the target of the measure is located.

Cross-border surveillance and Article 40 of the Convention implementing the Schengen Agreement (CISA). The relationship between the Directive and Article 40 CISA has proven to be quite problematic in the area of cross-border surveillance. There are differences among Member States as to whether and to what extent cross-border surveillance is a measure of police cooperation or of judicial cooperation. Practitioners and experts have agreed on the need for a legislative amendment to clarify whether the Directive applies to cross-border surveillance carried out for the purpose of gathering evidence in criminal proceedings.

The EIO in relation to information exchanges. A gap in the Directive highlighted by some Member States during the evaluations concerns the absence of a provision regulating the procedure whereby an EIO may be issued and executed to request and grant consent to use information previously shared between law enforcement authorities, or by way of spontaneous information exchange, as evidence in criminal proceedings**. This is particularly relevant in cases where the lex fori requires that a consent should be obtained for information, already provided on a police-to-police basis, to be used as evidence in criminal proceedings.**~~, in cases where the national law of the issuing State requires such consent~~.

Annex A. Practitioners from several Member States have called for legislative intervention aimed at making Annex A more user-friendly and have proposed a number of possible amendments that in their view would make it easier to complete Annex A and would improve communication between issuing and executing authorities.

A further topic that has been discussed in detail during the evaluations concerns the use of videoconferencing to ensure the participation of the accused person in a trial from another Member State. Some Member States issue and execute EIOs for the purposes of ensuring remote participation by the accused person in the trial via videoconference, while other Member States are of the opinion that this falls outside the scope of the Directive, since it is not **(**always**)** related to evidence gathering. In addition, some Member States have expressed reservations as to the compatibility of remote participation by the accused in a trial via videoconference with the right to a fair trial and with general principles of their national legal systems. The evaluations have however suggested that this topic is worth exploring further to find possible legislative solutions at EU level.

Although the Directive was adopted with the intention of having one single instrument for evidence-gathering purposes, practitioners frequently encounter EIOs being (partially) issued for other purposes. Situations also exist where the purpose of the requested measure is not clear-cut or can change during the course of the investigation, for example with assets seized for evidence-gathering purposes which – at a later stage – could be subject to freezing for the purpose of confiscation. Member States would appreciate more guidance at EU level on the scope of the EIO and its interrelation with other judicial cooperation instruments in criminal matters.

Some operational recommendations have also been made to the Member States with a view to further strengthening mutual trust and enhancing the smooth application of the EIO. In this regard, Member States have been encouraged *inter alia* to promote specialisation within their competent authorities; to ensure that issuing authorities provide a clearly structured and comprehensible description of the facts and requested measures in Annex A, as well as an adequate translation; to adopt a more flexible language regime; to favour direct contact between issuing and executing authorities and the full implementation of consultation procedures as envisaged in the Directive and to improve compliance with the time limits for the execution of the EIO and with the formalities requested by the issuing authorities.

Finally, it is worth noting that during the evaluations, practitioners reported very few cases where grounds for non-recognition or non-execution were invoked in the context of the EIO. The ground for non-execution concerning the violation of fundamental rights – which is now, for the first time, provided for in a mutual recognition instrument – has hardly ever been applied. However, whilst in the Directive all grounds for non-execution are optional, in their transposing legislation, several Member States have made all or some of them mandatory. Furthermore, some Member States have introduced additional grounds for non-execution that are not provided for in the Directive. It has been recommended that Member States align their transposing legislation with the Directive.

2. INTRODUCTION

The adoption of Joint Action 97/827/JHA of 5 December 1997[6] (the Joint Action) established a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime.

In line with Article 2 of the Joint Action, the Coordinating Committee in the area of police and judicial cooperation in criminal matters (CATS) agreed after an informal procedure following its meeting on 10 May 2021, that the tenth round of mutual evaluations would focus on the EIO.

By identifying shortcomings and areas for improvement in the application of the Directive, together with best practices, this round of evaluations has aimed at ensuring more effective and consistent application of the principle of mutual recognition at all stages of criminal proceedings throughout the Union.

Strengthening consistent and effective implementation of the Directive would further enhance mutual trust among the Member States' competent authorities and improve the functioning of cross-border judicial cooperation in criminal matters in the area of freedom, security and justice. Furthermore, this evaluation process could provide helpful input to Member States when implementing the Directive.

As provided for in the order of visits to the Member States adopted by CATS on 29 June 2022 by a silence procedure[7], the on-the-spot visits began in January 2023 and concluded in April 2024.

[6] Joint Action of 5 December 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime.
[7] ST 10119/22.

In accordance with Article 3 of the Joint Action, the Presidency drew up a list of experts for the evaluations to be carried out, based on the designation by the Member States of experts with substantial knowledge in the area covered by the evaluation. The evaluation teams consisted of three national experts, supported by one or more members of staff from the General Secretariat of the Council and by observers. For this round of mutual evaluations, it was agreed that the European Commission and the European Union Agency for Criminal Justice Cooperation (Eurojust) should be invited as observers[8].

This report, prepared by the General Secretariat of the Council on behalf of the Presidency, summarises the key findings, conclusions and recommendations of the individual country reports and formulates recommendations to the Member States and to the EU institutions and bodies, taking into account the recommendations identified as being most relevant and/or recurrent in the reports on the evaluated Member States. The text of the report also highlights some best practices identified in the context of this round of mutual evaluations that can be shared among Member States.

8 ST 10119/22.

3. COMPETENT AUTHORITIES

3.1. Issuing and executing authorities

Article 2 of the Directive provides the definitions of an issuing authority and an executing authority in the context of the EIO. In accordance with the Directive, an issuing authority can be a judge, a court, an investigating judge or a public prosecutor, or any other competent authority as defined by the issuing State, which is acting in its capacity as an investigating authority in criminal proceedings (for example, the police or an administrative authority). Where an authority from the latter category acts as issuing authority, an EIO always needs to be validated by a judicial authority before it is transmitted to the executing State.[9] The Court of Justice of the European Union (CJEU) also further clarified[10] that EIOs seeking to obtain traffic and location data associated with telecommunications cannot be issued by a public prosecutor where, in a similar domestic case, the judge has exclusive competence to adopt an investigative measure seeking access to such data. However, it was found that some Member States are still in the process of amending their national legislation to comply with this judgment and some other Member States have, following this judgment, introduced the practice of attaching, or requesting that the issuing State transmit, the underlying court decision ordering the investigative measure.

An executing authority is an authority with competence to recognise an EIO and ensure its execution in accordance with the Directive and the procedures applicable in a similar domestic case.

Furthermore, the Directive gives Member States the option of designating a central authority (or several central authorities) to assist the competent authorities. A Member State may also make its central authority/authorities responsible for the administrative transmission and receipt of EIOs, and for other official correspondence relating to them (Article 7(3) of the Directive).

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9 See further judgments of the Court of Justice in the case C-584/19 PPU Staatsanwaltschaft Wien/A. and Others, in the case C- 16/22 Staatsanwaltschaft Graz, and in the case C- 670/22 M.N. (EncroChat).

10 Judgment in the case C- 724/19 Criminal proceedings against HP.

In transposing the Directive, Member States differ in how they have organised the transmission and receipt of EIOs. However, in general terms, the evaluation has shown that most Member States have a system in which the prosecutor is competent to issue or validate an EIO during the pre-trial stage, and the court and/or a judge is competent to issue an EIO during the trial stage. A similar approach applies to the execution of EIOs, although it is not uncommon for Member States to have appointed one competent authority to take a decision on recognition and execution of an EIO (often the prosecutor's office), which may forward it to another authority for execution in accordance with national procedures.

Several Member States have appointed a central authority or central authorities, but their competences vary greatly. Overall, it was observed that where the Ministry of Justice was designated as the central authority, its competence was limited to statistical tasks or facilitating direct contact between issuing and executing authorities where needed. There are Member States that have not formally designated a central authority but nevertheless have a highly centralised system, requiring all incoming and outgoing EIOs to pass through a single authority. This single authority is often a prosecutor's office and it was found that they play a more substantial role, often providing quality checks and other significant input on all matters regarding the EIO.

Regardless of which authorities have been deemed competent to issue/execute EIOs in the different Member States, the tenth round of mutual evaluations has shown that a high degree of specialisation has a very positive influence on the successful application of the EIO in practice. Numerous best practices in this regard have been identified by the evaluation teams. Member States have been commended for having prosecutors, judges, clerks and investigative authorities specialised in international cooperation, and the establishment of specialised units responsible for issuing and/or executing EIOs has been highlighted as particularly beneficial. Practitioners who do not deal with EIOs on a daily basis have expressed their appreciation of the opportunity to ask their specialist colleagues for advice and thereby ensure that the EIO is applied correctly and consistently. Furthermore, direct communication between issuing and executing authorities benefits from a degree of specialisation on both sides.

On the other hand, a few country reports concluded that a recommendation was needed to address a lack of specialisation. Although many Member States were commended for the high level of specialisation in one competent authority, it was more exceptional to find the same level of specialisation in all other competent authorities dealing with the EIO in that Member State.

Moreover, coordination between the various (specialised) authorities within the same Member State proved to be just as important to successfully obtaining evidence in cross-border investigations. EIOs requesting multiple investigative measures often need to be executed by several different executing authorities depending, for instance, on the type of measure requested and/or the territorial link. From the issuing perspective, Member States referred to the challenges encountered with EIOs requesting multiple investigative measures, such as establishing direct contact with all involved authorities in the executing State and obtaining a comprehensive overview on the state of execution of the EIO. There was a call for more coordination among all parties dealing with the EIO. A thorough coordination on national level within the executing State is of great importance, not only between the various executing authorities on judicial level, but also on police level. In the same spirit, Member States that have clear arrangements regarding the authority responsible for coordinating the execution of EIOs have been commended for this practice.

3.2. The right of the suspected or accused person or victim to apply for an EIO

According to Article 1(3) of the Directive, the issuing of an EIO may be requested by a suspected or accused person, or by a lawyer on their behalf. No issues were identified in the transposition of this provision in the Member States. Although differences were observed in the procedures involved, all evaluated Member States allow suspects or accused persons to request that evidence be gathered, including by means of an EIO.

In practice, however, the defence very rarely makes use of this possibility in any Member State. Several reasons for this were brought to the attention of the evaluators. Firstly, representatives from several bar associations mentioned that in the pre-trial phase, the defence has limited rights and access to the files, which limits the practical application of such requests. Secondly, the timeframe for the defence to file such requests was sometimes mentioned as a limiting factor. Nonetheless, it seems that the lack of knowledge among defence lawyers is the most significant factor in explaining why such requests are so rarely made. Several representatives from the bar associations mentioned that they simply do not know when and how to file such requests. As a result, only a handful of Member States were able to share their practical experience in this regard. In those Member States, however, practitioners on both sides were generally content with the procedures in place.

The Directive contains no similar provision providing victims with the right to request that an EIO be issued. The question of whether the Directive should be amended in this regard was occasionally raised, but no widespread consensus was found. Nonetheless, it was determined that the national law of most Member States, in one way or another, allows victims to submit requests for evidence to be gathered and, consequently, for an EIO to be issued. This has been repeatedly recognised as a best practice, as it is considered to complement the victim's right to provide evidence under Directive 2012/29/EU.

RECOMMENDATIONS

- ***Member States are encouraged to maintain and, where possible, increase the level of specialisation of all their authorities working with international cooperation instruments, including the EIO. For this purpose, Member States that have not already done so could consider creating specialised offices and/or units where specialised practitioners such as prosecutors, judges, police officers and clerks deal with such cases.***

- ***While reaffirming the importance of direct contact between issuing and executing authorities for the optimal execution of EIOs, Member States are encouraged to ensure that legal and/or operational arrangements are in place for effective coordination between their national executing authorities in cases where EIOs are issued for multiple investigative measures involving different competent executing authorities, with a view to enhancing the efficient application of EIOs and facilitating communication with the issuing authority.***

4. SCOPE OF THE EIO AND RELATION TO OTHER INSTRUMENTS

4.1. EIO in relation to other instruments

The Directive stipulates that an EIO may be issued for one or more specific investigative measure(s) to be carried out in another Member State in order to obtain evidence. The EIO may also be issued in order to obtain evidence that is already in the possession of the competent authorities of the executing State. Furthermore, the EIO covers all investigative measures, with the exception of setting up a Joint Investigation Team (JIT), in accordance with Article 3 of the Directive.

In reality, however, Member States have indicated that EIOs for purposes other than obtaining evidence are regularly received, for example in situations where a Mutual Legal Assistance (MLA) request would have been the correct option. There are also so-called 'hybrid' EIOs, where investigative measures to collect evidence are requested, together with other measures that would, strictly speaking, fall outside the scope of the Directive.

Although the importance of respecting the scope of the EIO was frequently underlined, it was found that most Member States accept and regularly execute EIOs where an MLA request would have been the correct instrument, for example for a request to serve documents without evidentiary purposes. The reasoning behind this approach is that an MLA does not have formal requirements and practitioners choose to accept the EIO as an MLA, provided that all requirements are met. This flexible attitude is often commended as best practice, as it contributes to the efficiency of international cooperation in criminal matters and avoids additional requests and potential (translation) costs.

With regard to the European Arrest Warrant (EAW), many Member States have received EAWs in parallel with EIOs. In these cases, the EIO is sometimes transmitted for the sole purpose of locating a person, while the EAW requests that the person be arrested. Most Member States, however, consider this to be unnecessary and argue that the EAW also allows for measures to locate a person for the purposes of apprehension (executing the EAW). Furthermore, police channels may be used to that end. On the other hand, Member States do not usually refuse to execute an EIO to locate a person for their subsequent arrest on the basis of an EAW.

Some practitioners have stated that they are used to considering whether issuing an EIO **for the hearing of a suspect/accused person for evidentiary purposes** would be an effective alternative to an EAW~~, especially whether a hearing via videoconference could serve the same purpose~~. This approach follows the spirit of recital 26 of the Directive and has been commended by evaluators.

