



## ASPECTS CONCERNING THE EUROPEAN INVESTIGATION ORDER AND EUROJUST'S INVOLVEMENT IN THIS INSTRUMENT OF INTERNATIONAL JUDICIAL COOPERATION

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### Abstract

*Starting from the provisions of Article 82 para (2) of the TFEU on supporting the judicial cooperation in criminal matters at EU level, through the adoption of Directive 2014/41/3.04.2014 on the European Investigation Order (EIO), a new way of international judicial cooperation in this field has been carried out between the Member States of the Union covered by the Directive, with the aim of gathering evidence in the criminal proceedings. This way of international judicial cooperation was intended to create a single regime for obtaining evidence, and additional rules on certain investigation measures, such as: temporary transfer of liberty-deprived persons, hearings by videoconference, obtaining information on bank accounts or banking operations, supervised deliveries or covert investigations. The European Union Agency for Criminal Justice Cooperation, Eurojust, may intervene and support the actions carried out during the different stages of a European Investigation Order, including in complex situations where the measures have effects on different areas of the national territory and in those involving an adaptation of these measures and with others at the level of the issuing Member State and/or in other Member States or third States. The present study refers to issues related to the usefulness of the European Investigation Order and to the way whereby Eurojust supports the Member States of the Union in achieving the objectives for which such an Order may be issued.*

**Keywords:** international judicial cooperation; member states of the union; member states of the union; eurojust; european investigation order

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## **1. Issues relating to the Emergence and Purpose of the European Investigation Order**

At present, at the level of all EU Member States and at Union's level, it is believed that in order to ensure the EU's main purpose, that of forming a common area of freedom, security and justice, it is imperative to resort to various forms of international legal assistance in criminal matters, since by this assistance, the necessary support can be concretely provided by the judicial authorities of one Member State to those of another Member State, for the purpose of carrying out investigations, communicating various procedural documents, or for transmitting the information necessary for the proper and diligent performance of the judicial process.

Organised crime, through its new forms and its increasingly extensive dimensions and within the Union's framework, has highlighted, at EU level, the need to find effective methods of preventing and combating it, instruments of judicial cooperation based on the principle of mutual recognition at Union level. At Member State level, this requires increasing efforts to harmonise their legislation with the Union's legislation.

As a result of these awareness-raising processes, at Union's level, the TFEU has included in the text of Article 82, para (2), the provision that, in order to facilitate judicial cooperation in criminal matters within the Union, the European Parliament and the Council may, by decisions in accordance with the ordinary legislative procedure, adopt measures relating also to the mutual admission of evidence between Member States, meaning that the two institutions involved in the Union's legislative process, by the said procedure, have the acknowledged possibility to establish minimum rules on admitting the pieces of evidence between Member States, reciprocally.

The first concrete means adopted to this end was Framework Decision 2003/577/JHA on the execution in the EU of orders freezing property or evidence.<sup>1</sup>

Subsequently, Framework Decision 2008/978/JHA on the European evidence warrant for the purpose of obtaining objects, documents and data for use in criminal matters was adopted.<sup>2</sup>

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<sup>1</sup> <https://eur-lex.europa.eu/>, OJ L 196/2.08.2003. The Framework Decision enables the judicial authorities of one Member State to send an order to another Member State for the purpose of freezing property in order to obtain evidence or for their subsequent confiscation.

<sup>2</sup> <https://eur-lex.europa.eu/>, OJ L 350/ 30.12.2008.

It was found that these two Union's legislative acts formed a somewhat incomplete legal framework, which involved the use of both instruments of judicial cooperation for the purpose of freezing and transferring the evidence between member states and resorting to the provisions of the European Convention on Mutual Assistance in Criminal Matters of 29.05.2000<sup>1</sup>. Also, in view of the need to find a way of enforcing as quickly as possible a request for evidence from a Member State, as well as the need to apply as effectively as possible the principle of mutual recognition of judicial decisions, it was considered necessary to adopt another Union's legal act whereby a more practical and more efficient form of judicial cooperation is authorized for the Member States.

Thus, the three instruments have been replaced by a new way of international judicial cooperation in criminal matters, with an active character - Directive 2014/41/3.04.2014 on the European Investigation Order (EIO)<sup>2</sup>.

