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NOTE

From:	General Secretariat of the Council
To:	Delegations
No. prev. doc.:	9301/17
Subject:	Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters - State of play of the implementation process, information by Eurojust and the EJN

In accordance with its Art. 36(1), the deadline for transposition of Directive 2014/41/EU on the European Investigation Order (EIO) expired on 22 May 2017. However, not all Member States have implemented the Directive in their national legal order yet.

On the website of the European Judicial Network (EJN), the state of play of the transposition process has been set out:

https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=120

In connection with the delayed transposition of the Directive, delegations will find the following information provided by Eurojust and the EJN:

Annex I: a note on legal and practical implications of Directive 2014/41/EU, in which the contact-points of the EJM have described what is likely to be the situation when

- a) the issuing Member State has already implemented the EIO Directive, but the Executing Member State has not yet implemented it; and
- b) the issuing Member State has not yet implemented the EIO Directive, but the Executing Member State has already implemented it.

This Annex also includes information from the EJM on the scope of the EIO.

Annex II: a note by Eurojust and the EJM on the meaning of "corresponding provisions", as used in Art. 34 of the Directive, and the applicable legal regime in case of delayed transposition of the EIO Directive.

Legal and practical implications of the Directive 2014/41/EU regarding the European Investigation Order in criminal matters

I. Legal and practical challenges and scope of the EIO Directive

MEMBER STATE	<p>a) The Issuing Member State implemented the EIO Directive but the Executing Member State did not implement it.</p> <p><i>As issuing authority: would you issue an EIO or send an MLA request?</i></p> <p><i>As executing authority: would you be able to accept an EIO received from a Member State which did implement the EIO Directive? Would you treat it as an MLA request or would you deny the execution and ask the issuing authority to send an MLA request instead?</i></p> <p>b) The Issuing Member State did not implement the EIO Directive but the Executing Member State did implement it.</p> <p><i>As issuing authority it must be assumed that there is no possibility to issue an EIO in this situation and therefore an MLA request will be sent to the executing authority.</i></p> <p><i>As executing authority: would you be able to execute the MLA request?</i></p>	<p>The scope of the EIO - which investigative measures are not covered by the EIO Directive?</p> <p>Article 3 states that the EIO shall cover <u>any investigative measure</u> with the exception of the setting up of a joint investigation team and the gathering of evidence within such a team.</p> <p>Article 34 (1) states that EIO <u>replaces the corresponding provisions</u> of three central “MLA” conventions.</p> <p><i>Which measures would be excluded/ included within the scope of the EIO?</i></p>
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<p>Austria</p>	<p>a) From the date of implementation in Austria its authorities would issue an EIO form and ask the MS which has not yet implemented the directive to accept it as MLA request. Vice versa Austria would regard an EIO form as MLA request until the Austrian implementation comes into force.</p> <p>b) If the issuing State has not implemented the directive yet Austria will continue to provide legal assistance under the MLA regime even after having implemented the EIO (there is a Supreme Court Decision with regard to the transitional period before FD 2008/909/JAI has been implemented by most MS stating that Austrian authorities cannot oblige the issuing State to use the certificate of this FD if the issuing State has not implemented the FD).</p> <p>NB: Austria has contacted the MS which are the usual partners in MLA how to proceed in case of a delay in implementation.</p>	<p>Austria is considering whether the simple notification of procedural documents or summoning of persons can be regarded as investigative measure falling under the scope of the EIO. From a practical point of view it would be desirable to use the EIO form also in these cases even though the required measure does not fall under the scope of the EIO (the same goes for cross border observation).</p>
<p>Belgium</p>		
<p>Bulgaria</p>	<p>Bearing in mind that Bulgaria hasn't transposed the EIO, we shall not be able to cooperate fully on the basis of the new mechanism.</p> <p>As Executing Authorities, any form of a request can be accepted but we would consider the EIO as a MLA request. However, the national law will be interpreted consistently with the Directive 2014/41/EU, so far as it is possible to do so.</p> <p>Bulgaria could not issue an EIO and an MLA request will be sent to the executing authority instead.</p>	<ul style="list-style-type: none"> - Setting up of JIT and gathering of evidence with such teams – according to Article 3 of the Directive 2014/41/EU. - Freezing with a view of confiscation and the confiscation itself (Framework Decision 2006/783), taking into account that the existing legal basis for the latter is not replaced in accordance with Article 34 (1) of the Directive 2014/41/EU. - Service of procedural documents – according to Article 5 (1) of the Convention of 29 May 2000 on

		<p>mutual assistance in criminal matters between the Member States of the European Union;</p> <ul style="list-style-type: none"> - Extracts from criminal records, to which the ECRIS applies (within a criminal investigation Directive 2014/41/EU may also be used to obtain such information/; - Returning of a thing to the injured party – according to Article 8 of the Convention of 29 May 2000 on mutual assistance in criminal matters between the Member States of the European Union; - Cross-border observation – according to the Article 40 of the Convention implementing the Schengen Agreement. - Cross-border pursuit – according to the Article 41 of the Convention implementing the Schengen Agreement.
<p>Croatia</p>	<p>a) If the executing MS did not implement the EIO Directive the Croatian judicial authorities would apply the Conventions of the Council of Europe (EU MLA Convention 2000 and most of the provisions of the Convention implementing the Schengen Agreement have not yet enter into the force) and Act on mutual legal assistance in criminal matters.</p> <p>As executing authority: If Croatian authorities receive the EIO from the MS that has implemented the EIO Directive the received EIO shall be treated as MLA request. It is possible that in some cases the EIO will have to be amended or additional documents will have to be sent by the issuing MS. Namely. Some types of MLA requests cannot be</p>	<p>The following measures will be excluded from the scope of the EIO:</p> <ul style="list-style-type: none"> - setting of a JIT and gathering the evidence within such team -service of procedural documents -transfer of criminal proceedings and spontaneous exchange of information (applicable bilateral agreements and Art 21 of MLA 1959 Convention shall be applied) -freezing /seizure for the purpose of the