With regard to the freezing and seizure of assets, the evaluation has shown that the distinction between the seizure of assets for evidentiary purposes and freezing for purposes of confiscation causes challenges in practice. A substantial number of Member States reported that they have received EIOs to seize assets which are subsequently to be confiscated, although this measure has to be requested by means of a freezing certificate pursuant to Regulation (EU) 2018/1805. Practitioners acknowledge that the purpose of freezing or seizing assets might be mixed and can change during the course of the investigation. The parallel/simultaneous use of two instruments can be a confusing and delaying factor in practice. Another difficulty raised was the fact that a freezing certificate is often preceded by an EIO, as a result of which the existence and whereabouts of relevant assets were discovered. These issues are further complicated when the authorities competent to deal with an EIO and with a freezing certificate are not the same.

During several evaluation visits, discussions were held on assets such as luxury items and money. Some Member States argued that these should not be seized on the basis of an EIO, while for other Member States, these items could in some cases have evidentiary purposes.

With regard to JITs, most Member States have not experienced any difficulties. If within a JIT it becomes necessary to obtain evidence from a non-participating Member State, it is considered good practice for the EIO always to mention that the investigation is being carried out by a JIT and that the results of the execution of the EIO will be shared among all participants. Generally, this practice does not raise any issues for the JIT members or for the non-participating executing State. One Member State argued that the rule of speciality does not apply in the context of EIOs and that therefore, evidence that is gathered through an EIO issued by a JIT member can be shared not only with the other JIT members, but also outside of the JIT. A few Member States mentioned that they prefer to use other instruments for cooperation, such as the EIO, rather than a JIT, when there is no sufficient overlap between the investigations.

Throughout the visits, several practitioners pointed out that the interrelation with other judicial instruments can be challenging and can cause delays in proceedings. This is particularly the case when the objective of the measure changes in the course of criminal proceedings. However, experts and practitioners agreed that issuing authorities should always indicate in Annex A whether other legal instruments are being used in relation to the same case (see also Chapter 5).

It has been argued that more attention should be paid to the interrelation between the various instruments to maintain a smooth relationship between them, as also underlined by recital 34 of the Directive. Some country reports called for a handbook or guidelines issued by the Commission, and/or more training by the European Judicial Training Network (EJTN) on this issue.

4.2. EIO in relation to information exchange

Member States encounter incoming and outgoing EIOs that request consent for the use of information previously obtained through police cooperation as evidence in criminal proceedings. Executing States are generally willing to provide consent, although challenges arise as to the appropriate procedure for how such consent should be given. The Directive does not contain such a consent procedure, whereas Framework Decision 2006/960/JHA and its successor, Directive (EU) 2023/977, both mention the possibility of giving consent but do not mention how consent may be given.

The spontaneous exchange of information between judicial authorities was not mentioned as frequently by Member States as a form of requesting consent to use information previously obtained through police cooperation. Similarly, however, it was argued that on this issue, the Directive is also silent[11] and Member States have different views as to whether there is always a need to issue an EIO with a view to using evidence obtained through spontaneous exchange.

[11] As opposed, for example, to Article 7 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union ((2000/C 197/01)

All in all, several evaluation teams have concluded that there is a need for clarity on this matter and that consequently, it would be beneficial if the Directive provided for a clear possibility to request consent to use information previously shared between law enforcement authorities, or by way of spontaneous information exchange between judicial authorities, as evidence in criminal proceedings, in cases where the national law of the issuing State requires such consent.

4.3. EIO in relation to different stages of proceedings

The Directive is applicable to all stages of criminal proceedings, including the trial phase. However, the evaluation has shown that there is no consensus between Member States on the use of the EIO after the final decision that was rendered following the criminal proceedings. Some Member States believe that the Directive can be interpreted in such a way that an EIO may also include certain measures following the final decision, e.g. obtaining location data in order to contact a convicted person, in separate financial investigations aimed at enforcing a confiscation order or in proceedings concerning the application of alternative sanctions and probation decisions.

Furthermore, several Member States argued that they have never encountered an EIO in the process of enforcing a final decision but, in theory, see no obstacles to issuing/executing an EIO at that stage, as long as it is for evidentiary purposes and the EIO is in fact the correct instrument to use.

On the other hand, several Member States expressed a strong view that an EIO should never be used in the stages of enforcing a final decision, as it falls outside the scope of the Directive, and that other instruments are available for this purpose. In practice, it seems that EIOs are very rarely used at this stage, so experience with (the issues involved in) this matter is also limited. A few Member States gave examples of occasions when they have asked the issuing State to use another applicable instrument for their request and usually the authorities have come to an agreement through direct consultations.

RECOMMENDATIONS

- ***The Commission is invited to consider issuing a handbook or guidelines on the EIO and its interrelation with other judicial cooperation instruments in criminal matters, including the EAW Framework Decision and the Regulation (EU) 2018/1805 on freezing and confiscation orders. In addition, the EJTN is encouraged to increase awareness and dialogue on the connection between these instruments.***

- ***The Commission is invited to submit a legislative proposal to amend the Directive, by providing for a possibility to request consent to use information previously shared between law enforcement authorities, or by way of spontaneous information exchange between judicial authorities, as evidence in criminal proceedings~~, in cases where the national law of the issuing State requires such consent~~.***

5. CONTENT AND FORM

5.1. General challenges

In accordance with Article 5 of the Directive, an EIO may only be issued by completing and signing the form set out in Annex A. Annex A, available in all EU languages, was established to provide authorities with a consistent and efficient way of including all relevant information for the executing State. The separate sections and boxes to be 'ticked' aim to provide an overview of the case and the requested measures. During the visits, practitioners mentioned that, over the years, they have become increasingly familiar with and used to completing the form in Annex A. Nevertheless, the evaluation has shown that many practitioners in various Member States experience difficulties with Annex A. This sub-chapter aims to provide an overview of the challenges most frequently experienced.

- **Incomplete/unclear EIOs.** Almost all Member States have indicated that they frequently receive EIOs that are incomplete, inconsistent or unclear. It is not uncommon to see EIOs that fail to include basic information about the facts and time and place of and/or justification for the requested measure(s). In some cases, the summary of the facts is difficult to understand because the issuing authority has simply copied and pasted long and complex sentences from underlying national documents. Incorrect bank account numbers or details relating to the suspect may occur. Sometimes, the issuing authority lists the measures they wish to see executed but does not tick the appropriate boxes in Section C. Furthermore, discrepancies are seen in the text, relating for example to the description of the status of the person to be heard (witness/victim/suspect). Many reports include a recommendation to all Member States to pay particular attention to ensuring that the facts and requested measures in the EIO are set out in a clearly structured and understandable way, bearing the reader in mind. It was also suggested that issuing authorities should use short sentences and precise language to facilitate accurate translations. However, the evaluation teams pointed out that shortcomings in the content of the EIO, such as insufficient information or translation errors, should not lead to non-execution of the EIO but rather to consultation with the issuing authorities.

- **Section D.** This section allows Member States to inform the executing authorities that the EIO is related to a previous one. The Directive does not, however, contain a specific section for mentioning that the EIO is related to other judicial cooperation requests/orders, such as an EAW, JIT, freezing certificate or any MLA request, even though the evaluation teams and practitioners often agreed that being informed about other relevant requests/orders is just as important to ensure effective execution of the EIO. For example, it is not unusual for an EIO to request a house search that needs to be coordinated with an EAW requesting the arrest of the person living in that house. Needless to say, the competent executing authorities (which may vary depending on the instrument) should be informed of all requests in order to coordinate the execution smoothly. In several reports, practitioners expressed the wish to have a section in Annex A where they can declare a relationship with previous requests/orders. At the same time, Member States were encouraged to treat Section D as already providing the space to mention other relevant requests, irrespective of their legal basis.

- **User-friendliness of the form.** Several reports expressed the need to make Annex A more user-friendly. Some Member States mentioned that Sections C and G are often confused and wonder whether they should be positioned consecutively. Section C requires the issuing authority to first indicate, at the beginning of the form, which measures need to be carried out, and it is only later on in the form (in Section G) that the issuing authority is able to provide justification for these measures. Some reports proposed including additional measures in Section C as a tick box, in particular for searches, as this is a frequently used investigative measure. In addition, it was suggested to improve Section G by allowing a box to be ticked to indicate the phase of the investigation (pre-trial or trial). Furthermore, it was observed that Sections C and H contain unnecessary repetitions and that practitioners have to indicate twice what type of measure is requested. In relation to the boxes, a number of authorities would rather see the suspect and accused person separated and have a box for witnesses and victims for every measure in Section C. Several Member States argued that there should be a section for the questions to be asked to the witness/suspect/accused person or alternatively, a box could be ticked referring to an annexed list of questions. On this matter, creating a separate section for a list of any attachments (such as a national court order) was considered to be useful. Lastly, various reports underlined that many practitioners find Annex A too long and would appreciate the possibility of shortening or 'hiding' sections that are not necessary in specific cases.

One Member State mentioned a particular issue when signing the EIO. As a direct result of the increased danger posed by organised crime, practitioners from that Member State decided to sign the EIO anonymously by means of a number, in the most sensitive cases, to protect their identity. However, it was not clear whether or not this practice is in line with the Directive.

During the visits, Member States were asked how they respond to urgent situations and whether they can carry out investigative measures based on a phone call from a colleague abroad. Most Member States (with a few exceptions) stated that they do not accept EIOs that have been announced orally, and with the exception of preparatory actions, do not act or carry out any investigative measure before the EIO is received in written form.

All in all, the evaluation has shown that the challenges regarding the EIO form are two-fold. Firstly, legislative action is needed to make Annex A more user-friendly. Secondly, Member States should make more of an effort to complete the EIO form in a clear and consistent way and to provide comprehensible information.

5.2. Language regime and issues related to translation

Article 5(2) of the Directive sets out that each Member State must indicate which of the official language(s) of the institutions of the EU, in addition to the official language(s) of the Member State concerned, may be used for completing or translating the EIO when that Member State is the executing State. Recital 14 encourages Member States to include at least one language that is commonly used in the EU other than their official language(s).

The evaluation has shown that some Member States are flexible when it comes to the language regime. For example, one Member State officially accepts EIOs in as many as four languages. Another Member State accepts EIOs in three languages and in addition, any other language, provided there are no obstacles to its acceptance. English is the most common additional language indicated by Member States. However, the visits have revealed that some Member States included another language (often English) in their notification, yet in practice do not seem to accept EIOs in that additional language.

Despite the wording of Article 5(2), some Member States have only indicated their own official language as the one in which they accept EIOs. A few Member States have agreed to accept EIOs in the language of their neighbouring country, on the condition of reciprocity.

Most reports encouraged all Member States to include another language commonly used in the Union, in addition to their official language in their notification concerning the language regime, in the spirit of Article 5(2) and recital 14 of the Directive. A large number of practitioners and evaluators indicated that English is a commonly used language in international judicial cooperation.

Many Member States reported difficulties with regard to the translation of EIOs. From the executing perspective, practitioners encounter (machine) translations of very poor quality, in some cases making it almost impossible to comprehend the facts and the requested measure(s). In these cases, clarifications or a new translation are usually requested from the issuing State, causing delays in execution. In a few reports, it was considered good practice to attach the original version of the EIO to the translation, so that the executing State could translate (parts of) the EIO themselves if necessary. Some Member States commented that they would much rather receive an EIO translated into (good) English than a poor translation into their official language.

From the issuing perspective, practitioners mentioned problems in finding a qualified translator for certain languages. Some authorities have in-house translation services, but often not for every official language spoken in the EU. That is why in some cases, finding a qualified translator is difficult and costly. Some reports even identified situations where it seemed that EIOs could not be issued because it was simply impossible to translate them into the official language of the executing State.

Looking back at Chapter 5.1., it is true that the quality of translations is also affected by confusing, incomprehensible, and incomplete information in the original version of the EIO. On the other hand, many reports called on all Member States to make more of an effort to ensure and improve the quality of translations.

RECOMMENDATIONS

- ***Member States' issuing authorities are recommended to pay particular attention to ensuring a clearly structured and comprehensible description of the facts and requested measures in the EIO, making an effort to keep the reader in mind.***

- ***Member States' issuing authorities are recommended to mention in Annex A all related judicial cooperation requests/orders such as previous/parallel EAWs, freezing certificates or JITs, when issuing an EIO.***

- ***The Commission is invited to submit a legislative proposal to amend the Directive by making Annex A more user-friendly and effective, taking into account the shortcomings that have been identified.***

- ***Member States are encouraged to indicate another language commonly used in the Union in their declaration concerning the language regime, in addition to their official language, in the spirit of Article 5(2) and recital 14 of the Directive.***

- ***Member States' issuing authorities are recommended to ensure a good quality of translations. Furthermore, they are recommended to attach the original version of the EIO to the translation.***

6. TRANSMISSION OF THE EIO AND DIRECT CONTACT

Two main topics concerning the transmission of the EIO were addressed in this round of evaluations: (i) identification of the competent authority in the executing State to whom the EIO is to be sent; (ii) the means of transmission, namely whether electronic transmission of the EIO is sufficient, and under what conditions, or whether transmission of the original paper EIO is (also) necessary.

Although some occasional difficulties were reported, the evaluations generally showed that identification of the competent executing authority does not pose any significant problems.

The issue of secure means of transmission turned out to be more challenging: the reports highlighted the existence of different, and sometimes inconsistent, views and approaches among Member States, which could have a critical impact on the smooth application of the EIO. What has clearly emerged from this round of evaluations is that the full implementation of the electronic system for secure communication among Member States' competent authorities (e-Evidence Digital Exchange System - e-EDES) is expected to greatly improve the efficiency, speed and security of the transmission of EIOs.

6.1. Identification of the competent executing authority

The evaluations confirmed that the Judicial Atlas of the European Judicial Network (EJN Atlas) is an essential resource. Member States' issuing authorities regularly and actively use the EJN Atlas to identify and establish direct contact with the competent executing authorities of other Member States. However, it was pointed out that information about the competent authorities in the EJN Atlas was sometimes incomplete or out of date. Practitioners underlined that this information should always include the correct email addresses and telephone numbers of the competent authorities in order to facilitate direct contact.

Practitioners from one Member State suggested that the EJN should consider making the Atlas available in all official languages of the EU. Moreover, in one report, the EJN was invited to consider improving the Atlas with regard to cases where an EIO is issued for the execution of multiple investigative measures.

Considering that in the unanimous opinion of practitioners, the EJN Atlas has proved to be a valuable tool and given the importance of establishing direct contact under the Directive, it was recommended that Member States ensure that their information on competent authorities in the EJN Atlas is correct, complete and up to date.