This form of judicial cooperation in criminal matters is applicable only for:

- a. obtaining evidence from the competent executing authority of a Member State, and
- b. carrying out investigation measures that are necessary in specific cases, excluding other forms of assistance for which there is a more simplified procedure for transmission or enforcement<sup>3</sup>.

Specifically, as provided for in Article 1, paragraph 1 of the EIO Directive, 2014/41/3.04.2014, "A European Investigation Order (EIO) is a judicial decision which has been issued or validated by a judicial authority of a Member State (referred to as "the issuing State") to have one or several specific investigative measure(s) carried out in another Member State (referred to as "the executing State") to obtain evidence in accordance with this Directive."

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<sup>1</sup> OJ C 197/ 12.7.2000, and the Protocol to the Convention on Mutual Assistance in Criminal Matters between EU Member States, OJ C 326/ 21.11.2001. The use of the international rogatory commission for the remittance of the assets of the requesting state, for taking another sample, etc.

<sup>2</sup> OJ L 130/1, 01.5.2014.

<sup>3</sup> Mihaela Pătrăuș, *Reflecții în legătură cu transpunerea ordinului european de anchetă (EIO) în legislația națională / Reflections on the transposition of the European Investigation Order (EIO) into national law*, <http://revista.universuljuridic.ro/reflectii-legatura-cu-transpunerea-ordinului-european-de-ancheta-eio-legislatia-nationala/>.

## 2. Conditions for Resorting to the European Investigation Order and its Phases

Article 3 of the EIO Directive refers to “any investigative measure”, except for the establishment of a joint investigation team.

Regarding the interpretation that should be given to this provision, we refer to a joint note by Eurojust and the European Judicial Network<sup>1</sup>, which states that there would be useful criteria for determining whether the European Investigation Order (EIO) Directive should be applied in the following specific cases:

- a. the order relates to an investigative measure aimed at gathering or using evidence;
- b. the measure has been issued or validated by a judicial authority;
- c. the measure refers to the Member States bound by the EIO Directive<sup>2</sup>.

In situations where one of these criteria does not apply, the EIO Directive will not be the applicable instrument but, instead, another legal instrument, such as a request for mutual legal assistance, should be applied, based on the provisions of the 2000 Convention on International Legal Assistance in Criminal Matters, which establishes direct contact between judicial authorities - when the purpose is to obtain or transmit only procedural acts.

It is widely accepted that the EIO Directive does not cover the following measures:<sup>3</sup>

- the creation of a joint investigation team and the gathering of evidence within such a team;
- the notification and transmission of procedural documents, unless such transmission would be absolutely necessary for the investigative measure covered by the European Investigation Order – in this case, a malleable attitude of accepting the possibility of including it in the European Investigation Order, according to the provisions of Article 9, para (2) of the European Investigation Order, would be desirable;

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<sup>1</sup> Joint note by Eurojust and the European Judicial Network on the practical application of the European Investigation Order, June 2019, p. 5.

<sup>2</sup> Given that the EIO Directive stipulates that it applies to all Member States bound by it; Ireland and Denmark are not bound by it.

<sup>3</sup> Joint note by Eurojust and the European Judicial Network on the practical application of the European Investigation Order, June 2019, p. 6.

- spontaneous exchange of information (Article 7 of the 2000 Convention on Mutual Assistance);
- the transfer of proceedings (Article 21 of the 1959 Council of Europe Convention and the 1972 Council of Europe Convention);
- the freezing of property for the purpose of its subsequent confiscation (Framework Decision 2003/577/JHA on the execution in the European Union of orders to freeze property or evidence and, as of 19.12.2020, Regulation 2018/1805 on the mutual recognition of freezing and confiscation orders);
- return of an asset to the one harmed by the offence (Article 8 of the 2000 Convention on Mutual Assistance);
- to obtain excerpts from the criminal records register/ECRIS;
- cooperation between the police services of the Member States, or
- cooperation between customs services.

According to paragraph (25) of the European Investigation Order Directive, thesis 1, this Directive lays down rules on the implementation of an investigative measure, at all stages of criminal proceedings, where appropriate, with the participation of the person concerned, with the purpose of gathering evidence.

