

Scope and Content of the European Investigation Order (EIO)

Key Features

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Structure

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- Nothing but a con: More fragmentation
- Mutual recognition: The new religion
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- The self-restriction joke
- Mutual distrust: The new black
- Grounds for refusal
- Specific investigative measures: Marginal progress
- No free movement of evidence

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Single evidence gathering instrument?

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replacing the fragmented MLA instrumentarium in its entirety?

in same procedures as EU2000 (slight reformulation only, Art. 4)

- i.e. including for 'administrative offences' and in case of corporate liability
- most MS bound by EIO directive
- opt-out by Denmark, no opt-in by Ireland, opt-in by UK (until Brexit)

EIO directive replaces, between MS bound by it

- 2003 European Freezing Order
- "corresponding" provisions of
 - CoE 1959 MLA Convention + 1978 and 2001 Protocols
 - 1990 Schengen Implementing Convention
 - 2000 EU MLA Convention + 2001 Protocol
- EJN (early 2017) asked for MS' individual positions on which provisions they considered to be "corresponding" ...

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Nothing but a con: More fragmentation | 1

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MS bound will continue to apply (at least in part) all 'replaced' instruments amongst them

- sending and service of judicial documents (CoE 1959 MLA + EU 2000)
- cross-border invitation/subpoena of witnesses or experts (CoE 1959 MLA)
- denunciation (CoE 1959 MLA + EU 2000)
- spontaneous information exchange (EU 2000)
- joint investigation teams (EU 2000, except 13.8)
- cross-border observation (SIC, 2nd Protocol 1959 CoE MLA)
- entirety of traditional MLA instrumentarium for MLA re (via 49.b-f SIC)
 - in proceedings for claims for damages, in clemency proceedings, in civil actions joined to criminal proceedings, in the service of judicial documents relating to the enforcement of a sentence or a preventive measure, the imposition of a fine or the payment of costs for proceedings, in respect of measures relating to the deferral of delivery or suspension of enforcement of a sentence or a preventive measure, to conditional release or to a stay or interruption of enforcement of a sentence or a preventive measure
- mediation role Eurojust? (EU Protocol 2001, only for traditional MLA?)

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Nothing but a con: More fragmentation | 2

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MS bound will continue to apply amongst them, in parallel with the EIO

- 1962 Benelux Treaty
- 1997 Naples II Convention
- 2004 Benelux Police Treaty
- EU 2006 'Swedish' FD
- Prüm Convention/2008 EU Prüm Decisions

in their relations with Denmark-Ireland, MS bound by EIO will continue to apply

- 2003 FD European Freezing Order
- CoE 1959 MLA Convention + Protocol 1978
- 1990 Schengen Implementation Convention
- EU 2000 MLA Convention + 2001 Protocol (Denmark)
- Protocol 2001 to CoE 1959 MLA Convention (Ireland)

Schengen *acquis* | relations between bound MS and Norway-Iceland-Switzerland-Liechtenstein

- CoE 1959 MLA Convention + Protocol 1978
- 1990 Schengen Implementation Convention
- Norway-Iceland: also EU 2000 MLA Convention + 2001 Protocol
- Switzerland-Liechtenstein: some provisions EU MLA Convention

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Mutual recognition: The new religion

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MR fetish

- belief paradigm, linked to superiority paradigm

characteristics

- execution of 'orders' instead of granting assistance as 'requested'
- speediness and prioritisation as in national cases (30/90 days)
- for any investigative measure
 - v 'widest measure of mutual assistance' (CoE 1959 Convention)
- "alternatives" if a measure "does not exist" or is "not available in a similar domestic case"
- investigative measures that must be "always available"
 - existing evidence
 - information from police or judicial databases, directly accessible in criminal matters
 - hearing of witness, expert, victim, suspect or accused or third party
 - non-coercive investigative measures
 - identification of persons via telephone numbers and IP addresses

realistic? [no]

- IRCP/EC Study on the laws of evidence (infra)
- Study on execution MLA requests BE-NL (IRCs also deliberately kept by NL after EIO)

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Nothing like a free lunch

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EIO: places unrealistic burden upon executing MS