	<p>executed without the judicial order (Article 5 of the European convention on mutual legal assistance in criminal matters signed on 1959). So in those cases the issuing MS will have to send to Croatian authorities the additional documentation.</p> <p>b) Regarding the MS which did not implement the EIO Directive the Republic of Croatia will apply applicable international agreements (bilateral agreements and Conventions of the Council of Europe). In other words the Croatian judicial authorities will execute the MLA requests received from the MS which did not implement the EIO Directive.</p>	<p>confiscation (this measure is covered by the freezing order)</p> <p>-exchange of criminal records (this measure is covered by FD on ECRIS)</p> <p>-cross border surveillance as a type of police cooperation defined by the Article 41 of the SIS Convention</p> <p>-other specific police and custom cooperation measures</p>
Cyprus	<p>Cyprus may not be ready with the transposition of the EIO Directive. In such a case, Cyprus will continue with the use of the current MLA procedure and would not be able to accept EIOs.</p>	<p>EIO will cover any investigative measures with the exception of the setting up of a joint investigation team and the gathering of evidence within such a team.</p>
Czech Republic	<p>a) The Czech authorities as issuing authorities would issue an MLA request.</p> <p>The Czech authorities as executing authorities would execute an EIO as a MLA request.</p> <p>b) The Czech authorities as issuing authorities would issue an MLA request.</p>	<p>Not covered by the EIO Directive (besides the JITs):</p> <p>- service and sending of procedural documents,</p> <p>- transfer of criminal proceedings (Art. 21 of the 1959 Convention, including of course a transfer of a criminal prosecution according to the 1972 Convention),</p>

	<p>The Czech authorities as executing authorities would expect to receive a MLA request.</p> <p>The Ministry of Justice of the Czech Republic will inform the courts and the Supreme Public Prosecutor's Office will inform Prosecutors about this attitude to unify our practice.</p>	<ul style="list-style-type: none"> - returning of a thing to the injured party (Art. 8 of the 2000 Convention and Art. 12 of the Second Additional Protocol) including a seizure only for this purpose, - freezing/seizure for the purpose of confiscation, - freezing/seizure of the accused assets for the purpose of compensation of the victim, - exchange of criminal records (with exception of Art. 13 of 1959 MLA Convention, which has not been replaced by the ECRIS FWD and where the EIO should be sent between judicial authorities), - procedures of customs authorities according to the Naples II Convention, - cross border pursuit according to Art. 41 Schengen Implementing Convention, - a request for a consent to use information as evidence that has already been provided via police cooperation (the implementation of the Art 1(4) of the "Swedish initiative" and Art 39(2) of the Schengen Implementing Convention).
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		<i>We will use an EIO also for a cross border surveillance (we will use a MLA request only for certain aspects of cross border surveillance done only by technical devices stipulated by the bilateral treaties with AT, DE and SK that provide the higher standard than the EIO Directive).</i>
Estonia	If Estonia or another Member State has not implemented the EIO, we will continue with MLA. Consultations before sending out an MLA request or EIO in such case would be highly advised.	Setting up JIT-s is excluded from the EIO transposition law.
Finland	As executing state Finland will accept MLA requests from member states that have not implemented EIO. There should also be no problem in receiving an EIO and considering it MLA request if Finland has not implemented EIO in time. Some additional questions might be posed. As issuing state Finland will issue MLA request if the executing member state has not implemented EIO.	Service of procedural documents, extracts from criminal records (FD ECRIS) would not fall in the scope of EIO. Cross-border observation might. EU MLA agreement Article 8 would also be out of the scope.
France	From the 22 May 2017 the requests for assistance to the Member States will be sent in accordance with the formalities provided for in the Directive on the EIO, even to those states who have not transposed. The requests received by those Member States will be treated as requests falling under the EIO directive and in conformity with the provisions from the Code of criminal procedure resulting from the EIO Directive. _____	In accordance with the provisions of Article 694-18 of the French Criminal procedure code transposing the EIO Directive, <i>“An EIO is not issued:</i> <ul style="list-style-type: none"> • <i>For the setting up of a Joint Investigation Team;</i> • <i>On freezing orders of assets susceptible of confiscation, when the request is not also made for obtaining evidence;</i> • <i>When a request for cross-border observation is made on the basis of Article 40 of the Convention</i>

