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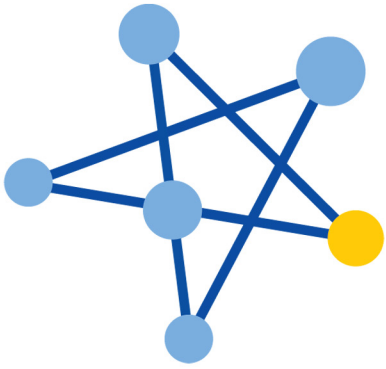

Jan Stajnko
Miha Šepec
István Szijártó
EDITORS

Practical Dilemmas and Theoretical Considerations, Book of Extended Abstracts, 8. & 9. December 2020, online

Faculty of Law

Conference

European Investigation Order

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(University of Maribor, Faculty of Law)

Miha Šepec
(University of Maribor, Faculty of Law)

István Szijártó
(University of Pécs, Faculty of Law)

Language editor Katja Drnovšek
(University of Maribor, Faculty of Law)

Technical editor Jan Perša
(University of Maribor, University Press)

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Table of Contents

Conference European Investigation Order:
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Book of Extended Abstracts, 8. & 9. December 2020
J. Stajnko, M. Šepec & I. Szijártó (eds.)

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Admissibility of Evidence Gathered in a Foreign State in the National Criminal Procedure

Miha Šepec
University of Maribor, Faculty of Law, Maribor, Slovenia. E-mail: miha.sepec@um.si

Legal system and criminal procedures between EU states differ – they mainly differ in which investigative measures are available in criminal procedure and what are the legal standard to obtain the evidence. Standards of admissibility of that evidence also differ. We could say that each system in its own is coherent and harmonic as a whole. However, if we only take one part from each system and transfer it to another system there will probably be some problems. The dilemma that could arise is should a national judge be able to evaluate the evidence that were gathered abroad in a foreign state. If not, this would mean that we have a system of perfect mutual trust. Much more common and prevailing solution is that the judge can evaluate the evidence gathered abroad, however the question is to what extent can this judicial control be.

There are numerous options. The judge can evaluate the evidence after the law of the state that has acquired the evidence – if the law of foreign state was respected when acquiring the evidence, the evidence will be admissible in a national procedure. The judge can also evaluate the evidence after the law of the state that will use the evidence (domestic law) – if the domestic standards are not met, the evidence will be excluded.

Third option is to create a uniform objective standard that could take into account the practice of the ECHR. Studies done in EU show that most of the countries firstly demand that the evidence was gathered legally in the state that acquired the evidence. However, studies also show that there is no unified practice and views on how to evaluate the evidence gathered from abroad from the aspect of the national system. Therefore, the purpose of the authors contribution is to shed some light on the solutions EU countries have regarding the topic of admissibility of evidence gathered in a foreign state in the national criminal procedure.

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EUROPEAN INVESTIGATION ORDER AND MUTUAL ASSISTANCE IN CRIMINAL MATTERS PRINCIPLES IN THE LEGISLATION OF NORTH MACEDONIA

ANDREJ BOZHINOVSKI
University of Zagreb, Faculty of Law, Zagreb, Croatia. E-mail: andrej_acm@yahoo.com

As negotiations for joining the EU are resuming, the necessary reforms entailed in Chapters 23 and 24 are carefully implemented, the Macedonian legal framework prepares for further amendments for successful transposition of the directive of the European Investigation Order[1] and the framework decision of the European Arrest Warrant.[2] Under Chapter 24 of the EU accession talks - which deals with justice policies, freedom and security - the process of harmonization of the laws of North Macedonia with the EU law imposes the need to establish legal guarantees, solid

[1] *See* DIRECTIVE 2014/41/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 3 April 2014 regarding the European Investigation Order in criminal matters.
[2] Council's Framework Decision on the European Arrest Warrant and Surrender Proceedings between Member States,
https://eur-lex.europa.eu/resource.html?uri=cellar:3b151647-772d-48b0-ad8c-0e4c78804c2e.0004.02/DOC_1&format=PDF.

legal framework, documented and continuous results of the institutions of North Macedonia. The purpose of this harmonization is the need to achieve successful judicial cooperation that will enable efficient and effective detection, proof, and litigation of criminal cases, especially in the area of transnational organized crime. Judicial cooperation in criminal matters is particularly interdependent on the recognition of court decisions, harmonization of legislation, and enforcement of the institutional assumptions for successful cooperation. It is important to mention that the EU does not insist on a complete unification of legislation in this area, but on finding appropriate mechanisms that will enable smooth and continuous cooperation between states and their judicial bodies, for the purpose of avoiding conflicts of competence and enforcing mutual respect of the actions taken and the decisions made. The Republic of North Macedonia, more specifically the Ministry of Justice, implements continuous reforms that enable the effective implementation of EU measures in this area. In doing so, the ratification process has been carried out for all relevant international instruments, conventions and their additional protocols in the field of international cooperation in criminal matters brought by the Council of Europe - and to which they are largely based on the principles on which EU regulations, decisions, and directives are based. There is a solid national legal framework aimed at promoting cooperation in the field of criminal cases, given the provisions of the Law on International cooperation in criminal matters and the new Law on Criminal Procedure that took effect in 2013. Successful inter-institutional cooperation is also being achieved by central level bodies, police and judicial bodies,as well as penitentiaries. There is also intensive international cooperation in police and judicial spheres, e.g. activities are carried out in cooperation with Europol and Eurojust.

Table 1: Principle of Mutual Recognition

EU measure	Degree of compliance with national legislation of North Macedonia
Program of Measures to Implement the Principle of Mutual Recognition of Decision in Criminal Matters (2001,OJ C 12/10)	Fully Compliant

In the area of mutual legal assistance in criminal matters, there is full compliance with this EU instrument. European Convention on Mutual Legal Assistance in Criminal Matters with the protocols of the Council of Europe were ratified by North Macedonia, and directly transferred in the Law on International Cooperation in the Criminal Matters, which regulates the recognition and execution of foreign court's decisions and transfer of convicted persons. This also includes individualization of punishment, which is one of the basic principles which the court considers during sentencing. Compliance is also seen in the inability of a person to be tried or punished for an act for which a final court decision has already been made (prohibition of double jeopardy), as well as in the harmonization of legislation in the area of orders securing evidence, seizure and freezing of property, confiscation, and compensation of victims of crimes. Temporary security and seizure of items or property is a matter that is regulated in detail by the Law on Criminal Procedure and the Law on international cooperation in criminal matters. Support for the injured party is provided by the Criminal Code, which provides that the injured party who in criminal proceedings referred to a dispute regarding its property claim, the same may be sought to settle the amount of the confiscated value - if it meets the conditions of the provision. There are legal grounds for respecting the principles defined regarding the sanctioning, recognition, and execution of prison sentences and the transfer of convicted persons, as well as in relation to criminal verdict decisions which refer to the supervision of probationers and persons on probation dismissal from a penitentiary institution.

Table 2: European Arrest Warrant and Extradition

EU measure	Degree of compliance of the national legislation of North Macedonia
Council Framework Decision on the European Arrest Warrant and the Surrender Proceedings between Member States (2002, OJ L 190/1)	Provisions for the Implementation of the framework decision on the European arrest warrant are compliant with national legislation. However they are not applicable until North Macedonia becomes EU Member state.
Convention relating to abbreviate extradition procedure between the Member States of the European Union (1996, OJ C 313/12)	Fully compliant

The European Arrest Warrant as an expedited form of surrender without extradition is inapplicable until North Macedonia becomes an EU member state. However, there is full harmonization of national legislation with regard to the possibility of applying an abbreviated extradition procedure. Namely, the Law on International Cooperation in Criminal Matters regulates the extradition procedure in a simplified manner. There is also compliance with other aspects of this EU instrument, as national legislation is compatible with the European Convention on Extradition of the Council of Europe and its three additional protocols that the Republic of North Macedonia has ratified.

