



EUROJUST

Report on Eurojust's casework in the field of the European Investigation Order

November 2020

Criminal justice across borders

Table of Contents

Executive summary	3
I. Introduction	5
II. Facilitation	7
1. Information needed before the issuing of a European Investigation Order	7
2. Communication, urgency and language issues	10
2.1. (Re-)establishing contact among issuing and executing authorities	10
2.2. Speeding up the execution of European Investigation Orders in urgent cases.....	12
2.3. Addressing language issues	13
3. Scope of the European Investigation Order	14
3.1. Temporal scope of the European Investigation Order	14
3.2. Material scope of the European Investigation Order	15
3.2.1. Judicial versus police cooperation	15
3.2.2. The European Investigation Order in relation to other judicial cooperation instruments ..	15
3.2.2.1. European Arrest Warrant	15
3.2.2.2. Freezing order.....	17
3.2.2.3. Joint investigation team	19
3.2.2.4. Letters of request.....	19
3.3. Territorial scope of the European Investigation Order – mutual legal assistance approach with Denmark and Ireland.....	21
4. Content and form of the European Investigation Order	21
4.1. The description of the criminal act.....	22
4.2. The description of the investigative measure requested	23
4.3. Other requests for additional information	24
4.3.1. Excessive requests	24
4.3.2. Domestic judicial decision authorising a coercive investigative measure.....	25
4.3.3. Available legal remedies	25
4.4. Compliance with certain formalities and procedures	26
5. Conditions for issuing a European Investigation Order	27

6. Transmission of European Investigation Orders and related documents to the competent executing authority	29
6.1. Transmission.....	29
6.2. Identifying the competent executing authority	30
7. Subsequent use of the evidence obtained for other investigative purposes.....	31
7.1. Rule of speciality.....	31
7.2. Subsequent use of the evidence by authorities in the executing Member State	31
8. Grounds for non-execution	32
8.1. Dual criminality.....	32
8.2. <i>Ne bis in idem</i>	34
8.3. Immunity or privilege.....	34
8.4. Use of the investigative measure restricted to certain offences	35
8.5. Fundamental rights	36
9. Specific investigative measures.....	36
9.1. Temporary transfer to the issuing state of persons held in custody for the purpose of carrying out an investigative measure.....	37
9.2. Hearing by videoconference	37
9.2.1. Practical or technical issues.....	37
9.2.2. Status of subject	38
9.2.3. Videoconference during trials and/or appeal proceedings	40
9.3. Covert investigations.....	41
9.4. Interception of telecommunications	42
9.4.1. Interception with technical assistance from another Member State	42
9.4.2. Interception without technical assistance (Annex C)	43
9.4.2.1. Operational topic in relation to Article 31 EIO DIR and Annex C.....	43
9.4.2.2. The meaning and scope of 'interception of telecommunication'	44
III. Coordination	47
IV. Conclusions and recommendations	51

Executive summary

The Directive on the European Investigation Order (EIO DIR) was introduced to replace and improve the legal framework of mutual legal assistance (MLA). In many cases, the existence of standard forms (available in all EU languages), the increased role of judicial authorities (as issuing or validating authorities), the limited grounds for refusal and the time limits proved successful and had a positive impact on judicial cooperation. Yet, for the mutual recognition formula to be fully successful, it is crucial that the templates be duly filled in, the grounds for non-recognition be applied correctly and time limits be fully respected. This has not always been the case and, in practice, many practitioners have often struggled with the practical application of this instrument.

The aim of this report, which is complementary to previously published documents by Eurojust (and the European Judicial Network (EJN)), is to inform both practitioners and policymakers of the main difficulties encountered in the practical application of the European Investigation Order (EIO) on the basis of Eurojust's casework and to highlight, where relevant, the role that Eurojust has played in overcoming such difficulties. The report is primarily based on the analysis of cases addressing issues related to the EIO registered at Eurojust between May 2017 and May 2019, and is complemented by views expressed during dedicated discussions with some Eurojust National Desks.

The report clearly indicates that the EIO is not yet functioning as a well-oiled machine. There are still several ongoing issues encountered throughout the life cycle of the EIO. Eurojust has played an important role in facilitating cooperation and ensuring coordination in both bilateral and multilateral cases involving EIOs. In the vast majority of cases handled by Eurojust, the issues mentioned throughout the report were resolved and EIOs could be executed successfully.

Based on Eurojust's casework, solutions and best practices were identified, but the report also stresses some challenges that one should be aware of and sets out the main conclusions reached and recommendations proposed. The 10 most relevant issues identified in the report, followed by, where possible, Eurojust's recommendations/best practices, are as follows.

1. Defining the scope of the EIO.
 - Further clarification on the scope of the EIO DIR would be recommended and the possible need for further guidance on the single or combined use of EIOs/Letter of request (LoR) when certain requests are instrumental or linked to requests aimed at the gathering of evidence.
2. Clarifying the content of the EIO and assisting with requests for additional information.
 - For an overview of best practices, Eurojust would like to refer to the Joint Note of Eurojust-EJN note on the practical application of the EIO, which includes some suggestions in relation to the filling in of the different sections of the EIO.
3. Bridging differences between national legal systems.
 - From an EU perspective, further clarification on the scope and meaning of these crucial concepts would be beneficial, rather than leaving it to the interpretation of each Member State, concerning, for example, but not limited to:

- interception of telecommunications;
 - temporary transfer to the issuing state;
 - the speciality rule;
 - cross-border surveillance.
4. Ensuring a correct and restrictive interpretation of the grounds for non-execution.
 5. Speeding up the execution of EIOs.
 - As best practice, it is suggested that, whenever the 'urgency' box is ticked in an EIO, it should be clearly explained why the execution of the requested measure is urgent.
 6. Facilitating direct contact and exchange of information between issuing and executing authorities.
 - Contacting Eurojust at an early stage has been clearly shown to have a positive effect on the correct and swift execution of EIOs.
 7. Addressing language issues.
 - A good translation of an EIO is the key to avoiding misunderstandings and unnecessary delays. As best practice, Eurojust's casework revealed that, in urgent cases, an English version of the EIO was accepted, after which an official translation would follow.
 8. Encouraging the use of Annexes B and C.
 9. Transmitting EIOs to the competent executing authority.
 10. Coordinating the execution of EIOs in different Member States and/or together with other instruments.
 - Early involvement of Eurojust in complex cases that require coordination has proved beneficial for the outcome in many cases and is therefore highly recommended.

A detailed explanation of the conclusions/recommendations/best practices mentioned above, including several other ongoing issues, can be found in this report. In addition, (anonymised) case examples, presented by Eurojust National Desks, have often been provided to help in explaining the issues at stake.

I. Introduction

This is the first report on Eurojust's casework in the field of the European Investigation Order. Prior to this report, Eurojust has produced several other relevant documents on this instrument. In May 2017, when it was clear that many Member States were struggling with implementing the Directive on the European Investigation Order in time, Eurojust and the European Judicial Network (EJN) published a Joint Note on the meaning of corresponding provisions and the applicable legal regime in case of delayed transposition of the EIO DIR ⁽¹⁾. In September 2018, Eurojust organised a meeting at which practitioners discussed their first experiences and best practices in the application of the EIO. The results of these discussions were gathered in an outcome report ⁽²⁾. Finally, in 2019, Eurojust published, together with the EJN, a Joint Note on the practical application of the EIO, which is a compilation of information, issues, challenges and best practices gathered by Eurojust and the EJN from meetings and documents ⁽³⁾.

This report focuses on issues identified in cases handled by the National Desks at Eurojust, covering a 2-year reference period starting from the deadline for transposition (22 May 2017). During this reference period, Eurojust registered 1 529 cases dealing with EIOs in its Case Management System. Given this large number of cases, the National Desks were invited to focus on major issues, practical difficulties and best practices they encountered in relation to the practical application of the EIO in their cases. Input to this report was provided by 24 National Desks, raising issues that relate to different aspects of the EIO and/or different phases in the life cycle of an EIO, including the scope of the EIO, its content, the form and language of the EIO, the issuing and transmission of an EIO, the recognition and execution of an EIO, and specific investigative measures.

In addition to the issues identified in Eurojust cases, the report also integrates the results of 5 operational topics ⁽⁴⁾ that National Desks launched in relation to specific aspects of the EIO. These topics were related to the conditions for issuing an EIO (see below, Chapter 5), the transmission of EIOs (see below, Section 6.1), hearings by videoconference during trials and appeal proceedings (see below, Section 9.2.3), covert investigations (see below, Section 9.3) and interception without technical assistance (see below, Section 9.4.2).

This report does not address the impact of COVID-19 on the issuing and execution of EIOs, as that falls outside the temporal scope of this report. However, in relation to this topic, reference can be made to

⁽¹⁾ The Joint Note forms Annex II to Council doc. 9936/17 and is available separately online (https://www.ejn-crimjust.europa.eu/ejn/EJN_RegistryDoc/EN/3112/0/0).

⁽²⁾ Eurojust, *Eurojust meeting on the European Investigation Order, The Hague, 19–20 September 2018: Outcome Report*, Council doc. 15735/18 (available at: [http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/ejstrategicmeetings/Outcome%20report%20of%20the%20Eurojust%20meeting%20on%20the%20European%20investigation%20order%20\(19-20%20September%202018\)/2018-12_Outcome-Report_Eurojust-meeting-on-EIO-Sept2018_EN.pdf](http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/ejstrategicmeetings/Outcome%20report%20of%20the%20Eurojust%20meeting%20on%20the%20European%20investigation%20order%20(19-20%20September%202018)/2018-12_Outcome-Report_Eurojust-meeting-on-EIO-Sept2018_EN.pdf)).

⁽³⁾ Eurojust and EJN, *Joint Note of Eurojust and the European Judicial Network on the practical application of the European Investigation Order*, Council doc. 11168/1/19 (available in all official EU languages; available in English at: http://www.eurojust.europa.eu/press/News/News/Pages/2019/2019-07-15_Eurojust-EJN-joint-note-on-EIO.aspx).

⁽⁴⁾ The purpose of operational topics opened at Eurojust is to gather from all Member States background information or advice that may be relevant to or have implications for operational matters. Topic cases may be opened at the College of Eurojust (which consists of all the National Members of each Member State) at the initiative of a National Desk or a College Team.

the Eurojust/EJN Compilation on the Impact of COVID-19 on Judicial Cooperation in Criminal Matters and the corresponding executive summary ⁽⁵⁾.

This report is divided into two main parts that reflect the essence of Eurojust's role in judicial cooperation in criminal matters, namely facilitation (Part II) and coordination (Part III). The report concludes with a summary of the main findings identified in Eurojust's casework and some recommendations related thereto (Part IV).

⁽⁵⁾ Eurojust and EJN, 'The Impact of COVID-19 on Judicial Cooperation in Criminal Matters', Council doc. WK 3472/2020 REV 20 LIMITE; General Secretariat of the Council, 'The Impact of COVID-19 on Judicial Cooperation in Criminal Matters – Executive summary of information compiled by Eurojust and EJN', Council doc. 7693/3/20 REV 4, pp. 7–8. Both documents are still being updated regularly.