Issuing authorities nevertheless sometimes encounter difficulties in determining the executing authority, especially in Member States that do not have a central point for receiving EIOs, in cases where multiple investigative measures are requested and the executing State has different competent authorities, or when the place where the requested measure is to be carried out is not known. Where difficulties arise in such cases, issuing authorities resort to a range of different sources, in line with Article 7(5) of the Directive.

According to the findings of this round of evaluations, issuing authorities often request assistance from the EJN contact points or, in more complex cases, from the relevant national desks at Eurojust. They may also request information from the central authorities, where designated, from the Ministry of Justice or from liaison magistrates present in their Member State or posted abroad. In several Member States, groups/units/networks of practitioners highly specialised in judicial cooperation are ready to assist their colleagues in dealing with matters concerning cross-border cases, including identifying the competent executing authority. Police channels are sometimes used to identify the competent executing authority.

It is worth noting that, in cases where the authorities receiving an EIO in the executing State do not have competence for its recognition and execution, they generally comply with Article 7(6) of the Directive and transmit the EIO, *ex officio*, to the competent executing authority. In fact, with few exceptions, practitioners reported no cases in which the EIO was returned to the issuing authority because it had been sent to an authority in the executing State that was not competent to recognise or execute it. In some reports, scrupulous compliance with Article 7(6) was considered a best practice and recommended to all Member States.

6.2. Means of transmission

Most Member States have transposed Article 7(1) of the Directive almost *verbatim* into their legislation, according to which the EIO should be transmitted from the issuing authority to the executing authority by means capable of producing a written record under conditions allowing the executing State to establish authenticity.

In general, practitioners agree that the electronic transmission of EIOs is a far better solution than sending papers by post, which is inherently slower and generates increased costs. However, since the obligation for the Member States' competent authorities to communicate for the purposes of an EIO through a decentralised IT system is not yet in force[12], competent authorities continue to face issues concerning secure channels, data protection and authenticity.

The competent authorities of most Member States generally send EIOs by email and accept EIOs transmitted by email, provided that they can establish their authenticity (authenticity can be ensured by means of an electronic signature or an equivalent form of verification, for example).

Some Member States clarified that, as executing authorities, they accept EIOs sent by email, unless doubts or issues concerning authenticity arise; in such cases, they ask the issuing authority to send the EIO by other agreed alternative means.

However, some Member States insist on receiving the original EIO by post, unless the EIO is transmitted through secure channels such as the Eurojust channels. In urgent cases, it is possible to start the execution of an EIO before it is received by post, on the basis of a copy transmitted electronically. In this regard, some evaluation teams encouraged Member States to accept EIOs sent by electronic means as long as they comply with Article 7 of the Directive, and not only those sent by post.

The competent issuing authorities of several Member States reported that they still send original EIOs by post/courier, even after first transmitting them electronically. Few Member States are particularly strict in this regard and do not send EIOs by email due to the lack of secure channels and for data protection reasons.

[12] As per Article 26(3) of the Digitalisation Regulation.

It should also be noted that it is not only competent authorities from different Member States that take different approaches to the issue of transmission; even practitioners from the same Member State sometimes have diverging views on how EIOs should be sent and received. In one Member State, during the on-site visit, most practitioners were of the opinion that sending EIOs by email was sufficient, while other practitioners expressed the view that EIOs should only be sent electronically if transmitted through Eurojust.

Any problems relating to the secure transmission of EIOs are expected to be solved following the full implementation of the decentralised IT system on the basis of the uniform legal framework created by the Digitalisation Regulation[13]. **As from 17 January 2028, cross-border communication under the Directive as a rule will take place through such a decentralised IT system. Member States may opt to develop or adapt their own national IT systems to connect to the decentralised IT system or to use the reference implementation software to be developed by the Commission for those purposes.** Given the benefits that a secure means of communication can bring, it was recommended that **until the decentralised IT system for EIO under the Digitalisation Regulation is operational,** Member States make use of e-EDES, a system that was developed by the Commission to support exchanges under the Directive. **E-EDES, currently used a voluntary tool, is envisaged to become the reference implementation software under the Digitalisation Regulation.**

At present, the use of e-EDES is voluntary: not all Member States have joined the pilot project and not all authorities within the Member States involved in the pilot project are connected. Member States already taking part in the e-EDES pilot project were praised for doing so by the evaluation teams, who also encouraged them to connect all competent authorities to the system, which in some Member States seems to be quite challenging due to a lack of adequate digital infrastructure.

Practitioners using e-EDES indicated some difficulties they had encountered and features of the system that might be improved (e.g. the obligation to fill in the EIO form directly in e-EDES was mentioned as problematic; practitioners also mentioned that e-EDES does not take into account the need to store EIOs in national judicial databases). The evaluation teams consequently invited the Commission to consider improving the system, addressing the issues identified and suggestions made during this round of evaluations.

[13] Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation.

6.3. Direct contact

After the EIO has been transmitted, in the vast majority of cases, communication takes place directly between the issuing and executing authorities, most often by e-mail or telephone. In some reports, the evaluation teams praised the competent authorities of the Member States concerned for always seeking to establish direct contact during the execution of an EIO to address any doubts or solve any problems that might arise. It was also suggested that Member States should ensure that the contact person(s) mentioned in the EIO speak(s) English to a sufficient level to allow for effective direct communication (see also Chapter 14).

Contact is made via or with the assistance of Eurojust, the EJN or the central authority when communication problems arise, in the event of delays, in complex or urgent cases or where there is a particular need for coordination (e.g. EIOs concerning multiple investigative measures, or investigative measures to be carried out in different Member States). The added value of Eurojust **and the EJN** in facilitating communication and coordination, especially in complex and/or multilateral cases, was often underlined by practitioners during this round of evaluations.

6.4 Obligation to inform – Annex B

Article 16(1) of the Directive obliges the executing State to acknowledge receipt of the EIO within one week of receiving it by completing and sending the form in Annex B. The purpose of Annex B is to inform the issuing State that the EIO has been duly received; it is a crucial element in establishing direct contact between the executing and issuing authorities.

Most Member States find that Annex B is fit for purpose, although a few reports included suggestions for changes, such as making the inclusion of an email address mandatory or removing the need to sign the form. As the form contains a space reserved for any further information that is considered helpful to the issuing authority for the successful outcome of the cooperation procedure, it is believed that this space could be used to alert the issuing authority to the incomplete or incorrect completion of the form set out in Annex A, asking the issuing authority to make all necessary or appropriate additions and/or corrections.

Some Member States claimed that the contact information filled in by the executing State was often incomplete or incorrect. The reports also mentioned that some practitioners chose to acknowledge receipt by means other than the form in Annex B, for example by simply sending an email.

Although some practitioners admitted that occasionally their workload or other factors caused them to forget to send Annex B, the main (ironic) conclusion on this topic is that it seems that Annex B is always sent but never received. Issuing authorities of several Member States reported that they often had to send reminders to the executing State since they had not received Annex B.

Given the important role Annex B has in establishing direct contact, many reports called upon all Member States to systematically send Annex B and to provide complete and correct contact information to the issuing State.

RECOMMENDATIONS

- ***Member States should ensure that information in the EJN Judicial Atlas is correct, complete and up to date, in order to facilitate identification of the competent executing authority and to enable direct contact between issuing and executing authorities.***
- ***Member States' competent authorities are encouraged to send EIOs by electronic means where possible and to accept EIOs received by electronic means, provided the conditions of Article 7 of the Directive are met.***

- ***Until the decentralised IT system for EIO under the Digitalisation Regulation is operational and where for the purposes of the Digitalisation Regulation Member States envisage using the reference implementation software, ~~I~~it is recommended that those Member States speed up the implementation of e-EDES pilot project and connect all competent authorities to this system~~it~~, with a view to ensuring the swift and secure transmission of EIOs, related communication and evidence.***

- ***Member States' executing authorities, as well as central authorities, where applicable, should send Annex B systematically. Furthermore, they should include correct and complete contact information in Annex B and should always include an email address.***

7. NECESSITY, PROPORTIONALITY AND RECOURSE TO A DIFFERENT TYPE OF INVESTIGATIVE MEASURE

In accordance with Article 6(1) of the Directive, the issuing authority may only issue an EIO when it is necessary and proportionate for the purpose of the proceedings and if the investigative measure(s) could have been ordered under the same conditions in a similar domestic case. The Directive leaves the assessment of whether these conditions are fulfilled to the issuing authority (Article 6(2)). The executing authority may consult the issuing authority when it has reason to believe that the conditions referred to in paragraph 1 are not met, but the Directive leaves it to the issuing authority to decide whether or not to withdraw the EIO after such consultation, meaning that it should not constitute a ground for non-execution (Article 6(3)).

The evaluation exercise has shown that most Member States apply more or less the same criteria when assessing whether issuing an EIO is necessary and proportionate. The most important elements in this assessment are, generally, the seriousness of the offence, the intrusiveness of the measure, whether the evidence can be obtained by other means and the importance of the evidence to the investigation. In some Member States, the principle of legality applies, and that can have an influence on the necessity and proportionality of issuing an EIO. Such Member States usually have exceptions to the legality principle that nevertheless allow them to perform an adequate assessment.

Member States that have a system where an investigative authority is competent to issue an EIO with a subsequent validation procedure occasionally encounter cases in which the validating authority has doubts as to whether the necessity and proportionality principles are met. In such cases, the validating authority may decide not to validate the EIO but, according to practitioners, this rarely happens in practice, as authorities can usually agree on a way forward together. Some Member States have a centralised system and require that all EIOs to be issued are sent through a specialised office, often within the prosecution service. It has been observed that specialised practitioners may advise their colleagues on matters of necessity and proportionality, and this has often been commended by the evaluators.

Although executing authorities occasionally encounter EIOs in which the necessity and proportionality are, in their opinion, questionable, the evaluation has shown that in the majority of the cases, the consultation procedure is followed and the EIOs are still executed by the executing authority, in some cases after agreeing on an alternative way forward with the issuing authority. However, on occasion, executing authorities have also refused to execute an EIO based on their own assessment of the principle of proportionality, either explicitly or implicitly.

Furthermore, Article 10 of the Directive gives the executing authority recourse to a different type of investigative measure in cases where the investigative measure does not exist in the executing State, would not be available in a similar domestic case or where the investigative measure selected by the executing authority would achieve the same results through less intrusive means. In all of these instances, Article 10(4) obliges the executing authority to first inform the issuing authority, which may decide to withdraw or supplement the EIO.

However, several reports have pointed out that the executing authorities do not always inform the issuing authority when they decide to make use of a less intrusive measure. Practitioners explained that they did not see the need for this, as the less intrusive measure achieved exactly the same result as the requested measure. However, as the evaluators pointed out, this practice could have unforeseen consequences in the issuing State, and the evaluation teams therefore repeatedly recommended always informing the issuing authority in accordance with Article 10(4).

RECOMMENDATIONS

- ***Member States' executing authorities should always inform the issuing authority in the event of recourse to another investigative measure, in accordance with Article 10(4) of the Directive.***

8. RECOGNITION AND EXECUTION OF THE EIO, FORMALITIES AND ADMISSIBILITY OF EVIDENCE

8.1. Recognition and execution in line with the mutual recognition principle

In accordance with Article 9(1) of the Directive, the executing authority must recognise the EIO without further formalities and ensure its execution in the same way as if the investigative measure had been ordered in the executing State. The evaluation has shown that most Member States do not differentiate between recognition and execution and simply make the decision to execute the EIO without further formalities, unless there are grounds for non-recognition, non-execution or postponement. A few Member States differentiate between recognition and execution, often resulting in two formal decisions. Some reports mentioned that, whenever there are grounds for non-recognition or non-execution, an explicit decision should be taken indicating the grounds applicable to the case.

Transmission of the underlying national judicial decision was frequently discussed during the visits. The Directive does not provide for an obligation for the issuing authority to attach the national judicial decision to the EIO.

Indeed, many practitioners emphasised that, owing to the principle of mutual trust, the transmission of the underlying judicial decision should not be required and a mere reference to it in Annex A would be sufficient. However, in practice it seems that some executing States do require the underlying judicial decision and make the execution of the EIO conditional upon its receipt. This can cause delays and confusion, especially in cases where a judicial decision does not exist. In several reports, the evaluation teams found it necessary to recommend that the executing authorities do not require the underlying judicial decision as an attachment to the EIO, as such an obligation cannot be derived from the Directive. A few reports called upon the Commission to address this matter in a handbook on the EIO.

Throughout the visits, many Member States indicated that, when receiving results from the executing State, it was often difficult to determine whether the EIO had been fully or partially executed, especially since the results are in the language of the executing State and may be spread out over many pages. It was frequently considered a best practice, to be recommended to the executing authorities, to add a cover letter when sending the results, explaining whether the EIO has been fully or partially executed and, in the latter case, which investigative measures are still pending. With reference to the consultation procedure provided for in Article 9(6) of the Directive, Member States were also commended for the practice of transmitting partial results 'on a rolling basis', depending on the urgency of the case and the needs of the issuing authority.

8.2. Compliance with formalities and admissibility of evidence

As stipulated in Article 9(2) of the Directive, executing authorities must comply with the formalities indicated by the issuing authority, as long as these are not contrary to the fundamental principles of law of the executing State.

On this topic, Member States raised a number of challenges during the visits. From the issuing perspective, several instances of non-compliance with essential formalities were described. Below are some of the most frequently mentioned examples:

- The presence of a judge, a defence lawyer or witnesses during a house search or a hearing was not arranged by the executing State, despite this being an obligation under the law of the issuing State.
- The status of the person to be heard, and thus the procedural formalities linked to the status, (e.g. witness vs. suspect) were changed by the executing authority without prior consultation, which adversely affected the investigation in the issuing State.
- Documents containing rights or formal notice of the procedural status were not served to the person concerned, despite this being required under the law of the issuing State.
- A hearing under oath was not performed, even though this was essential to the admissibility of such a hearing as evidence in the issuing State.

Non-compliance with requested formalities has had undesirable consequences such as having to send another EIO to repeat the requested measure, or more severe outcomes such as the inadmissibility of the evidence or even worse, the collapse of an entire investigation.

According to several practitioners and evaluators, some authorities interpret the 'fundamental principles of law' very broadly, rejecting certain formalities simply because they do not exist under their own law. This was considered problematic and not in line with the Directive.

