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NOTE

From: General Secretariat of the Council
To: Delegations

Subject: 52nd Plenary meeting of the European Judicial Network
- EJN Conclusions on the European Investigation Order

Delegations will find in the Annex Conclusions on the European Investigation Order (EIO), as resulting from the 52nd Plenary meeting of the European Judicial Network (EJN) (Bucharest, 26-28 June 2019).

52nd Plenary meeting of the EJM Contact Points

EJM Conclusions

On the EUROPEAN INVESTIGATION ORDER

On 3 April 2014, the European Parliament and the Council adopted Directive 2014/41/EU (the EIO Directive), regarding the European Investigation Order in criminal matters. Up to date, the Directive was transposed by all Member States that are bound by it, and there is already significant experience and information available.

The European Investigation Order (EIO) is setting up a comprehensive system for obtaining evidence cross borders, based on the principle of mutual recognition.

The EJM has issued a number of documents supporting the practical application of the EIO, e.g. the document on “*Competent authorities, languages accepted, urgent matters and scope of the EIO*”, available for practitioners on the EJM website.

The application of the Directive has been subject to debate in various fora, for instance in the [48th and 49th EJM Plenary meetings 2017 in Malta and Tallinn](#), the EJM Regular meeting in The Hague in February 2018, the EJM Plenary meeting in Sofia in June 2018, and in several National and Regional EJM meetings. As a joint effort, EJM and Eurojust recently drafted a Joint Note on the practical application of the European Investigation Order.

The discussions in the Workshop II on the EIO at the 52nd Plenary meeting of the EJM Contact Points under the Romanian Presidency focused on two issues:

- I. Art 14 of the EIO Directive concerning question of **legal remedies** in relation to the opinion of the Advocate General in the pending case at the **CJEU C-324/17**;
- II. The interception and the use of the term “**interception**” in the Member States, as well as the consequences of this for the application of Art 31 of the EIO Directive.

I. LEGAL REMEDIES

The first preliminary ruling on a substantial matter of the EIO Directive is currently pending at the CJEU. It was referred to the CJEU by a Bulgarian court in May 2017 ([Case C-324/17 – Criminal proceedings against Ivan Gavanozov](#)). The court referred, *inter alia*, the following questions to the CJEU:

- ▶ Are national legislation and case-law consistent with **Art 14 of the EIO Directive, in so far as they preclude a challenge**, either directly as an appeal against a court decision or indirectly by means of a separate claim for damages, **to the substantive grounds of a court decision issuing an EIO** for a search on residential and business premises and the seizure of specific items, and allowing examination of a witness?;
- ▶ Does **Art 14 (2) of the EIO directive grant**, in an immediate and direct manner, to a concerned party **the right to challenge a court decision issuing an EIO, even where such a procedural step is not provided for by national law**?

Art 14 EIO Directive provides for, inter alia, the following:

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

On 11 April 2019 [Advocate General \(AG\) Yves Bot delivered his opinion](#), expressing, in essence, that if the national legislation of an

EU Member State does not provide for legal remedies, by means of which the substantive reasons for an investigative measure requested by an EIO can be challenged, this Member State is not entitled to use the EIO instrument.

During the workshop the EJM Contact Points discussed in the light of this pending case, the availability of legal remedies in the issuing Member State and what would be the potential consequences of such a judgment by the CJEU.

There was a strong disagreement among the EJM Contact Points with the opinion of the AG. The main concerns that the Contact Points outlined were the following:

- ▶ A judgment following the opinion of the AG would be detrimental to the criminal procedure and international cooperation;
- ▶ Mutual trust between the Member States would risk to be harmed;
- ▶ Article 82(2) TFEU must be considered, i.e. the diversity of national systems (“*Such rules shall take into account the differences between the legal traditions and systems of the Member States*”);
- ▶ As the investigative measure ordered in an EIO must exist under the law of the executing State, it is doubtful whether further protection is needed;
- ▶ The opinion expressed by the AG might have severe consequences for the confidentiality of the investigations;

CONCLUSIONS:

- ▶ It is important that the voice of practitioners is heard in the process of interpreting and defining EU law; yet a problem of outreach was admitted.
- ▶ The practitioners should be informed on a regular basis by their respective Ministries about questions of vital interest to them and to judicial cooperation, which this case referred to the CJEU is an example of.

II. INTERCEPTION OF TELECOMMUNICATION (Art 30-31, Annex C)

During the second part of the workshop, the Contact Points focused on specific investigative measures (Art 22-31 of the EIO Directive), more specifically on interception of telecommunications (Art 31).