- any measure obligatory, appealing to self-restraint only (*supra*)
- related cost in principle borne by executing MS (*infra*: negotiation margin)

v IRCP study on the laws of evidence

- keep flexibility of 'widest measure'
- financial capacity
 - cost-sharing
 - 50/50 for costs above 10.000 EUR (or lower) threshold?
 - more costs potentially borne by requesting MS
 - *acquis* EU2000: video links, telecom interception, expert fees
 - extension necessary for, e.g. for covert operations
 - possible creation legal basis to suggest/replace with less costly alternatives
- operational capacity
 - new *aut exequi aut tolerare* rule?
 - JIT and Naples II *acquis* – no constitutional hurdles

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The self-restriction joke

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EIO solution to avoid disproportionate impact on executing MS:

mandatory *self*-restriction by issuing authority!

Article 6 | Conditions for issuing and transmitting an EIO

1. The issuing authority may only issue an EIO where the following conditions have been met:

- (a) the issuing of the EIO is necessary and proportionate for the purpose of the proceedings [...] taking into account the rights of the suspected or accused person; and
- (b) the investigative measure(s) indicated in the EIO could have been ordered under the same conditions in a similar domestic case.

2. The conditions [...] shall be assessed by the issuing authority in each case.

3. Where the executing authority has reason to believe that the conditions [...] have not been met, it may consult the issuing authority on the importance of executing the EIO. After that consultation the issuing authority may decide to withdraw the EIO.

cfr wide recognition disproportionate use EAW (notwithstanding threshold)

- hearing suspects, establishing place of residence, payment of fines, summoning, ...

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Mutual distrust: The new black

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consultation & withdrawal possibility in case of doubts about self-restriction
 negotiation margin in case of elevate/exceptional costs
 “alternatives” if “same result would be achieved by less intrusive means”
 refusal possibility where measure not allowed for ‘administrative’ offences (step back)
 especially pushed by EP and (some) Eastern European MS

- strict judicialisation (half a century back in time)
 - traditional MS discretion to appoint competent ‘judicial’ authorities
 - contemporary landscape blurred anyway (5 additional authorities)
 - often built-in authority-flexibility in traditional CoE and pre-EIO EU instruments
 - procedural safeguards do not depend on ‘judicial’ authorities, but on respecting procedural guarantees
- introduction fundamental rights exception (Article 6 TEU and Charter)
 - Azerbaijan contradiction
- introduction legal ‘remedies’
 - applicability legal remedies equivalent to those in a similar national case
 - except where undermining the need to ensure confidentiality (sic)

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Grounds for refusal

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Article 11

PM: administrative offences & fundamental rights exception (supra)

traditional MR (EAW, EBB) exceptions

- immunity or privilege, rules on determination and limitation of criminal liability relating to freedom of the press or of expression in other media
- ordre public
- ne bis in idem
- extraterritoriality

hardly surprising: no refusal based on lack of dual criminality

- as in EAW cases (32 list, 3 years)
- + for *per se* available investigative measures (= *de facto* continuity)

optional refusal where measures are not “allowed” for the offence concerned

- new and good!
- even if counter to MR logic

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Specific investigative measures: Marginal progress

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continuity and marginal improvement

- transfer of detainees (both directions)
- video conference hearings
 - *acquis* broadened to suspects/accused
 - allowance 'other' audiovisual means of transmission
- teleconference hearings
- controlled deliveries
- covert investigations
- interception of telecommunications
 - simplified formulation, decoding/decryption
- information on financial accounts or transactions, and monitoring thereof
 - broadened to non-bank financial institutions

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No free movement of evidence

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EIO plainly irrelevant, simply continuing *forum regit actum* (FRA) principle

- FRA break-through at the time (EU2000)
- however: conceptual flaws and weaknesses FRA
 - no per se admissibility
 - grey zone maintained re lawfulness of evidence
 - 1-on-1 solution at best
 - fully counter to MR logic

missed momentum | future?

- common minimum standards
 - procedural: ECHR-based per investigative measures
 - scientific (techniques, staff) | European Forensic Area
- + MR of guarantees
 - specific guarantees of a similar national case
 - best of two worlds

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Discussion | Q&A

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