European Investigation Order in criminal matters. Initiative Belgium, Bulgaria, Estonia, Spain, Austria, Slovenia and Sweden

2010/0817(COD) - 27/02/2014 - Text adopted by Parliament, 1st reading/single reading

The European Parliament adopted by 467 votes to 22 with 10 abstentions, a legislative resolution on the draft directive of the European Parliament and of the Council regarding the European Investigation Order (EIO) in criminal matters.

Parliament adopted its position in first reading following the ordinary legislative procedure. The amendments adopted in plenary are the result of a compromise agreement between Parliament and Council. They amend the Commission proposal as follows:

The European Investigation Order: a European Investigation Order (EIO) is a **judicial** decision which has been issued or validated **by a judicial authority** of a Member State to have one or several specific investigative measure(s) carried out in another Member State to obtain evidence in accordance with the Directive. The EIO may also be issued for obtaining evidence that is already in the possession of the competent authorities of the executing State.

The issuing of an EIO may be requested by a suspected or accused person, or by a lawyer on his behalf, within the framework of applicable defence rights in conformity with national criminal procedure.

Scope of the EIO: the EIO will have a horizontal scope and therefore should apply to all investigative measures aimed at gathering evidence. However, the setting up of a joint investigation team and the gathering of evidence within such a team require specific rules which are better dealt with separately. Without prejudice to the application of the Directive, existing instruments should therefore continue to apply to this type of investigative measure.

Content and form of the EIO: the EIO set out in the form provided for in Annex A shall be completed, signed, and its content certified as accurate and correct by the issuing authority. It shall contain specific information detailed in the text as well as linguistic provisions.

Conditions for issuing and transmitting an EIO: 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; (b) the investigative measure(s) indicated in the EIO could have been ordered under the same conditions in a similar domestic case.

Execution: the authorities of the issuing State present in the executing State shall be bound by the law of the executing State during the execution of the EIO. They shall not have any law enforcement powers in the territory of the executing State, unless the execution of such powers in the territory of the executing State is in accordance with the law of the executing State and to the extent agreed between the issuing authority and the executing authority.

Recourse to a different type of investigative measure: the executing authority may also have recourse to an investigative measure other than that indicated in the EIO where the investigative measure selected by the executing authority would achieve the same result by less intrusive means than the investigative measure indicated in the EIO.

Grounds for non-recognition or non-execution: the text clarified that recognition or execution of an EIO may be refused in the executing State where, inter alia:

- there are rules on determination and limitation of criminal liability relating to freedom of the press and freedom of expression in other media, which make it impossible to execute the EIO ;
- the execution of the EIO would be contrary to the principle of ne bis in idem (for instance when the issuing authority has provided assurances that the evidence transferred as a result of the execution of the EIO will not be used to prosecute or sanction a person whose case has been disposed in another Member State for the same facts);
- the EIO relates to a criminal offence which is alleged to have been committed outside the territory of the issuing State and wholly or partially on the territory of the executing State, and the conduct in connection with which the EIO is issued is not an offence in the executing State;
- the conduct for which the EIO has been issued does not constitute an offence under the law of the executing State, unless it concerns an offence listed within the categories of offences set out in Annex D (such as terrorism or trafficking in human beings), as indicated by the issuing authority in the EIO, if it is punishable in the issuing State by a custodial sentence or a detention order for a maximum period of at least three years.

In addition, where the EIO concerns an offence **in connection with taxes or duties**, customs and exchange, the executing authority shall not refuse recognition or execution **on the ground that the law of the executing State does not impose the same kind of tax or duty** or does not contain a tax, duty, customs and exchange regulation of the same kind as the law of the issuing State.

Legal remedies: legal remedies equivalent to those available in a similar domestic case must be applicable to the investigative measures indicated in the EIO. The substantive reasons for issuing the EIO may be challenged **only in an action brought in the issuing State**, without prejudice to the guarantees of fundamental rights in the executing State.