	<p>a) <i>As issuing authority: We would send an EIO.</i></p> <p>b) <i>As executing authority: Yes.</i></p>	<p><i>of 19 June 1990 Implementing the Schengen Agreements.”</i></p>
Germany	<p>Existing MLA instruments will be used. It should be possible to treat an EIO as an MLA request</p>	<p>According to German law the following investigation measures are <u>not covered by an EIO</u>:</p> <ul style="list-style-type: none"> • Setting up of a JIT and gathering evidence within such a team • Cross-border surveillance • Hearing of a suspect by telephone conference <p><u>Also not covered by the EIO is:</u></p> <ul style="list-style-type: none"> - sending and service of procedural documents - ECRIS - transfer of proceedings - spontaneous exchange of information - seizure of objects/freezing of assets in view of confiscation - requests according to Art. 39 (2) CISA - Customs/police cooperation
Greece	<p>If the EIO Directive is not transposed they return to the MLA and domestic legislation. If the EIO Directive is not transposed in Greece in due time, it cannot be executed by the Greek authorities.</p>	
Hungary	<p>Hungary should be ready in time with the transposition of the EIO Directive, but if not, they will be able to receive EIOs and treat them as MLA requests. In such a situation, they will not be able to use the</p>	

	whole EIO system, but just to handle it as MLA. In case the issuing Member State did not transpose the Directive, one solution could be to broaden the scope of the provisions in the draft law concerning the cooperation with Denmark and Ireland as to be applicable also to Member States which did not transpose the EIO Directive.	
Italy	Italy will consider the provisions of the existing MLA instruments “replaced” <u>only once both the Member States involved in the specific case have transposed the EIO Directive into national laws</u> . If not, the existing MLA instruments will consequently apply.	Only “investigative measures”, except the setting up of a JIT, fall in the scope of EIO Directive.
Latvia		
Lithuania	<p>Lithuania would follow the flexible approach on this issue.</p> <p>A)</p> <ul style="list-style-type: none"> As issuing authority: we would probably issue an EIO and in addition inform the executing authority that we accepted to be treated as an MLA request. As an executing authority: we would treat the received EIO as an MLA request. <p>B) as executing authority: we would treat it as an MLA request.</p>	<p>As pointed out in the EIO Directive under Article 3, setting up of a JIT and gathering evidence within such a team is out of the scope.</p> <p>Recital 9 of the Directive (exclusions of cross-border surveillance as referred to in the Convention implementing the Schengen Agreement) shall also be respected.</p>
Luxembourg	<p>A)</p> <ul style="list-style-type: none"> As issuing authority: Luxembourg would issue an EIO and ask the executing MS to accept it as an MLA. As executing authority: Luxembourg would accept the EIO and treat it as MLA. 	<p>Out of the scope of the EIO:</p> <ul style="list-style-type: none"> The setting up of a JIT. However, when a competent authority participating in a JIT requests assistance from another MS than those participating in the JIT, an EIO may be

	B) Luxembourg would continue to provide assistance under the MLA regime.	issued to this end. <ul style="list-style-type: none"> • Cross border observation according to Art. 40 Schengen Implementing Convention.
Malta	Malta should be ready with the transposition of the EIO Directive according to its deadline. Until such time the current system under the MLA regimes will remain in place.	
Poland	Polish draft law implementing the EIO Directive has been amended and it foresees that in a transitional period the existing instruments of cooperation shall be applied. Additionally, our Bureau started works on detailed guidelines for prosecutors on how to proceed in the transitional period in order to align practice in the whole country. An ad hoc meeting of the Polish contact points is planned yet in May devoted in full to the EIO and the rules of procedure in the transitional period.	Any investigative measures would be included within it, except for the ones not covered by the EIO Directive (e.g. setting up of JITs and the gathering of evidence within such teams)
Portugal	If the Directive is not transposed into the Portuguese legal order, an EIO would be treated as MLA. If the Directive is not transposed in time by other Member States, Portugal should apply the Convention of 29 May 2000 or other conventions in its cooperation with such countries.	Service of documents is also included as part of the scope of the EIO.
Romania	This draft law contains a provision which clarifies that the EIO procedures will be applicable only in relation with the Member States of the European Union bound by the EIO Directive and which transposed it. She mentioned that if the EIO Directive is not transposed in time, Romania will continue to apply the MLA regime. Although direct effect may be considered, there is a clear difference	In our view, apart from the measures expressly regulated in Chapter IV and in Chapter V of this directive, the Directive 2014/41/EU on the European Investigation Order in Criminal matters obviously covers any other investigation measure except