Table 3: Confiscation, Freezing of property and fines

EU measure	Degree of compliance of the national legislation of North Macedonia
Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property	Full compliance
2001/500/JHA: Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime	Full compliance
Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime.	Full compliance
Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders	Partial compliance
Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence	Partial compliance
Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties	Partial compliance

There is full compliance regarding the extended confiscation in accordance with the provisions contained in the Criminal Code and the Law on Criminal Procedure. The Criminal Code ensures the same level of harmonization of the national legislation regarding the measure of confiscation of the direct and indirect property benefit obtained through a crime, the incrimination of money laundering as a separate crime, the possibility of confiscating other property corresponding to the value of the acquired benefit, as well as the possibility for the property to be returned to another state in accordance with a ratified international agreement. In response to the need to determine the authority that will take care for the confiscated property, the Republic of North Macedonia created conditions for the existence of a special Agency for Management of Confiscated Property and regulated in detail its competencies, disposition of property, and property benefits, procedures to be undertaken and complied with, as well as international legal assistance. International Legal cooperation in criminal matters ensures harmonization of the legislation and in the part of the submission of spontaneous information by the national judicial authority of a competent foreign authority, subject to reciprocity, without prior request for international legal assistance. There is partial compliance with each other operation on the execution of confiscation orders and orders to freeze property or evidence in the EU.

Table 4: Cooperation with EUROJUST

EU measure	Degree of compliance of the national legislation of North Macedonia
Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime.	Full compliance
Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime.	Full compliance
Council Decision 2003/659/JHA of 18 June 2003 amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime.	Full compliance

In 2009, a mutual cooperation agreement was signed for the preparation of legislation and institutions for successful cooperation with Eurojust after North Macedonia will become an EU member state. Due to the candidate status, the EU instruments, subject to transposition are assessed as inapplicable as long as Macedonia does not become an EU member. However, full compliance is noted with the competencies of Eurojust in the part of the types of crimes for which Europol has jurisdiction to act. Full compliance also exists in terms of processing personal data and prohibitions on personal data processing.

Table 5: Mutual Assistance in Criminal Matters

EU measure	Degree of compliance of the national legislation of North Macedonia
Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union	Full compliance
Joint Action of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on good practice in mutual legal assistance in criminal matters	Transposed into national legislation, however inapplicable until North Macedonia becomes EU Member State
Council Framework Decision of 13 June 2002 on joint investigation teams	

In conclusion, the matter for mutual legal assistance in the criminal matter is fully harmonized in North Macedonia as a signatory country. North Macedonia has ratified all acts of the Council of Europe which regulates the matter of mutual legal assistance, and part of the accepted international acts are further specified in the Law on Mutual Cooperation in Criminal Matters, despite the full harmonization of the legislative plan, regarding the instrument related with good practices the benefits will be realized with Macedonia's accession to the EU. In addition, in this area, there is full compliance provided by the Law on international cooperation in criminal matters, offering the necessary legal framework for detection and prosecution of organized crime and corruption. The Republic of North Macedonia receives institutional support and assistance in setting up joint investigations teams through Europol and Eurojust. Namely, the signing of the Operational Agreement and strategic cooperation between the Republic of North Macedonia and Europol enable

participation of national representatives at the meetings of the heads of the national Europol cooperation units and enabled Europol to be involved in the joint venture investigation teams. Having all this in mind the national legal framework is in line with the EU acquis which in addition will create the perfect conditions for smooth transposition of the EIN directive in national legislation. The *modus operandae* of the transposition of the Directive will be through amendment of the current laws and legal documents, and not via special law. However more practical approach is needed for sustainable implementation of the European Investigative Order. Judges, Prosecutors, lawyers and law enforcement actors must be involved in pilot projects to achieve gradual sustainability and smooth transition once the directive has been transposed in national legislation. Early training for legal professionals is the key for effective and efficient justice.

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THE EIO - SOME COMMENTS ON THE PERSPECTIVE OF GERMAN LEGAL POLICY

PETER RACKOW

University of Göttingen, Institute for Criminal Law and Criminal Justice, Department of Foreign and International Criminal Law, Göttingen, Germany. E-mail: prackow@gwdg.de

The presentation deals with the perception of the initiative for the introduction of the European Investigation Order (EIO) by German legal policy. Considering this perspective seems meaningful as the acceptance of a certain legal instrument in the legal policy area of a state may have an impact on its practical application. On the other hand - and probably even more important - the way in which a certain instrument has been received by the legal policy actors of a state is likely to allow conclusions to be drawn about the future.

In retrospect it appears as striking how quickly the initiative to create an EIO was followed by very clear responses in Germany in 2010. Especially the important German Judges Association criticized it harshly. The German Bundestag's Legal Affairs Committee expressed doubts as to whether the principle of mutual recognition was working properly in the field of mutual assistance in evidence. In the context of the further negotiations, the German conduct of the negotiations can only be described as defensive. This must be seen against the background of the assessment of the Legal Affairs Committee, which the Bundestag itself had adopted.

Ideally, if possible, a comprehensive ground for refusal should be negotiated into the directive, according to which the execution of an EIO can be refused wherever the execution would be contrary to national law. Although this goal failed due to resistance from other states Art. 10(5) EIO-Directive may have the same effect in substance as the proposed for comprehensive ground for refusal. It is particularly noteworthy that the explanatory memorandum to the German Implementation Act of 2017 concludes that the implementation of the directive neither significantly reduces the possibilities for refusal nor leads to a significant change in the rules and structures of German mutual legal assistance law compared to the previous legal situation.

In the overall picture, the consistency and intensity of the scepticism towards a further shift to the principle of mutual recognition that German legal policy has shown towards the initiative to introduce the EIO is impressive. Furthermore, there are good reasons to believe that the defensive German negotiation strategy was not unsuccessful in the matter, if one compares the original proposal for an EIO-Directive with the EIO Directive that finally came into force and which is subject to the principle of mutual recognition in a watered-down form at best. It can be supposed that the difficult history of the German implementation of the European Arrest Warrant has led to a much more sceptical attitude towards European Criminal Law in general and the principle of mutual recognition in particular. The impression remains, that in the German legal-political landscape a comparable resistance to new innovative projects may quickly build up.

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LEGAL INSTRUMENTS FOR CROSS-BORDER CRIME INVESTIGATION IN EU: WILL THEY COME?

BORKA JERMAN BLAŽIČ
Jožef Stefan Institute, Laboratory for Open Systems and Networks, Ljubljana, Slovenia. E-mail: borka@e5.ijs.si

The presentation introduced the procedures proposed by the EU Commission for the adoption of two regulations for collecting e-evidence as an implementation documents accompanying the EIO Directive. The regulation is expected to remove the jurisdictive barriers for a more efficient justice processing of criminal acts in an interconnected world.

