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Delegations will find attached a report of the meeting on the European Investigation Order that was organized by Eurojust on 19 and 20 September 2018 in The Hague.

Eurojust meeting on the European investigation order

The Hague, 19–20 September 2018

Outcome Report

Executive summary

On 19-20 September 2018, Eurojust organised a meeting on the European Investigation Order. Practitioners from the EU Member States as well as representatives from EU institutions and academia met at Eurojust in plenary sessions and workshops to discuss potential problems and challenges related to the functioning of the EIO. The meeting provided a forum for practitioners to identify several practical and legal issues in the application of the EIO, to exchange experience and best practice and to discuss how Eurojust and EJN can further support the national authorities. Participants discussed inter alia the scope of the EIO, the competent authorities involved, the content, form and language of the EIO, the issuing and transmission of an EIO, the grounds for non-recognition, the possible recourse to another investigative measure, time limits, urgent requests, costs, the applicability (or not) of the speciality rule, the use of specific investigative measures and the use of EIOs vis-à-vis other co-existing legal instruments. The outcome report indicates that a vast majority of participants very much welcome the EIO regime and see it as a step forward in the area of cross-border evidence-gathering. Participants acknowledged the need to interpret national law in light of EU law and particularly in line with the principles of mutual recognition and mutual trust, but also underlined the challenge of constantly searching for legally sound and practically feasible solutions between different national legal systems. Practitioners agreed on the importance of an overall pragmatic and flexible approach. Participants' views diverged on some topics (e.g. rule of speciality, cost issues in the context of proportionality test, bugging of a car) but coincided on many other topics. Recommendations suggested relate inter alia to the scope of the EIO, the use of Forms A, B and C, the language regime and time limits. With regard to the role of Eurojust, participants envisaged that the support and involvement of Eurojust in relation to EIOs will be at least the same, but probably higher, when compared to the MLA regime, as more consultations are foreseen in the EIO Directive. Whilst "direct contact" amongst judicial authorities is the core principle of the EIO DIR, participants strongly believed that Eurojust's bridge-making role can facilitate communication between the judicial authorities involved in a bilateral case if one of the consultation procedures is triggered and that, moreover, in complex multilateral cases Eurojust has a unique and important coordinating role.

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I. Introduction

The Eurojust Meeting on the European Investigation Order (hereinafter "the meeting") was organised by Eurojust in The Hague on 19-20 September 2018. Practitioners from all over the European Union, as well as Eurojust College Members and staff, representatives from the Council, Commission and academia, met at Eurojust in plenary sessions and workshops to discuss in-depth the functioning of the Directive regarding the European Investigation Order (hereinafter "the EIO DIR").

The meeting provided a forum for practitioners to discuss several practical and legal issues related to the application of the EIO DIR and to exchange experiences and best practices. The meeting focused on topics that had been selected on the basis of Eurojust's casework, a Eurojust College Thematic Discussion held on 3 July 2018 and questions suggested by participants prior to the meeting. The meeting addressed issues related to the four main phases of the lifecycle of an EIO (the issuing phase, the transmission phase, the recognition phase and the execution phase) as well as issues related to the scope of the EIO DIR and its use vis-à-vis other co-existing legal instruments, the competent authorities, the content, form and language of the EIO and the use of some specific investigative measures. During the meeting, participants also discussed how Eurojust and other EU actors can support national authorities in ensuring an efficient, effective and correct use of this instrument. This outcome report summarises the main issues that were brought forward during the presentations, the discussions and the workshops.

II. Scope of the EIO Directive and its relation to other legal instruments

Participants welcomed the fact of having **one stand-alone legal instrument** covering all types of investigative measures (with the exception of JITs) in the field of evidence-gathering within the EU and considered this a major step forward compared to the former regime. That being said, participants discussed several scenarios where questions were raised as to whether a specific measure falls within **the scope of the EIO DIR** or not and/or whether the use of another legal instrument should take precedence. Participants also argued that, in some cases, the **co-existence of different legal instruments** can complicate judicial cooperation and in such cases it was considered **best practice to use Annex A/Section D to enumerate other instruments used or to be issued**.

