

THE REQUEST FOR MUTUAL ASSISTANCE AND THE EUROPEAN INVESTIGATION ORDER – IS THE MODERN LEGAL ASSISTANCE INSTRUMENT BETTER THAN ITS PREDECESSOR

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Abstract: *European evidence law is a quite sensitive topic and has always been the cause of much debate by practitioners and academics. Theoretical and physical borders do not matter for transnational crime. The intensive mobility of people and the evolution of world trade with goods and services create favorable conditions for the cross-border crime to develop. Therefore, it is of a great importance to take far-reaching steps to an upgraded mechanism for obtaining evidence in and from the Member States. This article examines the application of two mutual legal assistance instruments – the request for mutual assistance, which was established by the European Convention on Mutual Assistance in Criminal Matters of 1959, the EU Mutual Legal Assistance Convention of 2000 with its 2001 Protocol, and Arts. 48 to 53 of the Schengen Agreement, and the European Investigation Order introduced by the Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters. The main objective of this research is to emphasize the advantages and disadvantages of both judicial cooperation mechanisms. A comparative analysis of both operational tools is an appropriate way to assess which one is related to more procedural savings and how both of them deal with the protection of human rights. Thus, the modern instruments for judicial cooperation in the area of transnational evidence-gathering as an international response to crimes with cross-border dimensions can be adequately valued.*

Keywords: Request for mutual assistance, European Investigation Order, Evidence-gathering, Modern instrument for mutual legal assistance

1. Introduction

The Convention of 29 May 2000 on the mutual legal assistance in criminal matters between the Member States of the European Union (hereinafter “The 2000 Convention”) is the first legal regulation created in the area of judicial cooperation after the entry into force of the Treaty on the European Union. The need of it was clearly expressed during the practitioners seminar, which took place in April 1995. The main objective of the 2000 Convention was not to establish a new separate legal instrument, but to develop and contribute to the already

existing legal base in this field [1]. Such legal document was the answer of the Member States to the new dynamic situation in the territory of the EU back then, namely the elimination of checks at the borders of most of these states which almost led to the fully achievement of free internal market provided for by the Single European Act of 1985. The 2000 Convention supplements the following legal instruments usually referred to as “parent regulations”: The Convention on Mutual Assistance in Criminal Matters of 1959 (hereinafter “1959 Convention”) and

its Protocol of 1978, the Convention of 14 June 1990 implementing the Schengen Agreement of 14 June 1985, the Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters of 27 June 1962. All these instruments remained in force for matters which don't fall within the scope of the 2000 Convention.

Since the Directive 2014/41/EU of the European Parliament and the Council of 3 April 2014 regarding the European Investigation Order (hereinafter "the EIO Directive") is applicable in 26 Member States, the European Investigation Order (hereinafter "EIO") currently regulates the gathering of trans-border evidence. The creating of this new legal instrument was dictated by the need of more effective control over the perpetrators of transnational crimes. The new and upgraded regulation of the EIO directive places speed, clarity and optimization of the judicial cooperation at the frontline.

2. Application

According to Article 34 (1) of the EIO Directive the EIO becomes the only instrument to be used for gaining evidence by one Member State from another. The regulations of the EIO Directive prevail over those of the traditional Mutual Legal Assistance Conventions (hereinafter "MLA Conventions") and their additional protocols [2]. It is important to point out that although this modern mechanism replaces the traditional judicial cooperation system established by the MLA Conventions, it doesn't fully revoke it.

The EIO Convention is not binding for Ireland and Denmark and for this reason they still use the request for mutual assistance established by the 2000 Convention. The traditional tool for judicial cooperation remains in force for all third countries that are also parties of the relevant international treaties.

Sometimes the cooperation between Member States might not have judicial nature. An example for such a form of

mutual assistance are the trans-border surveillance under art. 40 CISA and the hot pursuit under art. 41 CISA. Since such measures may be qualified as police ones, they do not fall within the scope of the EIO Directive because the EIO is defined as a judicial decision which is a main characteristic of this instrument.

Requests for mutual legal assistance may still be issued when the reason for that is not gathering of evidence. Using this mutual assistance tool allows Member States to request service of documents and summons under art. 5, spontaneous exchange of information under art. 7, returning objects to the injured party under art. 8 of the 2000 Convention.

It may be concluded that the establishing of the EIO is a huge effort to overcome the disadvantages of the MLA regime. Moreover, the EIO Directive replaces Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence and Council Framework Decision 2008/978/JHA concerning the European evidence warrant. An EIO maybe issued for all kinds of investigative acts that are aimed at obtaining evidence. Gathering of evidence which is already in the possession of the executing State also falls within the scope of the new regulation. A sole exception of the wide range of investigative measures which can be requested by an EIO are those carried out by joint investigation teams. On account of its specific characteristics, this type of judicial cooperation needs a separate legal framework.