From the executing perspective, practitioners described some formalities as cumbersome and inconvenient. Some Member States question the value of serving a document on an individual while not being competent to answer any questions they might have. Furthermore, Member States have argued that it is sometimes very difficult to understand the formalities the issuing State has requested. The applicable procedural law might be completely different across Member States and lengthy, complex, or sometimes insufficient explanations complicate matters even further.

Many reports underline the importance of complying with the requested formalities, as they are crucial for the admissibility of evidence in the issuing State. That is why Member States are repeatedly called upon to respect the requested formalities as far as possible and to interpret the notion of 'fundamental principles of law' in a narrow way. At the same time however, it was considered appropriate to recommend that issuing authorities clearly describe the requested formalities and their importance in Section I of Annex A, bearing in mind that the reader is probably not familiar with the criminal procedural law of the Member State in question.

Aside from the challenges identified concerning the formalities, this evaluation has not identified any other significant issues with the admissibility of evidence in the context of the EIO.

8.3. Time limits and urgency

Several practitioners are of the view that the time limits provided for in Article 12 of the Directive have significantly increased the speed of cross-border cooperation compared to the MLA regime. Practitioners in a number of Member States have experienced a change in 'mindset' and the increased involvement of Eurojust and the EJN contact points has helped improve compliance with time limits.

Nevertheless, a number of challenges were identified. Practitioners commented that some Member States usually comply with time limits, while others seem to frequently exceed the deadlines provided for in the Directive. Furthermore, many issuing authorities found that in the event of a delay, they were rarely notified of the reasons and the executing authority often did not reply to reminders or requests for a status update. Several reports expressed the view that executing authorities should comply with the time limits and should inform the issuing authority in the event of a delay, giving reasons. It seems that the grounds for postponement provided for in Article 15 of the Directive are rarely applied in practice.

From the executing perspective, Member States mentioned that time limits were sometimes exceeded due to the complexity of the requested measure(s), backlogs and shortage of resources, or due to the fact that additional information was required from the issuing State.

Section B of Annex A allows the issuing State to tick a box indicating urgency. During the visits, Member States all listed similar criteria to label an EIO as urgent: an upcoming trial date, deadlines regarding the custody of a suspect, the risk of evidence being destroyed, etc. On the other hand, practitioners across the EU also seem to face the same challenges when executing EIOs labelled as urgent. They mentioned that even though the 'urgent' box was ticked, the urgency was often not explained and important information such as the trial date **or a preferred deadline for execution** was nowhere to be found. In such instances, the evaluation teams recommend that all Member States, when labelling an EIO as 'urgent', provide the relevant information to substantiate this urgency. At the same time, it is recommended that Member States make sensible use of the 'urgent' label, in order for it not to lose its meaning.

Additionally, a few reports mentioned that granting national members the power provided for in Article 8(3) point b) and (4)~~8~~ of Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), replacing and repealing Council Decision 2002/187/JHA (Eurojust Regulation) would greatly facilitate the resolution of urgent cases.

8.4. Costs

Article 21 of the Directive stipulates that the cost of executing an EIO in the territory of the executing State should be borne exclusively by that State. However, the legislator has taken into account that the execution of an EIO may come with exceptionally high costs for the executing State. In such situations, the executing authority may consult with the issuing authority on whether and how the costs could be shared or whether the EIO should be modified. As underlined by recital 23, exceptionally high costs should not constitute an additional ground for refusal and should not be abused in a such a way as to delay or impede the execution of the EIO. In fact, when no agreement can be reached, the Directive leaves it up to the issuing authority to decide to withdraw (part of) the EIO or to bear costs deemed to be exceptionally high.

In practice, most Member States have not encountered any major difficulties regarding exceptionally high costs. During some visits, examples were given where consultations were necessary to address cost-related issues, such as the request for a large volume of data, complex expert reports or a long period of wiretapping. These instances were generally solved through consultations between the executing and issuing authorities. Furthermore, a number of reports underlined that the costs of mandatory defence should not be construed as exceptionally high. A few Member States argued that it is difficult to define the term 'exceptionally high costs' and expressed the opinion that EU-level guidelines on this matter could be useful.

RECOMMENDATIONS

- ***It is recommended that Member States' executing authorities refrain from ~~systematically~~ requesting that the issuing State transmit the underlying national judicial decision as an attachment to the EIO.***

- ***Member States' executing authorities, when sending the results to the issuing State, are encouraged to add a cover letter stating whether the EIO has been fully or partially executed. In the case of partial execution, and with reference to the consultation procedure provided for in Article 9(6) of the Directive, Member States' executing authorities are encouraged to consult the issuing State on transmitting the results 'on a rolling basis', depending on the urgency of the case and the needs of the issuing authority.***

- ***Member States' executing authorities should ensure that the requested formalities are complied with as far as possible and refused only when contrary to 'fundamental principles of law', and to interpret the latter notion in a narrow way, meaning that the requested formalities should not be refused solely because they do not exist under their own national law. At the same time, it is recommended that Member States' issuing authorities clearly describe in Section I the requested formalities and their importance.***

- ***It is recommended that Member States' executing authorities comply with the time limits provided for in the Directive for the recognition and execution of the EIO and in the event of delays, to inform the issuing State as soon as possible, giving reasons.***

- ***Member States' issuing authorities, when labelling an EIO 'urgent', are recommended to provide all relevant information to substantiate the urgency. At the same time, they are recommended to make sensible use of the 'urgent' label, to ensure it does not lose its meaning.***

9. RULE OF SPECIALITY

9.1. Use of evidence in other proceedings by the issuing State

Unlike other legal frameworks, the Directive does not contain a general provision on the rule of speciality, the only exception being the provision on temporary transfer (Article 22(8) of the Directive). This lack of a general provision might suggest that the rule of speciality does not apply in the context of the Directive. However, the evaluation has clearly shown that Member States have diverging views on the application of the rule of speciality in the context of the EIO, and even practitioners within the same Member State might disagree as to whether and to what extent the rule of speciality is applicable.

On the one hand, a large number of Member States are of the opinion that the rule of speciality applies in the context of the EIO, albeit with differing reasonings. Some Member States believe that the rule of speciality is affirmed in Article 19(3) of the Directive on confidentiality, and that the rule of speciality is a form of confidentiality. Some other Member States rely on the speciality rule in their national law, while others believe that it is a general principle of international judicial cooperation and applies to all instruments in the area of cooperation in criminal matters. Firm believers in the rule of speciality refer to the principles of necessity and proportionality to illustrate that the speciality rule must apply; otherwise, evidence could be used in cases where it would not have been necessary and proportionate to issue an EIO.

From the issuing perspective, most issuing authorities in these Member States will request consent from the executing State when they wish to use the evidence provided by executing authorities in other proceedings. From the executing perspective, some authorities in these Member States will explicitly state that the evidence to be transmitted may only be used for the purposes for which it has been requested. Others do not specify these conditions but simply assume that the evidence will not be used for any other purpose. The way in which a request for consent should be assessed differs among Member States. It is generally evaluated whether, if the request for consent were a separate EIO, that EIO would be executed.

On the other hand, a group of Member States believes that the rule of speciality does not apply in the context of the EIO. Some of these Member States apply *Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA* when it comes to using evidence received as an issuing State. In their view, this Directive provides for the free flow of data, thus allowing for evidence to be used in other proceedings, as long as the data protection principles are abided by and the executing State has not expressly stated that the evidence can only be used for the purposes outlined in the EIO.

In light of these diverging views, the majority of the country reports have concluded that clarity on this topic is important and necessary, which is why the Commission has been frequently invited to submit a legislative proposal to clarify whether the speciality rule applies in the context of the EIO.

9.2. Opening of new criminal investigations following the execution of an EIO

Several Member States indicated that if during the execution of an EIO, information becomes available that a crime other than the one that gave rise to the issuing of the EIO has been committed on the territory of that Member State (accidental discovery), they will open a domestic investigation. Some of them are obliged to do so, as they are bound by the legality principle. However, not all Member States inform the issuing State if a domestic investigation has been opened on the basis of an EIO.

In the interests of coordination and to prevent possible harm to the investigation of the issuing State, multiple reports have recommended that all executing authorities should inform the issuing authority if a domestic proceeding is opened following receipt of an EIO or based on the evidence gathered in the framework of an EIO, if the domestic case is related to the case for which the EIO was issued.

RECOMMENDATIONS

- ***The Commission is invited to submit a legislative proposal to amend the Directive to clarify whether or not the rule of speciality applies in the context of the EIO.***

- ***In the interests of coordination and to prevent possible harm to the issuing State's investigation, it is recommended that Member States' executing authorities inform the issuing State if a domestic proceeding is opened following the execution of an EIO, if the domestic case is related to the case for which the EIO was issued.***

10.GROUNDS FOR NON-RECOGNITION OR NON-EXECUTION

10.1. General

Article 11 of the Directive lists the grounds for non-recognition or non-execution applicable to all investigative measures, while other provisions of the Directive regulate additional grounds for non-recognition or non-execution specific to certain investigative measures.

Practitioners from all Member States reported few cases in which grounds for non-recognition or non-execution were invoked, either as issuing or executing authorities. This was also confirmed by statistical data on the low number of cases of non-execution, albeit limited to the Member States for which such statistics were available.

The most frequent reasons for which EIOs are not executed are factual ones (e.g. the person to be heard no longer resides in the executing State or cannot be traced), and do not involve any of the grounds for non-recognition or non-execution provided for in Article 11 or the additional grounds for non-recognition or non-execution specific to certain investigative measures.

Practitioners also reported cases in which the EIO received was too incomplete or inaccurate to allow for execution (e.g. insufficient details were provided to identify the person affected by the measure or it was unclear which investigative measure should be carried out), and no additional information was provided, even upon request by the executing authorities, eventually leading to non-execution. In this regard, in some reports the evaluation teams underlined that shortcomings in the content of the EIO, such as insufficient information, translation errors or formal defects (e.g. lack of signature), should not lead to an automatic refusal to execute the EIO, but rather to consultations with the issuing authorities (see also Chapter 5).

Evaluation reports on individual Member States offer an interesting anthology of (sometimes unusual) cases of non-execution described by practitioners, both as issuing and executing authorities. For some of these cases, the evaluation teams expressed reservations as to the compatibility of the refusal with the provisions of the Directive.

The consultation mechanisms envisaged in the Directive (in particular in Articles 10(4) and 11(4)) appear to be complied with on a regular basis. Before deciding not to recognise or execute an EIO, the executing authority generally consults the issuing authority and, where appropriate, requests additional information in order to further assess whether there are grounds for refusal.

However, some issuing authorities reported cases in which they were notified of a refusal without being consulted beforehand. Moreover, in some cases, the EIO was returned without providing a formal justified decision and the ground for non-execution was only communicated in subsequent correspondence. In this regard, it was pointed out that, in cases of non-execution, the reasons and legal basis for non-execution should be promptly communicated to the issuing authority.

The importance of prior consultation was frequently emphasised during the evaluation. In the experience of many practitioners, where issues concerning the possible existence of grounds for refusal arise, direct consultation often allows the executing authority to re-evaluate the applicability of the ground for non-execution that was initially invoked (e.g. by obtaining more information on the criminal investigation and properly assessing whether the requested measure would be authorised in a similar domestic case). In some reports, the evaluation teams commended Member States' executing authorities for implementing the consultation mechanism in all cases of possible refusal. In one report, it was suggested that the scope of the mandatory consultation procedure laid down in Article 11(4) should be extended to further grounds for non-execution[14].

The issue of the proper transposition of the provisions of the Directive concerning grounds for non-recognition or non-execution was frequently addressed in the context of this round of evaluations.

Whilst in the Directive all grounds for non-recognition or non-execution are optional, when transposing the Directive, several Member States have made some or all of them mandatory.

[14] Article 11(4) of the Directive provides for mandatory consultations only in the cases of non-recognition/non-execution referred to in points (a), (b), (d), (e) and (f) of Article 11(1).

The evaluation teams carefully examined the reasons given by the Member States' authorities regarding the option of providing for mandatory grounds for non-recognition or non-execution. According to the authorities of some Member States, optional grounds would be inconsistent with their respective national legal framework or legal tradition or would require the legislator to set out detailed criteria for the exercise of judicial discretion. Legal certainty was also mentioned as a reason for mandatory grounds for non-execution. In addition, some practitioners consider that some of the grounds for non-execution listed in Article 11 of the Directive are such that, once it is determined that one of them is applicable, execution is impossible (e.g. violation of fundamental rights), and a different wording of the transposing legislation ('may' instead of 'shall') would not result in a different outcome in practice.

Furthermore, some Member States' transposing legislation contains additional grounds for non-recognition or non-execution that are not provided for in the Directive.

Although improper transposition of the Directive does not yet appear to have caused major systemic problems in practice, as demonstrated by the low rate of refusals, this round of evaluations indicated that some Member States, by making all grounds for non-recognition or non-execution mandatory, prevented (or might prevent) the competent authorities from executing EIOs that would otherwise probably been executed.

Some examples were provided during the on-site visits, with reference, *inter alia*, to the lack of consent of the person held in detention transposed into the legislation of some Member States as a mandatory ground for non-execution of EIOs issued for temporary transfer; or to the lack of consent of the suspect/accused person for EIOs issued for a hearing via videoconference.

Therefore, in several reports, the evaluation teams recommended that the Member States concerned consider aligning their transposing legislation with the Directive and make all grounds for non-recognition or non-execution optional and also limit the grounds for non-recognition or non-execution to those provided for in the Directive. It was emphasised that in the spirit of mutual trust and recognition, the execution of EIOs should be the default rule, and refusal should be an exception, to be interpreted in a strict manner.

10.2. Dual criminality

Even in the absence of comprehensive statistical data, it appears that the most common ground for non-execution of EIOs is the lack of dual criminality as laid down in Article 11(1)(g) of the Directive. This ground for refusal does not apply to the investigative measures referred to in Article 10(2) (non-coercive measures) and in cases where the EIO pertains to one of the criminal offences listed in Annex D, which are exempted from the verification of dual criminality if the offence is punishable in the issuing State by a custodial sentence or a detention order for a maximum period of at least three years.

Examples given during the evaluation concerned, *inter alia*, traffic violations, cases of breach of maintenance obligations and tax offences.

