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WK 13751/2024 INIT

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WORKING DOCUMENT

From:	General Secretariat of the Council
To:	JHA Counsellors on Judicial Cooperation in Criminal Matters (COPEN) Working Party on Judicial Cooperation in Criminal Matters (COPEN) (General matters) CATS
Subject:	DRAFT FINAL REPORT ON THE TENTH ROUND OF MUTUAL EVALUATIONS on the implementation of the European Investigation Order (EIO)- compilation written comments

Delegations will find in the Annex a compilation of the written comments received, following the Presidency's invitation on 8 October 2024, to submit written comments on the draft final report on the tenth round of mutual evaluations.

ANNEX

Replies to the comments as set out in WK 13751/2024

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AUSTRIA

Notwithstanding our objection to the deadlines and to the distribution of the final report before the discussion of the final reports we present the following preliminary comments:

Page 22: in chapter 4 the issue of interrelations between different instruments is raised. These pertain in particular to freezing and the EAW. We would suggest that this issue is also reflected in the recommendations.

Page 40, last para, second row: the reference to „8“ after „(4)“ should be deleted.

Page 82 on statistical data: we wonder why we should recommend Member States to improve collection of statistical data if the Digitalisation Regulation is going to solve this issue anyway. Setting up an efficient system for collection of statistical data is a rather costly task. Burdening Member States at this time before unionwide operability of e-EDES does not really make sense in our view.

BELGIUM

Tenth round of mutual evaluations on the implementation of the European Investigation Order (EIO)

Written comments from Belgium.

Regarding doc. ST14321/24

Dear Presidency and General Secretariat of the Council,

Thank you for the opportunity to provide written comments on the draft final report of the tenth round of mutual evaluations, as outlined in the Annex to the document ST14321/24.

Belgium welcomes the work carried out in the context of this mutual evaluation round, which focuses on the European Investigation Order (EIO). We fully support the objective of ensuring that the evaluations contribute to the effective implementation and coherence of the EIO across member states.

We would like to submit a number of comments aligned with the Belgian position on this matter. These comments reflect our commitment to strengthening judicial cooperation within the EU, and to ensuring that the mutual evaluations continue to serve as a useful tool for assessing and improving the implementation of key instruments such as the EIO.

Please find below our observations for consideration by the Presidency and the General Secretariat.

Proposed comments on the draft final report on the tenth round of mutual evaluations on the implementation of the European Investigation Order (EIO)

1. Executive summary

Application (or not) of the rule of speciality – Page 8, paragraph 1.

While some divergence in Member State practices exists regarding the rule of speciality, it is important to emphasize that the rule does not apply in the context of the EIO, as confirmed by the Commission during the presentation of the report on EE in COPEN on 30th April 2024 (doc. ST 8475/24, Recommendation n 18). During the meeting, as with every report, the evaluation team asked the Commission to amend or clarify the application of the speciality rule and the rules on the interception of communications. The Commission stated they considered that there is no unwritten rule of speciality and was considering amending the EIO Directive to explicitly state that this principle does not apply. In the Commission's view, the EIO Directive does not aim to ensure that

an accused person can take part in a hearing by videoconference. Instead, this possibility should be regulated by clarifying the procedure and the guarantees that apply.
As such, an amendment to the Directive may not be necessary. Instead, a formal communication from the Commission to clarify this matter could be sufficient. The principle of mutual trust, which underpins the Directive, logically supports this position. In the absence of explicit provisions regarding the rule, no such rule should be assumed to apply.
Suggestion: The report should recommend the issuance of a formal communication from the Commission to clarify the applicability of the rule of speciality within the context of the EIO.

Interception of telecommunications – Page 8, paragraph 2.
We fully agree with the conclusions presented on this matter. In the interim, it would be beneficial for Member States to ensure their Fiches Belges are updated to include clear instructions and descriptions of measures that fall within the field of application of Annex C in accordance with their respective legislation. This would provide much-needed clarity in the absence of uniformity in this area.
Suggestion: The report should encourage Member States to regularly review and update their Fiches Belges to enhance clarity and accessibility regarding the measures outlined in Annex C.

The EIO in relation to information exchanges – Page 8, paragraph 4.

In practice, the use of EIOs for this purpose has not caused significant difficulties. The option to request (tick the box) "evidence or information already in possession of the requested State" is frequently exercised without notable issues. The occasional challenges that arise, such as insufficient detail in descriptions, could likely be mitigated by encouraging greater precision from requesting Member States.