On 17 April 2018, following a two-year-long preparation process, the European Commission presented two legislative proposals to enhance cross-border gathering of electronic evidence: a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters and a Directive on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings. As to the first one, it is intended to allow competent judicial authorities from one Member State to request directly from a service provider established or represented in another Member State access to or preservation of electronic data (such as emails, text or messages in apps, as well as information to

identify a perpetrator as a first step) needed for investigation and prosecution of crimes. The proposal address the requests to the service providers operating in one or more Member States, wherever their headquarters are located or information stored. The proposed Regulation provides strong fundamental rights safeguards and rules for effective remedies. It also foresees the possibility for the service provider to request a review of the received order, on defined grounds, such as technical issues or in case of orders which are manifestly abusive or violating the Charter of fundamental rights. Both legislative proposals are intended to bring clarity and legal certainty, and they should considerably speed up the process of obtaining e-evidence, with an obligation for service providers to respond within 10 days and up to 6 hours in cases of emergency (compared to an average of 10 months allowed within the Mutual Legal Assistance procedures). On 6 June 2019, after two years of work the Justice and Home Affairs Council published its full set of recommendations for modifying the Commission proposal, including the changes agreed for the Regulation itself in December 2018, and the changes agreed on the supplementary annexes at the June 2019 meeting. The changes to the annexes include additional information requirements for Orders, such as unique identifiers like ID names or account names for the person sought, and more details on requested evidence. The European Economic and Social Committee (EESC) adopted its opinion and welcomed the proposals but called for the respect of the fundamental human rights. The Committee supported the development of Europe-wide uniform standards regarding the conditions for access to data and advocated extending scrutiny by a judge to the gathering of all personal data. The European Council, in its conclusions of 18 October 2018, underlined the importance of swift and efficient cross-border access to e-evidence in order to effectively fight terrorism and other serious and organised crime, and called for an agreement on the e-evidence proposals before the end of the legislature. By mid-December 2019, around 600 amendments were tabled to the draft report from LIBE. The vote in the Committee was foreseen for 26 March 2020, but it had to be postponed, as due to Covid-19 pandemic Parliamentary works have been limited to the most urgent matters and the destiny of the proposed regulations is not known.

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THE EUROPEAN INVESTIGATION ORDER IN THE LIGHT OF HUNGARIAN PRACTICE AND CASE LAW

ISTVÁN SZIJÁRTÓ
University of Pécs, Faculty of Law, Pécs, Hungary. E-mail: szijarto.istvan@ajk.pte.hu

The presentation revolves around the practice of the novel legal instrument of judicial cooperation in criminal matters in the European Union, namely the Hungarian practice of the European Investigation Order (EIO), a mutual-recognition-based instrument. After an initial introduction of the principle of mutual recognition and its significance in the field of judicial cooperation in criminal matters the presentation starts to examine the quality of the Hungarian implementation of the EIO directive with a specific focus on questions of jurisdiction.

Three points of interests were identified which are of great significance regarding the Hungarian implementing act and the practice in applying the legal instrument: which are the issuing and executing authorities according to the Hungarian act on international criminal cooperation between EU member states, the characteristics of EIOs issued during a two-year period from when the implementing act took effect (22nd May 2017) until the end of 2018 and last but not least questions of admissibility of evidence gathered by EIOs.

The presentation starts the analyses with an overview of the four-tier system of the Hungarian prosecutor's office in order to facilitate the understanding of the concept of issuing and executing authorities in Hungary. It proceeds to explain that Hungary did not appoint a central receiving authority for EIOs in criminal procedures, however in cases of administrative offences an appointment of such an authority is applied.

Following the review of questions of jurisdiction, the presentation turns to demonstrating a Hungarian study (Farkas, Kármán 2020) which examined 133 cases that involved international criminal cooperation. With the substantial contribution of the study in question the author describes the national characteristics of applying the EIO regime in Hungary in its initial two years of effect. The most important conclusion of the presentation may be that at the beginning the Prosecutor General's office provided technical assistance on issuing the EIOs in order to provide a uniform application of the new legal instrument. Thanks to this effort it can be stated that EIOs are issued and executed in a sufficient manner in Hungary.

Last but not least, the presentation provides the number of instances when a Hungarian prosecutor reached out for legal aid to other Member States for roughly the same period of time. In most cases procedural legal aid was asked through EIOs. It can be stated that with a single exception the necessity for issuing an EIO was the highest in counties located at the border of Hungary.

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THE LEVEL OF HARMONIZATION OF THE CATEGORIES OF OFFENCES LISTED IN ANNEX D OF THE EIO DIRECTIVE AND THEIR CONFORMITY WITH THE PRINCIPLE OF LEGALITY

LARA UNGER
University of Graz, Faculty of Law, Graz, Austria, e-mail: lara.unger@uni-graz.at

Annex D of the EIO Directive[3] contains a list of 32 offences for which the lack of double criminality does not constitute a ground for non-recognition or non-execution if the offence is punishable in the Member State that is issuing the EIO by a custodial sentence or a detention order for a maximum period of at least three years.[4] It is questionable whether the list of offences is in conformity with the principle of legality and the following principle of legal certainty. The ECJ[5] had to

[3] Annex D of the Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1.5.2014, p. 1.
[4] Art 11 para 1 lit g EIO Directive.
[5] ECJ, 3. May 2007, Judgement C-305/05 *Advocaten voor de Wereld VZW*.

deal with this question in the context of the European Arrest Warrant[6] following a reference for a preliminary ruling and concluded that the list of offences does not breach the principle of legality because the definitions of the offences follow from the law of the Member States.

However, this ECJ decision overlooks several problem areas. The first is that a lack of a clear normative content provided by the EU can lead to varying legal definitions of offences in the member states that differ to such extent, that there is no clear legal definition of the offence at all. This can be seen with regards to the listed offences "Murder and grievous bodily injury" or "Illicit trafficking in weapons, munitions and explosives". Another problem area is that some of the listed offences are so broad that it is even unclear which national offences should be considered when trying to find a corresponding definition. This is evident with regards to the offences "Computer-related Crime" and "Counterfeiting and piracy of products". The biggest problem is that due to a lack of harmonization and especially an obligation to criminalize certain offences for the Member States in EU law, some of the mentioned offences might not be punishable in the criminal law of some Member States. This problem can be clearly seen when you look at some of the trafficking offences for example at the offence "Illicit trafficking in cultural goods, including antiques and works of art."

The list of offences causes a great potential for uncertainty for judges, prosecutors and suspects. Therefore, clear legal definitions of each categorically listed offence should be regulated in EU legislation.

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[6] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), OJ L 190, 18.7.2002, p. 1.

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European Investigation Order in Croatia – Normative Framework and Practical Challenges

Elizabeta Ivičević Karas, Zoran Burić, Marin Bonačić &
Aleksandar Maršavelski

University of Zagreb, Faculty of Law, Zagreb, Croatia. E-mail: elizabeta.ivicevic@pravo.hr, zoran.buric@pravo.hr, marin.bonacic@pravo.hr, aleksandar.marsavelski@pravo.hr

This paper presents the National report on legal implementation and practical application of the EIO in Croatia. Croatia transposed the provisions of the Directive with the Amendments of the Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union, which were adopted and entered into force in October 2017. This means that Croatia was almost five months late with the transposition. In Croatia, the issuing authority can be a court or a state attorney's office that is undertaking the proceedings in the concrete case in which an EIO is needed. In cases of misdemeanour proceedings, the competent misdemeanour court shall issue an EIO upon the proposal of the administrative authority that is undertaking the misdemeanour proceedings. The competent executing authority in Croatia is the county state attorney's office that exercises the local jurisdiction in the place in which the evidence proceedings need to take place or where the evidence needs to be collected. The Ministry of Justice is the central authority for providing

assistance to domestic competent authorities and competent authorities of other member states in establishing contacts and judicial cooperation. Legal analysis showed that the provisions of the Directive were satisfactorily transposed into Croatian law.

