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REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

on the implementation of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters

1. INTRODUCTION

Directive 2014/41/EU on the European Investigation Order in criminal matters[1] ('the Directive') establishes a single comprehensive framework based on the principle of mutual recognition that allows authorities in 1 Member State to obtain evidence from another Member State.

The Directive was proposed on the initiative of 7 Member States[2]. The Council and the European Parliament adopted it in accordance with Article 82(1)(a) of the Treaty of the Functioning of the European Union (TFEU) on 3 April 2014 and it is binding on all Member States with the exception of Ireland and Denmark.

The Directive replaced existing frameworks for the gathering of evidence, namely the 2000 EU Mutual Legal Assistance Convention[3], Framework Decision 2008/978/JHA on the European evidence warrant[4] and Framework Decision 2003/577/JHA on the freezing of evidence[5].

The main elements of the Directive are listed below.

- The European Investigation Order ('EIO') is a **judicial decision** issued or validated by a judicial authority of a Member State to have one or several investigative measures executed or recognised in another Member State in order to obtain evidence.
- It covers **any investigative measure**[6], apart from setting up a joint investigative team, at all stages of criminal proceedings.
- Member States are obliged to **swiftly recognise and execute an EIO without any further formality**, and it can only be refused under limited circumstances, e.g. essential national security interests and respect for fundamental rights.
- The Directive sets strict **deadlines** for gathering the evidence requested.

[1] 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.
[2] Austria, Bulgaria, Belgium, Estonia, Slovenia, Spain and Sweden.
[3] Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 197, 12.7.2000, p. 1.
[4] Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350, 30.12.2008, p. 72. This Framework Decision was repealed by Regulation (EU) 2016/95 of the European Parliament and of the Council of 20 January 2016 repealing certain acts in the field of police cooperation and judicial cooperation in criminal matters, OJ L 26, 2.2.2016, p. 9.
[5] Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ L 196, 2.8.2003, p. 45.
[6] For example, the EIO allows the hearing of suspects and witnesses, including by videoconference and the gathering of information on bank and other financial accounts, or measures to preserve evidence.

- It provides **standard forms** for completing an EIO (Annex A), acknowledging its receipt (Annex B) and sending a notification about the interception of telecommunications on the territory of the notified Member State (Annex C)[7].

- It contains several additional **safeguards to protect the rights of the defence**, notably in Articles 1(3), 6 and 14.

In January 2021, the Commission proposed an amendment to Article 20 of the Directive to align it with EU rules on the protection of personal data[8].

Article 37 of the Directive requires the Commission to submit a report to the European Parliament and the Council on the application of the Directive on the basis of both qualitative and quantitative information. The report includes, in particular, the evaluation of its impact on cooperation in criminal matters and the protection of individuals, as well as the execution of its provisions on intercepting telecommunications in the light of technical developments.

The first part describes the state of play of the Directive's implementation by Member States, focusing on the main provisions, crucial for the smooth functioning of the EIO. The second part provides an overview of key elements relating to the Directive's application by Member States.

In drafting this report, the Commission used the information the Member States provided when notifying national measures transposing the Directive and the replies to the questionnaire of competent authorities and lawyers in Member States, as well as Eurojust and the European Judicial Network in criminal matters (EJN).

The report covers all Member States bound by the Directive.

2. GENERAL ASSESSMENT

At the expiry of the transposition period on 22 May 2017 (Article 36(1)), only 2 Member States had communicated the necessary measures to the Commission and another other 8 Member States notified measures in the following days and weeks.

In July 2017, the Commission launched infringement procedures under Article 258 TFEU against 13 Member States (Austria, Bulgaria, Cyprus, Czechia, Greece, Spain, Croatia, Luxembourg, Malta, Poland, Portugal, Sweden and Slovakia) for failing to notify measures transposing the Directive. In January 2018, the Commission sent reasoned opinions to Austria,

[7] The Council has published guidelines on how to fill in the forms:
https://data.consilium.europa.eu/doc/document/ST-5291-2020-INIT/en/pdf

[8] Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/41/EU, as regards its alignment with EU rules on the protection of personal data (COM/2021/21 final).