In general, practitioners have not experienced significant problems with regard to dual criminality in the context of the EIO, either as issuing or executing authority. However, judicial authorities from several Member States emphasised that it is crucial to describe the criminal offence in a clear manner, so as to enable the executing authority to assess whether the act constitutes a criminal offence under the law of the executing State.

Except for a few instances, practitioners have not encountered cases in which the dual criminality test was invoked in relation to the investigative measures listed in Article 10(2) of the Directive (non-coercive measures).

Practitioners from some Member States indicated a limited number of cases in which the dual criminality test was improperly applied in relation to the categories of offences set out in Annex D. In this regard, the evaluation teams emphasised that under Article 11(1)(g) of the Directive, it is for the issuing authority to indicate whether the offence falls within one of the categories listed in Annex D.

10.3. *Ne bis in idem*

In accordance with Article 11(1)(d) of the Directive, the recognition or execution of an EIO may be refused where the execution of the EIO would be contrary to the principle of *ne bis in idem*. No significant problems have been reported as regards application of this ground for refusal.

All Member States have a national criminal records register. There is a central database of past and ongoing criminal cases in several Member States, which would allow the executing authority to verify not only possible infringements of the *ne bis in idem* principle, but also links and connections with ongoing domestic investigations. However, based on the outcome of the evaluations, it seems that in some Member States the executing authorities do not regularly check the existence of previous decisions that would constitute a *ne bis in idem* situation, nor do they verify whether national investigations are ongoing in respect of the same act and/or against the same person. Practitioners from some Member States pointed out that the *ne bis in idem* principle would be an argument brought by the suspect/defendant, who is expected to raise this issue.

However, in some reports, the evaluation teams considered it appropriate to encourage Member States to use the means at their disposal to assess whether there may be a possible violation of the *ne bis in idem* principle, and called on Member States that do not have a national central database concerning all ongoing and finalised criminal cases to establish such a database.

10.4. Immunities or privileges

Pursuant to Article 11(1)(a) of the Directive, recognition or execution of an EIO may be refused in cases where there is an immunity or privilege under the law of the executing State which makes it impossible to execute the EIO, or where there are rules on determination and limitation of criminal liability relating to freedom of the press and freedom of expression in other media, which make it impossible to execute the EIO.

As clarified in recital 20 of the Directive, there is no common definition of what constitutes an immunity or privilege in Union law; the precise definition of these terms is left to national law. The evaluations indicated that even in the legislation of several Member States, no general concept of immunity or privilege has been established. The immunities and privileges provided for persons in certain positions and professions are laid down in specific laws.

Practitioners from most Member States have not experienced any cases in which this ground for refusal was invoked, either as issuing or executing authorities. Some practitioners mentioned cases where the EIO was issued for purpose of searching lawyers' offices, thus raising the issue of the protections enjoyed by the legal profession.

Specific issues concerning the application of this ground for refusal were raised by the Member State that hosts some seats of the EU institutions. The competent executing authorities reported cases in which an EIO was issued for the seizure of documents from a person working as an official of an EU institution or for the hearing of EU officials. In such cases, where a possible issue concerning immunities and/or privileges arose, and the authority competent to waive those immunities/privileges had to be contacted, it proved challenging to receive an answer from the EU institution in question. The executing authorities decided to refer the matter to the issuing State, in accordance with Article 11(5) of the Directive, which provides that where the power to waive the privilege or immunity lies with an authority of an international organisation, it is for the issuing State to request that the authority concerned exercise that power.

The evaluation team considered it appropriate to recommend that all EU institutions designate one contact point each for the Member States' competent authorities for cases in which the execution of an EIO requires the cooperation of an EU institution and invited EU institutions to ensure that such requests are processed and that replies are provided to the Member State concerned.

10.5. Fundamental rights

The Directive is the first mutual recognition instrument that explicitly provides a ground for non-recognition/non-execution related to possible violations of fundamental rights. In accordance with Article 11(1)(f) of the Directive, the recognition or execution of an EIO may be refused if there are substantial grounds to believe that the execution of the investigative measure would be incompatible with the executing State's obligations in accordance with Article 6 of the Treaty on European Union (TEU) and the Charter of Fundamental Rights of the European Union.

Interestingly, based on the findings of the evaluations, it can be said that this ground for non-execution has hardly ever been applied in practice. Only one case was reported where the execution of an EIO issued for temporary transfer was refused due to poor detention conditions in the issuing State.

The issue of fundamental rights was also addressed in cases concerning the execution of EIOs issued for the hearing of an accused person via videoconference during the main trial.

However, as pointed out in some reports, these are cases in which executing authorities seem to confuse the general 'fundamental rights' ground for non-execution provided for in Article 11(1)(f) of the Directive with that of fundamental principles of the legal system of the executing State (Article 24(2)(b) of the Directive). Issues concerning hearings via videoconference are dealt with in greater detail in Chapter 12.3. It is sufficient to point out here that some Member States refuse to execute EIOs issued for the hearing of an accused person via videoconference at the trial stage, even where the accused person gives their consent. In such cases, the executing authorities are of the opinion that executing the EIOs would lead to a breach of the principle of immediacy and/or of other fundamental principles of their legal system. In this context, the question of respect for the fundamental rights of the accused person is sometimes raised to explain why hearings via videoconference are considered to be incompatible with the fundamental principles of the executing State's legal system.

RECOMMENDATIONS

- ***Member States should ensure that, in line with the Directive, all grounds for non-recognition/non-execution are defined as optional in their transposing legislation. Furthermore, no additional grounds for non-recognition/non-execution other than those provided for in the Directive should be established.***

- ***Member States' executing authorities should comply with the mandatory consultation procedure laid down in Article 11(4) of the Directive. In cases where Member States' executing authorities consider applying any of the other grounds for non-recognition/non-execution provided for in the Directive, they are encouraged, before deciding not to recognise or execute an EIO, to consult the issuing authority and, where appropriate, to request additional information, with a view to properly assessing whether the conditions for the ground for non-recognition/non-execution exist.***

11.LEGAL REMEDIES

11.1. Legal remedies in the issuing and executing State

Pursuant to Article 14(1) of the Directive, Member States must ensure that legal remedies equivalent to those available in a similar domestic case are applicable to the investigative measures indicated in the EIO. The substantive reasons for issuing the EIO may be challenged only in an action brought in the issuing State, without prejudice to the guarantees of fundamental rights in the executing State (Article 14(2)).

Based on the findings of this round of evaluations, all in all, Member States ensure, both as issuing and executing State, that remedies available in similar domestic cases are also applicable to investigative measures requested and executed in the context of the EIO.

As executing State, only a few Member States provide for a specific remedy against the decision recognising, or ordering the execution of, an EIO. In most Member States, it is the investigative measure carried out to execute the EIO that may be challenged by the parties to the proceedings and/or the person affected by the measure. In line with Article 14(2) of the Directive, Member States' transposing legislation often expressly provides that the substantive reasons underlying the issuing of the EIO may be challenged only in the issuing State.

Remedies vary among Member States: if the investigative measure is ordered by a public prosecutor, in many Member States the person concerned may challenge the decision before a higher prosecutor or a judge; in cases where the investigative measure requires a decision or authorisation from a judge (e.g. an investigating judge), an appeal may be lodged against that decision or authorisation before a higher court. Some Member States provide for remedies against specific investigative measures (e.g. searches); in other Member States, a general remedy is available for assessing the legality of any investigative measure or for questioning any infringement of the rights of the person concerned.

As issuing State, the majority of Member States do not provide for a specific legal remedy against the issuing of an EIO as such. It is the underlying order of the prosecutor or court that can be challenged (e.g. a search order) by the party concerned in the same way as in a domestic case. Moreover, practitioners emphasised that the validity and/or admissibility of the evidence gathered through an EIO may be challenged at different stages of the criminal proceedings.

In some reports, the evaluation teams underlined that information on available legal remedies is essential to enable the person concerned to seek effective judicial review. Therefore, while acknowledging that, in the case of many investigative measures a legal remedy would be available only *ex post*, the evaluation teams recommended that Member States ensure that such information is always provided in a timely manner, in accordance with Article 14(3) of the Directive.

It was also noted that the structure of the legal remedies available in the executing State and the length of the relevant proceedings should not jeopardise the efficient functioning of the EIO by excessively delaying transmission to the issuing State of the evidence gathered.

The topic of legal remedies was addressed in the discussions with the defence lawyers. Lawyers from some Member States raised the issue of limited access to the content of the EIO in the executing State and that of insufficient information about the remedies available in the issuing State. In several Member States, the defence lawyers did not provide any examples of the use of legal remedies in the context of the EIO. Some reports highlighted lawyers' limited knowledge of and experience with the EIO legal framework, including with regard to remedies.

11.2. The *Gavanozov* judgments

The topic of legal remedies was also addressed in light of the judgments rendered by the CJEU in two related cases, C-324/17 (*Gavanozov I*) and C-852/19 (*Gavanozov II*), in 2019 and 2021, respectively.

In the first decision, the CJEU provided clarification on the kind of information that should be included in Section J of the form set out in Annex A. The CJEU interpreted Article 5(1) of the Directive in conjunction with Section J of Annex A and concluded that the judicial authority of the issuing Member State does not have to include in Section J a description of the legal remedies available in its Member State against the issuing of the EIO. The issuing authority is only required to indicate 'if a legal remedy has already been sought against the issuing of an EIO' and if so, to provide a description of the legal remedy, including any steps that must be taken and any deadlines set.

In *Gavanozov II,* the CJEU ruled that national legislation of an issuing Member State which does not provide for any legal remedy against the issuing of an EIO for searches, seizures or the hearing of witnesses via videoconference is incompatible with Article 14 of the Directive read in conjunction with Article 24(7) of the Directive and Article 47 of the Charter of Fundamental Rights of the European Union. As a consequence, in the absence of any legal remedy, the issuing of an EIO for the above-mentioned investigative measures would be contrary to Article 6 of the Directive read in conjunction with Article 47 of the Charter and Article 4(3) TEU, and the executing State should refuse to recognise/execute the EIO. In its decision, the CJEU stated that the legal remedy should enable the party concerned to contest, in the issuing State, the need for, and lawfulness of, an EIO, at the very least in light of the substantive reasons for issuing that EIO.

In the immediate aftermath of the *Gavanozov II* judgment, Member States' practitioners expressed serious concerns about the potentially significant impact of the decision on the functioning of the EIO, especially if the principles affirmed by the CJEU were to be applied to other investigative measures.

Although the situation remains fluid and subject to further developments, the main finding of this evaluation on this topic is that the *Gavanozov II* judgment has not had a significant impact on the actual application of the EIO thus far.

The majority of Member States do not intend to introduce legislative changes as a result of the *Gavanozov II* decision, as they consider their national legislation and practice to be in line with the principles affirmed by the CJEU.

As to EIOs issued for the execution of searches and seizures, Member States, as issuing State, provide for legal remedies that allow the substantive reasons underlying the search or seizure order to be challenged. With regard to other investigative measures, including the hearing of a witness by videoconference, some Member States referred to the possibility of lodging a constitutional complaint in cases of infringement of fundamental rights, or civil proceedings against the State for compensation for damages suffered as a result of the infringement. However, the national legislation of several Member States provides that a person affected by any actions or rulings issued during the investigation may submit a complaint about any such actions and rulings.

The evaluation teams expressed reservations as to the actual availability of legal remedies against the issuing of EIOs for non-coercive measures in some Member States, including the hearing of witnesses by videoconference. However, it is difficult to predict how prosecutors and courts in the Member States will apply the principles of the *Gavanozov II* judgment in practice and there is still some uncertainty regarding the concept and scope of an effective legal remedy, at least with reference to the hearing of witnesses by videoconference and other non-coercive measures.

As to the impact of the *Gavanozov II* judgment, the Member States' competent authorities did not report, in either their issuing or executing capacity, any cases where the execution of an EIO was refused due to the absence of legal remedies against the issuing of the EIO in the issuing State.

As issuing authorities, Member States reported some cases where, following the *Gavanozov II* judgment, they were asked by the executing authorities to provide information on the existence of legal remedies in the issuing State. However, such requests for additional information did not result in a refusal to execute the EIO.

As executing authorities, practitioners pointed out that, on the basis of the *Gavanozov I* decision and the principle of mutual trust, when they receive an EIO for a search or a seizure or for the hearing of a witness via videoconference, they do not ask the issuing authority to provide information on the legal remedies available in the issuing State. Some practitioners argued that this would contravene the very idea of mutual recognition if the executing authorities systematically examined the applicable legal remedies in the issuing State. Only if there is specific cause for concern in a particular case should the executing authority request additional information on the available legal remedies.

Following the *Gavanozov II* decision, only one Member State has introduced a legal remedy specifically against the issuing of an EIO itself: where an appeal is filed by the person concerned, the competent court must examine whether the conditions for issuing the EIO are met. **The Member State directly involved in the *Gavanozov II* case reported that it amended its legislation in order to ensure adherence to the ruling of the CJEU.** ~~Two other~~**Another** Member State~~s~~, ~~including the one directly involved in the *Gavanozov II* case, are~~ **is still** in the process of assessing **possible** amendments to **its**~~their~~ legislation~~, in order to ensure adherence to the ruling of the CJEU~~. It is worth adding that in some Member States, although no legislative changes have been made following the *Gavanozov II* decision, the applicability of already existing legal remedies has in practice been extended to EIOs issued for the hearing of witnesses via videoconference.

12. SPECIFIC INVESTIGATIVE MEASURES

12.1. General

Chapter IV (Articles 22-29) of the Directive contains specific provisions for certain investigative measures. Chapter V (Articles 30-31) is devoted to the interception of telecommunications.

The need for a specific regulation of certain types of investigative measures arises, *inter alia*, from their complexity, their impact on the fundamental rights of the persons affected, and the significant differences existing in the national laws of the Member States.

It is therefore no coincidence that for many of the investigative measures in question, the Directive provides an additional ground for non-execution, as it states that the execution of an EIO may be refused if the measure would not be authorised in a similar domestic case.

This round of evaluations has shown that the diverging procedural rules for certain investigative measures may still be a challenging factor in the context of judicial cooperation. The experts noted that some domestic laws set particularly strict limits for certain types of investigative measures. In one Member State, for example, some forms of interception of telecommunications may only be authorised if the suspect is known.