Suggestion: The report should recommend to establish best practice guidelines for Member States on providing detailed descriptions in EIO requests could enhance clarity and cooperation.

Annex A – Page 9, paragraph 2.

We partially disagree with the statement in paragraph 2. When the primary purpose of the videoconference is evidence gathering, the EIO is indeed applicable. However, if the purpose does not concern evidence gathering, it would be more appropriate to use an MLA (Mutual Legal Assistance) request. In practice, some Member States, including Belgium, accept Annex A but execute it as an MLA request. Concerns regarding the right to a fair trial are a matter of domestic law and are adequately addressed through national law provisions, as reflected in the Directive, which allows for refusal of videoconferencing requests that conflict with fundamental national legal principles.

Suggestion: It is suggested that the report clarify the distinction between the use of EIOs and MLA requests based on their primary purpose, to guide practitioners effectively.

Annex A – Page 10, paragraph 1.

It is worth noting that grounds for non-execution, particularly those related to fundamental rights, have been used to refuse specific modalities of requests, though rarely to refuse the entire request. For instance, while cooperation in investigations involving foreign authorities is common, certain aspects, such as the presence of foreign legal counsel during witness examinations, are often refused due to conflicting legal standards.

Suggestion: The report should recommend that Member States consider the implications of fundamental rights when formulating requests under Annex A, particularly regarding specific modalities.

4. Scope of the EIO and relation to other instruments

4.1. EIO in relation to other instruments

With regard to the European Arrest Warrant (EAW) – pages 18 (last paragraph) and 19, paragraph 1.

It may be beneficial for investigating judges to consider, more frequently, the approach described in the report, where the issuance of an EIO is evaluated as an alternative to the European Arrest Warrant (EAW). In particular, this could be done in combination with a proactive use of an Article 34 SIS II alert for locating the individual, ensuring alignment with the best practices noted in the evaluation.

Suggestion: The report should encourage the exploration of EIOs as a viable alternative to EAWs, along with the use of SIS II alerts for better efficiency in locating individuals.

With regard to the freezing and seizure of assets – page 19, paragraph 2 and 3.

In light of the complexities surrounding the distinction between freezing and seizing assets for evidentiary purposes and for confiscation, it may be advisable to engage in early consultation with the other Member State involved. By doing so, clarity can be obtained regarding what is required and the expectations in relation to the nature of the assets in question, as positions on what constitutes evidence may vary significantly between Member States. This consultation process, as highlighted previously, remains a key tool in ensuring efficient cooperation.

Suggestion: The report should recommend establishing consultation protocols between Member States for asset freezing and seizure, clarifying expectations and requirements.

4.2. EIO in relation to information exchange – page 21, paragraph 1.

It is our understanding that the current Directive already provides sufficient grounds for requesting consent to use previously shared information in criminal proceedings. Established practices across Member States seem to support this view. Regarding the format for granting consent, in Belgium's experience, a simple letter signed by a competent authority is generally sufficient. However, one recurring challenge lies in the broad wording of such requests, where it would be preferable to have greater specificity concerning the information for which consent is being sought.

Suggestion: The report should highlight the need for increased specificity in requests for consent to use previously shared information, to streamline the process and enhance clarity. The report could suggest the inclusion of a template or guidelines for consent requests.

4.3. EIO in relation to different stages of proceedings – page 21, paragraphs 2 and 3.

This passage confirms one of the conclusions drawn from the questionnaire during the 62nd plenary of the European Judicial Network that focused on focus on how we can further improve the cross-border cooperation when tracing proceeds of crime in the execution phase.

Suggestion : It may be beneficial to include a recommendation to explore further mechanisms for tracking the effectiveness of the EIO across different stages of proceedings.

Recommendation to the Commission – page 22, paragraph 2.

It would be advisable to evaluate the added value of this proposal. Firstly, the current Directive already allows the use of the EIO for confirming previously obtained information without significant issues arising. Secondly, for spontaneous exchanges, it would be preferable to refer to Article 7 of the 2000 Agreement, considering potential conflicts of law. Additionally, reconciling ***spontaneous*** information exchanges with the EIO is challenging, as the latter requires a ***request*** for information.

Suggestion: The report should propose a comprehensive review of the added value of the proposed changes to the Directive regarding the use of EIOs for confirming previously obtained information and spontaneous exchanges. A concrete suggestion would be to assess the feasibility of integrating spontaneous information exchanges within the EIO framework, ensuring that it aligns with existing legal instruments.