II. Facilitation

Pursuant to Article 2(2)(b) of the Eurojust Regulation ⁽⁶⁾, 'Eurojust shall facilitate the execution of requests for, and decisions on, judicial cooperation, including requests and decisions based on instruments that give effect to the principle of mutual recognition'. Like other mutual recognition instruments, EIOs have primarily a bilateral setting (Article 1(1) EIO DIR). The transmission of EIOs and any further official communication shall, in principle, be made directly between the issuing authority and the executing authority (Article 7(1) EIO DIR). However, when further advice or support is needed and/or a consultation procedure is triggered, the judicial authorities can contact Eurojust, which can play a bridge-building role, facilitating the dialogue between the issuing and executing authorities.

Facilitation, in many different aspects, lies at the heart of Eurojust's casework in the field of the EIO. When practitioners ask Eurojust to facilitate the execution of their EIOs, their questions relate to different issues. Sometimes practitioners reach out to Eurojust with specific questions prior to issuing the EIO (see below, Chapter 1). Often practitioners request support from Eurojust when the communication between the issuing and executing authorities has become problematic, in urgent cases where there is a need to speed up the execution of the EIO or when there are language issues (see below, Chapter 2). Some cases of facilitation are related to the scope of the EIO (see below, Chapter 3), the content and form of the EIO (see below, Chapter 4), the conditions for issuing an EIO (see below, Chapter 5) or the transmission of the EIO (see below, Chapter 6). Other cases were related to the rule of speciality (see below, Chapter 7), the application of grounds for non-recognition and non-execution (see below, Chapter 8) and the use of specific investigative measures (see below, Chapter 9). In these cases, level II meetings ⁽⁷⁾ and coordination meetings ⁽⁸⁾ have often proved to give added value, allowing various questions regarding difficulties in relation to the issuing or the execution of an EIO to be discussed and clarified and paving the way for the optimal execution of the EIOs involved.

1. Information needed before the issuing of a European Investigation Order

Eurojust has been frequently approached by national judicial authorities prior to the issuing of an EIO and/or the issuing of a follow-up EIO. Those situations occurred particularly when national authorities

⁽⁶⁾ Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA.

⁽⁷⁾ A level II meeting is a meeting between two or more National Members in relation to one or more cases. Usually, a level II meeting is initiated by the requesting National Member, is informal and takes place at Eurojust. The other National Member(s) involved in the case could also suggest such meetings, whenever deemed necessary for the coordination of a case. A level II meeting may be sufficient to address the needs of the case referred to Eurojust, and may therefore be convened by the National Member who is the owner of the case to discuss the case without consideration of a future level III meeting (coordination meeting). A coordination meeting may only take place if it is preceded by a level II meeting.

⁽⁸⁾ Coordination meetings at Eurojust are designed to bring together the judicial and law enforcement authorities of the countries involved, to stimulate and achieve agreement on cooperation between them and/or the coordination of investigations and prosecutions at national level.

needed contextual or background information or needed to assess the feasibility or the advantages of splitting one EIO into several orders. National authorities also requested support from Eurojust prior to the issuing of an EIO when they had information on possible links with other cases, which triggered the issuing of additional EIOs, or when additional or conditional EIOs raised doubts or questions. Additionally, questions were raised related to possible issues on the disclosure of EIOs to suspects.

Need for information. Issuing judicial authorities approached Eurojust to obtain different types of information. Eurojust frequently facilitated the exchange of information on the location of the targets, the identification of relevant telephone numbers, the places to search, and other investigative and procedural issues. Eurojust thus ensured the immediate communication of useful data to issue the EIOs. The support of Eurojust during this phase – and particularly during the preparation of the EIO – might be rather useful, since most National Members have access to their domestic databases. Therefore, in the pre-issuing phase, the National Member of the issuing state can ask the National Member of the executing state for information that will help in drafting a more accurate and better targeted EIO. Sometimes the requests were more specific, as, for example, in a case where Eurojust provided the issuing authority with information on how long data on telecommunications were retained so that the issuing authority could check if the relevant information would still be available in the executing Member State and the issuing of an EIO would make sense.

Also during coordination meetings, the need for information sometimes arose. In a case concerning the production and spreading of materials pertaining to sexual child abuse, it was considered best practice to draft the EIO in a coordination meeting, with the competent issuing and executing authorities both present on the spot. At the coordination meeting, they discussed, with the support of Eurojust, how to coordinate the house search, the seizure of devices with electronic evidence and the taking of measures aimed at protecting the minors involved.

Additional EIOs. Issuing judicial authorities sometimes approached Eurojust to check if an additional EIO was needed for minor additional requests, e.g. a check on an additional telephone number or a change in the name or address of a company to be searched. Some executing authorities did request an additional EIO whereas others were satisfied if the additional minor requests or corrections were sent by email. On the basis of Eurojust's casework, it has become clear that it is important to always check the national laws and practices, as there are considerable differences between the Member States on this point. Eurojust also gave support when additional EIOs were issued that included substantial additional requests. National authorities sometimes raised questions concerning the relation between a new EIO and an earlier EIO/LoR, e.g. whether the previous requests still needed to be executed or not. In such cases, Eurojust helped clarify these questions, ensuring continuity in the execution of the different requests and facilitating the communication between the different authorities involved.

Additional or successive EIOs frequently happen when a cross-border strategy includes a joint action day. In a first phase, EIOs are often issued to double-check whether or not the houses are used by the targets and/or to gather financial information (e.g. bank and business records). In a second phase, EIOs are issued including the concrete investigative measures to be executed on a coordinated and simultaneous action day.

Conditional EIOs. Eurojust provided guidance in relation to the issuing of conditional EIOs, whereby the execution of a certain investigative measure depended on the outcome of the execution of another

investigative measure. For instance, the issuing authority might request information related to money that was in a certain bank account, but, if the investigative measure revealed that the money was no longer there, the issuing authority would need information on where the money then went. Another example is related to the execution of a house search, which depended on the results of a prior interception. Conditional EIOs often raise questions about whether in such cases one single (conditional) EIO should be used or it should be split into several EIOs.

Eurojust's casework confirmed that there is no straightforward answer and that it basically depends on the law or practice of the executing Member State. In some cases, it was decided to issue one EIO after the other, whereas, in other cases, all investigative measures were included in one EIO. Eurojust's role in such cases was crucial, as it stimulated the dialogue between the issuing and executing authorities and sometimes clarified confusion caused by the coexistence of different EIOs, even if the later EIOs explicitly referred to the preceding one(s). A case-by-case approach seems advisable.

Splitting of EIOs. The choice between issuing one single EIO and splitting it into several EIOs has been discussed not only in the context of conditional EIOs, but also in relation to other, often complex, cases. For instance, in the context of a huge investigation for money laundering regarding the setting up of legal persons and the opening of bank accounts with a view to defrauding citizens of the executing Member State, the National Desk of the issuing Member State consulted the National Desk of the executing Member State. It concerned the draft of a huge EIO to be sent in order to have several persons heard (victims and defendants) and measures taken in different parts of the country. Following a level II meeting between the two National Desks, the National Desk of the executing Member State advised splitting the EIO according to the powers of the executing authorities involved in the different hearings. Consequently, the original draft was split into 14 separate EIOs. The choice between issuing one single EIO and splitting it into several EIOs is dependent on, inter alia, the Member States involved, their common practices, and jurisdictions within the Member State itself, and therefore could differ from case to case.

Disclosure of EIOs to suspects. Using separate EIOs may also be done to prevent certain information from being disclosed to suspects that could jeopardise the execution of other measures. Competent authorities sometimes discussed the position to take in relation to the disclosure of EIOs to suspects. Under some national laws, the person whose address is searched under an EIO is entitled to receive the supporting documents that were used to issue the search order, including the EIO. As the EIO often contains sensitive information, this might endanger the investigation. Although national law provides some exceptions under which a court could allow a party to refrain from disclosing material to another party when disclosure would be damaging to the public interest (i.e. the investigation), this exception is usually applied strictly. A judge will not forbid the EIOs to be disclosed to the subject in their entirety on the general basis that it would endanger the investigation. The judge may be persuaded to allow the EIOs to be redacted to remove particular sensitive information, but only if the judge is satisfied that there are good and specific grounds for doing so. An alternative solution that was discussed via Eurojust was an information notice to the suspect that depicts the basis of the house search, but might not be so damaging to the investigation as a full disclosure. However, if the suspect presses the issue, he or she has legal grounds to obtain the EIO. Therefore, it is important to keep this in mind when drafting an EIO

and, if needed, to double-check the rules on disclosure applicable in the executing Member State. As a general note, it could also be recommended to indicate, from the beginning, specific confidentiality requirements in relation to the requested investigative measure in Section C of the EIO. If the executing authority cannot comply with the requirement of confidentiality, it is obliged to notify the issuing authority without delay (Article 19(2) EIO DIR).

Information on linked proceedings. On some occasions, issuing authorities requested certain information on linked proceedings before issuing the EIO. In some cases, Eurojust was requested to search for hits in Eurojust's Case Management System in relation to several names of natural and legal persons and bank accounts. Sometimes these revealed links with other Member States, and EIOs were consequently transmitted to these countries through Eurojust. In another case, in which both the issuing and the executing authorities were investigating the smuggling of significant amounts of marijuana from one Member State to another, the issuing authority needed substantial information about the possibility of accessing certain documents that were in the possession of the executing Member State. In similar cases, the national authorities requested Eurojust to assist in identifying ongoing criminal proceedings in the executing Member State and asked for a copy of a previous verdict passed down in that Member State against the accused person.

2. Communication, urgency and language issues

2.1. (Re-)establishing contact among issuing and executing authorities

Lack of Annex B form and/or lack of reply. Issuing judicial authorities often contacted Eurojust when they did not receive any reply or reaction to EIOs that they had issued, or to related (repeated) emails and/or phone calls to the competent authority in the executing Member State. In many cases, issuing authorities explained that they had never received an Annex B form from the executing authority or any other confirmation of receipt. Therefore, they were uncertain whether the executing authority was actually taking care of the execution of the EIO or not. In other cases, the issuing authority had received an Annex B form, but it had not received any further information on the follow-up or progress related to the execution of the EIO, and, when it had explicitly asked for it, had not received any reply from the executing authority.

Issuing authorities often reached out to Eurojust long after the time limits of Article 12 EIO DIR had been exceeded and, in some cases, EIOs remained unexecuted for long periods of time (sometimes a year or even more). Mostly, Eurojust managed to obtain the Annex B forms and also further monitored the cases to ensure smooth communication among the authorities involved and, where needed, the swift execution of the requested investigative measures.

Misunderstandings. Eurojust has been regularly asked to help in clarifying misunderstandings or to assist in deciding on the best way forward. In some cases, the role of Eurojust was to intermediate and help finding the best possible solution when the issuing authority believed that the EIO had not been executed properly and the executing authority was of the opposite opinion. In other cases only a partial execution of the EIO had taken place and the authorities involved wanted to discuss how the remaining

part of the EIO could be duly executed by identifying and solving the existing difficulties. In both scenarios, Eurojust provided support to overcome the obstacles and to ensure full execution of the EIOs.