Bulgaria, Spain and Luxembourg as they had still not notified the transposition measures. By September 2018, all Member States bound by the Directive had notified their national transposing measures to the Commission. The analysis of the notified measures has not identified any significant stand-alone missing elements. The infringement proceedings failure to communicate transposition measures have therefore been closed[9].

3. SPECIFIC POINTS OF ASSESSMENT

3.1. Competent authorities and central authorities

Article 33(1) requires Member States to inform the Commission of the authorities competent to issue and execute EIOs, and of the central authority(ies), where designated in accordance with Article 7(3). All Member States have sent their notifications to the Commission.

3.1.1. Issuing authorities (Article 2(c))

Article 2(c) states that the term 'issuing authority' includes a judge, a court, an investigating judge or a public prosecutor[10]. It also includes any other competent authority as defined by the issuing State, which, in the case in question, is acting in its capacity as an investigating authority in criminal proceedings with competence to order the gathering of evidence in accordance with national law, provided such an EIO is validated by a judge, court, investigating judge or public prosecutor.

The Court of Justice has ruled[11] that the concepts of 'judicial authority' and 'issuing authority' in Articles 1(1) and 2(c) include the public prosecutor's office of a Member State, regardless of any relationship of legal subordination between that office and the executive of that Member State or of the exposure of that public prosecutor's office to the risk of being directly or indirectly subject to orders or individual instructions from the executive when adopting an EIO.

In a majority of Member States, the authorities competent to issue EIOs are public prosecutor's offices, investigating judges or courts. In 1 Member State, only courts are competent to issue EIOs, while another Member State designated its fiscal authority, which has the rights and discharges the responsibilities of a public prosecutor's office, as an issuing judicial authority in accordance with Article 2(c)(i)[12]. Less than half of Member States availed of the possibility to

[9] This is without prejudice to infringement proceedings that may be launched by the Commission against certain Member States when it finds that the notified national measures incorrectly transpose the Directive or systemic weaknesses are observed in its application in practice.
[10] Article 1(1) specifies that EIOs are judicial decisions issued or validated by judicial authorities.
[11] See judgment of the Court of Justice of 8 December 2020, Staatsanwaltschaft Wien/A. and Others, C-584/19 PPU, ECLI:EU:C:2020:1002.
[12] See case C-66/20 pending before the Court of Justice of the European Union.

appoint competent investigating authorities, such as police services, as their issuing authorities in accordance with Article 2(c)(ii). In some cases, administrative authorities were appointed as issuing authorities in administrative offence proceedings. Prosecutors, investigating judges or courts were appointed as validating authorities for such EIOs. In 1 Member State, no validating authority was appointed for EIOs issued by an administrative authority in administrative offence proceedings. Almost all Member States correctly implemented this provision.

3.1.2. Executing authorities (Article 2(d))

A large majority of Member States designated the authorities competent to issue EIOs as executing authorities also. In some Member States, the authorities competent to recognise EIOs and ensure their execution are also law enforcement or administrative authorities.

3.1.3. Central authorities (Article 7(3))

Article 7(3) provides for a possibility for Member States to designate 1 or more central authorities to assist the competent authorities. They may make such central authorities responsible for the administrative transmission and receipt of EIOs and other related official correspondence.

A significant number of Member States notified at least 1 central authority to the Commission. In most cases, the Ministries of Justice were appointed as central authorities, while different tasks were assigned to them. A few of those central authorities can also assist with the administrative transmission and receipt of EIOs, and only a small number of those Member States request that all incoming EIOs be sent through their central authorities. In a few cases, multiple central authorities were notified. In some Member States, authorities can provide assistance, although not formally notified as central authorities.

A couple of Member States granted their designated central authorities additional powers (e.g. by giving them the responsibility for a preliminary check whether all necessary documents had been received, or for refusing to execute an EIO under certain conditions). Almost all Member States correctly implemented this provision.