In order to enable the competent issuing authorities to obtain general information on the rules for investigative measures in the other Member States, it was recommended that Member States properly complete and update the *Fiches Belges* on investigative measures on the EJN website.

It was also pointed out on several occasions that it is even more essential for Annex A to contain sufficient information concerning the criminal case under investigation, in order to allow the executing authorities to easily assess whether the investigative measure would be authorised in a similar domestic case.

In addition, with reference to the most complex measures and cases, it was once again underlined that direct contact and early consultations between the competent authorities and, where necessary, the involvement of Eurojust, are of paramount importance for the successful execution of EIOs.

Besides issues arising from differences in the national legislation of the Member States, this round of evaluations has indicated that some of the difficulties encountered by practitioners in the application of the EIO with regard to specific investigative measures need to be addressed by legislation at EU level.

12.2 Temporary transfer

This round of evaluations showed that the temporary transfer provided for in Articles 22 and 23 of the Directive has been applied in a very limited number of cases.

Competent authorities from several Member States have had no experience with this measure, either as issuing or executing authorities. Practitioners pointed out that hearings by videoconference are considered to be a more practical and often more proportionate solution.

However, an EIO for temporary transfer may be issued for any other investigative measure that requires the presence of the individual in question (e.g. an identity parade), and not only for the purpose of hearing a person held in custody in the executing State. In addition, some practitioners underlined the importance of this measure, as it is sometimes crucial that a key witness held in detention in another Member State appears in person before the court.

Sometimes, problems have arisen in the choice of the correct instrument. In general, competent authorities correctly distinguish between temporary surrender based on the EAW for the purposes of prosecution, and temporary transfer under the EIO for the purposes of gathering evidence.

As clarified in recital 25 of the Directive, where a person held in custody in one Member State is to be transferred to another Member State for the purposes of prosecution, including bringing that person before a court for the purpose of standing trial, an EAW should be issued in accordance with Council Framework Decision 2002/584/JHA. Under the Directive, the sole purpose of the temporary transfer is to carry out a specific investigative measure that requires the person's presence (e.g. a hearing of the accused person or an identity parade).

However, practitioners reported cases where the issuing and executing authorities had diverging views on which legal basis should be applied. In some cases, the execution of an EIO issued to ensure the presence of the defendant in the trial was refused because the executing authority rightly argued that the temporary surrender should have been requested under the EAW. In most cases, after proper consultation, the issuing and executing authorities agreed on the instrument to be used.

The line between the two instruments may sometimes be less clear and the issuing authority might find it challenging to decide on the legal basis, also considering the different requirements for the EAW and the EIO (e.g. the lack of consent of the accused person is a ground for non-execution in the context of the EIO).

It is worth mentioning a case reported by a Member State to illustrate the interrelation between the two instruments. The Member State concerned received a very urgent request under the Directive for the temporary transfer of a person who was serving a custodial sentence in the executing State. The competent authority promptly executed the EIO. It later turned out that the same issuing authority had already issued an EAW for the purposes of prosecution against the same person in the same case, and that a different competent authority from the same executing State had already ordered the surrender of the person but had postponed it until the end of the sentence that the person was serving in the executing State. In this case, the EIO appears to have been issued in order to avoid the postponed surrender ordered in the context of the EAW proceedings.

Given the practical difficulties sometimes encountered by practitioners, a handbook or guidelines provided by the Commission covering the interrelation between the EIO and other judicial cooperation instruments including the EAW could be beneficial, as recommended in Chapter 4.

The execution of the EIO for temporary transfer may be refused if the person held in custody does not consent to it (Article 22(2)(a) of the Directive). As issuing authority, Member States do not have specific procedures in place to determine, before issuing and transmitting the EIO, whether the person will consent to the temporary transfer. Prior consultations with the executing authorities, including the consent of the person concerned, were considered a best practice.

In some Member States, contrary to the Directive, the lack of consent of the detained person is a mandatory ground for non-execution. The evaluation teams recommended that the Member States concerned align their transposing legislation with the Directive. As noted in some reports, allowing the person in custody to block the transfer may hamper judicial cooperation. Experts mentioned the case of an EIO issued for the temporary transfer of a suspect/accused person to participate in an identity parade in the issuing State. If lack of consent is a mandatory ground for non-execution, it would become impossible to implement the investigative measure, thus hampering evidence gathering and undermining the investigation.

Most Member States stated that they had not encountered any difficulties in ensuring that a transferred person was held in custody in the issuing State during the transfer, since the EIO is considered a sufficient legal basis for detention. In some Member States, a national detention order, based on the EIO, must be issued by the competent authority.

12.3. Hearing by videoconference

The hearing of witnesses, experts, suspects and accused persons via videoconference, as regulated by Article 24 of the Directive, is an investigative measure that is frequently requested and executed during both the investigative and trial phases.

As pointed out in some reports, conducting hearings by videoconference in criminal proceedings is an innovative approach, which has revolutionised how evidence is obtained and presented, enhancing the efficiency of judicial systems and accelerating justice. Moreover, during the COVID--19 pandemic, several Member States introduced or extended the use of videoconferencing in domestic cases to ensure the continuity of justice, and also adopted the necessary technical arrangements to improve the operation of videoconferencing systems.

Article 24(2) provides that in addition to the grounds for non-recognition or non-execution referred to in Article 11, the execution of an EIO for a hearing by videoconference may be refused if either: (a) the suspected or accused person does not consent; or (b) the execution of such an investigative measure in a particular case would be contrary to the fundamental principles of the law of the executing State.

Several Member States have transposed the lack of consent of the suspect or accused person as a mandatory ground for non-execution. As for other grounds for non-execution, the evaluation teams invited the Member States concerned to align their transposing legislation with the Directive.

The following two sub-chapters deal with two related but different topics. The first concerns videoconferences requested to hear the suspect/accused person for the purpose of gathering evidence (e.g. questioning of the suspect/accused person by the prosecutor or court), while the second concerns videoconferences as a means of ensuring the remote participation of the accused person in their main trial from another Member State.

12.3.1. Hearing of the suspect/accused person at the investigative and trial phases for evidentiary purposes

In the majority of Member States, the competent authorities may issue and execute EIOs for the hearing of a suspect or accused person both during investigations and at the trial stage. Some Member States, where the physical presence of the accused person in their trial is mandatory, may not issue EIOs for the hearing of an accused person in the trial phase, but they may execute such EIOs.

Some Member States, however, never allow the issuing and execution of EIOs for the hearing of an accused person at the trial phase, irrespective of their consent. The Member States concerned are of the opinion that the hearing of the accused person by videoconference in the trial phase would breach the principle of immediacy and would constitute a violation of the right to a fair trial and the right to (immediate) access to a defence lawyer.

The evaluation teams pointed out that the principle of immediacy and the rights of defence can be subject to limitations where necessary and proportionate to satisfy relevant public interests, as confirmed by the case-law of the European Court of Human Rights[15].

Moreover, it was observed that the hearing of an accused person by videoconference for evidentiary purposes does not necessarily result in infringements of that person's rights of defence, and that effective arrangements can be put in place to ensure direct and confidential communication between the defendant and their defence lawyer.

In addition, under Article 24(2)(b) of the Directive, execution of the EIO may be refused if the hearing by videoconference *in a particular case* would be contrary to the fundamental principles of the law of the executing State, thus requiring the executing authority to assess whether *the particular circumstances of the case* indicate that execution of the EIO would result in infringements of, or limitations to, the accused person's rights that would be incompatible with the fundamental principles of the law of the executing State.

The evaluation teams and several practitioners also emphasised that the hearing by videoconference may be a proportionate alternative to more intrusive measures, such as temporary transfer and even surrender based on an EAW, as suggested in recital 26 of the Directive.

In light of the above, it was recommended that the Member States concerned reconsider their legislation and/or practice so as to be able, depending on the circumstances of the case, to execute EIOs issued for the hearing of an accused person by videoconference for evidentiary purposes also during the trial phase.

[15] See *Marcello Viola v Italy*, no. 45106/04, 5 October 2006; *Sakhnovskiy v Russia*, no. 21272/03, 2 November 2010; *Boyets v Ukraine*, no. 20963/08, 30 January 2018; *Dijkhuizen v the Netherlands*, no. 61591/16, 9 June 2021.

12.3.2. Hearing by videoconference to ensure the participation of the accused in the main trial

This round of evaluations also addressed the question of whether an EIO for the hearing by videoconference may be issued for the purpose of ensuring the remote participation of the accused person throughout the main trial from another Member State.

The question involves two different aspects.

Firstly, the issue of whether the remote participation of the accused person in their trial by videoconference is compatible with respect for the right to a fair trial; and secondly, with the scope of the Directive, since participation of the accused person in the main trial is not **(**always**)** related to evidence gathering.

Several Member States issue and execute such EIOs, especially where the accused person consents. Their approach is based on a number of considerations, some of which can be summarised as follows.

Such a practice, in the view of these Member States, seems to be consistent with the spirit of the Directive. Recital 26 expressly requires issuing authorities to consider whether an EIO for the hearing of a suspect/accused person by videoconference could serve as an effective alternative to the EAW. Indeed, practitioners emphasised that the execution of EIOs issued to ensure the remote participation of the accused person in the main trial from another Member State is an effective means of avoiding the disproportionate use of EAWs. As argued by some practitioners, issuing an EAW to ensure the participation of the accused in the trial should be done as a 'last resort'.

Moreover, if the accused person consents, their participation in the main trial by videoconference from another Member State is a far better option than a trial *in absentia*. In such situations, videoconferencing can be deemed to be a tool facilitating the exercise of the accused person's rights of defence.

It has been noted that the national legislation of several Member States provides for the remote participation of the accused in their trial in domestic cases, but subject to specific conditions aimed at protecting the rights of defence. Practitioners from one Member State pointed out that the accused person has the right to be examined and to make statements at any time during the main trial under their national law (e.g. to comment on the evidence given by witnesses). Therefore, an EIO issued to ensure the participation of an accused person by videoconference also has evidentiary purposes.

During the evaluations, reference was also made to the case-law of the European Court of Human Rights mentioned in the previous sub-chapter, pursuant to which a defendant's participation in criminal proceedings by videoconference does not in itself conflict with the European Convention on Human Rights, provided that recourse to such a measure serves a legitimate aim and that the arrangements governing its conduct are compatible with the requirements of respect for due process, including the right to a fair trial and the effective exercise of the rights of defence.

The evaluation teams often agreed with these considerations.

It is worth mentioning that on 4 July 2024, the CJEU addressed the issue of the participation of an accused person in the main trial by videoconference in relation to a referral for a preliminary ruling concerning the interpretation of Article 8(1) of Directive (EU) 2016/343[16]. In its judgment, the CJEU concluded that Article 8(1) of the abovementioned Directive must be interpreted as not precluding an accused person from being able, at their express request, to participate in the hearings in their trial by videoconference, provided that the right to a fair trial is guaranteed[17]. The decision, while not providing an answer to the question of whether an EIO may be issued to ensure the remote participation of the accused person, indicates that the participation of the accused person in their trial by videoconference does not in itself conflict with the right to a fair trial under EU law.

16 Directive 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.
17 CJEU, Judgment of 4 July 2024, in Case C-760/22 FP and others.

Some Member States, however, take the view and firmly maintain that an EIO may never be issued and executed for the hearing of an accused person by videoconference to ensure their participation in the main trial from another Member State, even if the accused person consents.

They are of the opinion that the execution of such EIOs, in general, would be contrary to the fundamental principles of their legal system and would violate the accused person's rights of defence.

In addition, they argue that the hearing of an accused person via videoconference throughout the main trial falls outside the scope of the Directive. According to Article 1 of the Directive, an EIO may be issued to have one or several investigative measure(s) carried out in the executing State for the purpose of obtaining evidence, and the participation of the accused person in the main trial is not **(**always**)** related to evidence gathering. **With regard to recital 26, it was also noted that this recital considers the EIO as a possible alternative to the EAW in cases where the EIO for the hearing of the suspect/accused person is issued for evidentiary purposes.**

During this round of evaluations, both experts and practitioners closely observed developments on this issue in relation to the referral for a preliminary ruling pending before the CJEU (Joined Cases C-255/23 and C-285/23). One of the questions referred to the CJEU was whether Article 24(1) of the Directive should be interpreted as meaning that the hearing of an accused person by videoconference included situations where the accused person was participating in the trial by videoconference in a Member State other than their Member State of residence.

On 6 June 2024, however, the CJEU concluded that there was no need to decide on requests for a preliminary ruling, as the referring court had not suspended the national proceedings whilst awaiting the CJEU's decision[18].

Another request for a preliminary ruling on the same issue is now pending before the CJEU, which might provide some guidance in the near future[19].

18 CJEU, Judgment of 6 June 2024 in Joint Cases C-255/23 and C-285/23, *AVVA and Others*, para 38.
19 Case C-325/24 Bissilli, lodged on 2 May 2024.

Given the differing views among Member States and considering that, in the opinion of many practitioners, the remote participation of an accused person in the main trial from another Member State can be a valuable tool to enhance judicial cooperation and an effective means of ensuring the proportionate use of other more intrusive legal instruments, the evaluation teams invited the Commission to address this question through legislation. Some evaluation teams suggested amending the Directive and broadening the scope of Article 24, while other evaluation teams invited the Commission to address the question from a more general perspective, **also taking into account other instruments,** since ensuring the remote participation of the accused person in a trial from another Member State is not **(**always**)** related to evidence gathering.

12.3.3. Hearing by videoconference without issuing an EIO

During the on-site visits in this round of evaluations, frequent and sometimes lively discussions took place regarding the practice~~s~~ of some Member States, whereby the competent authorities, **in cases where the person concerned consents,** ~~without issuing an EIO,~~ organise hearings via videoconference by directly contacting the witness, suspect or accused person located in another Member State, in order to allow the person in question to participate in the proceedings and give evidence**, without issuing an EIO** ~~with that person's consent~~ ('direct videoconferences'). The laws of some Member States provide for the possibility of conducting cross-border hearings by videoconference without issuing an EIO. **One Member State pointed out that sometimes the judicial authority authorising the videoconference in domestic cases might not be aware that the person concerned is joining the videoconference from another Member State where they are (temporarily) located.**

The evaluation teams, while acknowledging the practical advantages of this method, considered that th**is**~~e~~ practice ~~of gathering evidence in another Member State without issuing an EIO~~ is not in line with the Directive.