Differences between national laws. Communication between authorities is often affected by differences in national laws that create confusion or misunderstanding. There were, for instance, cases brought to Eurojust where issues arose in relation to the recording of conversations taking place inside a vehicle and the different thresholds in the Member States for granting this specific measure. In one case, the cross-border surveillance of persons trafficking drugs in a car was requested, as well as the recording of their conversation using a bug in the car. The cross-border surveillance was granted without difficulty, but the legislation of the executing Member State had a very high threshold for the bugging of a car and the requested measure was hardly ever applied in that country. The public prosecutor responsible was at first hesitant and indicated that the execution of the EIO would probably not be approved. Yet, after further interventions through Eurojust, which gave support with the translating of crucial documents and facilitated the transmission of relevant additional information, the competent court in the executing Member State in the end approved the requested measure and the EIO was executed.

Differences between national laws also complicated direct cooperation among national authorities in many other cases in relation to other issues, e.g. in cases where issuing authorities requested compliance with certain formalities and procedures (see below, Section 4.4); cases where questions arose about which authority is or should be competent for certain investigative measures (see below, Chapter 5); cases that revealed misunderstandings on whether EIOs should be sent by ordinary post and/or digitally (see below, Chapter 6); different views on the rule of speciality (see below, Chapter 7); differences in the definition of criminal offences (see below, Section 8.1); differences related to hearings by telephone conference and videoconference (see below, Section 9.2); different qualification – either as judicial cooperation or as police cooperation – of covert investigations (see below, Section 9.3); and differences in relation to interception of telecommunications (see below, Section 9.4). In all these different fields, Eurojust gave support in clarifying these differences and finding solutions acceptable to both the issuing and the executing authorities.

Withdrawals of (defective) EIOs. The content and form of the EIO, as well as its requisites, are established in the EIO DIR. Sometimes even the intervention of Eurojust was not enough to amend the faults and mistakes of an order and it had to be withdrawn. Different kinds of defective EIOs were identified across a wide spectrum of relevance, going from a simple mistake in scanning the EIO, and thus sending a faulty version, to a case in which a defence lawyer requested that the witness be questioned by an investigative judge whereas the corresponding section of Annex A mentioned that the measure should be carried out by the police. In both cases a new EIO regarding the same matter had to be issued.

Refusals without further explanation. In a few cases, executing authorities simply replied, without giving any further justification or reasons, that they would not execute the EIO. They even refused investigative measures that must be available, such as obtaining data that they already had. When the issuing authorities asked for further explanations, they received no response. Eurojust intervened in

such cases, first, to re-establish the contact between those authorities, second, to understand the reasons for the non-execution and, finally, to see whether the reasons given could be overcome or not. In some cases, the EIOs were in the end executed. In other cases, it was confirmed that justified grounds for non-execution existed and the EIOs could not be executed. In some exceptional cases, a convincing argument for the non-execution of the EIO was, unfortunately, never received, despite Eurojust's intervention.

2.2. Speeding up the execution of European Investigation Orders in urgent cases

Urgent nature of the case. There can be multiple reasons for qualifying a case urgent. Judicial authorities referred 'urgent' cases to Eurojust when the person under investigation was in pre-trial detention, when there was an upcoming court hearing in the issuing Member State, when the criminal proceedings could be barred by statutory limitations, when there was an imminent risk that the evidence would be destroyed or when the nature of the crime urged fast execution. In some cases, information or evidence had to be obtained within a few days or even a few hours. In the vast majority of these cases, Eurojust managed to have the EIOs executed within the set deadline.

Problems with ticking the 'urgency' box. Eurojust experienced cases in which the 'urgency' box had been ticked in the EIO although there were no indications that the execution of the EIO was indeed urgent. On the other, Eurojust was also confronted with cases that were urgent although the 'urgency' box had not been ticked. Eurojust then often had to clarify the urgent nature of some requested investigative measures when this was not clearly indicated in the EIO. As best practice, it is important to note that, whenever the 'urgency' box is ticked in an EIO, it should be clearly explained why the execution of the requested measure is urgent. Similarly, the word 'urgent' should not be kept in the title of email communication when a matter is not urgent (any more).

Speeding up the execution. Eurojust successfully supported the execution of many urgent EIOs involving different types of investigative measures, including searches, seizures, securing and seizing data on servers, and (extension of) wiretapping. Eurojust assisted in identifying the competent authority, transmitting the EIO to the competent authority, resolving language issues, redrafting EIOs where needed, obtaining additional information or giving other types of essential support. For instance, in one case, Eurojust was able to transmit, urgently, within a few hours, relevant information to counter *ne bis in idem* arguments to be discussed at a court hearing the next day. In another case, a videoconference for the taking of a witness statement was urgently needed during the trial phase. Different courts had to be connected together and Eurojust facilitated the prompt execution of this urgent EIO. In another urgent case, a bank in the executing Member State had applied a protective measure to retain in a bank account EUR 540 000 that was allegedly derived from criminal activity, but this was only possible for a limited period of time. Eurojust was asked, 2 days before the retention period ended, to facilitate the immediate freezing of the money. Without any further order from an authority within the given time frame, the bank would have to release the money and it would be lost for the victim. With Eurojust's support, additional information about the account owner was provided and the execution of the EIO and an additional freezing order were executed within 2 days (see also below, Section 3.2.2.2).

Special contact person for urgent EIOs. Eurojust noted that some Member States appointed a special contact person for urgent EIOs. This can be very useful to speed up the execution of an EIO. However, in some cases, frictions arose when judicial authorities started using this contact person for non-urgent EIOs too. Moreover, when the special contact person was on leave, this sometimes also caused problems when there was not a substitute person appointed to take care of the execution of urgent EIOs. Therefore, it is important to mention that, when someone is specifically appointed as a contact person for urgent EIOs, the purpose of this contact person must be clear, and their appointment should be regulated, for this to work as best practice.

2.3. Addressing language issues

Eurojust encountered many language-related issues in its casework, often leading to significant delays in the execution of EIOs.

Flexible approach in urgent cases. The EIO DIR requires that the EIO be translated into one of the languages that are recognised by the executing Member State in accordance with Article 5(2) EIO DIR. Therefore, the executing judicial authority can, in principle, refuse to give effect to the EIO until it has received the translated version of the EIO. Whereas in non-urgent cases executing authorities insisted on receiving the translation before starting to execute the EIO, they were generally less strict in urgent cases. In general, whenever the nature of the criminal offences at stake, the high risk arising from the criminal activity and the urgency of disrupting the criminal activity strongly recommended urgent action, the executing authorities acted accordingly. In fact, most Member States were flexible and willing to start the execution of urgent orders on the basis of EIOs issued in another language (mostly in English, and provided that the executing authority understood that language), if translations would follow shortly after. In some very urgent cases, members of the National Desk at Eurojust themselves provided, within a few hours, translations from English into the required languages, so that EIOs could be executed immediately.

Language of the original EIO. On several occasions, Eurojust witnessed a practice whereby issuing authorities immediately issued the EIO in the language of the executing Member State and then signed only this version and sent it to the executing authority. Those EIOs were therefore not available in the original language. Eurojust clarified to the authorities involved that this is bad practice, as it is mandatory for EIOs to be issued and signed in the original language. Only after the EIO is available in the original language should the official EIO form/template in (one of) the accepted language(s) of the executing Member State be used for the translation ⁽⁹⁾.

Translation of additional documents. In several cases, Eurojust assisted in reaching agreements between the issuing and executing authorities about whether or not additional documents supporting the EIO, particularly court orders, had to be sent and translated and who should bear the costs thereof.

⁽⁹⁾ See also Eurojust and EJN, *Joint Note of Eurojust and the European Judicial Network on the practical application of the European Investigation Order* (see above, footnote 3), p. 6.

Poor translation. In many cases, Eurojust had to clarify problems or misunderstandings due to poor, incomplete or unclear translations. Executing authorities struggled to understand 'Google translate' sentences and requested clarification regarding crucial aspects of the EIO such as the requested investigative measure or the criminal offences under investigation. In some cases, there was confusion between the use of the words 'confidentiality' and 'secrecy'. In other cases, translators made crucial mistakes that led to a complete misunderstanding of the requested measure. In one case, because of a poor translation, the executing authority was unable to figure out that the requested measure was a house search. It was only after clarification through Eurojust that the investigative measure could be executed smoothly. As a perhaps obvious, yet crucial, rule, it should be noted that a good translation is the key to avoiding misunderstandings and unnecessary delays.

3. Scope of the European Investigation Order

3.1. Temporal scope of the European Investigation Order

Problems related to delayed transposition. When the deadline for the implementation of the EIO DIR was reached (22 May 2017), most Member States that were taking part in the adoption of the EIO DIR had not yet implemented this instrument into their national law. This led to a period in which issuing and executing authorities sometimes questioned which legal instrument to use as a basis for their request, depending on whether the issuing and/or executing Member State already had national EIO law in place or not. In some cases, judicial authorities discussed, via Eurojust, whether an EIO or a LoR had to be sent, whether a LoR should be withdrawn and replaced by an EIO or vice versa, and/or which instrument had to be used for a further update of an earlier request. Generally speaking, these issues were easily resolved and Member States took a pragmatic approach. In this regard, the abovementioned Joint Eurojust-EJN Note that specifically addressed the applicable legal regime in cases of delayed transposition of the EIO DIR ⁽¹⁰⁾ also proved useful for practitioners.

Different solutions. The outcomes of the questions raised above varied from one case to another, mostly depending on differences in national practice. Where a LoR had been sent by an issuing authority to an executing authority whose national EIO law had only recently come into force, the issuing authority asked, via Eurojust, if it had to replace the LoR with an EIO. The executing authority often replied that there was no need for this, as the executing authority could act on the basis of the LoR but execute it in the light of the EIO DIR legal framework. Sometimes, however, the issuing authority had to replace the LoR sent to another Member State that already had in force domestic legislation on the EIO. Eurojust was then requested to support the involved national authorities by facilitating a swift replacement of the LoR with an EIO. It goes without saying that problems related to the temporal scope of the EIO were mostly present in the second half of 2017 and started to disappear when the EIO DIR was fully in force in all Member States.

⁽¹⁰⁾ Eurojust and EJN, 'Note on the meaning of "corresponding provisions" and the applicable legal regime in case of delayed transposition of the EIO Directive' (see above, footnote 1).

3.2. Material scope of the European Investigation Order

Despite the EIO DIR's aim of creating one single instrument for investigative measures aimed at evidence gathering, questions have been raised about what falls within the scope of such investigative measures and/or evidence gathering⁽¹¹⁾. Eurojust often assisted in clarifying the key question of whether the investigative measure included in the EIO was required to obtain evidence or not.

