

European Investigation Order and the “Brussels” Bureaucracy

Marek Kordík,* Lucia Kurilovská**

* Marek Kordík, Associate Professor, JUDr., PhD, LL.M., Department of Criminal Law, Criminology and Criminalistics of the Faculty of Law, Comenius University in Bratislava. (e-mail: Marek.Kordik@flaw.uniba.sk)

** Lucia Kurilovská, Professor, Dr.h.c., JUDr., PhD, Department of Criminal Law, Criminology and Criminalistics of the Faculty of Law, Comenius University in Bratislava, Rector of the Police Academy in Bratislava. (e-mail: lucia.kurilovska@minv.sk)

Abstract: The contribution deals with the insight on the European investigation order, as a tool of mutual judicial assistance in criminal matters. With the purpose to show that the criticised, so called Brussels bureaucracy very often just reacts on the propositions of the member states. A good example of this is given in the presented article. It shows the result of a conducted CEPOL survey and connects it with the short presentation of this tool.

Keywords: European investigation order; mutual cooperation in criminal matters; template; bureaucracy; statistics

1. General Overview

In October 2017, CEPOL approached CNUs in 26 Member States² to provide direct contact points in law enforcement agencies (dealing with the subject of the OTNA) of their respective countries; 21 MS responded this initiative. Further on, the questionnaire was sent to these nominated contact points (law enforcement agencies and CEPOL National Units). This resulted in 44 completed answers from different LE agencies from 21 Member States, indicating a *relatively high response rate: 80.76% of Member States representing 42,601 law enforcement officials¹ across Europe*, expressed their needs in the field of Counterterrorism.²

The *most relevant main topic* for law enforcement officials in this area is related to *foreign terrorist fighters* (85.71% of MSs found it relevant) followed by *financing terrorism, radicalisation and open source intelligence* (80.95%) (Table 1). The least relevant need was about *hostage taking* (47.62%):³

Table 1.
The relevance and urgency rates of the individual law enforcement topics

Main topics	Relevance rate	Urgency rate	
Foreign terrorist fighters	85.71%	85.00%	Relevant and urgent
Radicalisation	80.95%	88.00%	Relevant and urgent
Financing terrorism	80.95%	84.00%	Relevant and urgent
Open source intelligence	80.95%	76.00%	Relevant and urgent
Terrorism/Firearms trafficking	71.43%	92.00%	Relevant and urgent
Covert Human Intelligence Sources	66.67%	80.00%	Relevant and urgent
Protection of soft targets	66.67%	72.00%	Relevant and urgent
Critical infrastructure protection	61.90%	68.00%	Relevant and urgent
Encryption technologies used to facilitate terrorism	57.14%	76.00%	Relevant and urgent
Aftermath of attack	57.14%	72.00%	Relevant and urgent
CBRN,CBRNE	57.14%	68.00%	Relevant and urgent
Hostage taking	47.62%	64.21%	Less relevant and urgent
E-evidence	42.86%	61.18%	Less relevant and urgent
De-radicalisation	33.33%	54.48%	Less relevant and urgent

Source: Compilation of the authors based on OPTNA on Counterterrorism, CEPOL, presented on the Management Board meeting in Sofia on 15–16 May 2018. 3.

With the aim of better understanding the needs of LE officials, various *horizontal aspects* were presented for the assessment of respondents under each topic. As the relevance varies from topic to topic, the overall assessment demonstrated *that training should put emphasis on prevention, cross border exchange of information, evidence and criminal AS intelligence*, as well as on cooperation with non-EU countries. At the same time protection of personal data, knowledge of cultural aspects and history, as well as fundamental rights were given less priority. According to the CEPOL's mandate "in its training activities, CEPOL should promote common respect for, and understanding of, fundamental rights in law enforcement"⁴ therefore, in spite of its low ranking, fundamental rights should be given priority when designing the training portfolio on Counterterrorism.⁵

Table 2.
The relevance rates of the horizontal aspects of law enforcement

Horizontal aspects	Relevance rate
Prevention	41.46%
Cross border exchange of evidence	40.86%
Cross border exchange of information	40.69%
Cooperation with non-EU countries	39.72%
Cross border exchange of criminal intelligence	37.38%
Better use of EU instruments	36.54%
Information exchange	34.53%
Undercover operations	33.88%
Common definitions	33.65%
Common sanctions	29.96%
Protection of personal data	29.42%
Knowledge of cultural aspects and history	28.26%
Fundamental rights	25.72%

Source: Compilation of the authors based on OPTNA on Counterterrorism, CEPOL, presented on the Management Board meeting in Sofia on 15–16 May 2018. 4.

