

# European Investigation Order Directive: What About Defence Rights?

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## Introduction

In the 2009 *Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility*, the Commission established the necessity to adopt an instrument which would expand the application of the principle of mutual recognition to all investigative measures in the gathering of evidence across the European Union (hereinafter, the EU). In April 2014, Directive 2014/41/EU on the European Investigation Order (hereinafter, the EIO Directive) was finally adopted (on its adoption process: Belfiore, 2015, p. 312-313). Its transposition was due by the 22<sup>nd</sup> of May 2017 (Art. 36) and has been complied by all the Member States (except Ireland and Denmark, which exercised their opt-out right).

The European Investigation Order (hereinafter, EIO) can be defined as “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” (Art. 1(1) Dir.). All investigative measures are part of its scope of application, apart from joint investigation teams (Art. 3).

The application of mutual recognition in the EIO certainly favours the rapidity of the proceedings. At present, a national investigative authority can directly issue an order to a foreign competent judicial authority to ask it to carry

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out one or more investigative measures and this second authority would have to comply with this request, as if the order came from one of their national colleagues. As it can be deduced from the first recitals of the EIO Directive, the adoption of this new instrument aimed indeed at increasing the efficiency of cross-border criminal investigations. Although it is a valuable goal, it is regrettable that “the objective of strengthening mutual assistance between Member States has prevailed, once again, over the objective of enhancing the role of the accused in criminal proceedings having a cross-border dimension” (Belfiore, 2015, p. 324).

As the EU aspires to build a real Area of Freedom, Security and Justice, judicial cooperation instruments can no longer solely favour the investigation and prosecution, but also need to take the suspect into consideration in order to reduce the gaps faced by the defence in transnational criminal proceedings (European Criminal Policy Initiative, 2013; Gless, Vervaele, 2013; Gless, 2015; Weyembergh, Sellier, 2018, p. 66-86). As part of this evolution<sup>2</sup>, the EU legislator has included some provisions about suspects’ rights in the EIO Directive, namely Articles 1(3) and 14.

In comparison with the former mutual recognition instruments adopted in criminal matters, which do not contain any specific rule about defence rights, the EIO Directive constitutes a clear improvement. Yet, an improvement does not mean that defence rights’ shortcomings are now fully addressed, and these provisions may not be sufficient to ensure effective equality of arms between prosecution or investigative authorities and the suspected person. Therefore, there is a special interest in analysing to what extent the EIO Directive strengthens the position of the defence in evidence gathering across the EU.

Two procedural rights are specifically relevant for this study. The first one is related to the right of the suspect to initiate the issuing of an EIO to have evidence obtained in order to defend himself/herself (Section 2). The second one applies when an EIO has been issued and the suspect wants to challenge, either the issuing or the execution of such order (Section 3).

<sup>2</sup> After the Stockholm Program, the first step on this direction has been the adoption, between 2010 and 2016, of the directives on application of the 2009 *Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings* (right to translation and interpretation, to information, to lawyer assistance, to presumption of innocence and be present at trial and to legal aid).

## **The right to initiate the issuing of an EIO**

Article 1(3) of the EIO Directive states that “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”. This provision was absent in the drafts of the EIO Directive and was added nearly at the end of the adoption process. This addition is a clear improvement, as the suspect was originally excluded from the possibility to request evidence gathering in cross-border proceedings (Hodgson, 2011, p. 627; Bachmaier, 2015). Nevertheless, two important limitations can be identified in this provision.

First, this provision does not grant a right to make a direct request to the foreign authority through an EIO. Instead, the defence would have to request the national competent authority to issue the order. Yet, the EIO Directive does not regulate to what extent the authority is obliged, upon request of the defence, to issue an EIO, nor imposes legal remedies to challenge a refusal. As a result, national authorities have a broad margin of manoeuvre to decide either to respond favourably to the suspect’s request or to rule it out (Van Wijk, 2017, p. 93).

The second limitation lies on the reference made in Article 1(3) to “national criminal procedures”. It means that suspects are not offered a general right to request the issuing of an EIO across the EU. On the contrary, it would depend on whether the national law grants suspects a right to request the execution of an investigative measure in domestic proceedings.

This reference to national procedures in Article 1(3) can lead to important disparities on the position of the defence from one State to another. Moreover, it gives national legislators a lot of power, as they have no obligation to guarantee the defence the right to be an active party in evidence gathering across the EU and to initiate the issuing of an EIO (Buric, 2016, p. 76; Van Wijk, 2017, p. 267).