5. Content and form

5.1. General challenges – page 26, paragraph 1.

Belgium considers that the development of guidelines or a handbook by the Commission would suffice to allow Member States to hide or delete superfluous sections of Annex A. However, it should be noted that modifying the order of sections would indeed require amendments to the Directive.

Suggestion: The report should recommend the Commission's development of guidelines or a handbook to facilitate the removal of unnecessary sections from Annex A, ensuring clearer and more effective communication.

6. Transmission of the EIO and direct contact

6.4 Obligation to inform – Annex B – page 34, paragraph 2.

The conclusions regarding the acknowledgment of receipt through Annex B appears very dismissive of the practitioners' experiences and challenges. In our experience, it has been observed that EIOs dispatched by prosecutors frequently rely on generic email addresses for communication managed by administrative staff. This practice leads to misunderstandings, as administrative staff may not always grasp the importance of Annex B, leading to delays in transmitting this information to the prosecutor. This oversight compromises the efficacy of the process and undermines the collaborative framework intended by the Directive. Therefore, it is imperative to recognise the operational realities faced by practitioners and rephrase this conclusion with greater accuracy and sensitivity.

Suggestion: The report could recommend specific training for administrative staff on the importance of timely acknowledgment of receipt in EIO communications to mitigate these challenges.

8. Recognition and execution of the EIO, formalities and admissibility of evidence

Recommendations – page 42, paragraph 3.

This recommendation seems to contradict the principle that the requested Member State must execute the EIO in accordance with its own national legislation. While it is essential to make every effort to accommodate requests from Member States, it is unrealistic to expect one Member State to disregard its own legislation, which could lead to discriminatory situations. For instance, requests that involve the presence of the foreign defence lawyer during the questioning of a victim or witness are not anticipated in Belgian legislation, which places the questioned individual in a more vulnerable position compared to a strictly Belgian procedure. It would be preferable for the report to recommend that Member States limit their requests in Section I.1 to what is absolutely necessary, under penalty of nullity.

Suggestion: A concrete suggestion would be to encourage the establishment of clear guidelines outlining the limits of requests to avoid potential discriminatory practices.

Recommendations – page 42, paragraph 5.

In addition to substantiating the urgency of an EIO, it is imperative that issuing authorities specify a preferred deadline for the response, particularly when an exact date cannot be provided. This clarification would greatly assist in managing expectations regarding the urgency, allowing for differentiation between critical, immediate needs and those that permit a longer response time, such as "drop-everything-now urgent" versus "an answer within two months will suffice."

Suggestion: The report could explicitly encourage issuing authorities to include preferred execution deadlines in EIO requests.

9. Rule of speciality

Recommendations – page 45, paragraph 1.

We refer to our first comment. The necessity of amending the Directive warrants careful consideration. It may be prudent to explore the potential for clarification through existing Handbooks or guidelines that have previously been referenced, rather than pursuing legislative changes. This approach could provide the needed clarity while minimising disruptions to the current framework.

Suggestion: Prior to legislative changes, the report could flag the importance to assess existing Handbooks and guidelines, identifying areas where clarity can be enhanced without legislative amendments.

12. Specific investigative measures

12.3.2. Hearing by videoconference to ensure the participation of the accused in the main trial – page 67, paragraph 3.

It is clear that the scope of the EIO is fundamentally focused on evidence gathering. Therefore, if the sole intent of the EIO is to ensure the accused's presence for the purpose of listening to evidence presented against them, such a use would fall outside its intended application. However, it remains essential to address the second question regarding whether participation via videoconference constitutes a valid alternative to in-person attendance, particularly concerning the rights of the defence.

Recommendations – page 80, paragraph 1.

It would be also recommendable that Member States include information regarding the circumstances under which Annex C may be used within the Fiches Belges on the EJN website. This additional detail will enhance clarity and usability for practitioners seeking to navigate the investigative measures available within their national frameworks.

BULGARIA

Referring to the draft report on the tenth round of mutual evaluations (document No st 14321/24), Bulgaria would like to propose an amendment on page 58 (part 11.2 Gavanozov cases) of the draft report. Our proposal is to change the wording of the underlined sentence with the following: "the Member State directly involved in the Gavanozov II case, has amended its legislation, in order to ensure adherence to the ruling of the CJEU". The amendments are already in force and the notifications will be made before next CATS meeting (05.11.2024).