As it is also emphasized in the Joint Rules of Eurojust and the EJN in this area, in practice, the European Investigation Order may be used to gather evidence, not only at the prosecution stage, but also at the trial stage, and in relation to some national legal systems, and during the enforcement phase of a final court decision, as for example, in the course of a financial investigation, in order to identify assets after a final decision on confiscation has been taken, or to gather evidence on the circumstances of executing a sentence.<sup>1</sup>

The investigative measures specific to the European Investigation Order are, as stipulated in Directive 2014/41, the following:

- temporary transfer to the issuing State of liberty-deprived persons for the purpose of applying an investigative measure (Article 22 of the Directive);
- hearing by videoconference or by other means of audiovisual transmission (Article 24 of the Directive);

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<sup>1</sup> Idem.

- information on bank accounts and other financial accounts (Article 26 of the Directive);
- information on banking and other financial transactions (Article 27 of the Directive);
- actual collection of evidence (Article 28) by means such as: video surveillance, localization or tracking by using technical devices (GPS);
- accessing a computer system;
- interception of telecommunications with technical assistance and without technical assistance (Articles 30 and 31 of the Directive)<sup>1</sup>.

### **3. European Union's Agency for Criminal Justice Cooperation – Eurojust and its Involvement in the European Investigation Order Procedure**

Established in 2002, the European Union's Agency for Criminal Justice Cooperation (Eurojust)<sup>2</sup> supports the EU Member States in combating terrorism and severe forms of organized crime. It also facilitates judicial coordination and cooperation between national authorities by providing concrete support to prosecutors in the fight against severe cross-border crime and terrorism.

The main partners of the Agency are the national authorities. The Agency forms relations between prosecutors, law enforcement authorities and other competent actors in the criminal sphere, enabling them to combat severe cross-border crime and terrorism, Eurojust's activity making possible a safer existence for all European citizens on the European continent.<sup>3</sup>

In achieving these objectives, Eurojust structures coordination meetings, supports the establishment and funding of joint investigation teams, organises coordination centres from where joint action days against criminal networks are run in real time, and maintains a global network of liaison prosecutors and contact points, which ensure access to jurisdictions around the world.

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<sup>1</sup> Idem, p. 15

<sup>2</sup> Based in The Hague.

<sup>3</sup> [https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/search-all-eu-institutions-and-bodies/eurojust\\_ro](https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/search-all-eu-institutions-and-bodies/eurojust_ro).

Regarding the issuing and execution of European Investigation Orders, Eurojust has also been involved, assisting the competent national authorities, in every step necessary to be taken in the procedure relating to such orders.

Any European Investigation Order is required to go through certain phases, which refer to: its elaboration, its transmission, its recognition and finally, its execution.

In completing each of these phases, the competent bodies and practitioners may request the necessary support to be obtained both to the European Judicial Network (EJN) and to Eurojust.

Thus, by way of example, we mention some of the aid forms that Eurojust can grant, always upon request, to the competent authorities for issuing and executing such an order:

1. Before issuing a European Investigation Order:

Eurojust may assist the issuing authorities with clarifications on the necessary wording of the European Investigation Order and the clarification of its legal aspects; it can support the identification of the truly competent authority for the reception or execution of the order issued; it can provide consultations on the usefulness of using the European Investigation Order procedure in relation to other mutual recognition tools. At the same time, the Agency will be able to identify and develop a possible tactic of cooperation in the specific case.

2. After the European Investigation Order has been issued

The issuing or executing authority will, at this stage, be able to request Eurojust's support on issues such as: whether the European Investigation Order has been correctly received; whether the European Investigation Order complies with the conditions required by the Directive we refer to, for enforcement; whether some problems have been identified and whether additional documents or information need to be transmitted.

3. Whenever a consultation procedure is started, or when further clarification is required, Eurojust may also provide the role of mediator.

The European Investigation Order involves several consultation modalities, for which Eurojust may, upon request, provide assistance. For example, it may provide assistance in order to clarify the authenticity of any document attached to the order (Article 7 para (7) of the EIO Directive); or in supporting the recognition and execution of such an order; it may provide consultancy on the grounds for which recognition or execution of a European Investigation Order may be refused before

the competent authority decides on such a refusal (Article 11 para (4) of the EIO Directive); it may clarify the temporary transfer of evidence; it may also check how well the timetable for the implementation of the specific investigative measure is drawn up, in cases where the executing authority is unable to comply with the time limit laid down (Article 12, para (6) of the EIO Directive). It may also support the decision on the possible sharing of the very high costs involved in the execution of orders, as well as on the finding of another method of investigation, or on the withdrawal of the transmitted European Investigation Order (Article 10, para (4) of the EIO Directive).