3.2.1. Judicial versus police cooperation

Authorities sometimes struggled with the boundaries between law enforcement cooperation (collecting of intelligence) and judicial cooperation (gathering of evidence). In some cases, authorities questioned why documents that had already been provided on a police-to-police basis had to be provided again under an EIO. There was a lack of understanding of whether a request could be executed on a police-to-police basis or an EIO was required. Eurojust provided guidance on when an EIO could or should be used. Despite recital 9 EIO DIR, cross-border surveillance remains a point of discussion between some Member States, which consider that this measure is police cooperation, and others, which consider that it is judicial cooperation. In several cases, executing authorities refused to execute an EIO for cross-border surveillance, arguing that cross-border surveillance falls under police cooperation. The National Desk of the issuing authorities then opened a case with the National Desk of the executing authorities enquiring about the best method by which such request should be issued. In some of these cases, there was a bilateral agreement in place between the two Member States concerned, to rectify the situation. In relation to covert investigations, similar questions on judicial versus police cooperation arose from different approaches in the Member States (see below, Section 9.3).

3.2.2. The European Investigation Order in relation to other judicial cooperation instruments

Eurojust had several cases in which difficulties arose when dealing with other legal instruments. In some cases, Eurojust did not consider the EIO to be the appropriate instrument to use and, successfully, suggested that the authorities use another measure, or combine an EIO with other legal instruments such as European Arrest Warrants (EAWs) (see below, Section 3.2.2.1), freezing orders (see below, Section 3.2.2.2), joint investigation teams (JITs) (see below, Section 3.2.2.3) or Letters of Request (LoRs) (see below, 3.2.2.4).

3.2.2.1. European Arrest Warrant

Transfer of persons. In some cases, national authorities sought clarification of which legal instrument to use when transferring a person to another Member State, and, more specifically, in the different stages of criminal proceedings. Recital 25 EIO DIR clarifies that where a 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, an EAW should be issued in accordance with the Framework Decision on EAWs (EAW FD)⁽¹²⁾. Where a person is to be transferred to another Member State for the purpose

⁽¹¹⁾ See also Eurojust and EJM, *Joint Note of Eurojust and the European Judicial Network on the practical application of the European Investigation Order* (see above, footnote 3), pp. 2–3.

⁽¹²⁾ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

of evidence gathering, an EIO should be issued in accordance with the EIO DIR (see also below, Section 9.1). Two cases clearly illustrate the sometimes challenging relation between EAW and EIO in relation to the temporary transfer of persons held in custody.

In one case, criminal proceedings were conducted in parallel in two Member States against a person ('the requested person') for different offences. The requested person had been convicted and detained in the executing Member State (to be released in 2030). Meanwhile he was tried *in absentia* in the issuing Member State and sentenced to a custodial sentence of 7 years' imprisonment. He appealed against this judgment and the appeal court decided that the case had to be retried by the first instance court, in the presence of the requested person. On his part, the requested person indicated that he did not agree to be judged *in absentia* and he did not agree to be heard via video link either. The issuing authority first issued an EAW, including a suggestion to agree on a temporary transfer during the EAW proceedings. The executing authority refused to execute the EAW, but never clarified the ground for this refusal. Subsequently, the issuing authority issued an EIO for the temporary transfer of a person detained in the executing state in order to attend trial as an accused person in the issuing state. The executing authority refused to execute the EIO, arguing, rightly, that the requested measure did not fall within the scope of the EIO DIR. For the time being, the requested person remains in custody in the executing Member State. The issuing Member State, supported by Eurojust, is still pursuing a solution and insists that, in its view, the EAW remains valid.

In a second case, criminal proceedings were again conducted in parallel in two Member States against a person ('the requested person') for different offences. When the issuing authority issued an EAW, the executing authority decided to postpone the surrender based on the argument that there were ongoing investigations against the requested person in the executing Member State. Given the difficulties in arranging a temporary surrender with the executing authority in the context of the EAW proceedings, the issuing authority started a consultation procedure, supported by Eurojust, with the executing authority. The issuing authority wanted to explore the possibility of issuing an EIO for the temporary transfer to the issuing state of the person held in custody in the executing state for the purpose of gathering DNA samples from the requested person, based on Article 22(1) EIO DIR. However, the executing authority rejected this option. The authorities then decided to (re)explore, with the support of Eurojust, the possibility of the temporary transfer of the requested person on the basis of Articles 18(1)(b), 18(2) and 24(2) EAW FD. The executing authority agreed and the DNA samples were taken in a speedy 1-day temporary surrender at a border court because of the high risk assessment profile of the requested person. The advantages of using the EAW provisions were that the temporary surrender could take place without the consent of the requested person and that it provided more legal certainty for the issuing authority in relation to the arrest of the requested person on the territory of the executing state, including the involvement of Supplementary Information Request at the National Entries (SIRENE) officers. This case confirms the sometimes thin line between the two types of temporary transfer and how authorities sometimes struggle to identify the appropriate one, but it also shows how continuous consultation, with the support of Eurojust, can lead to a positive outcome.

Coordinated execution of an EIO and an EAW. In many cases, a combination of the two instruments was necessary, which sometimes required coordination via Eurojust. For instance, in one case an EAW was issued against a subject together with a request for a house search and seizure of evidence. Eurojust successfully managed to coordinate the execution of both the EAW and the EIO. The combined execution

of the EIO and the EAW required crucial planning to ensure correct and timely execution of both legal instruments. Eurojust's assistance has shown to be very valuable when planning the simultaneous execution of both instruments (see also below, Part III).

3.2.2.2. *Freezing order*

Freezing for evidence gathering and/or for confiscation. Often cases were opened in which national authorities struggled with the scope of the EIO DIR and the Framework Decision on freezing orders (Freezing FD) and/or Framework Decision on Confiscation Orders (Confiscation FD) ⁽¹³⁾. As an object can be needed both as evidence and for confiscation, both the EIO DIR and the Freezing FD could, to a certain point, be applicable. The distinction between the two objectives – freezing for evidence gathering and freezing with a view to confiscation – is not always obvious and the objective may change in the course of the proceedings. National authorities experienced uncertainty in some cases about which legal instrument should be used. This uncertainty often occurred in situations in which the assets were sought both as evidence and for future confiscation and might, at a later stage, be considered either only evidence or only proceeds of crime. This twofold nature is possible and compatible, but the consequences are quite different. If the assets are considered proceeds of crime, the assets can be sold in advance and the final price may be divided between the Member States involved. If the assets are considered evidence, they will finally return to the requested Member State, if it requests.

This uncertainty was also noted in situations in which the assets were initially sought for one purpose, and at a later stage either this purpose changed or an additional purpose was added. It is important, though, to acknowledge that each case should be looked at on its own merits, meaning on a case-by-case basis. The issuing authority can prioritise whether it needs the asset primarily as evidence or with a view to confiscation. In fact, the execution of an EIO can be connected with the subsequent execution of a freezing order (Article 9 Freezing FD) and eventually a confiscation order (Article 4 Confiscation FD). In this scenario, linked consultation procedures and Eurojust's support would ensure a meaningful continuity of their execution between the different authorities concerned, which could include liaising with asset recovery offices involved in the management of the seized/frozen assets.

Provisional measures. In several cases, National Desks recalled that, if the assets are considered evidence, provisional measures could immediately be adopted under Article 32 EIO DIR, and the assets could be transferred during the pre-trial phase on the basis of Article 13 EIO DIR, unless the transfer could jeopardise an ongoing investigation in the executing state. However, once used in the trial phase as evidence, the assets should be returned to the executing state when requested, without being disposed of. Article 13(1) EIO DIR states that 'When requested in the EIO and if possible under the law of the executing State, the evidence shall be immediately transferred to the competent authorities of the issuing State assisting in the execution of the EIO in accordance with Article 9(4).' In the light of this provision, it is considered best practice to include this request of direct transfer in Section I, paragraph 2, of the EIO form.

⁽¹³⁾ Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence; Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders.

Assessment. Most national authorities agreed that it is, in principle, for the issuing authority to make the assessment of whether or not the item is to be used as evidence (and therefore be the object of an EIO) and to clarify the purpose of the freezing measure (see also recital 34 EIO DIR). However, there have been several cases in which executing authorities questioned the assessment made by the issuing authority and refused to execute the measure until they received a freezing order. In these cases, Eurojust intervened in the assessment and discussions, and assisted in finding solutions to ensure the smooth execution of the requested measure. Depending on the concrete aspects of the case, different solutions were found, as highlighted in the examples below.

- **Dual purpose requests.** In cases where an object is needed for both purposes, and if the primary goal is evidence gathering, the common view of most authorities involved in Eurojust cases was that the EIO should be used.
- **LoR split into EIO and freezing order.** In one particular case, in which the issuing authority had issued a LoR, the competent authorities, after discussions via Eurojust, decided to split the content into an EIO and a freezing order, as some objects were clearly secured for evidence gathering through the EIO and others objects secured for subsequent confiscation through the freezing order.
- **EIO replaced with freezing order.** In some cases, it was clarified, through further exchange of information via Eurojust that the requested freezing measures had been issued not with a view to evidence gathering, but with a view to confiscation. It was clarified that the wrong instrument had been used and therefore the EIO was replaced with a freezing order.
- **EIO complemented by freezing order.** In a few cases, issuing authorities issued EIOs that combined requests for information on banking operations and requests to freeze the available funds. In these cases, it was suggested, via Eurojust, that they send an EIO (for the banking information) and a freezing order (for the freezing of the funds) separately. In one of these cases (see also above, Section 2.2), Eurojust was contacted to assist in relation to the execution of an urgent EIO that requested banking information and the seizure of a large amount of money. The victim had transferred money to what turned out to be a fraudulent bank account. As a protective measure, the bank had retained the money derived from a criminal act, but the bank could only uphold the retention for a short period of time. If no further order from an authority arrived within this period, the bank would have to release the money and it would be lost for the victim. Eurojust was asked to facilitate the immediate seizure of the money by forwarding the EIO to the relevant national authority. Through Eurojust it was, first of all, clarified that an additional freezing order was needed to facilitate the seizure of the money retained by the bank. Second, it was agreed that the executing authority would not bluntly refuse the EIO on the basis that it needed a freezing order to seize the money. The executing authority agreed to start the necessary preparatory work on the basis of the information provided in the EIO. The final steps in the execution would then be made only after the freezing order arrived. Both the EIO (for obtaining bank information) and the freezing order (for the freezing of the funds) were successfully executed. In addition to speeding up the execution of the requested measures, Eurojust provided crucial support in the choice of the correct instrument to be used. This case was a clear example of how the issuance of an incorrect instrument does not have to lead to refusal and, with the close assistance of Eurojust, the communication and swift transmission of the documents could lead to a clear and successful result.

- **EIO to be complemented by freezing order in future.** In some cases, practitioners decided to use Section D of the EIO form to proactively inform the executing authority that a complementary freezing order to secure freezing for the purpose of confiscation or restitution to the victim would be issued. If, at the time of issuance of the EIO, the issuing authority is already aware that the purpose of the EIO may change and that the assets might subsequently be also sought for freezing and confiscation or for restitution to the victim(s), the issuing authority can use Section D of the EIO form. This can be considered good practice.