	<p>between directives and regulations and, consequently, the EIO Directive needs transposition and it is not directly applicable.</p>	<ul style="list-style-type: none"> - setting up of Joint Investigation Teams and gathering of evidence with such teams, expressly excluded from the EIO scope in accordance to Article 3 of the directive <i>and</i> - the freezing with a view of confiscation and the confiscation itself , taking into account that the existing legal basis for the latter is not replaced in accordance with Article 34 (1) of the directive. <p>In addition, we believe it <u>does not apply to</u>:</p> <ul style="list-style-type: none"> - service and notification of documents, on the one had because this is not an investigation measure <i>per se</i>, and, on the other hand, the “service by post” rule established in Article 5 (1) of the Convention of 29 May 2000 on mutual assistance in criminal matters between the Member States of the European Union represents a much easier procedure than the EIO itself, so Article 34(2) of the directive allows its application. - extracts from criminal records, to which the FD 2009/315/JHA (ECRIS) will continue to apply. Nevertheless, within a criminal investigation, the EIO directive may also be used to obtain
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		<p>information from criminal records;</p> <ul style="list-style-type: none"> - Specific police and custom cooperation measures.
Slovakia	<p>A)</p> <p><u>As issuing authority:</u> <i>MLA request</i></p> <p><u>As executing authority:</u> <i>NO. We will ask the issuing authority to send an MLA request.</i></p> <p>The prosecution service will be dealing with the requests even if Slovakia as executing State has not implemented EIO (but issuing state implemented EIO) - after 22 May 2017. These EIO request will be dealt by the same way as MLA request are now.</p> <p>B) <u>As executing authority:</u> <i>YES</i></p>	<p>EIO will cover any investigative measures with the exception of the setting up of a joint investigation team and the gathering of evidence within such a team.</p>
Slovenia		
Spain	<p>1. - Meanwhile the EIO DIR has not being transposed in Spain any request/EIO received from a Member State shall be executed in accordance to the existing conventions or European legal instruments. Prosecutors shall accept an EIO and treat it as an MLA. Moreover whilst applying the MLA rules, Prosecutors will do it as much as possible in light of the (non-transposed) EIO DIR (deadlines, acknowledge receipt,..).</p> <p>2.- Once the domestic transposition law should be in place, any incoming MLA request received from a Member State that had not implemented the EIO DIR would be accepted and executed by the Spanish Prosecutor as MLA</p>	<p>EIO DIR will not replace, among others, the following provisions:</p> <ul style="list-style-type: none"> - Service and sending of procedural documents (Article 5 of the MLA 2000 Convention); - Spontaneous exchange of information (Article 7 of the MLA 2000 Convention); - Transfer of criminal proceedings (Article 21 of the

	<p>request and according to the relevant conventions, unless the transposing Spanish law would provide any other solution to this situation.</p> <p>3.- In all the above mentioned scenarios the Public Prosecutor will try to interpret the Spanish national law, as far as possible, in light of the EIO DIR, even if Spain has not yet implemented it in the Spanish legislation, taking into account the CJEU case law.</p> <p>4.- From the active viewpoint and meanwhile the EIO DIR has not being transposed in Spain, the Spanish Prosecutors shall ensure that any outgoing MLA request aimed to gathering evidence shall be issue in accordance with the existing relevant MLA conventions. Likewise this Opinion expressly remembers that without prejudice to the application of EIO DIR existing legal instruments at EU and national level should continue to apply to JITs.</p> <p>5. - Once the EIO DIR would be implemented and in place in Spain only EIOs should be issued towards Member States bounded by the EIO DIR spite of the executing member State has not implemented it, unless the transposing Spanish law would provide any other solution to this situation.</p> <p>6.- Spanish Prosecutors shall take into consideration that Art. 34 of the EIO DIR does not repeal but replace traditional MLA Conventions within the EU and the CoE that will retain their relevance in situations in which the EIO DIR is not applicable, such as for instance in the relations with Denmark and Ireland, as well as in situations of non-transposition.</p>	<p>MLA Convention and the CoE Convention 1972 on the Transfer of Proceedings);</p> <p>- Returning of an object to the injured party (Article 8 of the 2000 Convention) including a seizure only for this purpose;</p>
<p>Sweden</p>	<p>A) <i>As issuing authority: We would send an MLA request.</i></p>	<p>It is not possible to state the Swedish position regarding the scope of the directive before the law which is implementing the directive into</p>

	<p><u>As executing authority:</u> <i>An EIO cannot be executed in accordance with the provisions of the EIO-directive before the directive has been implemented into Swedish law. However, if a Swedish prosecutor och court receives an EIO it should be possible to treat it as an MLA request.</i></p> <p>B) <u>As executing authority:</u> <i>Yes</i></p>	<p>Swedish law has entered into force. However, from a Swedish point of view it is clear that service of documents and transfer of criminal proceedings (which were two examples mentioned in the Discussion paper) are not covered by the directive.</p>
<p>The Netherlands</p>	<p>About the situation and way of working with or without the EIO in the NL:</p> <p>Implementation is on its way, most statutory steps have been made and implementation is foreseen as per 1 January 2018.</p> <p>A. Before (foreseen) 1 January 2018 three situation are possible:</p> <ol style="list-style-type: none"> 1. NL and another country both did not implement the EIO: both countries will have to rely on the usual MLA procedures. 2. The other country has implemented and NL has not and NL is requesting by MLA: NL will use the usual MLA procedure and hopefully the national legislation of that other county allows execution. 3. The other country has implemented and is requesting by EIO, NL has not implemented: NL will act according the MLA procedure but will stay as close as possible to the EIO Directive (terms of execution, etc.). <p>B. After (foreseen) 1 January 2018, also three situations:</p>	