2. 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 initiative on the adoption of the European Investigation Order came from the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council.⁶ The negotiations started in 2010.⁷ The Directive was adopted in 2014.⁸ Deadline for the transposition was on May 27, 2017.⁹

The main aim of its adoption was to:¹⁰ create a single comprehensive instrument with a large scope; set strict deadlines for gathering the evidence requested; limit the reasons for refusing such requests; reduce paperwork by introducing a single standard for and to protect the fundamental rights of the defence.

Under Article 1 a European Investigation Order (EIO) is a judicial decision which has been issued or validated by a judicial authority of a Member State (“OG the issuing State”) to have one or several specific investigative measure(s) carried out in another Member State (“the executing State”) to obtain evidence in accordance with this Directive. The EIO may also be issued for obtaining evidence that is already in the possession of the competent authorities of the executing State. Member States shall execute an EIO on the basis of the principle of

mutual recognition and in accordance with this Directive. The issuing of an EIO may be requested by a suspected or accused person, or by a lawyer on his behalf, within the framework of applicable defence rights in conformity with national criminal procedure. This Directive shall not have the effect of modifying the obligation to respect the fundamental rights and legal principles as enshrined in Article 6 of the TEU, including the rights of defence of persons subject to criminal proceedings, and any obligations incumbent on judicial authorities in this respect shall remain unaffected.

Where the objects, documents, or data concerned are already relevant for other proceedings, the executing authority may, at the explicit request of and after consultations with the issuing authority, temporarily transfer the evidence on the condition that it be returned to the executing State as soon as it is no longer required in the issuing State or at any other time or occasion agreed between the competent authorities.

Member States shall ensure under Article 14 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.

Where it would not undermine the need to ensure confidentiality of an investigation the issuing authority and the executing authority shall take the appropriate measures to ensure that information is provided about the possibilities under the national law for seeking the legal remedies when these become applicable and in due time to ensure that they can be exercised effectively.

Member States shall ensure that the time limits for seeking a legal remedy shall be the same as those that are provided for in similar domestic cases and are applied in a way that guarantees the possibility of the effective exercise of these legal remedies for the parties concerned.

The issuing authority and the executing authority shall inform each other about the legal remedies sought against the issuing, the recognition or the execution of an EIO.

A legal challenge shall not suspend the execution of the investigative measure, unless it is provided in similar domestic cases.

The issuing State shall take into account a successful challenge against the recognition or execution of an EIO in accordance with its own national law. Without prejudice to national procedural rules, Member States shall ensure that in criminal proceedings in the issuing State, the rights of the defence and the fairness of the proceedings are respected when assessing evidence obtained through the EIO.

3. Investigative Measures According to the European Investigation Order

3.1. Temporary transfer to the issuing State of persons held in custody for the purpose of carrying out an investigative measure

An EIO may be issued under Article 22 for the temporary transfer of a person in custody in the executing State for the purpose of carrying out an investigative measure with a view to gathering evidence for which the presence of that person on the territory of the issuing State is required, provided that he shall be sent back within the period stipulated by the executing State.

The transferred person shall remain in custody in the territory of the issuing State and, where applicable, in the territory of the Member State of transit, for the acts or convictions for which he has been kept in custody in the executing State, unless the executing State applies for his release.

The period of custody in the territory of the issuing State shall be deducted from the period of detention which the person concerned is or will be obliged to undergo in the territory of the executing State.

A transferred person shall not be prosecuted or detained or subjected to any other restriction of his personal liberty in the issuing State for acts committed or convictions handed down before his departure from the territory of the executing State and which are not specified in the EIO.

The immunity shall cease to exist if the transferred person, having had an opportunity to leave for a period of 15 consecutive days from the date when his presence is no longer required by the issuing authorities, has either:

- a) nevertheless, remained in the territory; or
- b) having left it, has returned.

3.2. Temporary transfer to the executing State of persons held in custody for the purpose of carrying out an investigative measure

An EIO may be issued under Article 23 for the temporary transfer of a person held in custody in the issuing State for the purpose of carrying out an investigative measure with a view to gathering evidence for which his presence on the territory of the executing State is required. Article 22 is applicable *mutatis mutandis* to the temporary transfer under this Article.