Participants discussed **the term "corresponding provisions"** of Article 34(1) EIO DIR and indicated that in some cases the interpretation of this term **remains a point of concern**. During the meeting, it was noted that, in some Member States, the national transposition law includes a list of the measures that fall outside the scope of the EIO DIR, whilst in other Member States soft law tools are being used (e.g. guidelines issued by a general prosecution office). In the absence of a common EU list,[1] it has become clear that in relation to some measures and provisions **different interpretations** exist in the Member States and lead sometimes to frictions. Participants mentioned that they have had cases where they received an MLA request while, in their view, an EIO would have been the appropriate instrument or, *vice versa*, where they received an EIO while, in their view, an MLA request would have been required. Participants noted that in some cases judicial authorities have been reluctant to execute a measure in such a scenario and/or insisted on receiving an additional EIO/MLA request. However, in many cases judicial authorities have been **pragmatic** and have executed an EIO *as if it were* an MLA request or have executed an MLA request *as if it were* an EIO. Participants expressed the **need for further guidance on the meaning of the term "corresponding provisions"** and reflected together on which guiding criteria could be helpful in assessing whether an EIO needs to be issued (or not) in relation to an on-going investigation in the issuing Member State. Participants agreed that the following **criteria** could be helpful in assessing whether the EIO DIR should apply: (i) the order concerns an investigative measure aimed at gathering or using evidence, (ii) the measure was issued or validated by a judicial authority and (iii) the measure relates to Member States bound by the EIO DIR. If one of these requirements does not apply, the EIO DIR would not be the right instrument to use and another legal instrument would need to apply. For instance, if a measure has no "evidence" related implications, but a mere procedural objective (e.g. service and sending of procedural documents), an MLA request, and not an EIO, should be sent.

In some cases, however, EIOs have been issued for **different measures with different aims**, such as, for instance, an EIO for a house search *and* for the delivery of a document. Participants noted that questions had been raised as to whether both measures could be included in a single EIO or whether an additional MLA request would be needed in relation to the delivery of the document. Most participants agreed that in cases where the delivery of a document is **instrumental** to the investigative measure that is the object of the EIO, a flexible approach should be followed to its inclusion in the EIO in line with Article 9(2) EIO DIR. If, however, the delivery of the document is not instrumental, different views exist meaning that in some Member States judicial authorities will execute the EIO while in other Member States they will insist on receiving an additional MLA request.

[1] Apart from Council doc. 14445, there is not (yet) a detailed list available indicating exactly which provisions will be replaced. In 2017, Eurojust and EJN issued a Joint Note, Council doc. 9936/17, which gathers *inter alia* the views of the EJN contact points on the question of which measures they consider would be excluded from the scope of the EIO DIR.

In relation to cases concerning **freezing measures,** it was pointed out that, on some occasions, questions arise regarding the purpose of a freezing measure and particularly whether the requested measure is for evidence-gathering (EIO DIR) or for subsequent confiscation (Framework Decision 2003/577/JHA) (Article 34(2) EIO DIR). While participants agreed that it is, in principle, for the issuing authority to make this assessment and to clarify the purpose of the freezing measure, there have been cases where executing authorities questioned the assessment made by the issuing authority and refused to execute the measure until they received a freezing certificate.

Participants also discussed whether the specific provisions for **certain investigative measures** (Articles 22-31 EIO DIR) have created doubts in relation to **the scope of the EIO DIR**. In relation to Articles 22-30 EIO DIR, no concerns were raised. In relation to Article 28 EIO DIR, most participants believed that the wording of this provision is sufficiently broad as to leave room for measures such as video/audio surveillance, tracking or tracing with the use of technical devices (GPS) and accessing a computer system. In relation to Article 30 EIO DIR, participants were divided and had different views as to whether this provision could be applied in the case of a covert listening device ("bugging of a car").

Participants also discussed whether, despite the wording of **recital 25**, an EIO could be used beyond the trial phase and whether it could be used for the transfer of persons in cases where the thresholds of the EAW FD are not met. As regards the first point, participants believed that the use of the EIO **beyond the trial phase** would be limited to Member States where the notion of criminal proceedings includes the execution phase and provided that Framework Decision 2008/947/JHA *on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions* would not apply. As regards the second point, participants' views were divided. Most participants believed that the EIO DIR could be used for **the transfer of persons** in view of obtaining evidence from the person concerned irrespective of whether the thresholds of the EAW FD are met. Some participants also emphasized that in some Member States, since this measure concerns a deprivation of liberty, a judge in the issuing Member State should be involved in the practical arrangements under Article 22(5) EIO DIR.

III. Competent authorities

In relation to **the issuing phase**, participants welcomed the enhanced role for judicial authorities in the EIO DIR when compared to the MLA regime. Participants considered the introduction of the "**validating authority**" as a positive evolution serving to enhance mutual trust as the driving force of the principle of mutual recognition. Furthermore, participants from Member States where this concept has been introduced in their national legal system explained that it has improved cooperation between law enforcement and judicial validating authorities and the latter's earlier involvement in the investigations in their Member State.