3.2.2.3. *Joint investigation team*

Leaving aside some exceptional cases, it seems that, generally speaking, the direct impact of the EIO DIR on the use of JITs has been rather limited so far ⁽¹⁴⁾. The features and advantages of JITs remain intact within the new setting of the EIO regime. However, the decision on whether to issue an EIO or set up a JIT should be decided on a case-by-case basis, as there is no legally provided general rule. One of the benefits of setting up a JIT is the possibility of financial support, either by Eurojust or through the European multidisciplinary platform against criminal threats (EMPACT) grants managed by Europol.

Despite recital 8 and Article 3 EIO DIR, establishing that the setting up of a JIT and the gathering of evidence within such a team are excluded from the scope of the EIO, several cases show that synergies can be found between the two instruments. In some cases, at first EIOs were issued, but the number of investigative measures requested and/or the complexity of the case resulted in the setting up of a JIT. Often these decisions were made during coordination meetings held at Eurojust.

The combination of the two tools happens far less often. Nevertheless, sometimes an EIO is issued by one of the countries involved in a JIT in order to gather evidence in a non-participating country. Evidence collected under these circumstances can be shared inside the JIT as long as the rule of speciality is respected, and preferably with an explicit clause in the EIO that enables the sharing of such evidence. Eurojust cases show that it is often agreed that the EIO issued by one of the JIT judicial leaders explicitly mentions in Section D of the Annex A form the existence of an ongoing JIT and that the evidence to be gathered outside the JIT from another Member State (except Denmark or Ireland) could be shared afterwards within the JIT. This is considered good practice, as there are different views on whether the speciality rule applies to the EIO DIR or not.

3.2.2.4. *Letters of request*

The EIO DIR replaced the 'corresponding provisions' of the 1959 Council of Europe Convention and its two additional protocols, as well as the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000 MLA Convention). Eurojust's casework confirms that there are still questions and doubts about the meaning of the term 'corresponding provisions' referred to in Article 34(1) EIO DIR ⁽¹⁵⁾. No comprehensive list is available,

⁽¹⁴⁾ See also Council of the European Union, 'Conclusions of the 14th Annual Meeting of National Experts on Joint Investigation Teams (JITs)', Council doc. 12133/18, p. 12.

⁽¹⁵⁾ This issue has been raised previously in documents published by Eurojust; see particularly the documents mentioned above in footnotes 1, 2 and 3.

as yet, indicating the exact provisions that will be replaced ⁽¹⁶⁾. The 2017 Joint Eurojust–EJN Note ⁽¹⁷⁾ assembles the views of EJN contact points on the interpretation of the term ‘corresponding provisions’, and the 2019 Joint Eurojust–EJN Note ⁽¹⁸⁾ includes some criteria that can be helpful in assessing whether an EIO or another instrument should be used. Yet, despite these useful tools, in some Eurojust cases there was still a need for clarification on the use of LoRs and/or EIOs, particularly in relation to the sending and serving of procedural documents (Article 5 of the 2000 MLA Convention), the restitution of objects to the rightful owner (Article 8 of the 2000 MLA Convention) and the sending of (information related to) criminal judgments.

Sending and serving of procedural documents. In several cases, executing authorities insisted on the need for a separate LoR for the sending and serving of a procedural document, unless the delivery of that document was instrumental to the investigative measure requested in the EIO. For instance, in a case in which the serving of the document was related to a house search, it was decided that no separate EIO was due. In other cases, in which there was no direct link between the document to be served and the investigative measure, the outcome was often different.

Return of a stolen object to the rightful owner. One case concerned the return of a stolen racing horse. The issuing authority contacted Eurojust in order to discuss whether a request for seizure and transport of the horse back to the victim falls under the EIO or the LoR regime. After consulting with the executing authorities, the issuing authority was informed that a standard LoR with reference to Article 8 of the 2000 MLA Convention was needed. However, in order to conduct, in addition, an interview with the person who was in possession of the horse in the executing Member State, an additional EIO was needed. As a result, the issuing authority drafted a LoR for the seizure of the horse and its transport back to the owner, and an EIO for the requested hearing. However, in other cases, in which the return measure and the requested investigative measure were closely linked, authorities agreed on the use of a single instrument (EIO) in which reference was made to Article 8 of the 2000 MLA Convention in relation to the return of the object.

Delivery of (information related to) criminal judgments. Some executing authorities requested EIOs for sending a copy of a case abstract, information regarding a judgment or the entire judgment. This was needed to assess a possible violation of the principle of *ne bis in idem* or to allow the taking into account of a previous conviction as an aggravating circumstance. In many cases, authorities have been, at the first stage, flexible and informal in providing this information on the basis of spontaneous exchange of information (Article 7 2000 MLA Convention). Yet in some cases it was discussed, at a later stage, which legal instrument should be used for a formal request. According to some authorities involved, it was debatable whether or not in such cases an EIO should have been issued. In some cases, the issuing authorities first issued an EIO, but then withdrew the EIO and replaced it with a LoR after they realised that the requested measure was not actually aimed at the gathering of evidence. In other cases, authorities argued that the purpose of obtaining the judgment (e.g. using that information as an aggravating circumstance) was evidence-related and therefore the EIO should be used.

⁽¹⁶⁾ See, however, Council doc. 14445/11 with a list of provisions that ‘may be affected’.

⁽¹⁷⁾ See footnote 1.

⁽¹⁸⁾ See Eurojust and EJN, *Joint Note of Eurojust and the European Judicial Network on the practical application of the European Investigation Order* (cited in footnote 3), pp. 2–3.

3.3. Territorial scope of the European Investigation Order – mutual legal assistance approach with Denmark and Ireland

Although Denmark and Ireland are not bound by the EIO DIR, both Member States sometimes receive, by mistake, EIOs instead of LoRs from other Member States. Both the National Member for Ireland and the Representative of Denmark informed Eurojust that the EIOs that are received in their respective countries can nevertheless be treated as LoRs and executed without the need for a new request.

Ireland. Irish authorities will treat EIOs as if they were LoRs and execute them on the basis of the 1959 Council of Europe MLA Convention rather than the 2000 MLA Convention, as Ireland has not technically ratified the latter.

Denmark. Danish authorities will also treat EIOs as LoRs and, when executing them, apply Danish law (criminal procedural code) by analogy rather than mutual recognition. The EIOs are normally executed by the local competent authority. In the event of any problems, the Prosecutor General Office intervenes to sort them out.

The fact that in the relations with Ireland and Denmark the principle of mutual recognition does not apply in the context of evidence gathering does not necessarily mean that such requests are inevitably lengthy and cumbersome. For instance, in one case in which a Member State requested assistance from Ireland, all requested measures were executed in less than 3 days.

4. Content and form of the European Investigation Order

Eurojust helped clarify issues related to the content and/or form of the EIO ⁽¹⁹⁾. In addition to language-related issues (see above, Section 2.3), EIOs often lacked clarity in the data and were vaguely or unclearly drafted, triggering requests for further information. Some issues were easily resolved, such as a missing stamp and/or signature, a typo in the signature, the correction of a wrongly ticked box or questions on the applicable time zone. Other EIOs were, according to the executing authority, not specific enough and required additional information or clarification. In some cases, important parts of EIOs were overlooked, forgotten or deleted by accident and thus the EIO lacked important information. In addition, the lack of cross-border recognition of e-signatures at EU level created some problems with EIOs electronically signed by the issuing authorities.

Eurojust's casework indicates that, although the EIO DIR is based on mutual recognition and, in principle, pursues more simplicity, certain EIOs can often end up being quite extensive, particularly on account of differences in national legal systems. In general, the intervention of Eurojust helped issuing and executing authorities to understand and overcome issues specific to each other's national laws. Eurojust helped clarify questions or requests for additional information in relation to the description of

⁽¹⁹⁾ See also Eurojust and EJN, *Joint Note of Eurojust and the European Judicial Network on the practical application of the European Investigation Order* (see above, footnote 3).

the criminal act (see below, Section 4.1), the investigative measure (see below, Section 4.2) or other issues (see below, Section 4.3). In some cases, issues arose in relation to compliance with certain formalities and procedures (see below, Section 4.4).

4.1. The description of the criminal act

Executing authorities often raised follow-up questions in relation to the description of the criminal act (or the underlying facts) and the specific provisions in the issuing Member State's law, which were clarified with the support of Eurojust.

Legal qualification. A clear reference to the legal wording of the investigated crimes was sometimes completely lacking and/or the EIO was not precise enough about the *modus operandi* of the suspected person. It often left the executing authority in doubt about the exact nature of the criminal act in question. For instance, in one case, the executing authority wondered whether the criminal act was not declaring employees to the competent authorities (which also constituted a crime in the executing Member State) or declaring them but not paying the corresponding taxes (which did not constitute a crime in the executing Member State). An accurate description was thus crucial for the assessment of the dual criminality requirement (see also below, Section 8.1).

Differences in national law. National authorities sometimes required more explanation in relation to a specific offence. The questions raised clearly resulted from different interpretations vis-à-vis a specific offence in the Member States involved. For instance, a stricter standard of proof regarding money laundering had consequences for the formulation of the EIO. Similarly, different understandings of environmental crime in the issuing and the executing Member States required more explanation before the EIO could be executed.

Factual elements of the case. Sometimes, issuing authorities annexed a document with a separate summary of the case instead of filling in Section G of the EIO form. Sometimes, Section G was filled in, but information was lacking on the concrete facts of the case, e.g. who was suspected of committing the alleged offence, what were the offences that had been committed and when they took place. For instance, in the context of an urgent investigation on cigarette smuggling, when the suspects were in custody, the issuing authority sent an EIO to the executing authority for the interrogation of a suspect, a house search and the gathering of banking information. The authorities had been in contact with other, and the EIO was amended several times at the request of the executing authority. At some point, the executing authority requested another amendment, but it was not clear to the issuing authority what the reasons were behind the requested change. The executing authority also held that there were no grounds for conducting a search on the basis of the executing Member State's law. Eurojust was requested to help in clarifying the additional request and speeding up the execution. With the support of Eurojust, the issuing authority sent a new EIO with a slightly different approach to the facts to meet the requirements of the executing Member State's law. In the end, the EIO was fully executed.

4.2. The description of the investigative measure requested

Executing authorities sometimes raised questions when they believed that information was missing or wrong in the description of the investigative measure that was requested. Eurojust often clarified questions and assisted in obtaining missing information.

Obtaining of documents. In EIOs related to the obtaining of documents, the executing authority sometimes requested more information on how the documents had to be obtained. In one case, it was unclear whether or not the executing authority should seek to invite a person authorised to act for the company concerned to provide these documents and whether or not the executing authority should perform a search of non-residential premises owned by the company if the person refused to voluntarily hand over the documents. Since the requested measure was not clear to the executing authority, Eurojust was consulted on this and asked to intermediate the communication between the authorities involved.