	<p>1. NL and other country both did implement the EIO: only the EIO procedure will be accepted on Dutch side.</p> <p>2. NL did implement and is requesting, but the other country did not: depending on the national legislation of that country, NL will send an EIO or a MLA.</p> <p>3. NL did implement but the other country did not and that country is requesting: NL will accept the MLA from that other country and execute.</p>	
<p>United Kingdom</p>	<p>The UK can provide MLA without requiring a treaty basis. This means that they would be able to continue to cooperate with states that do not transpose the EIO.</p> <p>They will look at the EJM website and if one Member State did not transpose the EIO, UK will use MLA in relation with the respective Member State.</p> <p>It would not matter if in scenario (b) the issuing member state sent the request using the form of an EIO or as a letter of request.</p> <p>Using MLA in case of delay in transposition of the EIO Directive is the only reasonable way in view of the purpose of the Directive and the general obligation between states to cooperate.</p> <p><i>In Scotland</i> so long as the Crown Office are satisfied the request has been issued by an authority competent to issue such a request, the request shall be executed wherever possible. The authorities in</p>	<p>Article 1 confirms that an EIO is a judicial decision ... <i>“to have one or several specific investigative measures carried out ... to obtain evidence”</i>.</p> <p>It would therefore appear that:</p> <p>Service of Procedural Documents (Art 5 MLAC 2000) – not covered by the EIO</p> <p>Spontaneous Transmission (Art 7 MLAC) – not covered by the EIO</p> <p>Transfer of Proceedings (Art 21 of the 1959 Convention) – not covered by the EIO</p> <p>Restraint – not covered by the EIO. FD 2003/577 will still apply for freezing property</p>

	<p>Scotland shall execute the request under the MLA conventions where possible. If this is not possible, the request shall be executed on the basis of reciprocity. There may therefore be benefit in reciprocity being offered in any such request.</p>	<p>for the purpose of subsequent confiscation, as per Article 34(2) EIO only replaces it as regards freezing of <u>evidence</u>.</p> <p>Confiscation – not covered by the EIO, still under Framework Decision 2006/783.</p>
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Note on the meaning of “corresponding provisions” and the applicable legal regime in case of delayed transposition of the EIO Directive

I. INTRODUCTION

Member States are requested to adopt by 22 May 2017 the necessary transposition measures to comply with Directive 2014/41/EU regarding the European Investigation Order in criminal matters (hereinafter “EIO DIR”). As from 22 May 2017, the EIO DIR replaces the corresponding provisions of three Conventions applicable between the 26 Member States that are bound by the EIO DIR, namely the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters and its two additional Protocols, the Convention Implementing the Schengen Agreement and the 2000 EU Convention on Mutual Assistance in Criminal Matters and its Protocol (Article 34(1) EIO DIR). The EIO DIR also replaces, for the above mentioned 26 Member States bound by this Directive, the provisions of Framework Decision 2003/577/JHA as regards freezing of evidence (Article 34(2) EIO DIR).

Article 34 EIO DIR has triggered two important questions. The first question relates to the scope of the EIO DIR, particularly, the meaning of the term “corresponding provisions”. The second question concerns the legal regime that should apply if one (or several) of the Member States involved have not transposed the EIO DIR by 22 May 2017. In view of the latest update of the status of transposition of this instrument carried out by the EJN, it seems more than likely that several Member States will not have their national EIO legislation in place by this deadline.¹

Concerns on these issues have been raised by practitioners on different occasions and the Consultative Forum of Prosecutors General voiced its worries on these topics, at its 11th meeting of June 2016 organised under NL and SK Presidencies², insisting on the need of a timely transposition since *“failing to do so would have serious negative consequences for on-going and future cases, given the substitution of the corresponding provisions of the Conventions used so far in this field by the Directive, as established by its Article 34”*.

¹ The updated status of implementation of the EIO Directive is published in the Judicial Library on the EJN website [here](#)

² Council doc. 12393/16.

Eurojust and the EJM have been requested by practitioners to look into these questions which are crucial for smooth judicial cooperation, and to address these problems which will have a strong impact on their daily work. This impact is likely to be stronger in those areas of criminality where, by nature, judicial cooperation is more demanding such as trafficking in human beings, cybercrime and terrorism. Therefore, Eurojust and the EJM worked closely together to discuss these issues and consulted with the national authorities in the Member States. Whilst it is ultimately for the Court of Justice of the EU (CJEU) to have the last word on the interpretation of Article 34 EIO DIR, Eurojust and the EJM believe that it is important to inform the national authorities of the questions surrounding this provision and how it is being interpreted by the consulted national authorities of the Member States.

The Note starts by addressing the scope of the EIO DIR and the question of the “corresponding provisions” (infra 2). Then it discusses the legal challenges caused by a delay in the transposition of the EIO DIR in the Member States (infra 3 and 4) and finally it summarises the main conclusions (infra 5).

II. ARTICLE 34 EIO DIR AND THE “CORRESPONDING PROVISIONS” OF THE MLA CONVENTIONS

As stated above, the EIO DIR replaces the “corresponding provisions” of three central MLA Conventions. Therefore, it is crucial to know which “corresponding provisions” will (and will not) be replaced.

In its Opinion of 4 March 2011,³ Eurojust already underlined the vagueness of the term “corresponding provisions” and pointed at the need to have clarification on the meaning of this term. Apart from a Council document of 2011,⁴ which mentions a number of provisions of MLA legal instruments that may be affected by the EIO Directive, there is not (yet) a detailed list available indicating which provisions exactly will be replaced⁵.