Participants also discussed to what extent an executing authority could or should verify the judicial nature of the issuing/validating authority. Some participants informed that they assume and trust that the issuing authority fulfills all the necessary requirements and that, therefore, they would not verify this. Most participants agreed, however, that a preliminary check of the judicial nature of the issuing authority would be in line with Article 9(3) EIO DIR.

In relation to the **executing phase**, participants discussed the role of **receiving authorities** and concluded that a centralized and/or specialized receiving authority that acts as a **Single Point of Contact** can be beneficial from different perspectives. First of all, internally it can improve efficiency by avoiding duplication or overlaps of incoming EIOs. Secondly, vis-à-vis the issuing authority, it can ensure a unified response, particularly in cases where several local prosecutors or investigating courts are involved in the execution of the EIOs.

Participants also mentioned that **central authorities** can play a useful administrative role in support of the judicial authorities. In some Member States, the central authority fulfils additional roles (e.g. transit of persons in custody and sharing of costs agreements).

For the identification of the competent executing authority, participants indicated that the **EJN Atlas** is a very useful tool.

IV. Content, form and language of the EIO

A majority of participants welcomed **the Annex A form** and saw it as a step forward in terms of **simplifying formalities, improving quality and reducing costs of translation**. While MLA requests often used to be very long, EIOs are often short and concise. Some participants argued that EIOs are sometimes too short, containing too little information, which then triggers the consultation procedure with requests for additional information. It was, however, also argued that practitioners might simply need more time to get used to the new forms and the information to be provided and that the problems that are currently encountered by some practitioners might be of a temporary nature.

In relation to the filling in of the **Annex A form**, participants made some concrete suggestions for **best practices** such as, for instance including the name of the suspect(s) even though the measure does not apply to him/her to avoid potential *ne bis in idem* situations and highlighting the requested measures and including the list of questions to be addressed to a witness/victim/suspect. Participants also discussed the **use of section D**. They acknowledged the narrow wording of the provision "relation to an earlier EIO", but argued that preference should be given to a broader interpretation whereby this box would also be used to provide relevant information on related past or future judicial cooperation requests such as upcoming EIOs or other mutual recognition orders, mutual legal assistance requests, or JITs, including existing JITs with other States in the framework of multilateral coordination settings. Participants also discussed the use of **section I**, in relation to the assistance of officials of the issuing Member State, and mentioned that this could be the appropriate box to be filled in when the EIO is issued in proceedings that are not subject to secrecy to allow for the possibility of interested persons to be present on the spot, under Article 4 of the 1959 Convention which, according to participants, has not been replaced by the EIO DIR and thus remains applicable.

Participants also discussed the advantages and/or disadvantages of **sending one EIO or multiple EIOs**, particularly in complex cases where different measures are required concerning different natural and legal persons with different positions in the proceedings. The discussions showed that in such cases the **internal coherence and consistency between the different sections of Annex A**, in particular between sections C, D, E, G, H and I, is a shared **concern.** For this reason, some practitioners prefer, in such cases, to issue several EIOs instead of one stand-alone EIO. Participants also argued that, for reasons **of confidentiality,** it may also be advisable, in some cases, to issue separate EIOs rather than just one, depending on the legal regimes in the Member States concerned and/or the stage of proceedings in the Member States involved. It was suggested that Eurojust assistance may be useful to decide on the best approach in the case at hand and to ensure continuity in the executing phase.

When asked whether **minor changes to the content of an EIO** would require the issuing of a new EIO, different views were expressed. While some authorities would require a new EIO, others would take a more flexible approach. Participants believed that this would primarily depend on the type of correction needed. For instance, if the correction relates to a new address, this would probably require a new EIO. However, it was noted by some participants that, in urgent cases, the formal part of issuing a new EIO could be done at a later stage, after the execution of the measure.

In some cases, either the issuing authority submits, or the executing authority requests, **additional documents**, particularly the national **judicial decision underlying the EIO**. Some participants wondered whether any parallels could be drawn with the *Bob Dogi* judgment,[2] particularly if coercive measures are at stake. Most participants considered that neither the EIO DIR nor their national legislation requests the domestic order to be attached to the EIO. Some emphasized that a reference to the domestic order in the EIO with full details of that order should be sufficient. Other participants added that Article 5 EIO DIR, unlike Article 8(1)(c) EAW FD, does not make any reference to an underlying judicial decision. In their view, Article 5 EIO DIR thus does not impose any legal requirement for the domestic judicial decision to be mentioned or attached to the EIO. A minority of participants noted that, under their national law, the attachment of a domestic order is required (e.g. in case of a house search warrant which must be handed over to the person subject to the measure). In that case, **pragmatic solutions** are identified, e.g. the EIO is kept simple and the domestic order (more lengthy) is attached with or without translation. Participants from Member States where the attachment of the domestic order is not required also acknowledged that, depending on the case, the attachment of the national court order may be useful, for informative purposes, for instance in cases where a coercive measure is requested and the executing Member State is also required to issue a court order.