Hearing of a suspect or witness (see also below, Section 9.2). In EIOs related to the hearing of a person, the address or whereabouts of the person was sometimes not specified or not sufficient to track the person down. Some executing authorities explained that this might lead to a refusal of the EIO if they did not receive the additional information in time. Other executing authorities asked their law enforcement authorities to conduct their own investigation to obtain the right address. In some EIOs, other important information, such as the name of the person who was requested to give a declaration, had to be corrected. In other EIOs, it was not clarified whether the person had to be heard as a witness or a suspect, which for some Member States makes a significant difference to their rights and/or obligations. In one case, the executing Member State explained that the court could only order (non-voluntary) witnesses to attend court, but could not order them to answer any questions. This had consequences for the formulation of the EIO, which, with the support of Eurojust, had to be redrafted.

Seizure. In EIOs related to seizure, there were sometimes mistakes in the bank account number or information missing on the goods to be seized. The intervention of Eurojust helped correct those aspects and avoided the re-issuing of the EIO.

Obtaining of geolocation data. In EIOs that related to requests for geolocation data, executing authorities noted that information was sometimes missing about where the data were expected to be collected. The missing information was completed with the support of Eurojust.

Searches. In EIOs related to searches, the issuing authorities had sometimes failed to explain the link between the suspects and the places to be searched, e.g. it was not clarified that the real estate was owned by the suspects. In some cases, the addresses indicated in the EIO needed to be further completed and/or corrected. Some addresses were incomplete (e.g. numbers or further specifications within apartment buildings were missing), too general (e.g. referring to a vast industrial zone) or incorrect (e.g. referring to streets that did not exist in a certain city or were located in another part of the country). Clarification and/or corrections were made via Eurojust. The information in the EIO was often updated

following information received from the executing authority. For instance, when preparing a company search, the executing authority found out that the company's manager was also the manager of another company. The executing authority requested Eurojust's support to find out, as soon as possible, whether or not the second company was also a suspect in the investigation in the issuing Member State. This was confirmed. Against that background, a new EIO was issued to search the premises of the second company too.

Another challenge identified related to house searches is the seizure of electronic devices and the subsequent judicial selection of the data downloaded/copied from seized mass storage devices. For example, if the material gathered may exceed the scope of the EIO, the issuing authority will need to provide key words to search for. The criteria for the execution of this selection should be a restrictive one, limited to the data that are directly connected to the scope of the main ongoing investigation.

Interception of telecommunication (see also below, Section 9.4). In EIOs related to telephone interception, Eurojust was sometimes involved to clarify to the issuing authority the importance of demonstrating the link between the telephone number and the criminal acts, the necessity and proportionality of the requested measure, the suspects involved, the extension of the request and the duration of the requested measure. Following these clarifications, most EIOs were successfully executed. In other EIOs, information was missing on the place/premises and meetings of the suspect to be intercepted, although this was explicitly required under the law of the executing Member State.

4.3. Other requests for additional information

4.3.1. Excessive requests

Executing authorities sometimes requested additional information that seemed to go beyond what would be allowed under the principle of mutual recognition and trust. In several cases, this seriously obstructed the execution of the EIO.

Entire case file. In an urgent case in which the issuing authority had requested audio and video surveillance, the executing court requested access to the entire case file of the issuing Member State. The issuing authority was reluctant to provide that information, arguing that this would go against the core principles underpinning the EIO DIR. In the end, the issuing authority – fearing that otherwise the EIO might not be executed – was willing to provide the access to the case file. Yet, following interventions via Eurojust, the executing authority dropped the request to get access to the entire case file and executed the measure, albeit partially. In subsequent cases, similar requests for access to the entire case file were made and the competent authorities from both Member States, together with Eurojust, planned meetings to find a structural solution for such excessive requests.

Evidence. Executing authorities sometimes insisted on obtaining more information on the concrete evidence that was available against the suspect. For instance, in a case related to Islamic State (IS) terrorism, with suspected terrorists having infiltrated various Member States, the executing authority asked for further clarification on the available evidence. The issuing authority provided further information, including reference to detailed statements from other suspects referring to the

participation of the suspect in question in IS and in a military training camp before he moved to Europe. Despite this additional information and the suspect's dangerous personality, the executing authority decided not to execute the EIO on the ground that 'the evidence against the suspect was deemed insufficient'. Such a refusal seems to be in violation of the EIO DIR and the principle of mutual recognition.

Reasons for delays in the investigation. In some cases, the executing authority requested an explanation for the delays that had taken place in the investigation in the issuing Member State. One of these cases related to an investigation for misappropriation of goods. The issuing authority in charge had issued an EIO for the hearing of a suspect by videoconference. The executing authority informed the issuing authority that before recognising the EIO they wanted to be provided with an explanation for the delay in the case. The issuing authority was not willing to provide an explanation for the delay in the investigation, arguing that this went beyond what could be requested in the framework of the EIO DIR. Consequently, the executing authority decided not to execute the EIO.

4.3.2. Domestic judicial decision authorising a coercive investigative measure

In some cases, particularly those related to the execution of coercive investigative measures such as a house search or a telephone interception, some executing authorities criticised the EIO for lacking an underlying judicial decision authorising the requested measure. Although Article 5 EIO DIR does not impose any legal requirement for the domestic judicial decision to be mentioned or attached to the EIO, it might still be useful to attach the domestic order for informative purposes ⁽²⁰⁾. It emerges from Eurojust's casework that authorities from some Member States systematically request the court orders in addition to the EIO. In most cases handled at Eurojust, the judicial decision, if explicitly requested, was translated and provided. In one case, the executing authority linked this request with Section L of the EIO, regarding the details of the judicial authority that validated the order. The executing authority noted that Section L of the EIO was not filled in and a copy of the court decision approving the wiretapping had not been attached. The National Desk of the executing Member State asked for a copy of the domestic court order and, within just 2 days after the issuing authorities had provided a copy of the domestic order, the wiretapping was conducted. For future such cases, the National Desk of the executing Member State proposed two possible solutions: either Section L of the EIO should be filled in and signed by the competent judge who had ordered the wiretapping, or the domestic court order should be attached by default or *ex officio* with translation.

4.3.3. Available legal remedies

In many EIOs that were transmitted through Eurojust, Section J was not filled in. This sometimes prompted executing judicial authorities to send requests for additional information related to the available legal remedies in the issuing Member State. In addition, several national authorities struggled

⁽²⁰⁾ See also Eurojust and EJN, *Joint Note of Eurojust and the European Judicial Network on the practical application of the European Investigation Order* (see above, footnote 3), pp. 4–6.

with questions on how to interpret the obligation to fill in this box: some insisted that the use of the present perfect in that section ('remedy ... already *has been sought* ...') implied that it was inherently impossible to fill in this box, as at the time of the issuance of the EIO template a legal remedy could not yet have been issued. Others believed that the sentence in brackets seemed to refer only to the availability of legal remedies in the national legislation (either used or not, in the specific case in question). With the *Gavanozov* judgment ⁽²¹⁾, this issue has been clarified. The Court of Justice of the European Union (CJEU) held that Article 5(1) EIO DIR must be interpreted as meaning that the judicial authority of a Member State does not, when issuing an EIO, have to include in Section J a description of the legal remedies, if any, that are provided for in its Member State against the issuing of such an order.

4.4. Compliance with certain formalities and procedures

Eurojust's casework confirms how important it is for executing authorities to comply, as far as possible, with the formalities and procedures expressly indicated by the issuing authority (see Article 9(2) EIO DIR and Section I of the EIO template). In some cases, the issuing authorities had omitted to fill in Section I of the EIO and the missing information had to be provided, at the last minute, via Eurojust.

Formalities related to the hearing of a person. In Eurojust's casework, formalities and procedures were often raised in relation to the hearing of a person. For instance, in an EIO related to the hearing of a witness, the issuing authority had not indicated how the witness should be informed of his or her rights and how an oath or a declaration of honour should be taken according to certain provisions of the national code of criminal procedure. Therefore, the executing authority asked the issuing authority to send the relevant provisions and a translation of them, and asked if the hearing could be executed following the instructions laid down in the legislation of the executing Member State and which authority should perform this executive measure (only a court or also a public prosecutor). Similar omissions took place in relation to EIOs for the hearing of a suspect. The instructions applicable to the examination of suspects had to be submitted, translated, as soon as possible, otherwise the hearing could not take place. It is considered good practice that, when a hearing is to be executed in the investigation or the trial phase, a list of questions is annexed by the issuing authority or requested by the executing authority, as this possibility is not explicitly set out in the Annex A form.

In another case, an EIO was sent to have the suspect heard and required to declare his or her identity and residence, in accordance with specific formalities under the issuing Member State's law. These formalities required that, first, before the hearing, the person had to be informed of his or her rights and duties and sign a form in which that information was mentioned and, second, after the hearing, the defendant had to sign another document where he or she was submitted to several procedural obligations. The latter document also had to be witnessed by the court's clerk assisting the act. The formalities were simple and straightforward, yet correct fulfilment was crucial to ensure that the person would acquire the status of defendant. Without these two documents, the suspect could not be considered a defendant and the hearing would not be valid. Since this case would soon exceed the statute of limitations and the hearing of the person as a defendant interrupted the period of

⁽²¹⁾ CJEU, Case C-324/17, *Gavanozov*, 24 October 2019.

prescription, it was crucial that the procedural formalities were correctly executed. With Eurojust's support, the measure could be executed in time and precisely.

Presence of police/judicial authorities. Information related to the required presence of police/judicial authorities of the issuing Member States was sometimes omitted in the EIO and had to be communicated later, urgently, via Eurojust, shortly before the hearing was going to take place, so that the presence of the requested authorities could be authorised.

Inadmissibility of evidence obtained without complying with formalities. If the evidence is not obtained in compliance with the requested formalities and/or procedures, the evidence can be considered inadmissible. For instance, in one case, the samples of a suspect's handwriting were not gathered in accordance with the formalities due under the law of the issuing Member State and therefore could not be used. In another case, the presence of a lawyer during the hearing of a suspect or accused person was not mandatory in the executing state, but mandatory in the issuing state, and the absence of a lawyer could have led to the inadmissibility of the evidence gathered.

5. Conditions for issuing a European Investigation Order

In some cases, national executing authorities raised questions related to which judicial authority was competent to order a specific investigative measure and if this competence should correspond to the authorities' respective powers under national law. In September 2018, the Irish National Desk at Eurojust opened an operational topic, asking the other National Desks several questions in relation to Article 6(1)(b) EIO DIR ⁽²²⁾. The conclusions of this topic can be summarised as follows.

Correspondence of EIO powers with domestic powers? The first question was if Article 6(1)(b) EIO DIR requires that judicial authorities who issue an EIO have the power to order the same investigative measure domestically. The replies reflected diverse approaches in the Member States.