3.2. Definition and scope of the EIO and types of proceedings for which it can be issued

3.2.1. EIO definition (Article 1)

All Member States transposed Article 1(1) defining the EIO as a judicial decision issued to have 1 or several specific investigative measure(s) carried out in another Member State to obtain evidence. Recital 25 specifies that the Directive sets out rules on carrying out an investigative measure at all stages of criminal proceedings, including the trial stage. In a small number of Member States an EIO can also be issued during the execution of a judgment or sentence. One Member State specified that an EIO may also be issued for additional procedural measures.

Some Member States did not explicitly refer in their transposing provisions to the rights of suspects or the accused, or a lawyer on their behalf, to request the issuing of an EIO (Article 1(3)), but this may be because national criminal procedures already grant this.

The vast majority of Member States did not explicitly refer to fundamental rights and legal principles (Article 1(4)) in their transposing provisions. However, a small number of Member States referred to the Charter of Fundamental Rights of the European Union, to national constitutions, or the European Convention on Human Rights. Nevertheless, most Member States explicitly make the general condition of respect for fundamental rights a ground for refusal pursuant to Article 11 (1)(f) in the event of infringement

3.2.2. Scope (Article 3)

Article 3 of the Directive states that the scope of the EIO covers any investigative measure with the exception of the setting up of a joint investigation team and the gathering of evidence within such a team. Recitals 9 and 34 clarify that the Directive should not apply to cross-border surveillance as referred to in the Convention implementing the Schengen Agreement[13], and to provisional measures with a view to confiscation.

Most Member States transposed Article 3 explicitly. A few Member States added additional exceptions, namely, the collection of criminal records data, legal assistance in serving procedural documents, the hearing of the accused by telephone conference, and the seizure of items subject to confiscation. Cross-border surveillance as referred to in the Convention implementing the Schengen Agreement was explicitly excluded from the scope of application of the EIO in a small number of Member States. Almost all of them correctly implemented this provision.

3.2.3. Types of proceedings (Article 4)

Article 4 of the Directive states that an EIO can be issued in criminal proceedings in all Member States (Article 4(a)). One Member State, however, requires criminal proceedings for a criminal offence committed in the issuing State, instead of referring to 'a criminal offence under the national law of the issuing State'. A few Member States, in their position as issuing States, stated that it was possible to issue an EIO in proceedings for acts punishable under the national law of the issuing State by virtue of being infringements of the rules of law under Article 4(b) and 4(c) of the Directive. In a large number of Member States, the transposing legislation does not include an explicit reference to proceedings for offences or infringements for which a legal person may be held liable or punished in the issuing State (Article 4(d)). Almost all Member States correctly implemented this provision.

[13] Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ L 239, 22.9.2000, p. 19).

3.3. Issuing an EIO

3.3.1. Content and form of an EIO (Article 5(1))

Article 5(1) of the Directive lays down the requirements for the content of an EIO and establishes an obligation to issue EIOs in the form set out in the Annex to the Directive.

Most Member States transposed the form established under the Directive in a complete and conform manner.

3.3.2. Conditions for issuing an EIO (Article 6)

According to Article 6(1), an EIO may be issued where (a) the issuing is necessary and proportionate for the proceedings referred to in Article 4, taking into account the rights of the suspect or the accused, and (b) the investigative measure(s) indicated in the EIO could have been ordered under the same conditions in a similar domestic case.

No specific explicit transposition of Article 6(1) could be identified in some Member States, while some instances of incorrect transposition were identified in a few other Member States.

A significant number of Member States did not explicitly mention the possibility of consulting the issuing authority on the importance of issuing an EIO (Article 6(3)), but some of those Member States adopted horizontal provisions on consulting the issuing authority about the recognition and execution of EIOs. A small number of Member States transposed Article 6(3) by referring to consulting the issuing authority only under the conditions set out in accordance with Article 6(1)(a). A small number of Member States made it mandatory, rather than discretional, to consult the issuing authority.