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. Two other Member States, including the one directly involved in the Gavanozov II case, are in the process of assessing amendments to 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.

CZECH REPUBLIC

Comments of the Czech Republic to the draft Final report on the tenth round of mutual evaluations on the implementation of the European Investigation Order

Doc. No. 14321/24

18 October 2024

Recommendation No. 5 page 80:

- 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 persons, vehicles and other items, 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.

We suggest supplementing the recommendation so that it does not refer only to vehicles. Installing spywares refers rather to telephones or servers, cross-border surveillance may also concern for example planes. We support the proposal to introduce specific provision for cases where no technical assistance is needed, which should include a combined surveillance with and without technical assistance. This provision should cover crossing the border in urgent cases with a possibility to request the consent afterwards.

Recommendation No. 6 page 80:

- 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.

We agree that the relation between the Directive and Article 40 of the Convention implementing Schengen Agreement should be clarified. Taking into account the existence of EIO, it should be clarified that Article 40 cannot be used in order to gather evidence. It should be used only for the purpose of operative activities of the police.

New recommendation for the Commission:

We are missing a recommendation that the Directive should allow for other measures which are not strictly for evidentiary purposes, e.g. the service of procedural documents, transmission of spontaneous information, etc., using simplified forms. At least service of procedural documents should be explicitly mentioned.

New recommendation for the Commission:

- The Commission is invited to submit a legislative proposal that would allow a court to validate an EIO issued by a prosecutor in cases where only a court in the issuing State can decide on an investigative measure in a pre-trial procedure.

We consider this very important as the Commission should react to the HP judgment – the executing authority should be able to accept EIO issued by the public prosecutor which is issued for measures that can be authorized only by the court in the issuing State which is either validated by the court or the decision is attached thereto. It is to be discussed if it is sufficient that the public prosecutor only refers to the date and reference number of the court's decision in the EIO – if so, then it should be explicitly stated in the Directive.

New recommendation for the Commission:

We are missing a recommendation for the Commission that it will support potential modifications to e-EDES if there will be legislative changes to the EIO Directive.

Recommendation No. 4 page 28:

- 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.

We are of the opinion that the Member States should be able to accept EIO in another language only on a reciprocal basis, as otherwise it could place uneven financial burden on the executing State (Czech Republic for example is obliged to translate all the measures within criminal proceedings into Czech). There is also a risk of misinterpretation if an EIO is to be translated through one additional language (for example EIO is issued in Italian, then translated into English, sent to the Czech Republic where it must be translated from English to Czech).

Recommendation No. 1 page 42:

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.

The Directive does not provide for the possibility to request the issuing State to transmit the underlying national judicial decision at all. If the decision is requested in exceptional individual cases, such possibility would have to be explicitly indicated in the revised Directive.

ESTONIA

Page 68:

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 practices of some Member States, whereby the competent authorities, 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 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.

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

It has been observed that this practice could conflict 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

Commented [A1]: We are asking to add also additionally explanation that direct hearings via videoconference without issuing the EIO are done only in cases where the assistance from another MS in contacting the person and establishing video connection, is not needed

Commented [A2]: We are kindly asking to reword the sentence by putting the term "person s consent" at the beginning/first part of the sentence This is important because the person s consent is the very first aspect to determine in order to be able to contact the person directly via videoconference and not issue an EIO

At the moment the wording emphasises more only the aspect of not issuing an EIO and not emphasising well enough that the EIO is not issued only because the person agreed voluntarely with direct participation

Commented [A3]: Estonia disagrees with this part of the sentence "gathering evidence in another Member State", because this part of the sentence is misleading We are kindly asking to remove this part of the sentence
In Estonian case, if the witness, suspect or person accused, who resides in another Member State, is being heard directly via videoconference, then this procedural act is being conducted in Estonia Therefore, the evidence is not being gathered in another Member State, but in Estonia

Therefore, as the evidence are not being gathered in another MS, then there is no breach of the Directive by not issuing an EIO

For example, if the witness sends an e-mail from another Member State, then can it also be said that this evidence can not be used in criminal procedure, because it is gathered in another Member State? What is the difference between those two situations?