In relation to the **language regime**, it was held that, in general, it does not create many problems. In case of urgent requests, the practice among Member States varies: some require a translation into their official language while others allow a second language. Participants agreed that **best practice** would be to translate only the parts of the form that have been filled in by the issuing authority, using the template in the language of the executing Member State to avoid useless and unofficial translations. Participants also underlined the importance of accepting one common, widespread language.

V. Issuing and transmission of an EIO

In relation to **the issuing of an EIO**, participants discussed the **proportionality check** (Article 6(1) EIO DIR) by the issuing authority and **the consultation mechanism** that can be triggered by the executing authority when the latter has reasons to believe that the proportionality requirement has not been met (Article 6(3) EIO DIR). Participants assessed this consultation mechanism positively and argued that it can be used to provide relevant information and to avoid the risk that the execution is refused. Participants also believed that Eurojust is in a privileged position to contribute by serving as a bridge-maker between both authorities.

[2] CJEU, Judgment of 1 June 2016 in Case C-241/15 *Bob Dogi*, in relation to the interpretation of Framework Decision 2002/584/JHA on the EAW.

Participants discussed whether **cost-related** issues should be taken into consideration for the proportionality check. Whilst participants acknowledged that cases involving costs "deemed to be exceptionally high" can be resolved through the consultation mechanism included in Article 21(2) EIO DIR, participants had different views in relation to cases involving costs that are *in se* not exceptionally high but that relate to minor offences and, if repeated, could entail high costs. Some participants explained that, in their Member States, executing authorities are receiving a huge amount of EIOs related to small offences and are struggling to cope with all these requests. Some participants underlined that a *de minimis* criterion cannot be used as a *de facto* ground for non-recognition. The grounds for non-recognition are exhaustively mentioned in the EIO DIR and constitute exceptions to the principle of mutual recognition, which should be interpreted restrictively. Other participants added that Member States which apply the mandatory prosecution principle, as opposed to the discretionary prosecution principle, would not be entitled to take cost-related considerations into consideration. Still other participants suggested that parallels could perhaps be drawn here with the discussions surrounding the EAW Framework Decision, where the issue of proportionality has also been raised in relation to petty offences. In this regard, an option could be that at some stage the EU legislator could develop criteria to be taken into consideration for applying tests such as the nature of the offence, the prejudice/loss, the victims involved and the cost of the measure.

In relation to **the transmission of an EIO,** participants indicated that, depending on the nature, complexity and urgency of the case, different channels are being used, including EJN Contact Points, Liaison Magistrates or Eurojust. Participants underlined the importance of a secure network of communications allowing them to transmit EIOs in a safe manner. Several participants indicated that they are looking forward to the coming into force of the e-evidence platform (see also *infra* VIII. Support provided by EU actors).

VI. Recognition and execution of an EIO

Grounds for non-recognition

Participants noted that, so far, they have **not yet** had **any experience** in the application of **the grounds for non-recognition.** They believed that this is probably because the EIO DIR has only been in force in Member States for a relatively short period of time. Some participants anticipated, however, that given recent development in the case law of the Court of Justice of the EU in relation to the EAW and the novelty of the fact that the fundamental rights ground is explicitly mentioned in the EIO DIR, questions may be raised in the future about this ground.

Participants mentioned a number of **other issues** that do not constitute grounds for non-recognition, but **that can also complicate the execution of EIOs**, in particular: (i) lack of information; (ii) bad translations and (iii), in relation to the investigative measure of the hearing of a person, a different status of the persons in the issuing ("witness") versus executing Member State ("suspect"). In relation to lack of information, participants underlined that the EIO should not be refused, but further necessary information should be requested in line with Article 11(4) EIO DIR. In relation to bad translations, it was suggested that a new translation could be requested. In some cases, the questions raised by the bad translation were clarified with the assistance of Eurojust and the EIO could be executed. In relation to the different status of a person in the issuing and executing Member States, several participants underlined that this could be remedied by informing the person of his respective rights as witness/suspect in the two Member States. In relation to the three aforementioned scenarios, it was argued that, when direct contact between judicial authorities is hampered, Eurojust could provide useful support.