A legal challenge shall not suspend the execution of the investigative measure, unless it is provided in similar domestic cases.

Expenses incurred for the execution of an EIO: the expenses incurred in the territory of the executing Member State for the execution of an EIO should be borne exclusively by that Member State. However, the execution of an EIO may incur exceptionally high costs on the executing State. Such exceptionally high costs may, for example, be complex experts' opinions or large police operation or surveillance activities over a large period of time. This should not impede the execution of the EIO and the **issuing and executing authorities should seek to establish which expenses are to be considered as exceptionally high**. The issue of costs might become subject to consultations between the Member States concerned and they are recommended to resolve this issue during the consultations stage.

As the last resort, the issuing authority may decide to withdraw the EIO or to maintain it and the part of the costs which are estimated exceptionally high by the executing State and absolutely necessary in the course of the proceedings, should be covered by the issuing State.

European Arrest Warrant: an EIO may be issued for the temporary transfer of the person to the issuing State or for carrying out of a hearing by videoconference. However, where the person is to be transferred to another Member State for the purposes of prosecution, including bringing that person before a court for the purpose of the standing trial, a European Arrest Warrant should be issued in accordance with the Council Framework Decision 2002/584/JHA. With a view to the proportionate use of an EAW, the issuing authority should consider whether an EIO would be an effective and proportionate means of pursuing criminal proceedings. The issuing authority should consider, in particular, whether issuing an EIO for the hearing of a suspected or accused person by videoconference could serve as an effective alternative.

Information on banking and other financial operations: an EIO may be issued in order to obtain the particulars of specified bank accounts and of banking operations which have been carried out during a specified period through one or more accounts specified within, including the particulars of any sending or recipient account. Measures have been laid down to determine which types of information should be recovered from the bank accounts.

Covert investigations: an EIO may be issued for the purpose of requesting the executing State to assist issuing State in the conduct of investigations into crime by officers acting under covert or false identity (covert investigations). Covert investigations shall take place in accordance with the national law and procedures of the Member State on the territory of which the covert investigation takes place.

Content of the telecommunication: it is stated that possibilities to cooperate under the provisions on interception of telecommunications should not be limited to the content of the telecommunication, but could also cover **collection of traffic and location data associated with such telecommunications**, allowing competent authorities to issue an EIO for purposes of obtaining less intrusive data on telecommunications.

Technical assistance: technical provisions have been introduced as regards the scope of the assistance to be offered. In an EIO containing the request for interception of telecommunications the issuing authority should provide the executing authority with sufficient information such as details of the criminal conduct under investigation, in order to allow the executing authority to assess whether the measure would be authorised in a similar national case.

Data protection: Member States should provide in the application of this Directive for transparent policies with regard to the processing of personal data and for the exercise of the data subject's **rights to legal remedies** for the protection of his or her personal data. Personal data obtained under this Directive should be processed when **necessary and proportionate** for purposes compatible with the prevention, investigation, detection and prosecution of crime or enforcement of criminal sanctions and the exercise of the right of defence. Only authorised persons should have access to information containing personal data which may be achieved through authentication processes.

Provisional measures: it is stated that an EIO may be issued in order to take any measure with a view to provisionally preventing the destruction, transformation, moving, transfer or disposal of item that may be used as evidence. The executing authority shall decide and communicate the decision on the provisional measure as soon as possible and, whenever practicable, **within 24 hours of receipt of the EIO**.

Report on the application: no later than five years after the date of entry into force of this Directive, the Commission shall present to the European Parliament and the Council a report on the application of this Directive, on the basis of both qualitative and quantitative information, including in particular, the evaluation of its impact on the cooperation in criminal matters and the protection of individuals, as well as the execution of the provisions on the interception of telecommunications in light of technical developments.

Annexes: the annexes of the Directive have been revised in order to clarify the content of the investigation order and list the offences that are likely to be the source of a EIO.