Commented [A4]: We are kindly asking to remove this sentence, because it is vague and not saying anything about the number of the MS who agreed on these conclusions If this sentence remains in this report, then the MS who agree on these conclusions should be named Also, there are MS who in case of the consent of the person, support hearing via videoconference without issuing an EIO

FINLAND

Page 8:

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, in cases where the national law of the issuing State requires such consent

Page 17:

- ***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.***

Commented [10/10/24#5]: FI has the opinion that because it is question of very intrusive coercive measures the problem cannot be solved by enlarging the concept of "interception of telecommunications" We support that notion of "interception of telecommunications" is clarified, but it is questionable that such a notion would cover all kinds of coercive measures that do not relate in anyway with telecommunications

It is clear, that if needed, GPS-tracking and bugging of vehicles e g would need independent clear new legislation The sentence could be clarified so that it would be clear that the Article 31 in force does not apply to GPS-tracking and bugging of vehicles Especially the term "should be assisted by a notification" makes this unclear

Commented [16/10/24#6]: FI is of the opinion that line 9 of the preamble of the Directive is clear It states that "This Directive should not apply to cross-border surveillance as referred to in the Convention implementing the Schengen Agreement"

It is evident that in different Member States there are different authorities that are resposible in this kind of cooperation

Article 40 CISA has specific provisions to be applied for cross border surveillance As the Directive has no provisions on this issue is seems questionable to say that similar cooperation would be covered by the Directive The wording could be clarified so that if cross-border surveillance would be included in the scope of the Directive, it would new provisions similiar to those in Article 40 CISA

Commented [10/10/24#7]: It is not only question of situations where the national law of the issuing State requires such consent The Directive stipulates that evidence should be obtained in accordance with the provisions of the Directive So it is unclear if information received by law enforcement cooperation or otherwise can be used as evidence

The text should be clarified that it is not question only of national legislation but also the unclear/lacking provisions of the Directive

Commented [16/10/24#8]: It should be kept in mind that each and every prosecutor and judge needs to be able to issue EIOs in their own cases

Page 21:

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.

Page 22:

- ***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.***

Page 37:

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.

Page 42:

- ***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.***

Commented [10/10/24#9]: see comment above (It is not only question of situations where the national law of the issuing State requires such consent The Directive stipulates that evidence should be obtained in accordance with the provisions of the Directive So it is unclear if information received by law enforcement cooperation or otherwise can be used as evidence

The text should be clarified that it is not question only of national legislation but also the unclear/lacking provisions of the Directive)

Commented [10/10/24#10]: see comment above (It not only question of situations where the national law of the issuing State requires such consent The Directive stipulates that evidence should be obtained in accordance with the provisions of the Directive So it is unclear if information received by law enforcement cooperation or otherwise can be used as evidence

The text should be clarified that it is not question only of national legislation but also the unclear/lacking provisions of the Directive)

Commented [10/10/24#11]: According to Article 6(1)(b) the issuing authority may only issue an EIO if the investigative measure(s) indicated in the EIO could have been ordered in a similar domestic case

The wording "could have been ordered" implies that it would not be necessary to even make a separate national decision However, it can be interperted that the wording does not prohibit to make a national decision before making an EIO In many circumstances this can be recommended because when making a national decision national law (e g on remedies) apply

Commented [16/10/24#12]: See the comment above

Commented [16/10/24#13]: It could be better reflected in the text that the principal rule according to Article 9(1) of the Directive is that the EIO is executed in the same way and under the same modalities as if the investigative measure concerned had been ordered by an authority of the executing State

Article 9(2) only complements the main rule of Article 9(1) All formalities and procedures of the procedural law of the issuing State should not be requested, but only those that are assessed necessary

Page 68:

It has been observed that this practice could conflict 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.

Commented [16/10/24#14]: The text should be clarified so that it would state that "this practice is in conflict with the principle of the soveignty of the State " It is very hard to find any ground how this practice could be acceptable

Page 69:

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.

Commented [10/10/24#15]: The text should be amended in a way "that the MS concerned seriously reconsider "

Page 74:

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.