3.3. Hearing by videoconference or other audiovisual transmission

Where a person is in the territory of the executing State and has to be heard as a witness or expert by the competent authorities of the issuing State, the issuing authority may issue an EIO under Article 24 in order to hear the witness or expert by videoconference or other

audiovisual transmission. The issuing authority may also issue an EIO for the purpose of hearing a suspected or accused person by videoconference or other audiovisual transmission.

The issuing authority and the executing authority shall agree on the practical arrangements. When agreeing on such arrangements, the executing authority shall undertake to:

- a) summon the witness or expert concerned, indicating the time and the venue of the hearing;
- b) summon the suspected or accused persons to appear for the hearing in accordance with the detailed rules laid down in the law of the executing State and inform such persons about their rights under the law of the issuing State, in such a time as to allow them to exercise their rights of defence effectively;
- c) ensure the identity of the person to be heard.

Where a hearing is held by videoconference or other audiovisual transmission, the following rules shall apply:

- a) the competent authority of the executing State shall be present during the hearing, where necessary assisted by an interpreter, and shall also be responsible for ensuring both the identity of the person to be heard and respect for the fundamental principles of the law of the executing State. If the executing authority is of the view that during the hearing the fundamental principles of the law of the executing State are being infringed, it shall immediately take the necessary measures to ensure that the hearing continues in accordance with those principles;
- b) measures for the protection of the person to be heard shall be agreed, where necessary, between the competent authorities of the issuing State and the executing State;
- c) the hearing shall be conducted directly by, or under the direction of the competent authority of the issuing State in accordance with its own laws;
- d) at the request of the issuing State or the person to be heard, the executing State shall ensure that the person to be heard is assisted by an interpreter, if necessary;
- e) suspected or accused persons shall be informed in advance of the hearing of the procedural rights which would accrue to them, including the right not to testify, under the law of the executing State and the issuing State. Witnesses and experts may claim the right not to testify which would accrue to them under the law of either the executing or the issuing State and shall be informed about this right in advance of the hearing.

3.4. Hearing by telephone conference

If a person is in the territory of one Member State and has to be heard as a witness or expert by competent authorities of another Member State, the issuing authority of the latter Member State may, where it is not appropriate or possible for the person to be heard to appear in its territory in person, and after having examined other suitable means, issue an EIO under Article 25 in order to hear a witness or expert by telephone conference.

The rules on videoconference or audiovisual transmission shall apply *mutatis mutandis* to hearings by telephone conference.

3.5. Information on banks and other financial accounts

An EIO may be issued under Article 26 in order to determine whether any natural or legal person subject to the criminal proceedings concerned holds or controls one or more accounts, of whatever nature, in any bank located in the territory of the executing State, and if so, to obtain all the details of the identified accounts. Each Member State shall take the measures necessary to enable to provide the information.

The information, if requested in the EIO, include accounts for which the person subject to the criminal proceedings concerned has powers of attorney. The obligation shall apply only to the extent that the information is in the possession of the bank keeping the account.

In the EIO, the issuing authority shall indicate the reasons why it considers that the requested information is likely to be of substantial value for the purpose of the criminal proceedings concerned and on what grounds it presumes that banks in the executing State hold the account and, to the extent available, which banks may be involved. It shall also include in the EIO any information available which may facilitate its execution.

An EIO may also be issued to determine whether any natural or legal person subject to the criminal proceedings concerned holds one or more accounts, in any non-bank financial institution located on the territory of the executing State.

3.6. Information on banking and other financial operations

An EIO may be issued under Article 27 in order to obtain the details of specified bank accounts and of banking operations which have been carried out during a defined period through one or more accounts specified therein, including the details of any sending or recipient account.

Each Member State shall take the measures necessary to enable it to provide the information referred to in paragraph 1 in accordance with the conditions under this Article.

The obligation set out in this Article shall apply only to the extent that the information is in the possession of the bank in which the account is held.

In the EIO, the issuing authority shall indicate the reasons why it considers the requested information relevant for the purpose of the criminal proceedings concerned.

An EIO may also be issued with regard to the information with reference to the financial operations conducted by non-banking financial institutions.

3.7. Investigative measures implying the gathering of evidence in real time, continuously and over a certain period of time

When the EIO is issued for the purpose of executing an investigative measure requiring the gathering of evidence in real time, continuously and over a certain period of time under Article 28, such as:

- a) the monitoring of banking or other financial operations that are being carried out through one or more specified accounts;
- b) the controlled deliveries on the territory of the executing State; its execution may be refused, in addition to the grounds for non-recognition and non-execution, if the execution of the investigative measure concerned would not be authorised in a similar domestic case.