4. In complex, multilateral cases where the measures taken produce effects on distinct parts of the national territory and involve coordination at the same time as with other measures to be taken in the issuing Member State and/or in other Member States or third States, Eurojust will also be of real help, through the coordination mechanisms at its disposal and which it can provide, mechanisms such as coordination meetings and coordination centers.

The authorities issuing a European Investigation Order may rely on Eurojust's support in cases where they foresee that they will issue a European Investigation Order involving several jurisdictions. These cases require multiple measures to be taken in different Member States. Especially when the execution of investigative measures must be carried out in concrete terms, on a day of joint action, simultaneously and planned in the different States, Eurojust will make available the support mechanisms, such as coordination meetings and coordination centres. At the same time, prior to a coordination meeting or a day of action, it will frequently offer European Investigation Order Projects, to assist the executing authorities in ensuring the uninterrupted execution of the European Investigation Orders.

A concrete example of Eurojust's involvement in the European Investigation Order procedure is Operation Carpatos of May 2019<sup>1</sup>, where an investigation was carried out on an organised criminal group involved in illegal fishing, tax evasion and money laundering. Eurojust supported the States involved, through two coordination meetings at Eurojust, with the participation of Europol, with the purpose of exchanging information, taking a decision on investigation and prosecution strategies and resolving operational issues.

The simultaneous actions taken by the national authorities of the states involved (Romania, Spain, France, Italy, Hungary and Portugal) were supported by a coordination centre at Eurojust, including the real-time coordination of three

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<sup>1</sup> 2019 EUROJUST ANNUAL REPORT, Eurojust, 2020, Website: [www.eurojust.europa.eu](http://www.eurojust.europa.eu)



European Investigation Orders from Romania to Hungary. The operational results included 250 searches, the arrest of 13 suspects and the confiscation of 11 boats and 30 tons of illegally caught fish.

#### **4. Conclusions**

The European Investigation Order is a judicial decision issued or validated by a judicial authority of an issuing Member State, with the aim of implementing one or more specific investigative measures in another Member State - executor, in order to obtain the evidence necessary to resolve criminal cases. This order establishes a certain concrete process of cooperation between the competent authorities of the Member States of the Union in order to obtain evidence, materialized, for example, by carrying out searches, conducting hearings, intercepting communications and temporarily transferring persons deprived of liberty.

The procedure of any European Investigation Order involves four phases, namely its preparation, its transmission, its acceptance and its execution. At all these stages, the European agency Eurojust is of real help to the competent issuing and executing authorities of the Member States of the Union. It will be able to provide support to these authorities at their express request. It does so mainly by being able to provide them with a unique tool represented by the coordination center, whereby Eurojust supports large-scale operations aimed at cross-border crime. In order to ensure the success of these actions, an important role is played by Eurojust in its ability to simultaneously carry out measures such as searches, confiscations of property, questioning of witnesses and possible suspects and seizures of assets. By resorting to the joint action days' procedure in several Member States, simultaneously, Eurojust provides participants with access to secure lines of communication, while at the same time reducing the risk that criminals may be able to prevent the networks they are part of. Also, the information obtained by the participating authorities gives them the opportunity to adapt their tactics in real time to the evolution of concrete situations.

However, as we have presented in this study, Eurojust's support is not only limited to making this instrument available, but it has a multitude of ways whereby it can support the states involved in issuing and executing a European Investigation Order, in all the phases that it involves, and may, if necessary, also assume the role of mediator between them.

From the analysis carried out in this study, we conclude that, at European Union level, there is concern for the permanent improvement of the judicial cooperation forms in criminal matters between the Member States and of the legal aid methods, whereby these states provide joint support in a real way and as quickly as possible, for the effective implementation of the act of criminal justice. For this, at the level of the Union, the legal framework has been achieved and concrete practical instruments have been created (a process which, we believe, is a continuous one, given the evolution of transnational forms of crime), as well as the Union's institutional framework absolutely necessary to support the competent bodies of the Member States of the Union in carrying out the criminal justice act.

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