~~It has been~~**Some Member States** observed that this practice ~~could~~ conflict**s** with the principle of the sovereignty of the Member State where the person to be heard is located. ~~Practitioners from several Member States agreed on these conclusions.~~

Also, with reference to the issue of cross-border hearings without an EIO, the experts and practitioners were awaiting clarification from the CJEU. One of the questions referred to the CJEU in Joined Cases C-255/23 and C-285/23 concerned whether a hearing by videoconference could be organised by the court handling the case without issuing an EIO, but just by sending the concerned person the link in order to join the videoconference from their Member State of residence. As mentioned above, the CJEU found that it was not necessary to rule on these requests.

In light of the above and in the absence of clarification from the CJEU, the evaluation teams recommended that the Member States concerned reconsider the practice of hearing persons located in another Member State via videoconference without issuing an EIO.

12.3.4. Practical challenges

During the evaluations, issues concerning the organisation of hearings by videoconference were addressed and some best practices were identified.

Several cases were reported in which it was extremely difficult to comply with the date proposed for the hearing by the issuing authorities, as the proposed date was too close to the date on which the EIO was received. It was therefore recommended that EIOs for the hearing by videoconference should be sent well in advance, should indicate a timeframe for the hearing to take place in and should provide for alternative dates. This would give the executing authority sufficient time to locate and summon the person to be heard and book an adequately equipped courtroom, while taking into account the work schedule of the executing authority. It was also recommended that, where possible, the expected duration of the hearing should be indicated.

Practitioners also reported cases in which technical difficulties were encountered in the execution of a videoconference due to the incompatibility of the different videoconferencing systems or devices used by the issuing and executing authorities. Some Member States suggested that it would be most beneficial to have an EU-wide technical solution for holding videoconferences, in order to overcome such technical problems. Therefore, the Commission was invited to examine the possibility of providing a secure and interoperable system for cross-border videoconferencing that could be used by all Member States.

It was considered best practice to include in Section H2 of Annex A technical information and the contact details of a technician for establishing a connection between issuing and executing authorities. It was also suggested that Annex A should include a specific box for the technical contact details needed to ensure the smooth running of a videoconference.

One Member State was praised for having implemented within the judiciary an automated booking system for videoconferences, which also ensures that contact and technical details are entered in advance and are correct.

Further best practice was identified in a standard form developed by the executing authorities of one Member State and sent to the issuing authorities to gather all of the technical information needed to facilitate the holding of the videoconference and avoid technical problems as far as possible.

Based on the findings of this round of evaluations, it can be said that Member States have generally provided the competent authorities with safe and adequate equipment to set up and efficiently conduct hearings by videoconference. Some Member States where shortcomings were identified were encouraged to take further steps to ensure that proper facilities and equipment for videoconferencing would be made available to the competent authorities.

12.4. Hearing by telephone conference

EIOs issued to hear a person as a witness or expert by telephone conference pursuant to Article 25 of the Directive are very rare.

Most Member States have not as yet dealt with this investigative measure, either as issuing or executing State. As pointed out during the evaluations, given the increasing use of videoconference hearings, hearings by telephone conference are now somewhat outdated, although in practice they may be useful (for example, as an alternative when technical problems are encountered in organising a videoconference).

In the few cases in which this investigative measure has been applied, Member States have not experienced any difficulties concerning the procedures and formalities of hearings via telephone conference.

Some Member States may execute an EIO issued for the purpose of a hearing by telephone conference, but they cannot issue such an EIO, since a telephone conference cannot be used as an investigative measure under their domestic legislation. Some Member States have not transposed Article 25 of the Directive, and their legislation does not provide for this investigative measure. Therefore, if they receive a request to conduct a hearing via telephone conference, after consulting the issuing authority, they suggest replacing it with a hearing by videoconference.

12.5. Information on bank and other financial accounts and banking and other financial operations

While Articles 26 and 27 of the Directive regulate EIOs issued to obtain existing information on bank and other financial accounts and on banking and other financial operations, respectively, Article 28(1)(a) concerns the obtaining of real-time information on operations to be carried out in the future (the monitoring of banking and other financial operations).

Not surprisingly, this round of evaluations showed that EIOs issued to obtain banking information are very common in practice. It is a well-known fact that more and more investigations – from the simplest to the most complex and sensitive – rely extensively on the gathering of banking information.

National legal frameworks for these investigative measures differs significantly among Member States. In some Member States, a court order is required to obtain information on banking operations, whereas in other Member States, a prosecutor's order or even a request from the police is sufficient. In most Member States, there are no limitations linked to the procedural status of the person (e.g. suspect, witness, victim) whose financial information is requested, the only condition being that the requested information must be relevant to the investigation. In a few Member States, banking information can only be provided for a list of certain criminal offences or for offences punishable by a certain threshold. Some practitioners underlined that severe restrictions on the use of these investigative measures would constitute a significant obstacle to effective investigations into serious cross-border crimes.

Almost all Member States have a centralised bank account registry which lists all bank accounts held in the country by natural and legal persons. Law enforcement authorities often have direct access to such registries. The existence of a central registry greatly facilitates and expedites the execution of EIOs. Therefore, the evaluation teams encouraged Member States that have not yet established a centralised registry to create one, also considering the obligations deriving from Directive (EU) 2015/849[20], and to include in their registry data concerning accounts held in all banks.

In the context of investigative measures for gathering banking information, the practice of EIOs containing 'cascading' requests was discussed. In a common scenario, the issuing authority requests confirmation of whether the suspect holds a bank account and, if that is the case, that information be provided on the suspect's banking operations; based on the outcome, information on further operations is requested, in order to follow the money. Although Member States did not generally report any difficulties in the execution of such EIOs, some practitioners expressed reservations about this practice, and noted that such EIOs could sometimes be 'excessive' and entail the executing authority not only carrying out investigative measures, but also having to analyse the evidence collected in order to proceed with the further requested investigative steps. In some cases, consultations with the issuing authority during the execution of the EIO proved to be useful.

During the evaluations, practitioners made some suggestions for improving the execution of EIOs issued for the gathering of banking information.

[20] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC

In some Member States, information on bank accounts and financial transactions is usually gathered and transmitted to the issuing authority in electronic format. In order to ensure the swift transmission of banking information, it was recommended that all Member States should consider making it possible for banks and other financial institutions, as well as executing authorities, to process banking information in electronic format. This practice allows the investigative bodies of the issuing State to process and analyse these sometimes-huge amounts of data in a more convenient manner. In this context, it was suggested that it would be useful to have a specific section in Annex A on the technical information necessary for receiving banking data in electronic format.

In accordance with Article 19(4) of the Directive, banks and other financial institutions are generally ordered by the executing authorities or are obliged by law not to disclose to their customers any information regarding the request for banking data or ongoing criminal investigations. In some Member States, the unauthorised disclosure of a request to clients may constitute a criminal offence. During the evaluation, only a few cases were reported in which the information was disclosed to bank customers in the context of the execution of EIOs.

The law of a few Member States does not permit investigative and judicial authorities to order or request the real-time monitoring of bank accounts, either in domestic cases or when executing an EIO. Practitioners stated that they would welcome the introduction of this measure, since it could be a very useful investigative tool. The Member States concerned were encouraged to consider amending their legislation to expressly provide for the real-time monitoring of bank accounts.

12.6. Interception of telecommunications

The national laws of most Member States provide that the interception of telecommunications may be authorised (i) for the investigation of serious criminal offences (identified in a catalogue of offences or by reference to the penalty threshold); (ii) if there are grounds to suspect that a serious criminal offence has been or is being committed; (iii) if the interception is indispensable or necessary to obtain evidence that would otherwise be impossible or very difficult to gather.

However, while Member States share these general principles, national legal frameworks differ significantly. In some Member States, certain forms of interception of telecommunications may only be authorised for a very limited number of criminal offences (e.g. terrorism or crimes against the security of the State). Some Member States have particularly strict rules if the interception concerns persons who are not suspected of having committed a criminal offence but are otherwise persons of interest in the investigation. In some Member States, the use of spyware is prohibited.

During the evaluations, Member States reported, in their capacity as both issuing and executing authorities, cases in which the execution of an EIO for the interception of telecommunications was refused on the grounds that the measure would not have been authorised in a similar domestic case.

In some reports, the evaluation teams noted that the existence of very strict domestic rules on authorising the interception of telecommunications has implications for judicial cooperation in criminal matters and may hinder the fight against serious forms of transnational crime.

12.6.1. The meaning and scope of 'interception of telecommunications'

This round of evaluations has confirmed that the main issue concerning the application of this investigative measure is the notion of 'interception of telecommunications'.

The Directive does not define the term 'interception of telecommunications', in Articles 30-31 (interception of telecommunications), Article 2 (definitions) or in its recitals. Nor is it defined in any other piece of European legislation. As a result, there is no uniform understanding within the European Union, and practitioners have differing views as to whether certain investigative measures, such as GPS tracking, the bugging of a car, installing spyware on a device in order to intercept conversations at the source, or audio/video surveillance fall under Articles 30 and 31 of the Directive.

Some Member States have adopted a strict interpretation, whereby the interception of telecommunications only covers the monitoring and recording of communications that take place over some type of telecommunication systems, such as wiretapping, thus excluding the interception of communications between persons present in the same place carried out using either a technological device (e.g. a device on which spyware has been installed) or a hidden microphone (bug). Under this strict interpretation, these measures fall within the scope of Article 28 of the Directive, which regulates investigative measures implying the gathering of evidence in real time. Member States that adopt this narrow interpretation argue that Articles 30 and 31 refer to 'telecommunications', and therefore do not cover other 'communications' that take place without the use of some type of telecommunications technology.

Other Member States have adopted a broader notion and consider Articles 30 and 31 also to be applicable to other measures such as the interception of communications that take place between persons who are present in the same place, such as the bugging of cars, surveillance through spyware installed on a device and audio/video surveillance in private places. Some Member States include GPS-tracking in the notion of the interception of telecommunications.

In its judgment in Case C-670/22, *M.N. (EncroChat)* rendered on 30 April 2024, the CJEU provided some clarification, ruling that the infiltration of terminal devices for the purpose of gathering traffic, location and communication data from an internet-based communication service constitutes an 'interception of telecommunications' within the meaning of Article 31(1) of the Directive.

However, it is not yet clear whether the same applies to other types of investigative measures such as the bugging of vehicles or GPS tracking.

12.6.2. The notification mechanism under Article 31

All reports emphasised that the major advantage of Article 31 is the possibility of an 'in progress' or 'ex-post' notification in a simplified form (Annex C). The notification mechanism is crucial to allowing Member States to continue surveillance measures, such as wiretapping, GPS tracking or the bugging of a vehicle, on the territory of another Member State from which technical assistance is not needed and where the target of the measure may move or has (sometimes, unexpectedly) moved.

Member States that adopt a restrictive interpretation of 'interception of telecommunication' do not accept notifications under Article 31 for measures falling outside their interpretation of the term. Consequently, if a bugged vehicle or a vehicle in which a GPS device has been installed enters their territory, they require an EIO (Annex A) to be issued, usually under Article 28, before the border is crossed, since the bugging of a car or GPS tracking are not seen as interception of telecommunications. However, Article 28 of the Directive is not accompanied by a notification mechanism similar to that provided for in Article 31 of the Directive.

The evaluation teams emphasised that the need for an ex-post notification mechanism appears to be all the more necessary when one considers that, in many cases, knowledge of a border crossing by an intercepted target only emerges during the interception and often after the interception has been carried out. In such cases, the issuing of an EIO (Annex A) is not feasible, and the use of an 'in progress' or 'ex-post' notification is indispensable to safeguard the admissibility of the intercepted material as evidence.

During the evaluations, different proposals were made by practitioners for possible amendments to the Directive. It was proposed that the scope of Articles 30 and 31 should be extended by replacing the term 'telecommunications' with the term 'communications' making it clear that all forms of communication are intended to be covered; in other cases, it was suggested that specific provisions should be introduced to regulate the bugging of cars and GPS tracking or that a notification mechanism similar to that provided for in Article 31 should be introduced for surveillance measures falling under Article 28.

All of the evaluation teams concurred that the Commission should adopt the required legislative initiative in order to clarify the concept of 'interception of telecommunications'. Furthermore, for all of the abovementioned measures, where no technical assistance is required from the Member State where the subject of the measure is located, a notification mechanism similar to that envisaged in Article 31 of the Directive should be provided.

12.6.3. Transmission of intercepts

Article 30(6) of the Directive provides that an EIO for the interception of telecommunications may be executed by (a) transmitting telecommunications immediately to the issuing State; or (b) intercepting, recording and subsequently transmitting the outcome of the interception of telecommunications to the issuing State.

Although several Member States reported that they have the technical means to immediately transmit intercepted telecommunications to the issuing State, it appears that in the majority of cases, the executing State collects the intercepted material and subsequently sends it to the issuing State. However, practitioners reported that solutions were found on an ad-hoc basis, taking into account the needs of the issuing authority. In some cases, the intercepted material was forwarded to the issuing authority with a slight delay (e.g. a few hours).

It was noted that the immediate transmission of intercepted telecommunications also poses legal issues concerning the review of an ongoing interception operation. The legislation of some Member States provides for specific obligations for the authority carrying out the interception of telecommunications, including the obligation to delete any parts of the intercepted material concerning conversations between the suspect and the defence counsel or the obligation to inform the intercepted person after the conclusion of the criminal proceedings. If the intercepted telecommunications are immediately transmitted to the issuing State, it is difficult for the executing authority to fulfil the abovementioned obligations.

Practitioners discussed whether it would be possible to transfer the subsequent control of interception to the issuing State under Article 30(5) of the Directive, pursuant to which the executing State may make its consent subject to any conditions that would be observed in a similar domestic case. Since there are differing views on this issue, in one report the evaluation team called on the Commission to address this issue at legislative level in order to clarify under which conditions it would be possible to permit the executing State to transfer its duties of subsequent control of interception to the issuing State, especially in cases involving interceptions immediately transmitted to the issuing State.

12.7. Cross-border surveillance

Recital 9 states that the EIO Directive should not be applied to cross-border surveillance as referred to in the Convention implementing the Schengen Agreement (CISA).