The 2000 MLA Convention is the first multilateral convention in criminal matters that deals explicitly with the issue of interception of telecommunications. Consequently, the EIO needs to build further on the experience gathered in the application of the Convention.

Annex C of the EIO Directive is to be used in order to notify a Member State about the interception of telecommunications that will be, is or has been carried out on its territory without its technical assistance.

The Contact Points discussed if the practitioners have ever encountered any problems with regard to the notification and what type of information must be provided in Annex C under the national law of the different Member States.

Article 31 EIO Directive

Notification of the Member State where the subject of the interception is located from which no technical assistance is needed

1. Where, for the purpose of carrying out an investigative measure, the interception of telecommunications is authorised by the competent authority of one Member State (the 'intercepting Member State') and the communication address of the subject of the interception specified in the interception order is being used on the territory of another Member State (the 'notified Member State') from which no technical assistance is needed to carry out the interception, the intercepting Member State shall notify the competent authority of the notified Member State of the interception:

- a) prior to the interception in cases where the competent authority of the intercepting Member State knows at the time of ordering the interception that the subject of the interception is or will be on the territory of the notified Member State;
- b) during the interception or after the interception has been carried out, immediately after it becomes aware that the subject of the interception is or has been during the interception, on the territory of the notified Member State.

2. The notification referred to in paragraph 1 shall be made by using the form set out in Annex C.

3. The competent authority of the notified Member States may, in case where the interception would not be authorised in a similar domestic case, notify, without delay and at the latest within 96 hours after the receipt of the notification referred to in paragraph 1, the competent authority of the intercepting Member State:

- a) that the interception may not be carried out or shall be terminated; and
- b) where necessary, that any material already intercepted while the subject of the interception was on its territory may not be used, or may only be used under conditions which it shall specify. The competent authority of the notified Member State shall inform the competent authority of the

The Contact Points stated that issues start with the question on **what is meant by “interception”**, due to different translations and understanding of interception of telecommunications. Consequently, the differences reflected in the national legislation have **consequences for the application of Art 31** — including the possibility for the notified Member State to give its consent.

- ▶ With regard to interception of other communications, e.g. via a device in a car that crosses the border, a covert listening device (‘bugging’), one Member State represented in the workshop reported that in its national legislation bugging is indeed regarded as interception of telecommunications/wiretapping. In other Member States, bugging is not regarded as interception, but is in fact considered an even more intrusive measure and cannot be authorised retroactively.
- ▶ In some Member States the national legislation provides for that a notification to the other Member State is required only if the communication is listened to; on the other hand, in some Member States, the legislation states that any information that is obtained through a telecommunications system requires notification, e.g. positioning.

The Contact Points admitted that they do not receive Annex C very often and the question was raised whether Member States sometimes do not send the Annex C when they should. As a response, it was argued that sometimes it may not be clear where the suspect actually is and consequently there is lack of clarity *if*, and in that case, *where* the Annex C should be sent. Different points of views were also expressed when it comes to situations where a suspect crosses a border unexpectedly. For example, an opinion was expressed that there should be no need for a notification of a Member State if there was never the intention to gather evidence in that Member State, even though eventually the suspect ended up there *unexpectedly*.

The discussions also revealed that in the opinion of some Member States, the notifications made in accordance with Art 31 often do not contain sufficient information. This is a problem since, for instance, consent might only be possible in the case of certain types of crime.

An example of best practice was put forward: The prosecution authority of one Member State can be reached 24/7 for an oral decision, whereas the paperwork is completed at a later stage. In this way, possible problems with timely or missing consent could be avoided.

The Contact Points also discussed whether consent is actually required. According to Art.31 (3), the notified Member State may notify “*without delay and at the latest within 96 hours after the receipt of the notification*” the intercepting Member State, *if* the interception may not be carried out. The notified Member State is however not, obliged to reply to an Annex C notification if the interception is allowed. Some Member States nevertheless require a response by the notified Member State also in this situation, i.e. a consent to carry out the interception. The different interpretations of Art 31(3), it was argued, may cause delays.

CONCLUSIONS:

- ▶ It was advised to contact the EJM Contact Points in advance whenever there is a doubt about the application of Art 31 of the EIO Directive in another Member State.
 - ▶ A questionnaire was proposed about the term “interception” and the scope of Art.31 and the consequences thereof in the Member States.
 - ▶ The list of investigative measures in the Atlas/Fiches Belges tools on the EJM website should be updated in light of the EIO Directive.
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