Recourse to another investigative measure

Participants mentioned several cases where the executing authorities had **recourse to a different type of investigative measure** (Article 10 EIO DIR). For instance, in some cases, executing authorities had recourse to production orders instead of house searches. It was argued that the information included in the corresponding EIOs, and the additional information obtained later on, did not meet the high thresholds for house searches in the executing Member State. In most of these cases, the issuing authority agreed with the execution of a production order and was satisfied with the result. In another case where the issuing authority had ordered a witness hearing with a view to obtaining banking information in the EIO, the executing authority had recourse to a house search instead of a witness hearing as house searches were the standard procedure in the executing Member State for these types of cases. Also in this case, the issuing authority was satisfied with the alternative investigative measure and the result obtained. When discussing these cases, participants concluded that the frequent use of this provision highlights the **challenges** created by the **different legal systems** in the Member States, particularly the different legal prerequisites for investigative measures. One participant described it as "*a daily struggle of deciding how far to go along with the differences in the legal system of another Member State in order to help them out*". Whilst in many cases the differences are relatively easily overcome and solutions are found as a result of the consultation procedure and the direct contact between the competent authorities involved, there have also been other cases where the consultation procedure and the direct contact threatened to come to a standstill. Participants suggested that in such cases, particularly **complex, sensitive and/or urgent** cases, Eurojust could play a vital role. It was considered that **Eurojust' expertise, its professional distance from the cases concerned and its mediating role are an added value for finding a balanced and legally sound solution**.

In the context of Article 10 EIO DIR, participants also discussed the meaning and scope of the concept **"non-coercive measure".** From these discussions, it was concluded that most Member States do not have a definition of "non-coercive measures" in their legislation, but that they see it rather as a "common concept" defined in every day legal language incorporating measures not affecting fundamental rights and often not requiring a court order.

Time limits

Several participants emphasized the importance of having time limits and considered this to be **a significant improvement** of the EIO regime. Other participants stated that it is probably **too early to assess** whether the new regime has *de facto* led to an improvement when compared to the MLA regime. A number of participants stated that compliance with deadlines often depends on a number of factors such as, for instance, the complexity of the case, the number and nature of the requested measures and the available resources in the executing Member State. A few participants believed that delays are often due to the intrinsic features of the EIO DIR itself, such as the completion of the EIO Form (which is considered, by these participants, to be a cumbersome and prescriptive task) or the consultation procedures (which are considered, by these participants, to be bureaucratic and cumbersome). Other participants noted that their experience is that some Member States are faster at executing EIOs than other Member States, but they did not see this as a change related to the new EIO regime and underlined that the same Member States were also faster at executing requests under the MLA regime.

Participants welcomed the **Annex B form** (acknowledgement of receipt) and deplored that, in practice, the form is often not used. Participants underlined the importance of using this form and held that, if time limits cannot be met, the executing authority should **explain the reasons for the delay** to the issuing authority and the latter should be immediately informed of **a feasible time frame**. Participants all agreed that, **under no circumstances should the delay be a cause or reason for non-execution.**

In the context of time limits, participants also briefly discussed cases regarding **e-evidence**. Several participants mentioned examples where EIO requests for data/e-evidence could not be executed as the data had already been deleted in the executing Member State.

Urgent requests

Participants noted that most Member States tend to adopt **a pragmatic and flexible approach** in relation to urgent cases. They explained that they start executing measures on the basis of mutual trust and they accept that the formal requirements are fulfilled later on. For instance, practitioners mentioned cases where the execution of EIOs started even though the translation was not yet available at the time of the execution, but was provided later on. Participants underlined, in this regard, the importance of accepting the use of **one common/widespread language** in order to facilitate the execution of urgent requests. Participants mentioned cases where, in order to preserve the evidence, the execution of an investigative measure was initiated following a phone call or an email and the formal EIO followed shortly afterwards.

In relation to urgent cases, participants also agreed that a timely **involvement and intervention of Eurojust** can be crucial.

Some participants underlined that issuing authorities should **not misuse the concept "urgent"** by labelling cases as urgent when the so-called urgency merely results from the fact that the authorities in the issuing Member State wasted time in their investigation and would simply like to speed up the case.