Article 40 CISA regulates cross-border surveillance as a measure of police cooperation. In fact, Article 40 forms part of Title III, Chapter 1, CISA, which is devoted to Police Cooperation**.** ~~,~~ **According to some Member States Article 40 CISA** ~~and~~ does not regulate cross-border surveillance ordered by judicial authorities**, whereas other Member States consider such request as judicial assistance**.

This round of evaluations has clearly shown that the relationship between the EIO Directive and CISA is quite problematic in the area of cross-border surveillance and that different approaches and practices are followed by the Member States. There are differences between Member States as to whether and to what extent cross-border surveillance is a measure of police cooperation (Article 40 CISA) or of judicial cooperation. This has led several evaluation teams to recommend that the issue be addressed at EU legislative level.

Some Member States see cross-border surveillance only as a form of police cooperation, and consequently consider the Directive not to be applicable. Other Member States, however, are of the opinion that cross-border surveillance can also be considered to be a judicial investigative measure and as a means of gathering evidence, and therefore the Directive should be applicable. Based on recital 9 of the Directive, some Member States have expressly stated in their transposing legislation that cross-border surveillance falls outside the scope of the EIO.

~~During the evaluations, practitioners made several suggestions as to possible amendments to the Directive. In particular, it was suggested that the Union legislator should introduce regulation of cross-border surveillance, either under Article 28 or through a separate provision.~~

The majority of evaluation teams invited the Commission to adopt the required legislative initiative to clarify the application of the Directive in relation to cross-border surveillance carried out by technical means.

12.8. Covert investigations

The notion of 'covert investigations' varies considerably in the national legislation of the Member States. In some, it covers a large variety of investigative measures that are carried out without the knowledge of the persons involved (e.g. also including interception of telecommunications).

In Article 29 of the Directive, the notion of covert investigations instead refers only to investigations conducted by officers acting under covert or false identity.

Although experience of this investigative measure in the context of the EIO appears to be limited, some Member States reported that in the execution of EIOs for covert investigations, they encountered difficulties arising from differences in the national law of the issuing and executing State.

All Member States provide for the possibility of police officers acting under covert or false identity. Often, these investigative measures are conducted by specialised police units and may only be authorised for serious criminal offences. National legal frameworks differ across Member States as to the criminal offences for which covert investigations may be authorised, as well as types of measures/activities that may be carried out by undercover agents.

Some Member States provide for the possibility of using civilians as undercover agents, while others do not allow it and therefore the execution of similar EIOs can be difficult in practice.

Some Member States clarified that they do not issue an EIO to use foreign officers as undercover agents in domestic investigations conducted on their territory.

RECOMMENDATIONS

- ***Member States should ensure that the Fiches Belges on the EJN website include accurate and up-to-date legal and practical information on the investigative measures available in their respective national systems.***

- ***The Commission is invited to, upon due assessment of the findings of this report, address at legislative level the question of the participation of the accused person in the trial via videoconference from another Member State.***

- ***Member States are recommended to reconsider the practice of ~~should refrain from~~ conducting hearings of witnesses, suspects or accused persons located in another Member State by videoconference without issuing an EIO.***

- ***~~It is recommended that~~ Member States are encouraged to include in ~~ensure that~~ their national legislation provisions that allow~~s~~ for the execution of EIOs issued for the monitoring of banking or other financial operations in real time, as referred to~~provided for~~ in Article 28(1)(a) of the Directive.***

- ***The Commission is invited to submit a legislative proposal to clarify the notion of 'interception of telecommunications' under Articles 30 and 31 of the Directive, and in particular whether it covers surveillance measures such as the bugging of vehicles, GPS-tracking and installing spywares. If not, the Commission is invited to submit a legislative proposal to introduce specific provisions regulating such measures, including a notification mechanism similar to Article 31 for cases in which no technical assistance is needed from the Member State where the subject of the measure is located.***

- ***The Commission is invited to submit a legislative proposal to clarify the application of the Directive in relation to Article 40 of the Convention implementing the Schengen Agreement. It should be explicitly stated whether the Directive applies to cross-border surveillance carried out by technical means for the purpose of gathering evidence in criminal proceedings and within the framework of judicial cooperation.***

13. STATISTICS

In the context of this round of evaluations, Member States were requested to provide statistics for the last five years concerning the number of incoming and outgoing EIOs, cases of non-recognition and non-execution and cases in which execution was postponed. With a few commendable exceptions, most Member States were unable to provide reliable and comprehensive statistical data concerning application of the EIO.

A few Member States were not able to provide any statistical data but only estimates of the annual number of incoming and outgoing EIOs, due to the absence of a centralised system for registering issued and received EIOs. For most Member States, only the overall annual figures of incoming and outgoing EIOs were available, without further details on cases of non-recognition or non-execution, grounds for non-recognition or non-execution, cases of postponed execution, and types of investigative measures requested.

Furthermore, even for the Member States that provided more detailed statistical data, such statistics did not always cover all the competent issuing and executing authorities (e.g. they did not include EIOs processed by courts in the trial phase or EIOs issued by administrative authorities) or included EIOs and other kinds of incoming and outgoing requests for legal assistance.

In light of the above, the lack of reliable and comprehensive statistical data was identified as a general problem faced by almost all Member States.

As emphasised in several evaluation reports, comprehensive statistics are crucial for analysing and improving cooperation between Member States by identifying gaps and disadvantages in the functioning of instruments for judicial cooperation and their implementation by the Member States. It is expected that the situation will improve somewhat once **the decentralised IT system for cross-border communication and** e-EDES becomes fully operational. In addition, some Member States are in the process of introducing or enhancing their information systems, which will allow for the automatic collection of data on the operation of the EIO.

However, the evaluation teams recommended that Member States improve the collection of statistical data on the EIO.

It is worth mentioning that in the context of this evaluation, Eurojust provided statistics from its Case Management System in relation to cases dealt with by Eurojust between 2017 and 2022, which included information on: (i) the total number of EIO-related cases at Eurojust; (ii) the number of bilateral and multilateral cases involving each Member State; and (iii) the number of EIO-related cases in which each Member State was either 'requesting' or 'requested'[21]. Based on these statistics, it was noted that in recent years, there has been a steady increase in the number of Eurojust cases and thus also in the support provided by Eurojust to Member States' practitioners.

RECOMMENDATIONS

- ***Member States are encouraged to improve their systems for collecting statistics on the EIO, with a view to facilitating analysis of its application and improving cooperation between Member States. ~~It is recommended that~~ Member States are encouraged to gather more detailed statistics comprising data on cases of non-recognition/non-execution, grounds for non-recognition/non-execution and cases of postponed execution, and that they include in the statistics data concerning all the competent issuing and executing authorities.***

[21] 'Requesting' means that an authority of the Member State concerned requested that its national desk open a case at Eurojust vis-à-vis one or more other Member States; 'requested' means that another desk at Eurojust opened, at the request of its national authority, a case vis-à-vis the Member State concerned.

14. TRAINING

Most Member States have structured and efficient systems for the training of practitioners in the field of judicial cooperation in criminal matters, including the EIO, with mechanisms in place aimed at assessing the quality of training events and identifying the needs of practitioners.

A variety of institutions are in charge of the initial and continuous training of judges and prosecutors: in some Member States, there is an *ad hoc* institution entrusted with the task of providing training to all magistrates (judges and prosecutors); in other Member States, different institutions are responsible for the training of judges and prosecutors respectively; in several Member States, training for prosecutors is organised by the Prosecutor General's Office. Training activities are often organised both at central and decentralised level.

During this round of evaluations, several Member States provided the evaluation teams with a detailed account of the training activities organised on the topic of the EIO over the last few years (e.g. workshops, seminars, on-line courses, publication of manuals and guidelines, training of trainers).

Numerous best practices were identified. It is worth mentioning some of them.

Some Member States were commended for providing a mandatory training programme on international judicial cooperation in criminal matters, covering the EIO, as part of the initial training of all future judges and prosecutors. The organisation of joint training initiatives involving both judges and prosecutors was also considered a good practice. In one report, the evaluation team praised the organisation of joint training courses for judges, prosecutors and representatives of the Ministry of Justice, emphasising that such initiatives provide, by their multidisciplinary nature, not only an opportunity to exchange experiences but also a unified approach to relevant procedures.

A further good practice was identified in the publication and dissemination among practitioners by the competent authority (often the Prosecutor General's Office and/or the Ministry of Justice) of guidelines or handbooks on the proper handling of EIOs, with a special focus on practical issues, including how to fill in an EIO form. These guidelines and handbooks, also available on the intranet, are updated when necessary. With regard to one Member State, the evaluation team expressed particular appreciation for the publication by the Prosecutor General's Office of an annotated EIO form, which is intended to provide answers to questions that may arise when completing the form. Equally interesting is the practice implemented in some Member States of establishing, on a permanent basis, groups/units/networks of prosecutors/judges highly specialised in international judicial cooperation, who serve as a centre of expertise and are ready to train, assist and advise colleagues on preparing and executing EIOs, thus sharing and disseminating their experience on legal and practical issues concerning cross-border cooperation.

An additional useful initiative highlighted during the evaluations was the organisation on a regular basis in some Member States of meetings where practitioners specialised in judicial cooperation from different regions/districts provide information and exchange views on cases concerning the EIO and other legal instruments, thus improving international cooperation and promoting a uniform approach. Lastly, some Member States were praised for organising specialised training courses on mutual recognition instruments, including the EIO, for clerks working with the courts and prosecution offices. Strengthening the professionalism and knowledge of judicial support staff contributes to the smooth and efficient functioning of judicial cooperation instruments.

Notwithstanding the wide range of best practices outlined above, this round of evaluations showed that there is still room for improvement.

For a few Member States, the respective evaluation teams expressed the view that, in general, more regular and structured training on judicial cooperation in criminal matters should be provided to practitioners. Moreover, even with regard to Member States that were praised for offering a broad range of training activities on judicial cooperation, the evaluation teams highlighted the need to strengthen training initiatives for certain categories of justice professionals. Regarding some Member States, the evaluation teams noted the lack of sufficient training on the EIO for judges; in other cases, the experts encouraged the Member States concerned to provide more systematic training to the police and/or to courts' and prosecution offices' support staff.

What has emerged clearly is that - although certain categories of practitioners are more frequently involved in the application of the EIO (e.g. prosecutors and in some Member States investigating judges) - all relevant justice professionals dealing with the EIO should receive appropriate training. As noted in one report, international cooperation remains, after all, a joint effort and each link in the chain should have access to training.

Some reports also emphasised that, since direct contacts and smooth consultation procedures between issuing and executing authorities are crucial to the successful operation of the EIO, it would be advisable to improve practitioners' language skills. Therefore, Member States were encouraged to increase the number of language training courses, at least for practitioners who deal with judicial cooperation instruments on a regular basis.

As noted above, Member States provided detailed information on their past and ongoing training activities related to the EIO. They also gave an overview of the training initiatives at European level in which their authorities had participated; mainly activities and projects led by, or organised in cooperation with, the EJTN, the Academy of European Law, and the European Institute of Public Administration. In that regard, in several reports, the evaluation teams, being aware of the added value that the EJTN can bring to training activities, called for greater involvement of the EJTN in the organisation of training initiatives related to the EIO, possibly in coordination with national training projects. It was suggested that such activities should cover the interrelation between the various instruments for judicial cooperation in criminal matters, which is a topic often mentioned in this round of evaluations.

During the evaluations, practitioners expressed great appreciation for the notes, compilations and guidelines prepared by Eurojust and the EJN on relevant topics in the field of the EIO, such as the Joint Note on the practical application of the EIO published in 2019, or the Questionnaire and compilation on the impact of the *Gavanozov II* judgment published in 2022. Therefore, Eurojust and the EJN were invited to continue producing such notes, compilations and guidelines in order to provide practitioners with updated information and guidance.

A further issue concerns the training of lawyers in the field of judicial cooperation. In some Member States, during the on-site visits, representatives of the relevant lawyers' associations expressed the view that more training on the EIO, and in general on instruments for judicial cooperation, needs to be provided to defence lawyers. Increasing their awareness and knowledge of judicial cooperation tools would help them navigate cross-border criminal cases more effectively and exercise the rights provided for by the relevant legal instruments.

With regard to the EIO, defence lawyers would be better equipped to exercise the right to request the issuance of an EIO on behalf of suspects/defendants or, where provided for by their national legislation, in the interest of victims, as well as to activate the available legal remedies in the issuing or executing State in the appropriate way.

RECOMMENDATIONS

- ***It is recommended that Member States ensure that adequate training on international judicial cooperation in criminal matters, covering the EIO, is systematically provided to all practitioners involved in the operation of the EIO, including judges, prosecutors, police officers and courts' and prosecution offices' support staff. Member States are also encouraged to increase the number of language courses, at least for justice professionals involved on a regular basis in judicial cooperation procedures.***

- ***Member States are invited to consider promoting joint training initiatives on judicial cooperation in criminal matters, covering the EIO, addressed to different categories of practitioners involved in the operation of the relevant legal instruments, including, where possible, lawyers, while considering the independence of the legal profession in accordance with the relevant national legislation.***

- ***The EJTN is invited to consider increasing the number of courses related to the EIO, possibly in partnership with national training projects. Training should cover the interrelation between the various instruments for judicial cooperation in criminal matters.***

- ***Eurojust and the EJN are invited to continue producing notes, compilations and guidelines on relevant topics in the field of the EIO and, where appropriate, update existing ones.***

LIST OF ABBREVIATIONS/GLOSSARY OF TERMS

ACRONYMS AND ABBREVIATIONS	FULL TERM
CATS	Coordinating Committee in the area of police and judicial cooperation in criminal matters
CISA	Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders
CJEU	Court of Justice of the European Union
Digitalisation Regulation	Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation
Directive	Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 on the European Investigation Order in criminal matters
EAW	European Arrest Warrant
e-EDES	e-Evidence Digital Exchange System
EIO	European Investigation Order
EJN	European Judicial Network
EJN Atlas	Judicial Atlas of the European Judicial Network
EJTN	European Judicial Training Network
Eurojust	European Union Agency for Criminal Justice Cooperation
JIT	Joint Investigation Team
Joint Action	Joint Action of 5 December 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime
MLA	Mutual Legal Assistance