The interviews with the state attorney's deputies showed that if the state attorney's office is the issuing authority, the EIOs are normally issued during the investigation (or the simplified investigation) stage of the proceedings. Sometimes they are also issued during the inquiries (preliminary investigation) into the criminal offence. Although state attorney's deputies are familiar with the Framework Decision 2006/960/JHA, it is not considered as an equivalent to the EIO, because they believe that the former is more appropriate for police cooperation. They did encounter problems with the EIO form and information contained in it, but these problems are normally solved through direct communication with the issuing authority. Problems with the EIO form are normally not used as a reason to refuse to execute an EIO. They mostly consider that the deadline for the execution of the EIO is appropriate. E-mail is normally used as a means of communication in EIO cases. Postal service is also used. They generally find the European Judicial Network as a necessary mechanism for the functioning of judicial cooperation in criminal matters. In practice, specific formalities are normally requested and executed and there are no practical problems with them, even if they are requested for tactical reasons. With regard to proportionality and fundamental rights as a ground for refusal, the interviews showed that state attorney's deputies have very limited experience with them and that they are normally not used as a ground for refusal of cooperation. All the state attorneys who work as an executing authority responded that they would not execute a measure that does not exist in Croatian legal system (for example the use of Trojan virus), but they would execute the measure which is the most similar to the requested one. A little more than half of them had experiences with the video conferences as a tool for cross-border gathering of evidence, and they pointed out two problems that occur in practice: the incompatibility of equipment in the Republic of Croatia and the issuing state and different interpretation of two acts in collision on who should conduct the video conference. None of the state attorneys has the experience with the EIO where no assistance of the executing state is necessary, but they have received a few of such requests. The majority of them did not encounter any issues as regards double criminality, but the issue has arisen regarding the crimes that are under domestic

legislation misdemeanors or are not prosecuted *ex officio*. The majority would refuse the EIO that is obviously intended for non-evidentiary purposes, but some of them would contact the issuing state before refusal. In regards to the use of evidence transferred under an EIO for other purposes (in other procedures not specified in the EIO – speciality rule), the state attorneys gave different responses, but the majority of them thinks it is allowed. There is no clear practice regarding the check whether the issuing authority has a status of a judicial authority. The majority of the state attorneys would, as the issuing authority, request a court order when sending an EIO if the order is necessary for a certain measure in Croatian legal system and most of them would, as an executing authority, request such order before executing the EIO. Regarding the problems specific to digital evidence, the majority responded that they encountered no problems. The Croatian legal system provides for data retention, so there are no problems in that regard either. None of them has encountered cases in which a suspect, defendant, or accused would use legal remedies related to EIO and cannot recollect such cases in practice.

According to our analysis of the interviews with Croatian judges, they mostly use EIO in the trial phase, with the exception of judges of investigation who can use it in the investigative phase of the proceedings. None of them have practical experience with the Framework Decision 2006/960/JHA on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union. Furthermore, none of the judges reported problems with the EIO form, regardless whether while acting as issuing or executing authority. Most judges responded they would invoke the *ne bis in idem* non-recognition ground for refusing to execute EIO. All judges responded that the EIO time-frame is appropriate as these proceedings are dealt with urgency and electronic communication is available and all of them have used the electronic version of the EIO form. None of the judges reported confidentiality requirement was used in practice (although it is available under the law). The analysis of interviews conducted with judges also showed that proportionality and invoking fundamental rights are not used as a non-recognition ground in practice, nor is double criminality. Judges do not have experience with EIO issued for an investigative measure that would be conducted in the executing state with no assistance of the executing state. Interviewed judges held that the EIO should only be used for evidentiary purposes and, generally, according to speciality rule. As concerns checking whether the issuing authority has the status of a judicial authority, interviewed judges gave rather diverse

answers indicating that the practice with that regard is not uniform. If in Croatian system a court order is necessary for a certain measure, judges, acting as issuing authority, would in general request such an order when sending an EIO. The interviews showed that there are no specific problems related to digital evidence. None of the six interviewed judges encountered cases in which a suspect, defendant, or accused would use legal remedies related to EIO. Finally, an example of good practice is the case mentioned by one of the Croatian judges who managed to examine a second witness in Germany based on the EIO issued for his wife whom he accompanied during her testimony via audio-video link. The Croatian judge requested the examination only orally and German authorities allowed the husband to be examined without further formalities to make the process more efficient.

Acknowledgments

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THE SLOVENE EIO-LAPD NATIONAL REPORT AND GATHERING OF DATA FROM PRACTITIONERS

JAN STAJNKO[1] & TAMARA DUGAR[2]

[1] University of Maribor, Faculty of Law, Maribor, Slovenia. E-mail: jan.stajnko@um.si
[2] Republic of Slovenia, Higher Court of Maribor, Maribor, Slovenia. E-mail: tamara.dugar@gmail.com

The presentation focused mainly on the results of the Slovene EIO-LAPD national report. Regarding the methodology of the report on practical application of the European investigation order, it was emphasized that most practitioners were interviewed in person, in one-on-one interviews. Interviews typically lasted from 1 to 2 hours, depending on the interviewees' depth of knowledge and the extent of experience with the EIO. Most interviews were first recorded (with explicit consent of interviewees) before being transcribed into a written form. The written transcriptions formed a fundament for the national report on practical application.

Interviews with practitioners left no doubt that the EIO is regularly used in criminal legal proceedings with a cross-border element. We nonetheless emphasized some peculiarities and issues which were found during our research:

- Most practitioners agreed that the EIO form is usable. There were, however, many complaints that the form is somewhat awkward and could use some improvement. Arguments of practitioners were sound, which indicates that the form could be improved.
- Practitioners were not unanimous regarding the question of whether or not they would use the *ne bis in idem* ground for refusal to execute an EIO if the procedure was stopped at the investigation phase of the criminal proceeding. Many legal practitioners were visibly nervous or unsure of how to answer this question.
- Time-frames for the execution of the EIO were often criticised by the practitioners for being too short. They also indicated that in certain MS, deadlines are systematically not respected.
- Most practitioners had encountered issues regarding double criminality, especially in cases where a certain offence is considered a criminal offence in Slovenia, but a misdemeanour in executing MS and vice versa.
- Practitioners usually do not use safe communication channels when dealing with the EIO, which presents a problem, since the shared information is of sensitive nature.

Interview with the attorney further revealed that:

- The EIO is sometimes used by the issuing authorities in a peculiar way – for example to ask the "executing" authority of the way their police officers gathered evidence and if it was obtained legally in their respective Member States.
- The lack of regulation on how the EIO should be used by the defence is an issue and contributes to the lack of practical application of the EIO Directive.

Some surprising facts gathered during the legal research (cabinet work) phase include the following:

- Higher national constitutional standards on fundamental rights can be used under the grounds for refusal clause because Slovenia explicitly added fundamental principles of its legal order to the formulation.
- Slovene legal system does not provide a specific legal remedy for EIO – either during the issuing or during the execution procedure. Instead, general rules on inadmissibility and exclusion of evidence in the criminal procedure can be used by the defence.
- Slovenia always accepts EIOs in English language, even in cases of non-urgent requests.
- There are unofficial incentives to extend the possibility to issue an EIO in proceedings conducted by the Commission for the Prevention of Corruption and parliamentary investigative commissions. As things stand, however, EIO's can only be issued on criminal and misdemeanour proceedings.

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EIO in Portugal – Legal Analysis and Practical Dilemmas

Mário Simões Barata
Polytechnic of Leiria and Portucalense University, Portucalense Institute for Legal Research (IJP-IP Leiria), Oporto, Portugal.
E-mail: mario.barata@ipleiria.pt

This presentation aims to analyse the Portuguese legislative act (i.e., Law nº 88/2017) that transposed Directive 2014/41/EU regarding the European Investigation Order (EIO) as well as the practical dilemmas associated with this novel mechanism. The implementing legislation regulates the types of proceedings/cases where an EIO may be issued and the specific conditions relative to the issuing and validation of this instrument. In general, an EIO can be issued by the national judicial authority that is in charge of the specific phase of the penal procedure. It is directly transmitted by the issuing authority to the executing authority. The law states that the executing authority recognizes without any additional formalities the EIO issued and transmitted by the competent authority of another Member State and guarantees its execution based on the principle of mutual recognition in the conditions that are applicable to the investigative measure if it would have been ordered by a national authority. The law also establishes the rules regarding the competence to recognize an EIO which lies with the national judiciary authority. In Portugal, an EIO is executed by the national judicial authority that has the competence to order the

investigative measure in Portuguese territory. The Portuguese legislator applied all the non-recognition or non-execution grounds that are stated in the EIO Directive. Lastly, the executing authority transfers the evidence collected or in its possession to the competent authorities of the issuing State after it has been obtained.