Most Member States correctly transposed Article 6. However, in the case of a few Member States transposition does not conform to the Directive.

3.3.3. Language regime (Article 5(2)-(3) and 33(1)(b))

Pursuant to Article 5(3), an EIO must be translated by the competent authorities of the issuing State into the official language(s) of the executing State or into any other language that State has notified as acceptable.

Most Member States transposed Article 5(3) in a complete and conform manner. Very few Member States did not explicitly transpose it.

More than half of the Member States notified in accordance with Article 33(1)(b) that they accept EIOs in language(s) other than their own (typically English). A few Member States made the acceptance of such other language(s) conditional on the urgency of the request or a reciprocal commitment from the other Member State in question. A small number of Member States also established preferential language regimes for certain neighbouring Member States. While a vast

majority of Member States indicate in their transposing legislation the language that may be used for completing or translating an EIO when the Member State concerned is the executing State, a very small number of Member States do not specify the language regime in their transposing legislation.

3.4. Recognising and executing an EIO

3.4.1. Recognition and execution of an EIO (Article 9)

Pursuant to Article 9, the executing authority has a general duty to recognise an EIO and ensure its execution in the same way and under the same conditions as if the investigative measure concerned had been ordered by an authority of the executing State.

A very small number of Member States did not explicitly refer to the obligation to recognise an EIO in their transposing legislation. One Member State referred to discretion instead of an obligation to execute an EIO.

The majority of Member States correctly transposed Article 9(2). This Article requires compliance with formalities and procedures expressly indicated by the issuing authority, provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State. One Member State provided for a discretionary provision instead of an obligatory one. In a couple of Member States, relevant provisions covering administrative criminal law proceedings could not be identified. Several Member States transposed the reference to 'fundamental principles of law' as a general reference to 'national law' or its 'basic principles'.

Article 9(3) requires the executing authority to return an EIO not issued by an issuing authority to the issuing State. A large majority of Member States transposed this provision in a conform manner. However, a few Member States did not explicitly transpose it, and 1 Member State transposed it as a ground for non-execution or non-recognition.

No explicit transposition of Articles 9(4) and 9(5), specifying how the authorities of the issuing State can assist in the execution of the EIO in the executing State, could be identified in a small number of Member States, while compliance issues were identified in a few others.

3.4.2. Recourse to a different type of investigative measure (Article 10)

Under Article 10(1), the executing authority is obliged to have recourse to an investigative measure other than that provided in the EIO where the measure requested does not exist under national law, or would not be available in a similar domestic case.

Most Member States transposed Article 10 in a conform manner, while in a few Member States compliance issues were identified. These relate, for example, to its being discretionary instead of obligatory to have recourse to another investigative measure (paragraph 1), or to its being

obligatory instead of discretionary to have recourse to a less intrusive investigative measure (paragraph 3), while a few Member States transposed paragraph 5 as a ground for non-recognition or non-execution.

3.4.3. Grounds for non-recognition or non-execution (Articles 11(1), 22(2), 23(2), 24(2), 26(6), 27(5), 28(1), 29(3), 30(5))

The general duty to execute an EIO in Article 9(1) is limited by the optional grounds for non-recognition or non-execution listed in Article 11(1), as well as by additional grounds for certain investigative measures in Articles 22(2), 23(2), 24(2), 26(6), 27(5), 28(1), 29(3), and 30(5).

More than half of Member States transposed all or some grounds for non-recognition or non-execution in accordance with Article 11(1) as mandatory, whereas the other Member States transposed them as optional. Some Member States did not explicitly transpose some grounds for refusal in accordance with Article 11(1). A few Member States either did not transpose, or transposed additional, grounds under Articles 22(2), 24(2), 26(6), 27(5), 28(1), 29(3), and 30(5) as mandatory grounds.