In the context of the 38th EJM Regular meeting on 22 February 2017, the EJM Contact Points were invited to express their views on which measures would be excluded from the scope of the EIO DIR. It was recalled that the EIO DIR is clear in excluding from its scope joint investigative teams and the evidence gathered within such teams, but it is less clear in relation to other measures. Several (but not all) EJM representatives believed that the following measures are excluded from the scope (and therefore should remain valid under the regulation of the previous Conventions and instruments):

- **Service and sending of procedural documents (Article 5 of the MLA 2000 Convention); some EJM Contact Points disagreed and believed that service of documents is included as part of the scope of the EIO DIR;**
- **Spontaneous exchange of information (Article 7 of the MLA 2000 Convention);**
- **Transfer of criminal proceedings (Article 21 of the MLA Convention and the CoE Convention 1972 on the Transfer of Proceedings);**

³ Council doc. 6814/11.

⁴ Council doc. 14445/11.

⁵ It is even doubtful that such a list could be produced at this stage, given the difficulties to determine its legal effects as means of interpretation of a Directive, and the problematic identification of a suitable and competent institution to issue such a list.

- **Returning of an object to the injured party (Article 8 of the 2000 Convention and Article 12 of the Second Additional Protocol) including a seizure only for this purpose;**
- **Freezing/seizure of property for the purpose of confiscation (FD 2003/577);**
- **Confiscation (FD 2006/783);**
- **Freezing/seizure of the accused assets for the purpose of compensation of the victim;**
- **Exchange of criminal records (2009/315/JHA FD (ECRIS FD), with the exception of Article 13 of 1959 MLA Convention, which has not been replaced by the ECRIS FD, and where the EIO should be sent between judicial authorities;**
- **Measures on cooperation between customs authorities (Naples II Convention);**
- **A request for consent to use information as evidence that has already been provided via police cooperation (Article 1(4) of FD 2006/960/JHA on simplifying the exchange of information and intelligence and Article 39(2) of the Convention Implementing the Schengen Agreement);**
- **International police cooperation measures, such as cross-border surveillance and cross-border pursuit (hot pursuit) (Articles 40 and 41 of the Convention Implementing the Schengen Agreement and recital (9) of the EIO DIR). However, some EJM Contact Points believed that the EIO DIR might be used for some types of cross-border surveillance measures. One Member States explicitly excluded cross-border surveillance from the scope of its national EIO legislation.**

III. ARTICLE 34 EIO DIR AND THE APPLICABLE LEGAL BASIS FOR CROSS BORDER COOPERATION

The EIO DIR replaces, as from 22 May 2017, the corresponding provisions of the previously mentioned MLA instruments for the Member States bound by this directive (Article 34(1) EIO DIR). Before looking at different possible interpretations that can be made of this provision, it is important to make some preliminary observations. First of all, *all* Member States, except Denmark and Ireland, are “bound” by the EIO DIR,⁶ and this entails certain consequences after the expiry of the transposition deadline (see *infra* IV). Secondly, Article 35 EIO DIR includes a transitional provision which allows the continued use of the existing MLA instruments, but this is limited to MLA requests received *before* 22 May 2017. This provision is thus not a solution for the issuing of MLA requests *after* 22 May 2017 in case of non-transposition. Thirdly, Article 34(3) and 34(4) EIO DIR foresee that, subject to a notification to the Commission, Member States may conclude or continue to apply bilateral or multilateral agreements or arrangements with other Member States after 22 May 2017, but “only insofar as these instruments make it possible to further strengthen the aims of the directive and contribute to simplifying or further facilitating the procedures for gathering evidence and provided that the level of safeguards set out in this Directive is respected”. It is difficult to see how this provision could be applied in relation to the three abovementioned MLA Conventions since the objective of the EIO DIR is precisely to replace them by a simpler system.⁷

⁶ See recitals 44 and 45 EIO DIR.

⁷ For a similar reasoning in relation to Article 31(1) EAW FD, see CJEU, Case C-296/08 PPU, *Goicoechea*, paras 55-56.

In sum, the abovementioned provisions do not seem to give much leeway. Whilst it is, to a certain extent, understandable that the EU legislator does not make explicit arrangements for scenarios in which Member States breach their commitments,⁸ the question remains as to how this possible legal vacuum can be avoided. It is important to bear in mind that this problem is not new or unique to the EIO DIR, but also applies to other instruments, particularly framework decisions and directives, where the European legislator used the repeal or replace method,⁹ and that it is relevant to take into account what happened with these other instruments when delays in the transposition occurred.

On the basis of the information gathered by Eurojust and the EJN, two possible interpretations were put forward.

1. Literal interpretation – The risk of a legal deadlock and a revival of reciprocity

Following a strict, literal reading of Article 34 EIO DIR, national authorities of the Member States that are bound by the EIO DIR, can no longer use the corresponding provisions of the “old” MLA Conventions from 22 May 2017 onwards as, on that day, these provisions will be replaced by the EIO DIR. Consequently, they would lack a legal basis to carry out cross-border cooperation actions. Such an interpretation thus creates a legal vacuum and can seriously jeopardise judicial cooperation.

On the basis of the information gathered by Eurojust and the EJN, only a minority of national authorities believe that the judicial authorities in their Member States would adhere to such an interpretation. Some believe that this might lead to a revival of the “principle of reciprocity” and be contrary to the principles of judicial cooperation in criminal matters between the EU Member States, as expressed in the Treaty of the Functioning of the European Union.