- Eight National Desks replied that, in their Member State, this provision is interpreted as a requirement that judicial authorities who issue an EIO have the power to order the same investigative measure domestically. Two of them added that issuing an EIO needs additional validation/ratification by the prosecutor in charge of the case.
- Four National Desks replied that their Member State had transposed Article 6(1)(b) EIO DIR into their national legislation in a literal way, that their national laws did not give any further guidance on this question and/or that, so far, no issues have been raised on this point. One of the respondents was of the opinion that the rules of legal interpretation as well as the systematic position of the provision, the title and wording of the provision suggest that this provision has no implications with regard to the powers and nature of the issuing/validating authority. Another respondent indicated that, shortly after the transposition of the EIO DIR into national

⁽²²⁾ Although Ireland has not opted in to the EIO DIR, consideration is being given to the practical and legal difficulties that may arise. Against that background, Irish national authorities contacted the Irish National Desk, which then launched this operational topic.

law, some practitioners considered that a prosecutor, when issuing an EIO for coercive measures, would not need to obtain the approval of a court, whereas for a domestic case he or she would need such court approval. However, later this approach was dismissed, based on the argument that the EIO is a judicial decision (an order, not a mere request) and it would not make sense for the issuing authority to order an investigative measure that exceeds its authority according to the national law.

- Finally, three National Desks replied that in their national laws this provision is not interpreted as a requirement that judicial authorities who issue an EIO have the power to order the same investigative measure domestically. In these countries, the judicial authority competent to issue an EIO is the judicial authority who is in charge of the investigation, prosecution or trial and this authority does not necessarily have the same powers domestically. For instance, one of the respondents gave the example of a house search, for which a pre-trial EIO will be issued by the supervising prosecutor whereas domestically a judge is competent to order a house search. Another respondent indicated that, under its national law, the main distinction between the judicial authorities with powers to issue an EIO is based on the stage of the criminal proceedings, not on the domestic powers to issue investigative measures.

Specific authorities for specific investigative measures? The second and third questions concerned whether or not the national legislation in the Member State distinguishes which domestic judicial authority can issue an EIO for specific investigative measures within the range set out in Section C of Annex A and, if so, whether or not that distinction reflects domestic powers to issue investigative measures.

- Eight National Desks replied that the transposing legislation in their Member State does not distinguish which domestic judicial authority can issue an EIO for specific investigative measures within the range set out in Section C of Annex A.
- Four National Desks replied that their national laws do distinguish. In these countries, the most common criteria that are used to distinguish an issuing judicial authority's competence to issue specific investigative measures are the type of the investigating measure (particularly, coercive measures versus non-coercive measures) and the phase of the criminal proceedings. These criteria sometimes reflect domestic powers for issuing investigative measures, but not always.

Changes vis-à-vis the mutual legal assistance regime? The fourth and final question was if the new EIO regime changed the powers of prosecutors to issue a request for mutual assistance under the 1959 and 2000 Conventions.

- Eight National Desks said that the EIO DIR did not have an impact on or change the powers of domestic prosecutors to issue a request for mutual assistance under the 1959 and 2000 Conventions.
- Four National Desks said that there is a difference. For example, some explained that, in cases that fall under the EIO DIR, the prosecutor has to validate/approve the EIO, which was not an obligation according to the 1959 and 2000 Conventions. Others replied that the EIO is an actual order and not a request and therefore the order must be issued by the authority that has the competence and the power to carry out the measure in question.

6. Transmission of European Investigation Orders and related documents to the competent executing authority

In its casework, Eurojust has often been involved in the transmission of EIOs, particularly in the context of urgent requests and/or assisting where the issuing judicial authorities struggled to identify the competent executing authorities. By transmitting the EIOs to the competent executing authorities, Eurojust also expressed its availability to help during the recognition phase and to facilitate the execution of these EIOs. Eurojust was sometimes already supporting the competent issuing authorities in their respective investigations, and the transmission of the EIOs via the National Desks allowed them to be kept closely involved and follow up on the case with a view to future cooperation and coordination. In many cases, Eurojust also provided support in the transmission of supporting documents or evidence obtained based on the EIO. Most questions on transmission related either to questions regarding the transmission means themselves (e.g. fax, email or post) (see below, Section 6.1) or to problems related to identifying the competent authorities (see below, Section 6.2).

6.1. Transmission

Transmission by ordinary mail or digitally. Eurojust was often asked to clarify whether or not an EIO that had already been sent digitally by email still had to be sent by post. In June 2017, the Estonian National Desk at Eurojust opened an operational topic on digital tools, which addressed this issue ⁽²³⁾. The question included in the topic, focused on whether the transmission of EIOs (and LoRs) by fax or email only was sufficient for its execution or the executing authority required subsequent transmission of the EIO (and LoR) by post. The replies to the questionnaire revealed that a majority of Member States considered the digital transmission of EIOs sufficient. Yet some Member States said that, even though their home authorities could already initiate the execution of EIOs upon receipt of the EIO by fax or email, subsequent transmission of the EIO by post was still required. The replies also showed different approaches depending on whether EIOs or traditional LoRs were concerned. These different approaches sometimes led to confusion and uncertainty among the competent authorities, who asked for clarification through Eurojust.

Restricted or sensitive information. Competent authorities sometimes discussed the best way of sending restricted or sensitive information. Different views existed. In some cases, national authorities decided to send the restricted information by post. In other cases, given their sensitivity, the national authorities preferred not to send the documents by post but to send them digitally. Finally, in some cases, the National Member handed them over personally.

Secure communication channels. Several National Desks set up a secure communication channel between the National Desk at Eurojust and its national authorities. This can be seen as best practice, as

⁽²³⁾ In relation to more recent developments, outside the temporal scope of this casework report, see Eurojust and EJP, 'Impact of COVID-19 on Judicial Cooperation in Criminal Matters', and General Secretariat of the Council, 'The impact of COVID-19 on Judicial Cooperation in Criminal Matters – Executive summary of information compiled by Eurojust and EJP' (see above, footnote 5), which confirm the current digitalisation of the transmission of EIOs due to COVID-19.

it allows national authorities to transmit urgent and/or sensitive EIOs (e.g. for wiretaps) via this channel to their National Desk at Eurojust, which then facilitates their prompt execution in other Member States.

6.2. Identifying the competent executing authority

Obtaining crucial information to identify the competent executing authority. Eurojust provided support in many cases when difficulties arose in identifying the competent executing authority. In some cases, the content of the EIO was not clear and/or lacked information that was crucial to identify the competent executing authority in the Member States involved, such as the exact location of the suspect, further specification of the crimes, the place of the procedural action, the place where the crime had been committed or the roughly estimated amount of damages. The type of investigative measures was also sometimes decisive for identifying the competent authority in charge of the execution.

Addressing cases with multiple executing authorities. EIOs that included multiple requests sometimes needed to be executed by different authorities and this created confusion and uncertainty. For instance, in the context of an investigation into child pornography over the internet, an authority issued an EIO to identify an internet protocol (IP) address and, subsequently, to perform house searches at the residence where the address was physically set up. Under these circumstances, the identification of the competent executing authority was not straightforward and Eurojust was requested to transmit the EIO. After the identification of the IP by a first executing authority, the EIO was sent to another executing authority. In another case, a hearing of eight victims, who were located within several jurisdictions, Eurojust assisted in the swift and correct identification of the different executing authorities involved and ensured that one EIO was sent to six different prosecution offices. The fact that Member States use different criteria to appoint the competent authority often adds to the complexity of identifying the competent authority.

Solving problems with different communication channels. Sometimes the information was passed through different channels, which created additional confusion. In some cases, it went first via the police, e.g. the whereabouts of a suspect needed to be identified and only then could it be established which national authority was in charge of executing the EIO. In some cases, in addition to sending a request via Eurojust, requests for police cooperation were also sent via police channels and/or the Secure Information Exchange Network Application (SIENA), and a lack of coordination sometimes created confusion. In some cases EIOs were first sent via SIENA and only a week afterwards via Eurojust. This meant that EIOs reached police officers directly without any involvement of judicial authorities and without corresponding judicial action being taken. The circulation of several EIOs at different (police and judicial) levels without adequate coordination was confusing. As best practice, it was concluded, preferably only one transmission channel should be used and preferably not SIENA for EIOs, unless really necessary.

Tracking 'lost' EIOs. In several cases, Eurojust assisted in tracking an EIO that had been sent to the wrong executing authority, and Eurojust retransmitted it to the correct authority. Member States should be reminded that an executing authority that receives an EIO, but is not competent to recognise and execute it, has an obligation to transmit it, *ex officio*, to the correct national authority and inform the issuing authority (Article 7(6) EIO DIR).

7. Subsequent use of the evidence obtained for other investigative purposes

7.1. Rule of speciality

In several cases, Eurojust clarified questions related to the application of the principle of speciality. Eurojust supported the issuing authorities in obtaining permission from the executing Member State to use the evidence previously obtained for other purposes than initially requested in the EIO, to ensure the admissibility of the evidence at trial stage. In some cases, it was not always clear if requesting such permission was required, including in the light of the CJEU's case-law ⁽²⁴⁾, but, to avoid any risk and to ensure the admissibility of evidence, requests for permission were regularly transmitted via Eurojust.

For instance, in a large-scale fraud investigation regarding pension money invested in funds involving many Member States, the crimes for which evidence was required changed during the investigation. The investigation had started in 2016 and in the course of the investigation 50–60 LoRs and EIOs were sent to a variety of countries. The investigation revealed that what originally was thought to be embezzlement was in the end qualified as fraud. In addition to this, new crimes, e.g. money laundering and bribery, had been added. Moreover, some of the original suspects were no longer suspects and new suspects had been added. In its casework, Eurojust noted that some countries are of the opinion that evidence sought for certain given purposes may only be used for exactly those purposes, and these countries require to be informed by the issuing Member State and give their permission to use the evidence when an investigation undergoes changes. Other countries do not have a problem if the evidence is used for other crimes or even other purposes, and would not require to be consulted to give permission. In the case in question, Eurojust ensured that all evidence gathered could be used in trial. To this end, the authorities of all Member States involved were asked if the evidence obtained could be used in relation to the suspects and the final charges. The competent authorities of all Member States involved replied in an affirmative way.

7.2. Subsequent use of the evidence by authorities in the executing Member State

Sometimes questions were raised on the subsequent use of the evidence by the executing Member State. For instance, in one case of two parallel proceedings, the issuing authority initially objected to the public prosecutor in the executing Member State witnessing the interrogation. To overcome this obstacle, it was agreed via Eurojust that the public prosecutor was entitled to witness the interrogation as long as he would not use anything he might learn during the interrogation. Moreover, it was also agreed that, if the executing authority wished to use it, he would have to issue a separate EIO to officially obtain the outcome of the interrogation. Given the urgency of the matter, the issue was discussed orally between the representatives of the two National Desks and the national authorities involved. In another case, it was again not the issuing authority that requested permission to use the evidence (a witness statement)

⁽²⁴⁾ Particularly, Case C-388/08, *Leymann and Pustovarov*, Judgment of 1 December 2008 (in relation to the EAW FD).

for another purpose, but it was the executing authority that issued an EIO to ask the (old) issuing authority if it could use the evidence that it had previously collected when executing the EIO for the authority of the other Member State. The latter authority did not object to the evidence being used, and gave its permission via Eurojust.