Significant differences in the transposition approaches have been observed in the case of Article 11(1)(d), setting out an optional ground for refusal if the execution of the EIO would be contrary to the principle of ne bis in idem. While some Member States only refer to the principle itself, others specify it, and some of those add an enforcement condition[14].

For the fundamental rights ground for refusal under Article 11(1)(f), a conform transposition was observed in a significant number of Member States. A couple of Member States, however, did not refer to such explicit ground for non-recognition and non-execution. Moreover, a few Member States omitted references to Article 6 TFEU and the Charter, a couple of Member States referred to the European Convention on Human Rights, and 1 Member State to the judgments of the European Court of Human Rights.

All Member States transposed the double criminality ground for refusal in accordance with Article 11(1)(g), while some Member States included exceptions or conditions that raise conformity issues. As regards the categories of offences for which verification of double criminality was abolished, 1 Member State does not exclude such verification in the case of its nationals, while another does, for coercive measures, unless such measures are restricted to certain offences or there is a certain threshold. One Member State has an option to make the non-application of this ground for non-recognition or non-execution conditional on reciprocity. Reference to a detention order is missing in a very small number of Member States.

[14] This stems from Article 54 of the Convention implementing the Schengen Agreement 'if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party').

Two Member States did not transpose Article 11(2) specifying that the double criminality ground for refusal, as well as the ground for non-recognition or non-execution under Article 11(1)(h), do not apply to investigative measures referred to in Article 10(2).

Most Member States transposed the exception for fiscal offences related to taxes, duties, customs and exchange in accordance with Article 11(3) correctly, while in a small number of Member States implementation measures are lacking.

Article 11(4) requires the executing authority to consult the issuing authority before deciding not to recognise or execute an EIO on some of the grounds for non-recognition or non-execution. Most Member States implemented this provision correctly, but some only did so partially, for example, by omitting the words 'in whole or in part' and 'without delay', or omitting the requirement to consult the issuing authority about certain grounds for non-recognition or non-execution.

In accordance with Article 11(5), the executing authority is obliged to request an authority in its Member State to waive privilege or immunity, where such an authority has the power to do so. A small number of Member States did not transpose this provision or transposed it only partially.

Apart from the grounds for the non-recognition or non-execution of an EIO in the Directive, a few Member States set out additional ones in their national legislation. For example, if an EIO form or its translation is incomplete, incorrect or missing, if a successful legal challenge is mounted against an EIO, if an EIO is withdrawn, or if there are other reasons that make it impossible to perform procedural actions.

Such different approaches to implementation can lead to discrepancies between the different legal systems. These could in turn make it more difficult to apply the Directive in practice. As confirmed by the Court of Justice[15], the EIO 'is indeed an instrument based on the principles of mutual trust and mutual recognition, the execution of which constitutes the rule and refusal to execute is intended to be an exception which must be interpreted strictly'.

3.5. Time limits for recognition or execution and grounds for postponement of recognition or execution (Articles 12 and 15)

The time limits and principles set out in Article 12 are important for the efficiency of the EIO.

A number of Member States did not transpose the wording of paragraph 1 on taking the decision on recognition or execution and carrying out the investigative measure 'with the same celerity and priority as for a similar domestic case'.

[15] See Judgment of the Court of Justice of 8 December 2020, A and Others, C-584/19, ECLI:EU:C:2020:1002, paragraph 64.

A small number of Member States did not transpose paragraph 2, requiring the executing authority to take into account the issuing authority's request to execute an EIO within a shorter deadline or on a specific date.

Paragraph 3 specifies that a decision on the recognition or execution of an EIO must be taken as soon as possible and no later than 30 days after the receipt of an EIO. A large majority of Member States correctly transposed the deadline in a conform manner, but a few present conformity issues, for example, by making exceptions.

Paragraph 4 states that the executing authority must carry out the investigative measure without delay and no later than 90 days following the decision on the recognition or execution of an EIO. All Member States set this time limit in their national legislation.

Paragraphs 5 and 6 permit the extension of the time limits. However, a few Member States seem not to have implemented these provisions correctly.