The final transposition deadline of the EIO Directive was 22 May 2017. It has been almost three years now. The following paragraphs of this article will try to clarify if the main objective of the modern instrument in the area of transnational evidence law was achieved and of course to what extent.

3. EIO standardized form and the formal letters for mutual legal assistance

Under the traditional MLA tools the Member States used to request from each other the executing of investigative measures by sending a free-form letter. The free choice of the form of the requests came out to be the main reason for their excessive length. The amount of the text caused more time and costs for translating.

The EIO Directive, on the other hand, in its Annex A introduced a standard form for issuing an EIO. The majority of practitioners deemed this approach as a step forward to removing the administrative burdens of the MLA regime. The EIO form is clear and easy to fill by the competent authorities. Nevertheless, there were some arguments that EIOs are in some cases too short and concise and don't contain enough information. Some even define them as inflexible for all kinds of investigative measures. Such claims, however, were eliminated during an Eurojust Meeting on the EIO [3], when its participants made some useful suggestions on the filling of the EIO form. The best practices introduced included indicating the name of the suspected person in the EIO even if the requested measure was not aimed at him/her in order to avoid an infringement of the principle of "*ne bis in idem*" and listing questions to the witness, victim or suspect. It has also been proposed that section D of the EIO form, especially the title "relation to an earlier EIO" may have wider interpretation and it could be used not only for EIOs but also for mutual legal assistance requests or even Joint Investigation Teams.

Another benefit of the EIO regulation is also the opportunity for the competent authorities to choose between sending one or multiple EIOs depending on the factual and legal circumstances of the case.

A significant difference is that under the EIO Directive each participating state may choose more than one official language for the receiving and recognizing of EIOs. This

is certainly a significant improvement compared to the MLA regime which obliged the issuing State to translate the rogatory letter in the appropriate language of the executing State.

4. Transmitting

According to the 1959 European Convention on Mutual Assistance in Criminal Matters or the so called "Parent Convention" the requests for mutual legal assistance were usually forwarded between the Ministries of Justice of the Member States. Article 6 of the 2000 Convention replaced this regulation by incorporating the possibility for establishing direct contact between the competent issuing and executing judicial authorities. Paragraph 2 of article 6 of this Convention allows a deviation of the general rule of direct contact: "*Paragraph 1 shall not prejudice the possibility of requests being sent or returned in specific cases: (a) between a central authority of a Member State and a central authority of another Member State; or (b) between a judicial authority of one Member State and a central authority of another Member State.*" This allows the Member States to exercise discretion during the transmission procedure.

The transmitting mechanism of an EIO is almost similar to that of the requests for mutual assistance. Article 7 of the EIO places more emphasis upon the direct contact between the issuing and executing authorities. According to paragraph 1 and 2 of this Article the issuing authority shall forward the EIO and any further information directly to the executing one. The regulation of the new comprehensive mechanism for obtaining cross-border evidence is clearer, more precise and detailed. The Member States are able to determine a central authority to assist the competent issuing or executing authorities during the relevant phases of the life cycle of an EIO. The regulation also offers a solution to difficulties related to identifying the relevant competent authority and also

introduces an option for *ex officio* transmitting of the EIO in case it has not been received by the competent authority of the executing state.

It is of a significant importance to note the newly-introduced proportionality assessment and the consultation between the competent authorities, which led to the establishing of a validating phase for the EIO. Practitioners show completely diverging views for this novelty. Some maintain that this might slow down the procedure of executing the requested investigative measures and also depart the EIO from its main objective, namely to speed up the cross-border investigation and to eliminate the administrative formalities.

Others support the establishing of the legal institution of the proportionality assessment and are of the opinion that it may be used as a filter and also to avoid a refusal of the execution of the EIO.

5. Deadlines

Paragraph 2 of Article 4 of the 2000 Convention is a result from the general principle of the executing Member State to comply with all formalities and procedural rules set out in the request for mutual assistance by the requesting Member State. By the imposition of this principle the legislator aims to ensure the effective use of the obtained information as an evidence according to the legislation of the requesting Member State and also takes into account that each case requires specific time frames.

The executing Member State shall take the necessary actions at the earliest opportunity and shall also take into consideration the time limit expressly mentioned by the requesting Member State in the request for mutual assistance. Such regulation aims to ensure procedural time savings and the legality of the obtained evidence. Nevertheless, mutual legal assistance requests were criticized by practitioners for being too time-consuming. Also, practice has shown that some competent authorities prefer to note their

requests as urgent. This often leads to difficulties when assessing their priority. It can be concluded that the executing of the request depends on the good will of the competent executing authority of the requested Member State [4].