Commented [10/10/24#16]: As the Directive is based on the principle of mutual recognition and not harmonisation the fact that national legal frameworks differ from each other should not be presented in a negative way

This comment can be applied to the whole draft report

As mutual recognition is the basis of cooperation national legislations do not need to be identical, and different national solutions should be respected This is most important in relation to coercive measures, where the Directive allows to refuse execution on the grounds that the measure would not have been authorised in a similar case

Page 80:

- ***Member States should refrain from conducting hearings of witnesses, suspects or accused persons located in another Member State by videoconference without issuing an EIO.***

Commented [10/10/24#17]: See comments above

It is essential that the wording "should refrain" would stay It should not be changed to a less restrictive form

It should be made clear that hearing persons the are on the territory of another MS withouth the consent of that MS is a breach of soveignty

- ***It is recommended that Member States ensure that their national legislation allows for the execution of EIOs issued for the monitoring of banking or other financial operations in real time, as provided for in Article 28(1)(a) of the Directive.***

Commented [10/10/24#18]: As the wording of Article 28(1) has the concept "such as", it cannnot be interperted that a MS should have a certain type of legislation on a investigative measure

As stated above, the Directive is based on mutual recognition and it does not harmonise national legislation on investigative measure

This is why this recommendation should be reformulated or deleted

- ***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.***

Commented [10/10/24#19]: see comment above

FI has the opinion that because it is question of very intrusive coercive measures the problem cannot be solved by enlarging the concept of "interception of telecommunications" We support that notion of "interception of telecommunications" is clarified, but it is questionable that such a notion would cover all kinds of coercive measures that do not relate in anyway with telecommunications

It is clear, that if needed, GPS-tracking and bugging of vehicles e g would need independent clear new legislation It should be clear that the Article 31 in force does not apply to GPS-tracking and bugging of vehicles

The recommendation should be clarified in a way that it would not implicate that the problem could be solved by just enlarging the concept of interception of communications in an unproper way

Commented [10/10/24#20]: see the comment above

FI is of the opinion that line 9 of the preamble of the Directive is clear It states that "This Directive should not apply to cross-border surveillance as referred to in the Convention implementing the Schengen Agreement"

It is evident that in different Member States there are different authorities that are resposible in this kind of cooperation

Article 40 CISA has specific provisions to be applied for cross border surveillance As the Directive has no provisions on this issue is seems questionable to say that similar cooperation would be covered by the Directive The wording could be clarified so that if cross-border surveillance would be included in tha scope of the Directive, it would new provisions similiar to those in Article 40 CISA

GERMANY

Page 66-67:

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 State consider such request as judicial assistance, whereas other Member State 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, to clarify the application of the Directive in relation to Article 40 of the Convention implementing the Schengen Agreement ~~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.

HUNGARY

There is yet one recommendation we partially disagree with:

"Member States should refrain from conducting hearings of witnesses, suspects or accused persons located in another Member State by videoconference without issuing an EIO." – states p 80 of the document.

In our opinion, such refrainment could potentially undermine timely procedures. Our code on criminal procedure enables the application of a so-called „simplified" videoconference, when the person concerned joins the trial via a weblink sent by the Court, using their own IT equipment, and upon their consent. Using such means of communication does not require the cooperation from any other authority, either domestic, or from a different member state; yet it may accelerate the procedure greatly.

It should also not escape notice that the court, when allowing or ordering such communication, is not always in the position to know the precise location of the person concerned. E.g. even a witness who basically lives in Hungary may need to travel abroad for personal reasons, and could decide that he/she will join the videoconference from a temporary location, as there is no rule for witnesses to update their whereabouts to the authorities.

THE NETHERLANDS

Comments by the Netherlands concerning the draft final report on the tenth round of mutual evaluation (doc. 14321/24)

P. 9.

As to the use of videoconferencing during a trial for the purpose of ensuring the participation of a suspect/accused during the trial The Netherlands is of the view that this serves another purpose than gathering evidence (i.e. the right of the suspect/accused to be present at the trial). For that reason, we would like to propose putting the word "always" between brackets:

"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."

p. 17

We would like to suggest making a link between the first and second recommendation:

"While reaffirming the importance of direct contact between issuing and executing authorities for the optimal execution of EIOs, where possible with the assistance of colleagues specialised in international cooperation, 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."

p. 19

The Netherlands would like to note here that recital 26 has a rather specific background. This background is that a practice had developed at the time in which an EAW was sometimes issued solely to question a suspect once. In such cases, it is indeed conceivable that an EIO is issued instead of an EAW. However, this concerns a rather specific situation. Recital 26 is, therefore, not intended to express that an EIO for a hearing by videoconference can be issued with a view to ensuring the presence of the suspect/accused at the trial. The Netherlands, therefore, proposes to amend this passage as follows (in red):

"Some practitioners have stated that they are used to considering whether issuing an EIO would be an effective alternative to an EAW, especially whether a hearing via videoconference could serve the same purpose. In cases of an incidental hearing, ~~T~~this approach follows the spirit of recital 26 of the Directive and has been commended by evaluators."

p. 32

"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. Given the benefits that a secure means of communication can bring, **it was** recommended that Member States make use of e-EDES, a system **that was** developed by the Commission to support exchanges under the Directive.