The recognition and execution of an EIO can be postponed on two grounds indicated in Article 15(1). As soon as such grounds cease to exist, the executing authority must forthwith take the necessary measures for the execution of the EIO and inform the issuing authority (Article 15(2)). Most Member States correctly transposed these provisions. Very few Member States introduced an obligation to postpone recognition or execution instead of giving discretion. A small number of Member States only partially transposed Article 15(2).

3.6. Transfer of evidence (Article 13)

Under Article 13(1), the executing authority must transfer evidence to the executing State without undue delay. Evidence can also be transferred directly to the competent authorities of the issuing State assisting with the execution of an EIO in accordance with Article 9(4). Not all Member States correctly transposed this provision.

The transfer of evidence may be suspended pending a decision on a legal remedy in accordance with Article 13(2). A small number of Member States did not transpose this provision, or only partially did so. A few Member States provided for an obligation to suspend the transfer of evidence, with 1 Member State stating that the transfer of evidence must not be suspended due to a legal remedy.

In accordance with Article 13(4), the executing authority may temporarily transfer the evidence to the issuing State where it is already relevant for other proceedings. A few Member States did not transpose this provision.

3.7. Legal remedies (Article 14)

Article 14(1), read with recital 22, obliges Member States to ensure that legal remedies, equivalent to those available in a similar domestic case, are applicable to the investigative measures indicated in the EIO.

Several Member States did not specify that the legal remedies equivalent to those available in a similar domestic case are applicable to the investigative measures indicated in an EIO, if an EIO is issued in the Member State in question. A couple of Member States made no explicit provision for their actions as executing States. However, a number of Member States indicated that the national laws regulating criminal procedures apply. In a small number of Member States, transposing laws lay down remedies specific to EIOs.

Some Member States did not explicitly transpose paragraph 2, specifying that only the issuing State could challenge the substantive reasons for issuing an EIO.

A significant number of Member States did not explicitly transpose paragraphs 3, 4, 6 and 7, on the provision of information about seeking legal remedies, the time limits applicable for seeking legal remedies, or the consequences of a legal challenge.

Under paragraph 5, the issuing and executing authorities must inform each other of the legal remedies sought against the issuing, recognition or execution of an EIO. While a very small number of Member States did not transpose this provision at all, others failed to implement it correctly.

3.8. Obligation to inform (Article 16)

A majority of Member States correctly transposed the obligations in Article 16 to confirm the receipt of an EIO and provide other information to the issuing State in the course of recognising or executing an EIO. A small number of Member States, however, transposed Article 16 only partially (e.g. ‘without delay’ and ‘immediately’ are omitted; the obligation to confirm the receipt of an EIO is not imposed on the executing authorities, where a central authority is involved; Article 16(2)(b) is not transposed).

4. DATA COLLECTION

In September 2020, the Commission sent questionnaires to competent authorities and lawyers in Member States, to Eurojust and to the EJN, requesting both qualitative and quantitative information pursuant to Article 37 of the Directive. It received replies from 19 Member State competent authorities, Eurojust and the EJN, and 9 from lawyers.

From the competent authorities' replies, it appears that the EIO is frequently used: the number of EIOs issued and executed since the start of application of the Directive varies between a low three-digit number (for example, 1 Member State issued 364 EIOs and received 180 for execution) and a low five-digit number (for example, 1 Member State issued around 15 900 EIOs and received around 10 500 for execution). Moreover, the number of EIOs for which the EJN was asked to provide assistance significantly increased from 255 in 2017 to 1762 in 2019. Such assistance involved, for example, direct contacts between authorities, speeding up cooperation, as well as providing information on points of law or the status of a criminal case. Since the entry into application of the Directive, in 3348 cases involving EIOs, Eurojust's assistance has been sought. The type of assistance has varied from case to case and covered different stages, from issuing an EIO to recognising or executing it and following it up.

Hearing of a person and obtaining information on bank and other financial accounts are among the investigative measures most often requested in most Member States. However, it appears that most types of investigative measures are regularly requested.