The report also considers the practical dilemmas from the point of view of the practitioners in Portugal. The Public Prosecution Office replied that the EIO is especially used in the court/ prosecutor investigation phase and they had never encountered problems with the EIO form as an issuing authority. Some magistrates make use of the possibility that additional formalities may be requested from executing authorities when executing the EIO. Generally, magistrates do not provide a justification for not revealing a measure to the suspect. The Public Prosecution uses the electronic forms and consult the EJN webpage and considers that the timeframe for the recognition and execution of an EIO is adequate. They have not encountered difficulties with the EIO form in the execution phase either. The research team also received several replies from attorneys in Portugal. These indicate that there is a limited experience with the issuing of an EIO and challenging the evidence collected in its framework. Attorneys stated that they could challenge an EIO in the issuing, recognition, and execution phases. However, a European definition of proportionality and rules regarding the automatic exclusion of evidence are needed. Finally, some attorneys expressed difficulties with the use of video conference as a tool for cross border gathering of evidence.

In conclusion, judicial and police entities that have to deal with the various phases of an EIO in Portugal have not provided criticisms that call for any major/significant legislative alterations. However, some attorneys have expressed a need for the definition and clarification of particular aspects of the EIO at the European level.

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EUROPEAN INVENSTIGATION ORDER IN PRACTICE - A PROSECUTOR'S PERSPECTIVE (CROATIA)

NATALIJA SLAVICA
Republic of Croatia, County State's Attorney's Office Zagreb, Zagreb, Croatia.
E-mail: natalija.slavica@zdozg.dorh.hr.

The previous presentations showed that the European Investigation Order (EIO), as an instrument of judicial cooperation following the implementation of the European Arrest Warrant (EAW), resulted in another major change with regard to effective and improved international legal assistance.

We all testify that by implementing the European Investigation Order in its legal system, the European Union, as an area of security, justice and freedom, raised the principle of mutual recognition and trust to the highest level.

I would like to briefly present to you my experiences in the implementation of the European Investigation Order from the perspective of a State Attorney working for the biggest County State Attorney's Office in the Republic of Croatia. In these challenging and "fast" times, where "time" has become a very precious category, any

change that relieves us from unnecessary correspondence, paperwork and, consequently, unnecessary loss of time, is always a welcome change.

In October of 2017, the Republic of Croatia implemented Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters in its Act on Judicial Cooperation in Criminal Matters with Member States of the European Union and the beginning of its application was marked by what could be referred to, as initial obstacles that always accompany each major and significant novelty in life and otherwise.

This most commonly involved the confusion or equalization of the European Investigation Order/Freezing Orders/European Arrest Warrant purposes, however, but at that time and in the following years a number of workshops, consultations and e-courses were held within the Judicial Academy, where prosecutors, judges and court counsellors/state attorneys caunsellors had an opportunity to learn all about this novelty that has eventually proved to facilitate our work on international cases.

It is imortant to emphasize that EIO has replaced all traditional forms of international legal assistance except:

- setting of a Joint investigation team and gathering the evidence within such team
- service of procedural documents
- -transfer of criminal proceedings and spontaneous exchange of information (applicable bilateral agreements and Art 21 of MLA 1959 Convention shall be applied)
- freezing /seizure for the purpose of the confiscation (this measure is covered by the freezing order)
- exchange of criminal records (this measure is covered by FD on ECRIS)
- cross border surveillance as a type of police cooperation defined by the Article 41 of the SIS Convention
- other specific police and custom cooperation measures

It's important to make difference between cases when the judicial authority in Republic of Croatia issue or execute EIO.

The competent authorities in Republic of Croatia to issue an EIO are:

- Municipal and County State Attorney's Offices
- Municipal Courts and County Courts
- Misdemeanour Courts.

The authority competent to receive an EIO is County State Attorney's Office depending on the area of execution of requested investigative measure or depending on the area where an evidence is located.

Furthermore, County State Attorney's office is competent to recognize and execute EIO but there is no formal decision about recognition. If the order is issued for the purpose of conducting an investigative measure which, according to the Criminal Procedure Code, may be carried out by the State Attorney's Office, the same shall be carried out by the County State's Attorney's Office which received the order or the EIO can be assign to another office. In some cases CSA will send the request to investigating judge to issue a decision ordering some measure.

For the purpose of carrying out an investigative measure supervision of telecommunications when the subject of supervision is located on territory of the Republic of Croatia but the Republic of Croatia doesn't provide technical assistance to carry out the supervision (Article 31 of the Directive), the competent authority for receiving notifications regarding supervision (Annex C) is County Court in Zagreb.

Taking into account the total number of EIO that are in the work of my office each year, it may be said that we execute many more EIOs than we issue, which I believe is also the case in the rest of the country. This trend has persisted for years now and we assume the reason for it lies in the size of Croatia's population, which is smaller compared to the rest of the EU Member States, but also because for the time being we do not receive a large number of cases where material or personal evidence is located in European Union Member States. On the other hand, the specialized State

Attorney's Office for the fight against Corruption and Organized Crime, over these three years, records a continuous increase in the number of cases in which it issued a European investigation order, mainly to obtain certain bank data and transactions, telecommunication data etc.

As regards the EIO's upsides, we have so far detected several:

- efficiency and speed in the process of exchanging and gathering evidence, which has accelerated our work on cases and helped us take relevant decisions more quickly and easily;
- direct contact between judicial authorities in delivering orders and providing further explanations, which additionally accelerates the process;
- unified forms that allow practitioners to focus on important information and facts;
- quick and efficient work and coordination between several judicial authorities in several Member States regarding events transpiring in real time and requiring cooperation with police departments of several countries (controlled transfer and delivery of items relating to criminal offences, apartment and house searches, seizure of property, secret surveillance and technical recording of persons, surveillance and technical recording of telephone conversations, etc.);
- full support and assistance from EUROJUST (via National Members and through participation in coordination meetings in Den Haag) and the European Judicial Network (EJN), as well as the Contact Points/National points that are always available for resolving all kinds of issues concerning the implementation of the EIO.

I have chosen to highlight a case concerning a serious traffic accident in Zagreb, where the vehicle that caused the accident had installed in its airbag module an Event Data Recorder (something like the black box on an airplane) which the Croatian court expert witness was unable to open or read, so it had to be provided to the experts at the factory in Germany where the vehicle was manufactured. Thanks to excellent cooperation between the Croatian and German police departments and colleague in Prosecutor's office in Munich and assistance from Croatia's EUROJUST National Member, very soon after an EIO was issued and the item was transferred to the factory in Germany, the necessary data were downloaded from the

device and all information required for the further course of the criminal proceedings in the Republic of Croatia was thus obtained. This took around two months – I am quite sure the standard international legal assistance procedure would have been much lengthier.

I will in this context highlight the good practices implemented by some judicial authorities, which provide within the EIO or in a separate supplement the relevant provisions of their procedural regulations/warnings that need to be presented to the suspect/witness, so that the record of their hearing could constitute admissible evidence in the EIO issuing Member State, or provide a list of questions including the relevant documentation, which may be presented to persons during their hearing. The latter is very useful, facilitates order execution, and ultimately allows obtaining good evidence for further investigation.