However, this reference also presents positive aspects. First, it is in full conformity with the obligation imposed to the Union by Article 67(1) of the Treaty on the Functioning of the European Union to “respect the different legal systems and traditions of the Member States”. Moreover, it is a way to avoid inequality between suspects in national proceedings and suspects in transnational ones regarding their ability to participate to evidence gathering. Nevertheless, such an inequality could also be avoided by granting every suspect, in

national and transnational proceedings, a right to request the execution of an investigative measure (Buric, 2016, p. 76-77). It would ensure a better equality of arms between the prosecution and the suspect, but it seems to exceed the EU's current competence (Van Wijk, 2017, p. 265).

The right a suspect has to initiate the issuing of an EIO, by requesting it to his or her national competent authority, is not guaranteed across the EU by the EIO Directive and depends on the national legislations. The situation is quite identical regarding the right to challenge the issuing or execution of an EIO, as seen below.

### **The right to challenge the issuing or execution of an EIO**

The right to an effective remedy against the issuing or the execution of a judicial cooperation instrument has been highly discussed in the last years, starting with the European Arrest Warrant<sup>3</sup>. For the first time, in 2014, the European legislator has taken this right into consideration and has inserted specific provisions on it in the EIO Directive, namely Recital 22 and Article 14. According to Article 14(1), "Member States shall ensure that legal remedies equivalent to those available in a similar domestic case, are applicable to the investigative measures indicated in the EIO". This provision has been seen as a positive innovation (Garcimartín Montero, 2017, p. 48; Ambos, 2018, p. 460), but it remains unsatisfying regarding the ability of the defence to effectively challenge an EIO.

Indeed, similarly to Article 1(3), Article 14(1) also refers to national legislation and only imposes "legal remedies equivalent to those available in a similar domestic case". But what happens if national law does not provide for legal remedies against some investigative measures, including in domestic proceedings? In that case, is the law compatible with Article 14? Moreover, does the EIO Directive grant, in an immediate and direct manner, to a concerned party the right to challenge an EIO?

These questions have been raised through a preliminary ruling (*Gavanozov* case, 2019) by a Bulgarian court to the Court of Justice of the European Un-

<sup>3</sup> As illustrated by the "Jeremy F. case": CJEU, *Jeremy F. v. Premier ministre*, 30 May 2013, C-168/13 PPU.

ion (hereinafter, CJEU). However, the CJEU avoided answering to the referred questions, by reducing the dispute “to a mere formal question” (Wahl, 2020). Consequently, the Bulgarian court requested a new preliminary ruling (*Gavanov II* case) in which it expressly asked if an EIO can be issued when the law of the issuing State does not provide for any legal remedy against that order (because of the investigative measures concerned). This preliminary ruling is still pending and the CJEU’s answer is very expected, because of the repercussion it could have on the appreciation of defence rights.

Regarding the impacts legal remedies may have on the proceedings, Article 14 offers a positive provision and a negative one. Starting with the latter, according to paragraph 6, “a legal challenge shall not suspend the execution of the investigative measure, unless it is provided in similar domestic cases”. This provision is disappointing on two aspects. On the one hand, it is a clear example of the importance granted to the efficiency of criminal investigations at the expense of the situation of suspects. On the other hand, once again, the rights granted to the defence depend on national legislations, with all the existing discrepancies. Fortunately, Article 13(2) counterbalances a little bit, by stating that “the transfer of the evidence may be suspended, pending a decision regarding a legal remedy”.

Then, coming back to the positive innovation, Article 14(7) obliges the issuing Member State to “take into account a successful challenge against the recognition or execution of an EIO”. This provision is important in a transnational context and strengthens the efficiency of the right to legal remedies.

## **Conclusion**

A common conclusion for both rights emerges from the elements highlighted above: in some respects, the EIO Directive has strengthened the rights of the suspect or accused. Indeed, for the first time in a judicial cooperation instrument in criminal matters, there is a specific provision related to legal remedies. Moreover, the defence is offered a possibility to request the issuing of an EIO, that is to say, a possibility to be an active party in the gathering of evidence.

Nevertheless, those positive innovations are far from sufficient to guarantee equality of arms between the investigative authorities and the defence.

Mainly, the choice to offer the suspect, either the right to request the issuing of an EIO or access to legal remedies in order to effectively challenge the issuing or the execution of an EIO, remains regulated at the national level. The EIO Directive does not give direct rights to suspects. Plus, some of its provisions show the importance still granted in the EU to the efficiency of criminal proceedings at the cost of suspects' rights.

In conclusion, the EIO Directive is certainly an instrument of big value to increase the efficiency and the rapidity of transnational criminal investigations, as the application of the principle of mutual recognition makes recollection or exchange of evidence easier. Yet, unsurprisingly, the protection of suspects' rights is still a step backward and is affected by the transnational aspect of the proceedings, which is problematic in the perspective of a real Area of Freedom, Security and Justice where the emphasis is not only put on the Security aspect.

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Chloé Fauchon is a PhD Student in Strasbourg University and Salamanca University. Her main areas of scientific interest and research include EU, French and Spanish substantial and procedure criminal law.

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