Most of the EIOs issued were successfully executed (between 76.65% of EIOs executed in 1 Member State, and 96.93% executed in another) and only a very few were refused (between 0% of all EIOs issued in 1 Member State, and 17% of EIOs issued in another). However, there were a few issues with refusals to execute EIOs in individual cases, for instance, on grounds of dual criminality, or because a requested measure could not be authorised in accordance with domestic law, as well as for factual reasons, or due to translation issues, including grounds such as proportionality, *de minimis* policies and the COVID-19 pandemic, as well as refusals without reasons. Only a couple of Member States invoked Article 11(1)(f) (fundamental rights) as grounds for non-recognition or non-execution.

Most Member States reported executing an EIO and transferring evidence to the issuing State within 31 to 60 days. A large number of Member States, however, reported receiving evidence from the executing State only within 91 to 120 days. Many Member States consider the EIO time limits as appropriate. A group of Member States, however, reports (serious) individual delays, even in urgent cases, while some replies indicate that compliance with time limits varies among Member States. Internal procedures, workload and the COVID-19 pandemic, as well as other reasons, such as the impossibility of serving a summons, were cited as some of the reasons for delays. Some Member States report that they resolved such issues through direct contacts, or by getting support from Eurojust, the EJN or Europol for urgent requests.

Most Member States consider the present framework for the mutual recognition of EIOs satisfactory in general for obtaining evidence. However, this is not the case for electronic evidence[16], where Member States continue to see a strong need for specific rules, all the more

[16] https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/e-evidence-cross-border-access-electronic-evidence_en

pressing with increased digitalisation and the COVID-19 pandemic. Most Member States also believe that the Directive has simplified and sped up the gathering of evidence and had a positive impact on judicial cooperation in criminal matters. To a large extent, Eurojust and the EJN share these views.

Difficulties hindering the smooth functioning of the EIO have been identified, most frequently the length and complexity of the form. Differences arising from national legal regimes for obtaining evidence were also identified, as well as other practical application issues in individual cases. For instance, the executing State requesting to send the national decision (court order) in addition to the EIO form, incomplete forms, poor quality translations, and cases where the executing State did not follow specific procedural requirements requested by the issuing State. With respect to the latter issue, a couple of Member States highlighted it in the context of the admissibility of evidence obtained through an EIO in courts. Other Member States, however, reported no difficulties with the admissibility of evidence, or that they did not have such information. Most Member States preferred non-legislative action to improve the functioning of the EIO, but also provided suggestions for simplifying the form.

On the interception of telecommunications, the majority of Member States either could not provide exact figures on how often this measure has been used so far, or reported quite low numbers. In the case of Article 30, the number of EIOs issued varied between 0 in 1 Member State to 25 in another; the number of EIOs received varied between 0 in 1 Member State and 90 in another. In the case of Article 31, the number of notifications sent varied between 0 in 1 Member State and at least 40 in another; and the number of notifications received varied between 0 in 1 Member State and 35 in another). The majority of Member States could not indicate in how many cases the interception of telecommunications (pursuant to Article 30 or 31) was refused, or reported very low figures.

On whether the Directive's provisions on the interception of telecommunications, taking into account technical developments, are satisfactory, a majority of Member States indicated that they found the Directive satisfactory in this respect, and considered that the challenges could not be surmounted through legislation. A few Member States suggested that the Directive's scope could be further clarified, or that specific regulation of the providers of so-called over-the-top (OTT) services was needed. Some Member States did not take a view on this at all.