As regards the structure of criminal offences in cases for which European Investigation Orders were issued/executed fraud, embezzlement, money laundering, and illicit trafficking in narcotic drugs and psychotropic substances are the most common ones, followed by tax evasion, computer-related crime, forgery of documents, etc.

Most often, a European investigation order for evidence gathering purposes requires obtaining bank data on the account holder and the performed transactions,hearing witness, suspected person, victim, obtaining informations or evidence which is already in the possession of the executing authority and informations contained in databases held by police or judicial authorities, identification of persons holding a subscription of a specified phone number or IP address and, less commonly hearing by videoconference, searches of homes and other premises, safety deposit boxes and cars, surveillance and technical recording of telephone conversations and other remote communication (wiretapping),etc..

On the other hand,it has been noticed:

- that one EIO normally requires several investigative measures, but also that supplements and new orders are subsequently delivered in connection with that same case, which means that almost an entire investigation is completed for a judicial authority of a Member State and we also sometimes received

a European Arrest Warrant against the same person after executing the relevant EIO.

- It has also been noted that some Member States competent authority do not provide an entirely completed European Investigation Order form but extract the sections they consider to be relevant and have them translated into Croatian
- that EIOs are delivered without a translation into Croatian or are received translated into English without any need for urgent action (it is most likely easier to find a translator for English and we never receive the order in Croatian later),
- that EIOs are often received without the required orders from the competent judicial authority of the issuing Member State, which delays the whole process.
- we also noticed a large number of EIO with deficient factual descriptions of the offence
- there are also certain doubts regarding EIOs which *de facto* require police investigations and issuance of authorizations (consents) to process GPS data showing the movements of the accused person's vehicle where the GPS device was installed in the vehicle in the EIO issuing Member State, but there are no legal grounds to give such consent in Croatia.
- In addition, some EIOs requiring cross-border surveillance of a suspect as a form of police cooperation defined in Article 41 of the Convention implementing the Schengen Agreement were acted on, which is specifically excluded from the scope of the European Investigation Order. This indicates a lack of harmonization between procedural legislations of EU Member States, which may in certain situations create problems regarding the quality and lawfulness of the evidence gathered.

Furthermore, our state attorney´s office started to receive EIOs issued by one judicial authorities for the purpose of obtaining the judgments/ convictions but obtaining of judgments /convictions cannot be considered as investigative measure, nor as obtaining of information or evidence that is already in the possession of the executing authority. So, the EIO cannot be issued for that purpose. The judgments can be obtained by the MLA requests.

In the concrete case our County State Attorney´s Office in Zagreb refused to execute the EIO due to the above mentioned reasons and we suggested to the competent judicial authority the issuance of the MLA request.

In conclusion, we could continue discussing the EIO for hours – there are numerous good and less than good examples of judicial cooperation pursued through this instrument. This project is certainly an opportunity to promote the purpose and objective of implementing the EIO and I do hope my presentation has helped achieve this.

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RIGHTS OF THE DEFENCE AND THE EUROPEAN INVESTIGATION ORDER (SLIDES)

NICOLA CANESTRINI
CanestriniLex, Rovereto, Italy. E-mail: nicola.canestrini@canestrinilex.com

Fundamental rights are a cornerstone of democracies and EU constitutional systems; human rights are a fundamental value of the European Union; same fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of EU law; the Charter of Fundamental Rights of the European Union became part of binding primary EU law over a decade ago. Nonetheless judicial cooperation in criminal matters and mutual recognition can fail on fundamental rights protection. Even if an explicit refusal ground based on fundamental rights appears in only Directive 2014/41/EU regarding the European Investigation Order, ECJ's 2016 landmark Aranyosi and Căldăraru judgment pointed out a new roadmap for fundamental rights defense. It's our duty as criminal defense attorneys to make sure that the EU legal HR framework guarantees not rights that are theoretical or illusory but rights that are practical and effective.

"International criminal law enforcement needs cannot prejudice fundamental rights"
Italian Constitutional court, judgement 280/1985

"Constitutions are chains with which men bind themselves in their sane moments that they may not die by a suicidal hand in the day of their frenzy."
John Potter Stockton, 1871

Area of Freedom, justice and security post Tampere 1999

- Mutual recognition – trust – rights;
- The rights of individuals in criminal procedure (Art. 82 TFEU);
- Fundamental rights

EU and fundamental rights?

- Art. 2/6 Treaty of the European Union;
- 53 Charta Fundamental Rights.

Why EU procedural rights?

Although all the Member States are party to the ECHR, experience has shown that that alone does not always provide a sufficient degree of trust in the criminal justice systems of other Member States.

(considerandum n. 6 dir. 64; considerando n. 7 dir. 13; considerando n. 5 dir. 48)

"Strengthening mutual trust requires a more consistent implementation of the rights and guarantees set out in Article 6 of the ECHR. It also requires, by means of this Directive and other measures, further development within the Union of the minimum standards set out in the ECHR and the Charter."

"Not rights that are theoretical or illusory but rights that are practical and effective."

ECtHR, Artico v Italy judgement (1980)

Fundamental rights in EU mutual recognition instruments: EAW

- Aranyosi Caldararu c-404/15 (2016) and developments;
- Poltorak case c-452/16 (2016);
- Opinion 2/13 accession EU to ECHR

Fundamental rights in EU mutual recognition instruments: EIO

- Refusal ground of potential violation of fundamental rights (11.1 (f);
- A and Others c-584/19 (2020) – Issuing authority
- Legal remedies?

Blind trust? EAW experience

(EAW FD, 10)

The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union, determined by the Council (..)

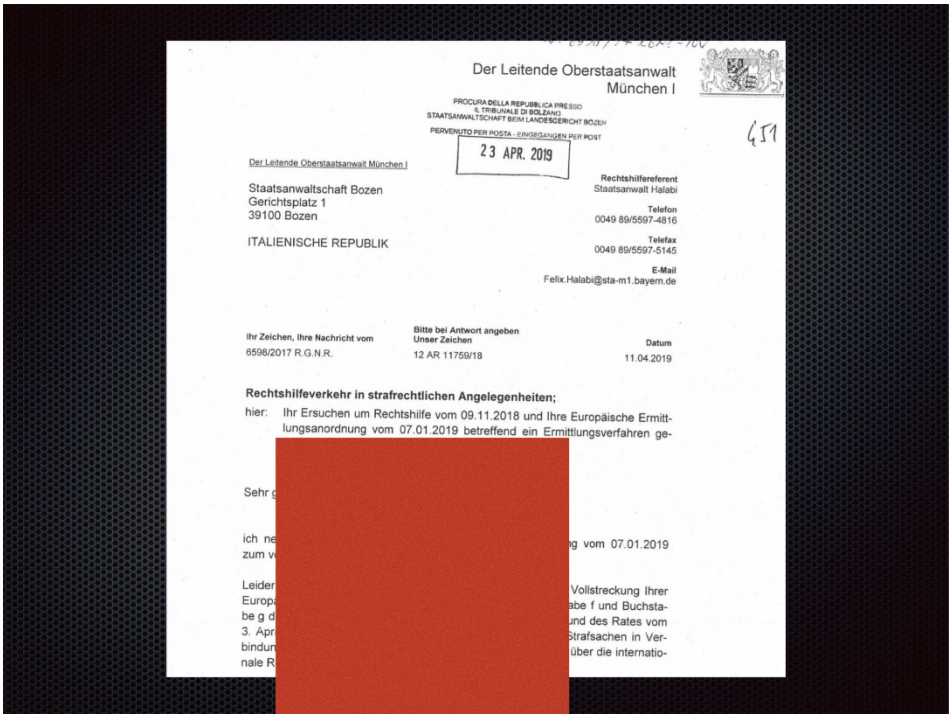
The creation of an area of freedom, security and justice within the Union is based on mutual confidence and a presumption of compliance by other Member States with Union law and, in particular, with fundamental rights. However, that presumption is rebuttable. Consequently, if there are substantial grounds for believing that the execution of an investigative measure indicated in the EIO would result in a breach of a fundamental right of the person concerned and that the executing State would disregard its obligations concerning the protection of fundamental rights recognised in the Charter, the execution of the EIO should be refused.