Speciality rule

Participants were **divided** in relation to the application of the speciality rule in the context of the EIO DIR. Some participants mentioned Article 19(3) EIO DIR (on confidentiality), but a large majority of participants believed that this provision is not at all related to the speciality rule and they underlined that there is no explicit provision in the EIO DIR which addresses this issue. Some participants held that the EIO DIR has not changed anything in relation to the speciality rule and argued that this rule still applies under the new regime. Other participants believed that, under the EIO regime, the issuing authority becomes the owner of the evidence and is entitled, subject to national and EU data protection rules, to transfer it further, unless the executing authority has prohibited such transfer explicitly. As a result of these different views, participants have **different approaches** when issuing or executing EIOs. From the executing Member State's perspective, some participants indicated that they explicitly mention, when executing an EIO, that the evidence can only be used for the purpose of that specific investigation, often fearing that it might be used in another case without this explicit wording. Others stated that they would not mention anything, but would assume that the evidence will not be used for another purpose. From the issuing Member State's perspective, some participants indicated that, before using the evidence in a different case, they would always ask permission from the executing Member State. Others considered that this is not required since it is a matter for the issuing authority to decide upon and they would transfer it, subject to the applicable legal framework on data protection.

VII. Specific investigative measures

Hearing of suspected and accused persons by videoconference

Participants were asked, in the context of a hearing by videoconference, to what extent the absence of the **suspected or accused person's consent** constitutes a mandatory or optional ground for non-recognition. The discussions amongst participants illustrated that some national implementation laws only allow the hearing of a suspected or accused person by videoconference if the person consents ("*shall*" refuse, mandatory ground for non-recognition) while other national implementation laws are less rigid ("*may*" refuse, optional ground for non-recognition). Some participants suggested that in cases where grounds for non-recognition are being raised the legal systems of both Member States should be given close consideration and the assistance of Eurojust could be helpful.

In relation to the question whether **victims fall within the concept of "witness"** of Article 24 EIO DIR, participants unanimously agreed that this would be the case under their national laws.

Participants also discussed whether a hearing by videoconference could be allowed to guarantee the **participation of a defendant in his criminal trial.** Different views were voiced in relation to this question. It followed from the discussions that it is not a common practice and that in most Member States it is not foreseen in the national legislation. Some participants firmly stated that it would not be allowed under their national law. Other participants stated that their national law does not regulate it, but noted that – since it is not explicitly prohibited and it is considered not contrary to the fundamental principles of law of the executing Member State – EIOs have been executed, provided that the defendant's rights were guaranteed.

Hearing of witnesses and experts by telephone conference

Participants discussed the use of telephone conference for the hearing of witnesses and experts. In some Member States, this is explicitly foreseen in the national legislation while in other Member States it is not. In relation to the latter group, some participants said that it would not be possible to execute such EIOs, while others said that, despite the absence of a legal provision, it would be possible to execute such EIOs. Some participants argued that despite the legal possibility of doing it, it is hardly ever used and preference is usually given to hearing by video conference.

Interception of telecommunications without technical assistance

Participants discussed different issues in relation to the interception of telecommunications without technical assistance. Even though the wording of this provision is not new when compared to the 2000 MLA Convention, discussions amongst practitioners revealed that the application of this provision is sometimes problematic.

Participants of **some Member States** indicated that they have **never received an Annex C** template and were thus never notified by a Member State that an interception will be, is or has been carried out on their territory. While this could be explained by the fact that there have not been interceptions on the territories of the respective Member States, most participants believed that it is due rather to the fact that the intercepting authorities have simply not notified them.

Participants discussed to what extent a notified authority should check whether "***the interception would not be authorized in a similar domestic case***". While most participants agreed that this should be a merely **formal, procedural check**, several participants indicated that in some Member States it is a **very substantive examination** whereby additional information is requested to make the assessment and it often leads to decisions imposing a termination of the interception (if it is still on-going) and/or a prohibition to use the intercepted material. One participant noted that more than 50% of outgoing notifications lead to a refusal as a consequence of a very substantive assessment. Most participants rejected a detailed, substantive approach and argued that it is not line with the ratio legis of this provision. The **purpose of the notification is *not* an order for recognizing an investigative measure** (Annex A), but a mere reflection of **respect for the sovereignty** of the other country. It would be a paradox if in the context of an Annex C form the same or more information would be requested than in the context of an Annex A form. Participants believed that the provision should be interpreted in the context of the area of freedom, security and justice, based on mutual trust and respect for different legal systems. In light of the foregoing, most participants believed that Article 31(3) EIO DIR should not be interpreted in an extensive way.

Related to the foregoing, participants also discussed the consequences of a lack of notification and/or a lack of approval. Participants expressed concerns with regard to **the admissibility of the evidence**. Some participants stated that the evidence obtained would not be considered admissible. Other participants noted that in cases where the lack of notification was due to the authorities not knowing where the person was, it had not led to the inadmissibility of the evidence.