Although strict deadlines are an innovation in the area of judicial cooperation, the EIO Directive is not the first to introduce them. Their positive impact was noticed after the implementation of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. According to a Report from the Commission to the European Parliament and the Council on the implementation of the European arrest warrant (hereinafter “EAW”) for the time period 2007-2009 [5], under the EAW mechanism, it takes persons 14-17 days to surrender if they consented to do so and not more than 48 days if there was a lack of consent. This was marked as a successful improvement compared to the extradition, which usually lasted approximately 1 year. Generally, an EIO shall be recognised within 30 days after its receipt by the competent authority of the executing State and the relevant investigative measures shall be carried out no later than 90 days after the recognition of the EIO. The EIO Directive also covers situations when depending on the seriousness and the specific circumstances of the case a shorter deadline is needed. The competent authority of the issuing State may request the executing of the EIO on a specific date and the execution authority shall take full account of this requirement. Article 11 of the EIO Directive is a reflection of flexibility and offers a higher level of security when it comes to admissibility of evidence gathered in another Member State. Introducing of time limits is certainly a guarantee for a more coherent and effective judicial cooperation between the Member States.

6. Grounds for refusal

Grounds for refusal of a request for mutual legal assistance are regulated by article 2 of the 1959 Convention. The receiving authority may reject the execution of a request if the relevant offence is a political or fiscal crime or if there are reasons to believe that executing the requested investigative measures may jeopardize the sovereignty, national security, public order or other state interests. These refusal options are too broad and are not precise enough. Such a concise legal text led to refusing the execution of requests for legal assistance too often.

The new comprehensive system for obtaining evidence between the Member States introduced by the EIO Directive provides for limited and concrete non-recognition and non-execution grounds. This approach of the European legislator is undoubtedly a huge progress in facilitating judicial cooperation for investigative purposes. Refusal grounds can be classified as general and additional. First category is related to guaranteeing of sovereignty, national security interests, freedom of press, ne bis in idem principle, double criminality rule and fundamental rights and freedoms. Additional refusal grounds are related to the authorization of the requested investigative measures and to the existence of the relevant offence under the domestic legislation of the executing State.

It is of a significant importance to note that the EIO directive in its Article 10 incorporates a possibility for the executing State to recourse to a different investigative measure in case it deems that the same result aimed by the issuing State can be achieved. The competent executing authority may avail of this opportunity when the investigative measure indicated in the EIO is not provided for by the domestic legislation or when the same objective may be reached but in a less intrusive manner.

“An EIO with limited grounds for refusal represents a further step towards the principle of mutual recognition, and

conversely, if the grounds for refusal are drafted extensively, the principle of mutual recognition tends to vanish”[6]. Although the new regulation offers a complex list of refusal grounds they are limited in their application. It could be concluded that the establishing of article 11 of the EIO Directive is based on the rule that an EIO’s recognition or execution should be a last resort after the existing alternatives have already been exhausted. Steve Peers has the following view for the consequences of judicial cooperation between the Member States: “The effect of mutual recognition is that the executing State has in principle lost some of its sovereign power over the full control over the full enforcement of criminal decisions on its territory” [7]. In this relation, reducing the power of the executing authorities to refuse to recognize and execute the requested investigative measures contains a certain dose of risk for the fundamental rights of the concerned by the EIO persons who directly become subjects of foreign criminal processes. “Decision-making is left mainly to the judiciary of the issuing state (i.e. the state requesting cooperation), whose decisions can be implemented in another state with limited grounds for refusal and without any real consideration of the processes by which decisions were reached” [8]. For this reason, the increased level of automaticity in the functioning of the EIO may be perceived as a mixed blessing.

7. Conclusion

Circumstances related to cross-border criminal activity have changed a great deal throughout the years and the situation still remains dynamic. The EIO is the latest tool for combating crimes with cross-border dimension providing rapidity, optimality and enhanced mutual trust between the Member States. The new mechanism incorporated in this modern regulation for conducting transnational investigation is based on some new rules and principles such as the direct contact between the

competent authorities and the immediate notification of the issuing State in case there are any changes in the original content of the EIO.

The MLA system remains too fragmented, containing rather awkward and abstract legal texts in numerous different regulations. The legislative fragmentation and the lack of uniform practice among the executive authorities are huge shortcomings of this form of judicial cooperation in criminal matters. Although the EIO is a new approach of the European legislator to deal with legal assistance issues and there is too little time passed since the implementation of the EIO by all 26 Member States a lot of practitioners are already of the opinion that this is a major

development in resolving many problems which occurred while using the requests for mutual assistance. There is also no absence of critical view, but just like any innovative product the EIO still needs to be discussed and improved. Nevertheless, the EIO Directive managed successfully to lay the foundations of a completely new comprehensive system for obtaining evidence across the EU and also to serve as a booster for the creating of a legal mechanism for gathering and using of electronic evidence which “seeks to adapt cooperation mechanisms to the digital age, giving the judiciary and law enforcement tools to address the way criminals communicate today and to counter modern forms of criminality.”

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