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….."

In other words, E-Edes is the 'old' system, which is used in several Member States but not in all. In the context of E-justice a decentralised IT system is being developed, the RI (for which E-Edes may be used as a basis?).

The Netherlands would like to observe that it is important to emphasise that it is ultimately up to the Member States to choose whether they will use the RI or, instead, let the national systems connect to the EU system. This is also what the Netherlands has consistently emphasised and continues to emphasise. In/for the Netherlands, this choice still has to be made.

In this context, we would like to refer to the text in the so-called draft FAD document quoted below:

"Regulation (EU) 2023/2844 of 27 December 2023 (the Digitalisation Regulation) obliges the competent authorities under the EIO Directive to communicate electronically through a decentralised IT system based on e-CODEX. Member States may opt to develop/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…"

We would like to see the abovementioned notion (in red) reflected in the draft report.

p. 33

We would suggest adding "and the EJN" after "The added value of Eurojust" in the last sentence of paragraph 6.3.

p. 34

In line with the previous comment concerning E-Edes we would like to propose to amend the recommendation on p. 34 as follows:

"It is recommended that Member States speed up the implementation of the non-mandatory e-EDES system if they decide to use it and connect all competent authorities to it, with a view to ensuring the swift and secure transmission of EIOs, related communication and evidence."

P. 65 - 68

In line with our observation with respect to p. 19, The Netherlands again notes that recital 26 has a rather specific background. This background is that a practice had developed at the time in which an EAW was sometimes issued solely to question a suspect once. In such cases, it is indeed conceivable that an EIO is issued instead of an EAW. Recital 26 is therefore only intended to prevent the unnecessary issuing of an EAW in cases where the actual purpose is to gather evidence, but does not equally concern the use of an EIO for videoconferencing as an alternative to the physical presence of the suspect/accused at the hearing. In this context, The Netherlands also refers to recital 25 of the Directive, which states that an EAW must be issued when the trial of the suspect is concerned. Against this background, NL proposes the following amendment to the text on p. 67 (in red):

"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 should be noted that this recital has a very specific background. At the time of the negotiations on the EIO Directive EAWs were also issued only for the sake of incidentally hearing a suspect or accused person. For these situations, the EIO may indeed provide an alternative. However, this does not mean that the EIO can also be issued for the remote participation of a suspect/accused person during the trial via videoconference. These Member States argued that, on the contrary, recital 25 (especially the last sentence) indicates that in these cases an EAW should be issued.

In line with this observation we would also like to suggest amending the following text on p. 68 "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, since ensuring the remote participation of the accused person in a trial from another Member State is not (always) related to evidence gathering and this would allow for considerations regarding the requirements of a right to a fair trial and the relation with other instruments such as the EAW FD and the new ToP-Regulation."

p. 80:

The Netherlands would like to add to the second recommendation after "The Commission … another Member State": "after answering the preliminary question as to whether the EIO Directive is the correct legal instrument for this purpose or not."

With respect to the fifth recommendation we would also like to have clarity regarding the practice in some Member States to continue sending an Annex C rather than follow-up an Annex C with an EIO, as would be our preference.

We would also like to stress that the Commission should evidently address the impact on national sovereignty as well as privacy aspects when it considers submitting a legislative proposal as a follow-up to the sixth recommendation.

p. 82:

As to the recommendation on improving national systems for collecting systems on the EIO, we would like to emphasise that the recommendation to supply (more) statistical data entails a lot of work for national authorities, the purpose of which is not always evident. In addition, adjusting case management systems for such purpose is far more cumbersome than the recommendation would seem to suggest. We note in that respect that the EIO Directive itself does not clearly define the data to be provided and we suggest to explore first which data Member States are actually able to provide at the moment. We would also like to refer to the talks about the extent of any obligation to provide statistics in the context of the discussion on the future of European criminal law, the negotiations on the draft directive on migrant smuggling etc.