In relation to the material scope of Article 31 EIO DIR and particularly the question of whether this provision also applies in case of a **covert listening device ('bugging'**), participants were divided.

Finally, participants also discussed the **competent authorities** for receiving Article 31 notifications and concluded that in most Member States it is the central authority, while in other Member States it is the local authority, if identified (if not, the central authority).

Gathering of financial information from a bank or any other non-banking financial institution

Participants briefly discussed Article 27 EIO DIR and concluded that this provision is not limited to suspected or accused persons, but that it also comprises any other person in respect of whom such financial information is found necessary, as long as the request is sufficiently motivated for use in the course of criminal proceedings (proportionality).

VIII. Support provided by EU actors

Eurojust explained how it can support practitioners on the basis of Article 9b,9c and 9d of the Eurojust Decision in the four crucial phases of **the life cycle of an EIO**: **the (pre)issuing phase, the transmission phase, the recognition phase and the execution phase**. Eurojust can provide support in bilateral and multilateral cases. In **bilateral cases**, Eurojust can, for instance, provide support in identifying the competent authority, in completing (draft) EIOs, in clarifying legal and practical issues in relation to other legal instruments, or in obtaining/providing necessary **additional information** in the context of one of the **consultation procedures** that the EIO DIR foresees. For instance, Eurojust can intervene and provide support where questions arise in relation to the proportionality check, the recourse to a different type of investigative measure or the application of a ground for non-recognition and it can help with finding balanced solutions where different national systems clash. In **multilateral cases**, Eurojust has a unique **coordinating role**, particularly in complex cases where action days are planned simultaneously in different Member States and where Eurojust can provide support in the context of a **coordination meeting and/or a coordination center**.

The Secretary to the **European Judicial Network** (EJN) informed the practitioners about the assistance the EJN Contact Points can provide in EIO cases and on the useful tools and information for the practical application of the EIO DIR available on the EJN website. This part of the website includes, for instance, information on the status of the transposition of the EIO DIR (e.g. date of entry into force in the respective Member States, official notifications, links to national legislation), the competent authorities and the languages accepted in the respective Member States. It also includes the EIO conclusions of the 48th and 49th EJN Plenary meetings of 2017 in Malta and Tallinn. The website provides direct access to the **Compendium**, a tool that enables an EIO to be drafted online and saved as a work file at any time. Other relevant tools are the **Judicial Atlas** (which can be used to identify the locally competent authority that can receive the EIO), the **Fiches belges** (which contain concise and practical legal information on what is possible in the respective Member States) and the **Judicial Library** (which includes, *inter alia*, the full text of the EIO DIR and the word versions of the three Annexes). In some Member States, there are national Handbooks on the EIO. These national Handbooks on the EIO, if shared with the EJN, are placed on the EJN website under the restricted area.

The **European Commission** underlined that smooth cross-border gathering of evidence requires that Member States have the EIO DIR properly implemented in their national laws and correctly applied in practice. For the purpose of assessing national laws/practice and, where necessary, improving knowledge among practitioners, the Commission has different tools in place. First of all, in 2016-2017 the Commission organized three **expert meetings** on the EIO and it plans to hold the next meeting in 2019. Next, the Commission has **funding** available for projects that increase, *inter alia*, awareness building, training, and the exchange of best practices in relation to the EIO DIR and other relevant instruments. Furthermore, the Commission attaches great importance to the **good cooperation** it has **with Eurojust and EJN** since they are in a privileged position to identify obstacles to judicial cooperation. Finally, the Commission will not refrain from launching **infringements procedures** against Member States for incorrect transpositions of the EIO DIR. In this regard, the Commission noted that it had commissioned an external study to examine compliance with the EIO DIR in the national legislations of the Member States bound by the instrument. The Study, which looks at correct implementation from different angles – completeness, compliance and no risk of undermining practical implementation – is due by May 2019.

In relation to the **secure transmission of EIOs and MLA requests**, the Commission underlined that the work on the **e-evidence platform** is currently on-going and is expected to be finalized by the end of 2019. During the meeting, participants were informed about the difference between the EJN platform and the e-evidence platform and it was emphasized that the two platforms are not duplicating each other. The e-evidence platform will be a more "active" platform, including a tick box with a whole list of possible e-evidence-related measures and concrete guidance and suggestions for practitioners. Whilst the EJN Compendium is available for all mutual recognition instruments, the e-evidence platform has been initially developed for EIOs and MLA requests. However, the Commission noted that it is considering broadening the scope of the platform at a later stage so that it can also encompass orders related to the other mutual recognition instruments.