3.8. Covert investigations

An EIO may be issued under Article 29 for the purpose of requesting the executing State to assist the issuing State in the conduct of investigations into crime by officers acting under covert or false identity (“covert investigations”).

The issuing authority shall indicate in the EIO why it considers that the covert investigation is likely to be relevant for the purpose of the criminal proceedings. The decision on the recognition and execution of an EIO issued under this Article shall be taken in each individual case by the competent authorities of the executing State with due regard to its national law and procedures.

In addition to the grounds for non-recognition and non-execution, the executing authority may refuse to execute an EIO, where:

- a) the execution of the covert investigation would not be authorised in a similar domestic case; or
- b) it was not possible to reach an agreement on the arrangements for the covert investigations.

Covert investigations shall take place in accordance with the national law and procedures of the Member State on the territory of which the covert investigation takes place. The right to act, to direct and to control the operation related to the covert investigation shall lie solely with the competent authorities of the executing State. The duration of the covert investigation, the detailed conditions, and the legal status of the officers concerned during covert investigations shall be agreed between the issuing State and the executing State with due regard to their national laws and procedures.

3.9. Interception of telecommunications

Regarding interception of telecommunications with technical assistance of another Member State, an EIO may be issued under Article 30 for the interception of

telecommunications in the Member State from which technical assistance is needed. Where more than one Member State is in a position to provide the complete necessary technical assistance for the same interception of telecommunications, the EIO shall be sent only to one of them. Priority shall always be given to the Member State where the subject of the interception is or will be located.

An EIO shall also contain the following information:

- a) information for the purpose of identifying the subject of the interception;
- b) the desired duration of the interception; and
- c) sufficient technical data, in particular the target identifier, to ensure that the EIO can be executed.

The issuing authority shall indicate in the EIO the reasons why it considers the indicated investigative measure relevant for the purpose of the criminal proceedings concerned.

In addition to the grounds for non-recognition or non-execution, the execution of an EIO may also be refused where the investigative measure would not have been authorised in a similar domestic case. The executing State may make its consent subject to any conditions which would be observed in a similar domestic case.

An EIO may be executed by:

- a) transmitting telecommunications immediately to the issuing State; or
- b) intercepting, recording and subsequently transmitting the outcome of interception of telecommunications to the issuing State.

The issuing authority and the executing authority shall consult each other with a view to agreeing on whether the interception is carried out in accordance with point a) or b).

When issuing an EIO or during the interception, the issuing authority may, where it has a particular reason to do so, also request a transcription, decoding or decrypting of the recording subject to the agreement of the executing authority.

4. Conclusion

It needs to be emphasised, that the survey was conducted prior to the implementation deadline for the European Investigation order. So the practitioners did not have any chance to use it in practice.

From the survey it is evident that the law enforcing personnel considers one of the most important needs in the practice the effective smooth and quick cross border exchange of evidence and information. This was also the primary aim of the new coming European Investigation Order. As spoken above, the idea of a European investigation order came from down (the Member States) to the top (European Parliament) as a result of the activity of the member states. The place of the EIO within the mutual recognition programme.

It explores the lessons arising from experience with mutual recognition (specifically the European Arrest Warrant, EAW) and the need for mutual trust. The EIO will extend the mutual recognition programme to enable nearly all mutual legal assistance to be achieved through a single, mutual recognition instrument. In doing so, it represents not

only a further step in the evolution of the mutual recognition agenda, but also a break with the traditional mechanisms of mutual legal assistance. The existing way of obtaining most kinds of evidence from abroad is by using commission rogatories or letters of request.¹¹

Due to the EU with the EIO, mutual recognition moves the untested application of the principle from the exchange of existing evidence to active evidence gathering. This is a step into uncharted waters without time to acquire knowledge from the experience of the EEW. The EIO is a departure from the traditional paradigm of recognition of judicial decisions to requests for active participation in criminal investigations with little in the way of refusal grounds. It is also a departure from the traditional method of mutual legal assistance.

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- 11 Such processes are found in the treaties governing the present framework on mutual legal assistance: the European Convention on Mutual Assistance in Criminal Matters of 1959 (the ‘1959 Convention’), the EU Mutual Legal Assistance Convention of 2000 (the ‘EU MLA Convention’) with its 2001 Protocol, and Articles 48 to 53 of the Schengen Agreement. The move towards the use of mutual recognition instruments commenced with the Framework Decision (2008/978/JHA) on the European Evidence Warrant (EEW) the Framework Decision (2003/577/JHA) on the freezing of assets.