⁸ G. VERMEULEN, W. DE BONDT and C. RYCKMAN, *Rethinking international cooperation in criminal matters in the EU*, 2012, p. 372-374 and p. 542.

⁹ *Ibidem*.

2. Teleological/pragmatic interpretation – The continued use of the MLA Conventions by Member States that have not transposed the EIO DIR by 22 May 2017

2.1 Arguments in favour of a teleological/pragmatic interpretation

According to a pragmatic, teleological interpretation of Article 34 EIO DIR, Member States would still be able to continue to use the old MLA instruments as long as either the issuing and/or the executing Member State has not implemented the EIO DIR. The corresponding provisions and Conventions would then only be considered to be replaced *to the extent that the EIO DIR has been transposed in the concerned Member States* rather than automatically on 22 May 2017. There are some arguments that could sustain such an interpretation:

- **First of all, it is important to underline that the “replacement” of the corresponding provisions of the conventions mentioned in Article 34(1) EIO DIR does not entail the “abolition” of those conventions or provisions. They will retain their relevance in situations in which the EIO Directive is not applicable, such as for instance in the relations with Denmark and Ireland, but possibly also in situations of non-transposition.¹⁰ One could argue that in cases where the EIO DIR is not yet transposed in the national law, the EIO system as such cannot be “applicable” amongst these Member States, even though the Member States are of course “bound” by the EIO DIR (*see infra* IV).**

¹⁰ In this regard, it is relevant to draw a parallel with the *Goicoechea* judgment where the CJEU ruled, in relation to a strikingly similar provision in the EAW FD, that “*the replacement under Article 31(1) of the Framework Decision of the conventions mentioned in that provision does not entail the abolition of those conventions, which retain their relevance in cases covered by a statement made by a Member State pursuant to Article 32 of the Framework Decision, and also in other situations in which the European arrest warrant system is not applicable” (emphasis added). CJEU, Case C-296/08 PPU, *Goicoechea*, para 58. See also paras 59 and 63, where the CJEU underlines that Article 31 must be interpreted as referring only to the situation in which the EAW system is applicable.*

- Secondly, an interpretation which would allow the continued use of the MLA Conventions by the Member States that have not yet transposed the EIO DIR by 22 May 2017, would be more in line with the objective of the EIO DIR, which is to follow a new approach by creating a single, comprehensive instrument for obtaining evidence in cases with a cross-border dimension, based on the principle of mutual recognition, but also taking into account the flexibility of the traditional system of MLA.¹¹ It is hard to see how an interpretation which would amount to the absence of a legal basis or the revival of the reciprocity could fit into this objective.
- Thirdly, the European Commission noted in one of its reports on the implementation by the Member States of Framework Decision 2008/909/JHA on transfer of prisoners,¹² that: *“The non-implementation of the Framework Decisions by some Member States is very problematic since those Member States who have properly implemented the Framework Decisions cannot benefit from their co-operation provisions in their relations with those Member States who did not implement them in time. Indeed, the principle of mutual recognition, which is the cornerstone of the judicial area of justice, requires a reciprocal transposition; it cannot work if instruments are not implemented correctly in the two Member States concerned. As a consequence, when cooperating with a Member State who did not implement in time, even those Member States who did so will have to continue to apply the corresponding conventions of the Council of Europe when transferring EU prisoners or sentences to other Member States”* (emphasis added).¹³ In other words, in a strikingly similar scenario to the one being analysed here the Commission, whilst deploring the non-transposition, explicitly acknowledges that in such a scenario the Member States will have to continue to use the “replaced” Conventions.

¹¹ Recitals 6-8 EIO DIR.

¹² This instrument, FD 2008/909/JHA, includes a provision that is similar to Article 34 EIO DIR, namely Article 26(1) which states that *“Without prejudice to their application between Member States and third States and their transitional application according to Article 28, this Framework Decision shall, from 5 December 2011, replace the corresponding provisions of the following conventions applicable in relations between the Member States: ...”*.

¹³ COM (2014) 57 final.

2.2 Views in the Member States

On the basis of the information gathered by Eurojust and the EJM, a majority of the national authorities that were consulted, expressed to be in favour of a pragmatic/teleological interpretation.¹⁴ Some Member States explicitly inserted in their national EIO legislation or their draft EIO legislation a clause which regulates the scenario of non-timely transposition. A few national draft EIO laws prescribe the continued use of the MLA Conventions in relation with Member States that did not implement in time.¹⁵ One (already adopted) national EIO law prescribes the treatment of incoming MLA requests from Member States that have not (yet) transposed the EIO DIR *as if they were EIOs*.¹⁶

This difference in approach shows that -whilst most of the national authorities that participated in the discussion and consultation expressed to be in favour of a teleological/pragmatic approach and rejected cooperation on the basis of reciprocity and/or national provisions on international cooperation included in criminal procedural code- national authorities would not necessarily react in a uniform way vis-à-vis specific questions that will rise in practise.