The Commission also confirmed its commitment to drafting a **Handbook on the EIO**, but noted that it may take several years to finalize it since it is important that the Handbook integrates practical information from the Member States and relevant case law.

IX. Conclusions

From a **general perspective**, **a vast majority of the participants very much welcomed the EIO regime**. They see the instrument, with its characteristic mutual recognition features – e.g. standard form, judicial authorities in charge (e.g. role of validating authorities), limited grounds for refusal and time limits – as **a step forward** in the area of cross-border evidence-gathering. Only a small number of participants perceived the new instrument, and particularly its template, as more complicated and more cumbersome than before.

Participants acknowledged the need to interpret national law **in light of EU law and, in particular, in line with the principles of mutual recognition and mutual trust.** In practise, the application of the EIO DIR often requires constantly searching for legally sound and practically feasible compromises between different **national legal systems**. A majority of participants agreed that the differences that co-exist within the area of freedom, security and justice in the EU require some flexibility towards the legal systems of other Member States. For instance, a "similar domestic case" may not necessarily require a perfectly matching measure. Moreover, flexibility and goodwill should go hand in hand with the avoidance of any abusive use of EIOs as the latter may jeopardise mutual trust amongst practitioners. In relation to the foregoing, practitioners underlined the importance of an overall **pragmatic and flexible approach.** There is a need to reflect not only on what is *legally required* by the EIO DIR and/or by national law, but also on what is *useful or feasible from a practical point of view* in relation, for example, to the need to attach the original court order to the EIO, or in relation to very urgent requests where measures are sometimes needed before a formal EIO can be issued.

In relation to some **specific topics**, participants agreed on a number of suggestions and/or best practices:

- **Scope of the EIO DIR and its relation to other legal instruments**: It was recommended to have more guidance on the meaning of the term "corresponding provisions". It was also agreed that the following cumulative criteria could be helpful in assessing whether an EIO needs to be issued: (i) the order concerns an investigative measure aimed at gathering evidence, (ii) the measure was issued or validated by a judicial authority and (iii) the measure relates to Member States bound by the EIO DIR.
- **Competent authorities**: it was recommended to use the EJN Atlas for the identification of the competent authorities.
- **Forms**:
    - **Annex A**: It was recommended to include the name of the suspect(s) even though the measure does not apply to him/her to avoid potential *ne bis in idem* situations; to highlight the requested measures and to include the list of questions to be addressed to a witness/victim/suspect. In relation to the **use of section D**, participants suggested a broad interpretation whereby this box would also be used to provide relevant information on related past or future judicial cooperation requests. It was also recommended to use Annex A/section D to enumerate, if applicable, the use of other judicial cooperation instruments.
    - If several measures are requested and the question is raised as to whether **one EIO or several EIOs** should be issued, it was recommended to apply a case-by-case approach, taking into account different elements (e.g. the complexity of the case and confidentiality issues).
    - In relation to the **translation,** it was recommended to translate only the parts of the form that have been completed by the issuing authority, using the template in the language of the executing Member State in order to avoid useless and unofficial translations.
    - **Annex B:** It was underlined that this form is currently not sufficiently used and it was recommended that it should be used more.
    - **Annex C:** It was recommended that the concept of "a similar domestic case" should not be interpreted in an extensive way as consent was considered to be of a procedural rather than a substantive nature.

- **Language regime:** It was recommended to accept one common, widespread language.
- **Time limits:** It was recommended that if time limits cannot be met, the executing authority should **explain the reasons for the delay** to the issuing authority and the latter should be immediately informed of **a feasible time frame**. Participants agreed that under no circumstances should the delay be a cause or reason for non-execution.

In relation to some other specific topics, participants had **different or even opposing views**, e.g. the **proportionality** test (particularly in relation to the issue of costs), **the speciality rule** and the scope of specific investigative measures (particularly Article 31 EIO DIR and **the bugging of a car**).

Finally, with regard to **the role of Eurojust**, participants envisaged that the support and involvement of Eurojust in relation to EIOs, when compared to the MLA regime, will be at least the same, but probably greater, as more consultations are foreseen in the EIO Directive. Participants underlined that it is important that these **consultation procedures** are used before refusing to recognise or execute an EIO. While participants acknowledged that "direct contact" amongst judicial authorities is the core principle of the EIO DIR, they also acknowledged that if, in a **bilateral case,** one of the consultation procedures is triggered, Eurojust's **bridge-making role** can facilitate communication between the judicial authorities involved, particularly in complex, sensitive or urgent cases. Moreover, in complex **multilateral cases** Eurojust has a unique and **important coordinating role**.