EIO DIRECTIVE 2014/41 (cons. 19)

EIO .. from blind trust to distrust?

- Fundamental rights protection -> "rebuttable" presumption of compliance of member states with fundamental rights (§ 19);
- Primacy of EU law -> BUT protection of national constitution's principles;
- proportionality principle (double check) -> specificity of national systems.

National Courts?


Der Leitende Oberstaatsanwalt
München I

PROCURA DELLA REPUBBLICA PRESSO
IL TRIBUNALE DI BOLZANO
STAATSANWALTSCHAFT BEIM LANDESGERICHT BOZEN
PERVENUTO PER POSTA - EINGEGANGEN PER POST
23 APR. 2019

Der Leitende Oberstaatsanwalt München I

Staatsanwaltschaft Bozen
Gerichtsplatz 1
39100 Bozen

ITALIENISCHE REPUBLIK

Rechtshilfereferent
Staatsanwalt Halabi

Telefon
0049 89/5597-4816

Telefax
0049 89/5597-5145

E-Mail
Felix.Halabi@sta-m1.bayern.de

Ihr Zeichen, Ihre Nachricht vom	Bitte bei Antwort angeben Unser Zeichen	Datum
6598/2017 R.G.N.R.	12 AR 11759/18	11.04.2019

Rechtshilfeverkehr in strafrechtlichen Angelegenheiten;
hier: Ihr Ersuchen um Rechtshilfe vom 09.11.2018 und Ihre Europäische Ermittlungsanordnung vom 07.01.2019 betreffend ein Ermittlungsverfahren ge-

Sehr g

ich ne ng vom 07.01.2019
zum v

Leider Vollstreckung Ihrer
Europ abe f und Buchsta-
be g d und des Rates vom
3. Apr Strafsachen in Ver-
bindun über die internatio-
nale R

Figure 1: EIO Legal Remedies in practice. Source: own.

"Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety."

Benjamin Franklin, 1755

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INTERCEPTION OF TELECOMMUNICATIONS - STRENGTHS AND WEAKNESSES OF THE EUROPEAN INVESTIGATION ORDER DIRECTIVE (SLIDES)

OSCAR CALAVITA
University of Turin, Law Department, Turin, Italy. E-mail: oscar.calavita@unito.it

Legal Basis

- EU Countries except Denmark and Ireland: Articles 30-31 Directive 2014/41/EU;
- Denmark and Ireland: Articles 17-22 Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union ("Strasbourg Convention").

Technical aspects of EU Interceptions

- With technical assistance of the requested Member State (MS);
- Witout technical assistance of the requested Member State (MS).

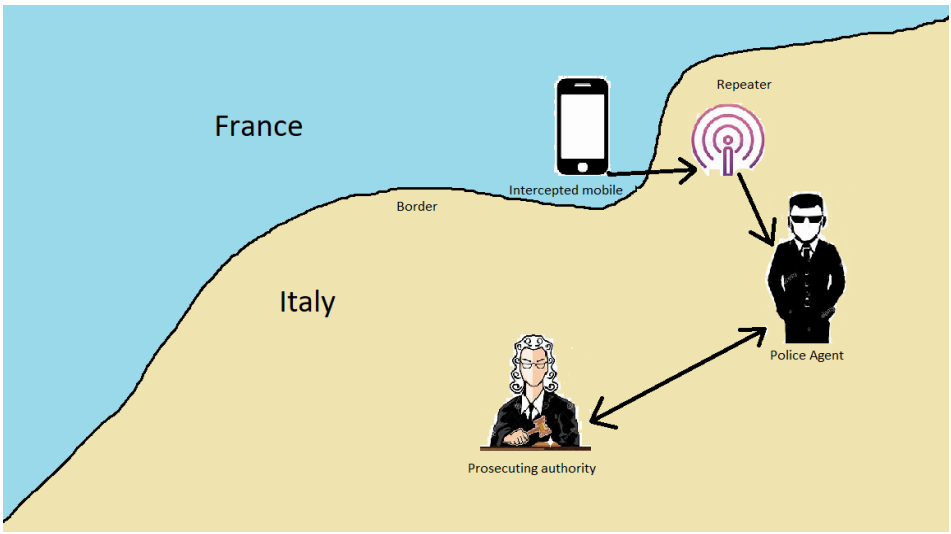

Figure 1: «CASE A.1» (without technical assistance)
Source: own.

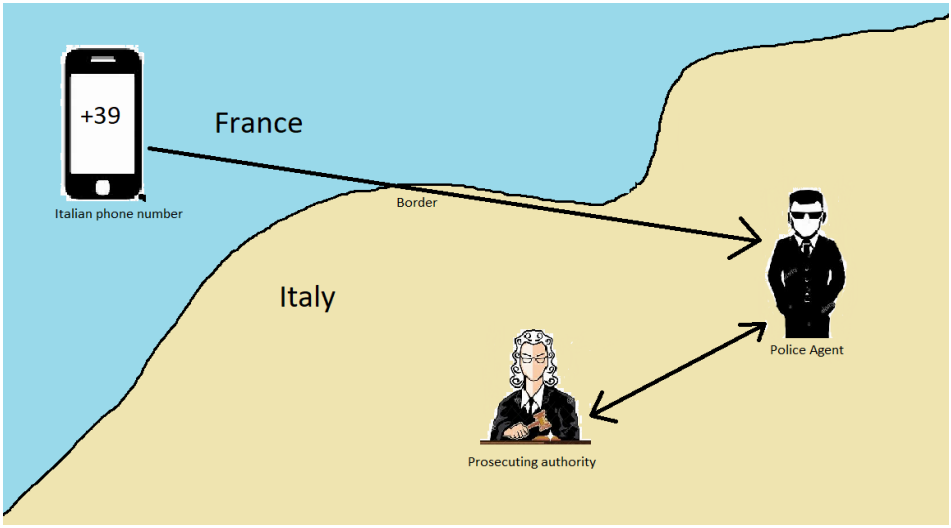

Figure 2: «CASE A.2» (with technical assistance)
Source: own.

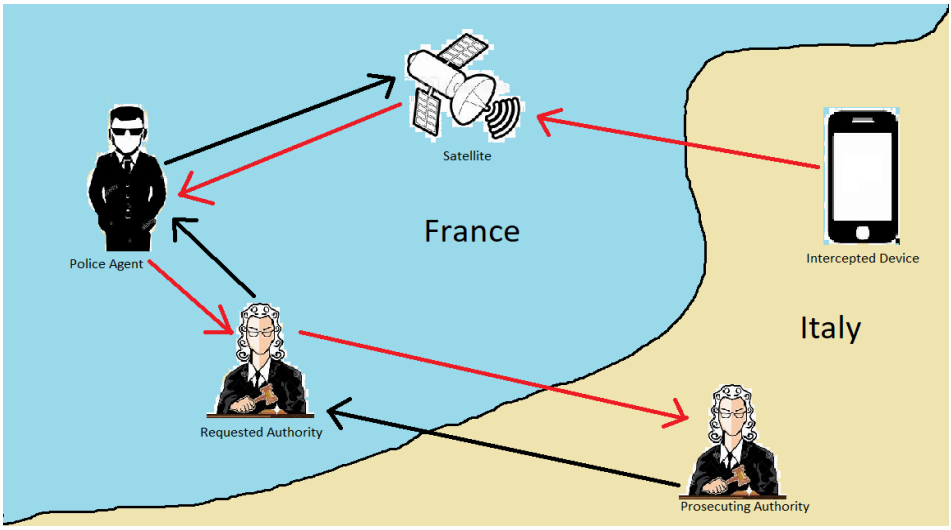

Figure 3: «CASE B» (with technical assistance)
Source: own.