In autumn 2018, in the context of the discussions on the newly proposed rules for cross-border access to stored electronic evidence, the Commission consulted Member States on the current problems and possible ways to improve cross-border real-time interception. These consultations demonstrated that the conditions for issuing interception orders (such as restricting the use of the measure to certain offences, or to specific penalty thresholds) set out in Member States' national laws vary greatly, and showed that there were mainly technical challenges concerning the cross-border transmission of data. Nevertheless, the existing EIO system was considered an appropriate and useful tool to handle cross-border requests between Member States. The

consultations also showed that legislative measures, including addressing real-time interception as part of the proposed e-evidence package and the harmonisation of differing national conditions to tackle current difficulties, were not considered appropriate. Finally, the compliance assessment showed that while most of the Member States correctly transposed Articles 30 and 31, a few did not transpose parts of those provisions or were otherwise not in conformity with the Directive because, for example, they provided for mandatory instead of optional grounds for non-recognition or non-execution.

Both the EJN and Eurojust also reported[17] certain difficulties in the practical application of the Directive, for example the handling of urgent cases, poor quality translations, weaknesses in the EIO form, the lack of explicit regulation of the 'rule of speciality', and differently interpreted provisions. They suggested taking both legislative and non-legislative action to address this.

Lawyers' replies indicated they had limited practical experience of EIOs. For instance, very limited to no experience was noted on challenging the issuing of an EIO or its recognition and execution. A small number of replies showed that requests from the defence to gather evidence from another Member State (Article 1(3)) were rarely granted. Some of the replies underlined the importance of an EIO in complementing the European arrest warrant[18]. While a number of replies suggested that the present framework for the mutual recognition of EIOs is satisfactory in its protection of fundamental rights, a few suggestions were made to improve the functioning of EIOs through legislative or non-legislative action.

Many Member State competent authorities, lawyers and especially the EJN and Eurojust provided examples of good practice. These include, for instance, direct consultations between authorities, training for practitioners, coordination meetings, or publications on the use of the EIO.

5. CONCLUSION

The Directive is the core instrument for gathering evidence in the EU. It adopted a new approach based on the principle of mutual recognition in order to obtain evidence in criminal matters. Overall, the Directive provided EU added value compared to previous instruments by streamlining the process of gathering evidence and imposing concrete time limits for doing so.

While recognising the efforts made by Member States to date, this assessment also shows that there are still difficulties regarding certain key provisions of the Directive, such as grounds for

[17] A number of practical application issues were also publicly reported by Eurojust and EJN, such as in the Joint Note of Eurojust and EJN from June 2019 and in a Report on Eurojust's casework from November 2020.
[18] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002, p. 1.

non-recognition or non-execution. The Commission will continue to assess Member States' compliance with the Directive and take appropriate measures to ensure conformity with its provisions throughout the EU.[19]

At the same time, the Commission is working closely with Member States to overcome the difficulties in implementing the Directive. Since its adoption, the Commission has organised 3 experts' meetings with the Member States to support them in the application of the Directive in practice[20]. Moreover, the Commission is promoting, notably through financial support, the effective application of the EIO by raising awareness of its availability and stressing the need to train practitioners in how to use it[21]. It has also developed the e-Evidence Digital Exchange System (eEDES), an IT tool Member States may use to swiftly and securely exchange EIOs in digital format in compliance with requirements set out in the Directive. The system may also be used to transmit electronic evidence and the associated evidence from the executing to the issuing Member State. In its Communication on the digitalisation of justice adopted on 2 December 2020[22], the Commission encouraged all Member States to connect to eEDES, since it is expected to further increase the efficiency of the Directive.

Finally, future rules on electronic evidence[23] should complement the Directive, introducing swift procedures that reflect the specificities of electronic evidence and address the urgent and increasing needs of practitioners.

[19] In line with its enforcement strategy set out in Communication from the Commission — EU law: Better results through better application (C/2016/8600), the Commission investigates with priority cases where Member States have incorrectly transposed directives.
[20] On 25 January 2016, 18 May 2016 and 22 June 2017.
[21] Future Regulation of the European Parliament and of the Council establishing the Justice Programme.
[22] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *Digitalisation of justice in the European Union A toolbox of opportunities* (COM/2020/710 final).
[23] Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters (COM/2018/225 final), and Proposal for a Directive of the European Parliament and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings (COM/2018/226 final).