As a matter of fact, at the EJM Regular meeting on 22 February 2017, different scenarios and solutions were mentioned and discussed. The replies provided as well as the information gathered via Eurojust confirm that national authorities can indeed take different approaches. For instance, when asked about a scenario where the issuing Member State transposed the EIO DIR by the deadline, but the executing Member State did not, some authorities replied that, as issuing authority, they would issue an EIO and ask/expect the executing authority to accept it as a MLA request whilst others said they would issue an MLA request if they knew that the executing Member State had not implemented the EIO DIR. Some authorities said they would first check and/or ask what the executing authority would prefer. When asked what they would do as *executing* Member State in

¹⁴ On the basis of a consultation by the National Members at Eurojust, national authorities from the following Member States believed that the existing MLA instruments can still be used after the transposition deadline in relation with or between Member States that did not implement on time: BE, BG, CZ, DK, DE, EE, EL, ES, HR, IT, LV, LT, HU, NL, AT (official position will follow), PL, RO, SK, FI and SE.

¹⁵ E.g. the draft laws in HU, RO and SK.

¹⁶ Article 5 of the Ordonnance of 1 December 2016 which transposes the EIO DIR into French law.

this scenario, and whether they would be able to accept an EIO and treat it as an MLA, a majority replied positively and specified that whilst applying the MLA rules, they would try to do it as much as possible in light of the (non-transposed) EIO DIR (see also *infra* IV). Other authorities, however, stated that they would not be able to execute an EIO and that they would ask for a MLA request. Another scenario that was discussed was the inverse situation where the executing Member State transposed the EIO DIR by the deadline, but the issuing MS did not. Here, the majority of authorities replied that they would be able to execute a MLA request.

Some authorities explained that in order to clarify the situation beforehand, they had already contacted their usual partners for MLA requests to see how to proceed in case of a delay in the implementation. Others said that, in order to unify the practice within their country, the Ministry of Justice would inform the courts and Supreme Public Prosecutor's Office of some guidelines.

IV. Effects of the EIO DIR in the national legal order - Duty to EU-conform interpretation

At the EJM Regular meeting on 22 February 2017, participants discussed to what extent provisions of a directive can entail direct and/or indirect effect. Participants recalled that whilst provisions of directives can entail -subject to certain conditions- direct effect,¹⁷ they also entail a so-called indirect effect, meaning that, when the period for transposition expires, national authorities are under a duty to interpret the national law, as far as possible,¹⁸ in conformity with the directive. This applies also to national law that was not adopted to transpose the directive.

¹⁷ Provisions of directives can only have vertical direct effect, but not horizontal direct effect meaning that they can only be invoked by an individual vis-à-vis the State, but not vis-à-vis another individual. Moreover, a provision can only entail direct effect if: (i) the period for transposition expired and the directive has not been transposed or has not been transposed correctly; (ii) the provisions of the directive are unconditional and sufficiently precise; the provisions of the directive confer rights on individuals. It should be added that instruments regarding international cooperation in criminal matters usually do not fulfil the last condition, see: G. VERMEULEN, W. DE BONDT and C. RYCKMAN, *Rethinking international cooperation in criminal matters in the EU*, 2012, p. 372.

¹⁸ They are not obliged to make an interpretation *contra legem*, see, for instance: CJEU, Case C-212/04 *Adeneler*, para 110.

In sum, as from 22 May 2017, national authorities have a duty to interpret their national law in light of the EIO DIR, even if they have not yet implemented it into their national law.

On the basis of the information gathered by Eurojust and the EJM, it can be concluded that several national authorities referred to this duty of EU-conform interpretation. For instance, one authority replied that, if its own Member State did not implement the EIO DIR by the deadline whilst the other Member State did implement it, the former will apply the currently existing MLA Conventions, but will stay as close as possible to the EIO DIR, e.g. in relation to terms of execution.

V. CONCLUSION

This Note has addressed two issues in relation to Article 34 EIO DIR, namely the meaning of “corresponding provisions” and the question of the legal basis for MLA requests after 22 May 2017 in relation with Member States that have not yet transposed the EIO DIR by then. It summarises the outcome of the information gathered by Eurojust and the EJM.

As regards the meaning of the “corresponding provisions”, the consulted national authorities indicated some of the measures that they deem to be excluded from the scope of the EIO DIR. It was also clear that with regard to some measures, there are different views in the Member States both at institutional level and among practitioners.

As regards the legal basis, it appears that a majority of the consulted national authorities is inclined to give a “pragmatic”, “teleological” interpretation of Article 34(1) EIO DIR, meaning that they would continue to use the currently existing MLA Conventions in their relation with Member States that did not transpose the EIO DIR in time. In this regard, only a few Member States included provisions in their national (draft) legislation to regulate this issue explicitly. For those Member States that did not regulate this explicitly, the question remains open as to how the national authorities will act in practice.

The Note also recalls that, irrespective of the interpretation of Article 34(1) EIO DIR, national authorities have a duty, as from 22 May 2017, to interpret their national law, as far as possible, in light of the EIO DIR. On the basis of the information gathered, some national authorities already explicitly stated that they would do so, for instance by applying the terms of the execution of an EIO.

In view of the fact that there are different approaches thinkable in case one or several of the concerned Member States have not implemented the EIO DIR by 22 May 2017, Member States' authorities could contact each other first informally before sending out the request. If, despite direct contacts, national authorities continue to experience difficulties with the execution of an MLA request or an EIO, Eurojust and the EJM remain fully at their disposal to support them. In order to verify first whether a Member State has implemented the EIO DIR or not, national authorities can consult the Judicial Library on the EJM website which is being regularly updated.