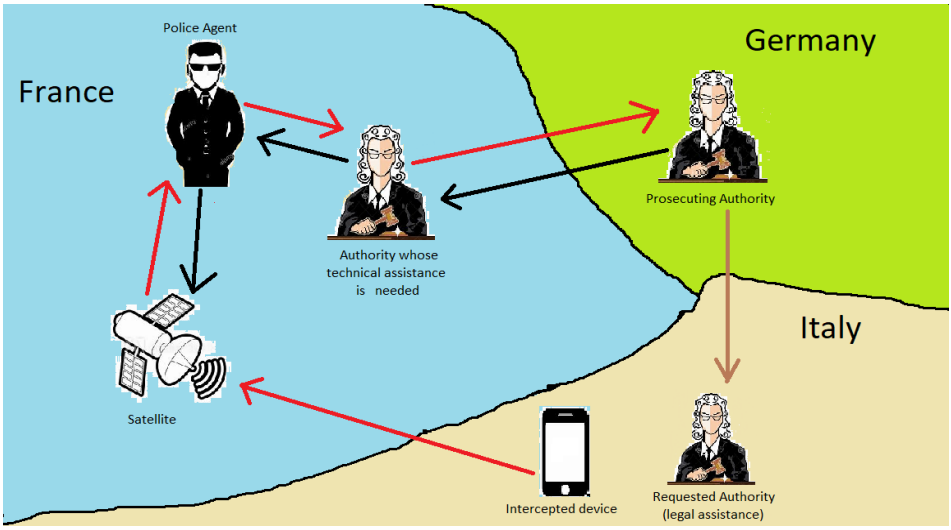

Figure 4: «CASE C» (with technical and legal assistance)
Source: own.

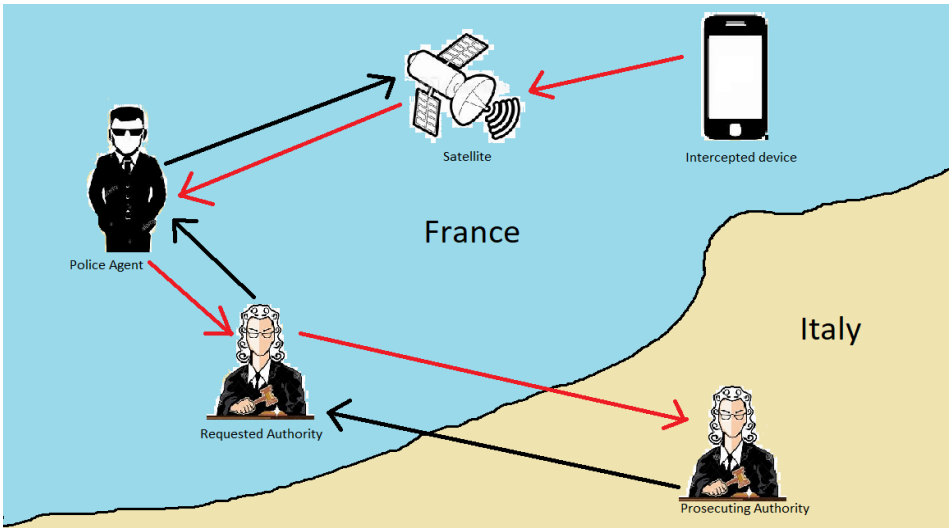

Figure 5: «CASE D» (with technical assistance)
Source: own.

Solution

- Without technical assistance (art. 31): notification to the competent MS;
- With technical assistance (art. 30): notification to the competent MS.

General content of an EIO (art. 5)

a) data about the issuing authority and, where applicable, the validating authority;
b) object of and reasons for the EIO;
c) necessary information available on the person(s) concerned;
d) description of the criminal act, which is the subject of the investigation or proceedings, and the applicable provisions of the criminal law of the issuing State;
e) description of the criminal act, which is the subject of the investigation or proceedings, and the applicable provisions of the criminal law of the issuing State.

Specific content of an interceptive EIO (art. 30)

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

Desired duration of the interception

- State A: X days;
- State B: Y days.

- State A: 30 days -> State B 30 days = OK;
- State A: 30 days -> State B: 45 days = OK;
- State A: 4 months -> State B: 15 days = ?

- Art. 11(1)(f) - recognition or execution of an EIO may be refused in the executing State where -> there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter -> NO duration -> 

- Art. 30(5) - The execution of an EIO may also be refused where the investigative measure *would not have been authorised* in a similar domestic case + Art. 10(1)(b) - Recourse to a different investigative measure if it *would not be available* in a similar domestic case -> **?**

- Measure not available -> does exist in the executing MS -> Not permitted in the executing MS
- Duration - Art. 35 -> International courtesy before refusal

- No indication of the duration -> 
- Duration > in the issuing MS than in the executing MS -> International courtesy -> either  or OK

- Duration < or = in the issuing MS than/and in the executing MS -> OK

Transmission of the interception results

- Direct;
- Indirect.

Notion of «interception of telecommunications»

1) Private conversation;
2) Third parties;
3) Contextuality.

Telecommunications

- Cambridge Dictionary: the sending and receiving of messages over distance, especially by phone, radio and television.
- Oxford Dictionary: the technology of sending signals, images and messages over long distances by radio, phone, television, satellite, etc.

Telecommunications and audio-surveillance

- Art. 30-31 –> 
- Art. 28 –> OK

Telecommunications and Trojan horse

- Art. 30-31 -> OK -> Look at national law of MS

Acknowledgments

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CONFERENCE EUROPEAN INVESTIGATION ORDER: PRACTICAL DILEMMAS AND THEORETICAL CONSIDERATIONS BOOK OF EXTENDED ABSTRACTS, 8. & 9. DECEMBER 2020

JAN STAJNKO,[1] MIHA ŠEPEC[1] & ISTVÁN SZIJÁRTÓ[2]

[1] University of Maribor, Faculty of Law , Maribor, Slovenia.
E-mail: jan.stajnko@um.si, miha.sepec@um.si
[2] University of Pécs, Faculty of Law, Pécs, Hungary.
E-mail: szijarto.istvan@ajk.pte.hu

Abstract This publication contains abstracts of contributions presented at the conference "European Investigation Order – Practical Dilemmas and Theoretical Considerations", which was held online on 8th and 9th of December 2020. Practitioners and academics from multiple EU Member States shared best practices and identified key shortcomings of the European Investigation Order. The event was executed as an integral part of the EU JUST project "European Investigation Order – Legal Analysis and Practical Dilemmas (EIP-LAPD)", coordinated by the University of Maribor. The structure of the publication roughly follows the agenda of the conference. In the first part the future of mutual recognition and judicial cooperation in criminal matters in the EU is addressed. The second part is more closely focused at the European Investigation Order. Some theoretical dilemmas as well as practical considerations are presented. Lastly, some national reports which were drafted as a key deliverable of the EIO-LAPD project are also outlined.

Keywords: European criminal law, EU, cross-border, evidence, gathering

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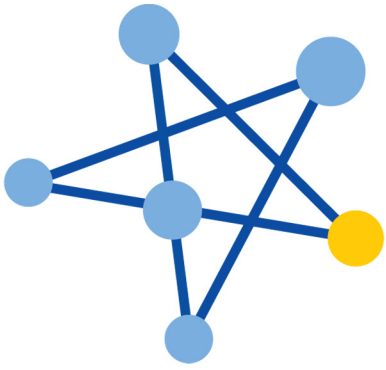

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