SWEDEN

Sweden's comments on the draft final report on the tenth round of mutual evaluations on the implementation of the European Investigation Order (EIO)

1. Introductory and general comments

We welcome the well written report and the recommendations. We also thank you for the possibility to submit written comments on the report.

As an overall comment, we notice that the Commission in several recommendations is invited to submit legislative proposals to amend the Directive. We do not question that changes to the Directive might be needed, but they must be appropriate and fit for purpose. The Commission should therefore rather generally be invited to *consider* whether there are reasons to make suggestions in certain parts. Such changes do not necessarily have to be achieved through legislative proposals but recommendations or clarifications from the Commission may be sufficient in several cases.

Please find below our comments regarding the report in certain parts.

2. Chapter 4 - SCOPE OF THE EIO AND RELATION TO OTHER INSTRUMENTS

The evaluation indicates a need to clarify the procedure to request consent to use the current type of information. However, we are of the opinion that the Commission should rather be invited to *consider* a legislative proposal and that the Commission also should be invited to consider other sufficient measures than legislative ones. To clarify this, we suggest the following wording of the third recommendation in the end of chapter 4.

The Commission is invited to ~~submit~~ consider 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, or to consider other sufficient measures to clarify and simplify this procedure.

3. Chapter 5 – CONTENT AND FORM

It follows from the report that Annex A needs to be more user-friendly and effective. However, we are of the opinion that the Commission should rather be invited to *consider* a legislative proposal and that the Commission also should be invited to consider other sufficient measures than legislative ones. To clarify this, we suggest the following wording of the third recommendation in the end of chapter 5.

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

Furthermore, it would facilitate the cooperation if more Member States would accept EIO:s in at least in one major language We therefore suggest to formulate the fourth recommendation in the end of chapter 5 more strictly in that respect and closer to the wording in article 5.2 of the Directive. For this purpose, we suggest the following wording of the fourth recommendation in the end of chapter 5.

Member States ~~are encouraged to~~ should indicate another language ~~commonly used in~~ among the official languages of the institutions of 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.

4. Chapter 9 - RULE OF SPECIALITY

The evaluation indicates a need to clarify whether the rule of speciality applies in the context of the EIO. However, we do not believe that such clarification necessarily needs to be done by a legislative proposal. Instead, the Commission should be invited to clarify the application of the rule of speciality. To clarify this, we suggest the following wording of the first recommendation in the end of chapter 9.

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.

5. Chapter 12 - SPECIFIC INVESTIGATIVE MEASURES

Even in this part the evaluation indicates that certain questions need to be clarified. However, we do not believe that the evaluation indicates the need for legislative proposals. Therefore, we suggest the following amendments of the second and last recommendation in the end of chapter 12.

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

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.

The same reasoning applies to the fifth recommendation regarding clarification of the notion "interception of telecommunications". Regarding the second sentence we are of the opinion that it is not appropriate to develop common EU-legislation for GPS tracking sine this investigative measure is regulated at different levels (police/judicial level) in the Member States. Therefore, we would prefer to strike out the last sentence regarding legislative proposals on GPS-tracking. So, we suggest the following amendments of the fifth recommendation in the end of chapter 12.

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.~~

At second hand, if the second sentence is not deleted, that sentence should be formulated as an invitation for the commission to *consider* a legislative proposal. Thus we suggest the following amendments of the fifth recommendation in the end of chapter 12.

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~~ consider 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.

Sweden's additional comments on the draft final report on the tenth round of mutual evaluations on the implementation of the European Investigation Order (EIO)

Upon reconsiderations due to the extended deadline, we would like to make additional comments on the draft report. These comments complement to our written comments sent to you on the 18th of October.

Chapter 4 - SCOPE OF THE EIO AND RELATION TO OTHER INSTRUMENTS

The draft report mention that 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 and that during several evaluation visits, discussions were held on assets such as luxury items and money. Since the evaluation has shown challenges between the scope of the EIO and the Regulation (EU) 2018/1805 on the mutual recognition of freezing orders and confiscation orders we would like to introduce a new recommendation in the draft report. The recommendation should be in line with the challenges which has been identified during the evaluation.

NEW RECOMMENDATION: The Commission is invited to consider sufficient measures to clarify and simplify procedures and challenges regarding seizure of assets for evidentiary purposes and freezing for purpose of confiscation. The Commission is also invited to review and analyse the need to amend the Directive in order for it to cover investigative measure concerning proceedings in relation to confiscation of unexplained wealth, such as seizure of luxury items and money.