8. Grounds for non-execution

In its casework, Eurojust has sometimes assisted judicial authorities when grounds for non-recognition were discussed. In some cases, these discussions took place before any decision on the execution had been taken. In other cases, executing authorities had already decided not to execute the EIOs, but Eurojust's intervention sometimes led to the issuing of new EIOs, which could then be executed successfully.

By far the two most frequent grounds for non-execution identified in Eurojust's casework have been dual criminality (Article 11(1)(g) EIO DIR; see below, Section 8.1) and *ne bis in idem* (Article 11(1)(d) EIO DIR; see below, Section 8.2). Exceptionally, Eurojust dealt with a few cases concerning other grounds, e.g. immunities (Article 11(1)(a) EIO DIR; see below, Section 8.3) and the ground related to restrictions on the use of specific investigative measures under the executing Member State's law (Article 11(1)(h) EIO DIR; see below, Section 8.4). It is also noteworthy that, so far, Eurojust has not dealt with cases where the fundamental rights ground (Article 11(1)(f) EIO DIR) was at stake (see below, Section 8.5).

8.1. Dual criminality

EIOs were sometimes inaccurately drafted or poorly translated, and the executing judicial authority raised questions from the perspective of dual criminality. Eurojust was asked for additional information to clarify further details related to the offence that had been committed. Eurojust also assisted in clarifying in which circumstances the dual criminality ground could or could not be invoked.

Clarification of the *modus operandi*. In one case, the translation of the original EIO was not precise enough about the suspect's *modus operandi*. The prosecutor was unable to decide whether the offence under investigation was not declaring employees to the competent authorities (which constituted a crime in both Member States) or declaring them but not paying the taxes (which was not a crime in the executing Member State, but handled in an administrative procedure). The National Desks provided a thorough and exhaustive clarification of the *modus operandi* and following this intervention the EIO was executed.

Clarification of the subject of the investigation. In another case, Eurojust was contacted after the executing judicial authority had already refused to execute an EIO for the obtaining of telecommunication data. According to the description in the EIO, the person had been sentenced to a significant custodial term and was currently hiding and escaping from justice. The EIO mentioned as the underlying offence 'obstruction of criminal proceedings'. The executing authority had understood from the EIO that the investigation for the obstruction of criminal proceedings was conducted against the

convicted criminal himself. The executing authority argued that there was a lack of equivalent criminalisation under the law of the executing Member State. The crime 'obstruction of criminal proceedings' existed in the executing Member State, but it could not be applied to the perpetrator or an accomplice of the main crime. When the perpetrator of the main crime carried out the conduct himself, it could not be considered a separate crime and could not be punished separately. Eurojust assisted in clarifying through the exchange of emails that the investigation for 'obstruction of criminal proceedings' was not conducted against the convicted criminal himself, but against others who had helped the convicted criminal to escape and hide. In fact, it became clear that both the issuing and executing authorities had the same understanding of the offence 'obstruction of criminal proceedings'. Thus, what at first sight had appeared to be an issue of dual criminality was not in the end. Unfortunately, the new information that might have led to the execution of the EIO arrived too late. The EIO had already been rejected and the suggestion of the executing authority to issue a new EIO was not followed up.

No dual criminality check for certain investigative measures. Article 11(2) EIO DIR states that paragraphs 1(g) and 1(h) do not apply to investigative measures referred to in Article 10(2) EIO DIR. In its casework, Eurojust had to remind national authorities on several occasions that paragraph 1(g) (dual criminality) does not apply to what are called the privileged measures of Article 10(2) EIO DIR, such as the hearing of a suspected or accused person (Article 10(2)(c) EIO DIR).

- A first case was related to an investigation into the **purchase/acquisition of prohibited weapons (exhibits)**. Bullet weapons were modified in a Member State so that they could not be used as firearms. That is not illegal in that country, as they are no longer considered firearms. The exhibits were couriered to another Member State, which started an investigation. EIOs were issued for witness hearings to support a judicial decision. Despite the absence of dual criminality in the executing Member State, the EIO was executed because no coercive measures (only witness hearings) were to take place. If a coercive measure had been requested, the executing Member State could not have executed the EIO, because the given activity did not constitute a crime under the executing Member State's law. Eurojust facilitated the execution of the EIO by clarifying that dual criminality could not be invoked for the requested investigative measure.
- A second case was related to an investigation into **obstruction of the enforcement of an official decision**. The suspect had been requested to show up at the prison house to serve his sentence, but had not appeared by the given deadline. This constituted a criminal offence in the issuing Member State, but not in the executing Member State. The issuing authority had issued an EIO for a hearing of the accused person and for providing documentary evidence (a court ruling). The executing authorities had sent the requested documents, but had refused to hear the person as an accused person because of the lack of dual criminality in relation to the crime committed. As in the previous case, Eurojust clarified to the executing authority that the list of measures specified in Article 10(2) must always be available under the law of the executing state, even in the absence of dual criminality. Consequently, the EIO could be executed.
- A third case was related to the **non-payment of taxes or insurance contributions**. This conduct only constituted a crime in the executing Member State if it was committed fraudulently by deception. The mere failure of such payments – which had happened in the present case – could only be punished with a fine of an administrative nature. Once again, it was recalled that

the condition stipulated in Article 11(1)(g) (dual criminality) does not apply to the measures listed in Article 10(2), such as the interviewing of a suspect. In this case, the executing authority withdrew the original refusal and recognised and executed the EIO.

List offences and predicate offences. In Eurojust's casework, issues were raised in relation to 'list offences' (see Annex D to the EIO DIR), particularly in cases where the list offence was an offence that required a predicate offence in the executing Member State (e.g. money laundering or participation in a criminal organisation) and the predicate offence did not pass the dual criminality test. For instance, in one case, the issuing authority had issued an EIO for a house search related to trafficking in steroids and participation in a criminal organisation. The issuing and executing authorities had different views on whether or not the EIOs could be refused. In the case in question, the executing authority refused to execute the EIO, arguing that trafficking in steroids was not a criminal offence (but a mere contravention) in the executing Member State and that for the offence 'participation in a criminal organisation' a predicate offence was needed, which trafficking in steroids was not in the executing Member State. The argument that 'illicit trafficking in narcotic drugs and psychotropic substances' is a list offence for which the definition of the issuing Member State's law should be decisive did not convince the executing authority.

8.2. *Ne bis in idem*

Eurojust assisted in clarifying questions that were raised in relation to the application (or non-application) of the principle of *ne bis in idem*. In one case, the suspects of an investigation in the issuing Member State were also subject to investigations in the executing Member State and other Member States. From the very brief description of the facts in the EIO, the executing authorities could not establish whether the facts related to its own investigation were identical in terms of both perpetrators and facts or the connection between both investigations was limited to the person's identity. This aspect was particularly relevant to the request for searches to be carried out at locations that had previously been searched in the context of the criminal investigation in the executing state. After consulting with Eurojust, the executing authority considered a coordination meeting appropriate, but that meeting did not take place, as the issuing authority decided to withdraw the EIO.

In another case, the issuing authority issued an EIO to request certain documents related to a linked case in the executing Member State. At first, the executing authority was reluctant to provide these documents, arguing that, if these document were to be used to reassess the same case in the issuing Member State, the executing authority would have to refuse on the basis of *ne bis in idem* grounds. However, it was clarified via Eurojust that the documents were needed to dismiss the case in the issuing Member State. Consequently, the EIO was executed.

8.3. Immunity or privilege

Eurojust was requested to facilitate the execution of EIOs when issues were raised in relation to professional privilege and immunity. In addition, difficulties arose in relation to banking secrecy.

Search of a lawyer's premises. A first case concerned the restitution of paintings that had been stolen during the Second World War. The issuing authority requested a search of the offices of a lawyer who

was a suspect in the criminal proceedings. The executing authorities invoked various grounds to refuse execution, including legal professional privilege. The issuing authority tried to contest the argument, but, in the end, the EIO was withdrawn, as the restitution of the paintings was arranged through diplomatic channels.

Movements and financial transactions of a diplomat. A second case concerned an investigation into a third-country national with diplomatic status who was suspected of espionage and preparing a serious violent offence endangering the state. The issuing authority had issued EIOs to investigate the suspect's movements and his financial transactions. Through the involvement of Eurojust it was clarified that the delay in the execution of the EIOs was because the executing authorities needed to wait for a decision from the Ministry of Justice. The ministry had to assess to what extent the personal immunity issues involved affected the execution of the two EIOs.

Hearing of an EU official as a witness. In a third case, the issuing authorities were carrying out investigations into the collapse of a bank and were looking at charges of false financial statements, investment fraud offences, market manipulation and insider trading. The issuing authorities requested to hear an EU official as a witness. They approached Eurojust to seek assistance on how to address the hearing of the witness. Eurojust informed the issuing authority of the relevant legal framework related to confidentiality, privileges and immunities and some relevant case law from the CJEU. Eurojust gave some concrete guidance to the authorities on how best to address the immunity issue in the case in question, e.g. which procedural steps to take regarding the lifting of the immunity, the filling in of the EIO and the accompanying documents that could be provided.

Hearing of a bank employee as a witness. In a final case, the issuing authorities had sent an EIO for the hearing of a witness, who was resident in the executing Member State, in relation to his former job as a bank employee in another EU Member State. It was clarified through Eurojust that the obligation to give a statement under the issuing and executing Member States' laws could have exposed the witness to criminal proceedings in the Member State where he had previously worked, on the ground of violation of banking secrecy. Although banking secrecy is not a ground for non-recognition,^[1] it created difficulties in the execution of the EIO and was one of the underlying reasons for its withdrawal.

8.4. Use of the investigative measure restricted to certain offences

Executing authorities approached Eurojust in relation to the execution of EIOs for – in their view – petty offences. In some of these cases, the executing authority suggested (where possible) alternative measures (e.g. a production order instead of a house search), which were then communicated through Eurojust.

^[1] See particularly recital 20 of the EIO DIR in conjunction with Article 7 of the Protocol established by the Council in accordance with Article 34 of the Treaty on European Union to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, *Official Journal*, C-326, 21.11.2001, p. 2.

For instance, in one case, the issuing authority had sent an EIO to request interception, searches and banking evidence for a fraud investigation involving only EUR 2 000. The executing authority felt reluctant to execute all these measures for such an offence and contacted Eurojust to discuss the options. The executing authority considered the application of Article 11(1)(h) EIO DIR. This refusal ground applies if the use of the investigative measure indicated in the EIO is restricted under the law of the executing Member State to a category of offences or to offences punishable beyond a certain threshold. However, in the case in question, the executing authority concluded that this ground could not be applied, as the requested investigative measures could be used in the executing Member State for a fraud-related offence regardless of the amount of money that had been fraudulently obtained. In the end, the EIO was executed.

8.5. Fundamental rights

The Eurojust cases analysed for this Report did not include any case in which the executing authority had invoked that there were substantive grounds to believe that the execution of the EIO would be incompatible with the executing State's obligations in accordance with Article 6 of the Treaty on European Union (TEU) and the Charter of Fundamental Rights of the European Union (CFR) (Article 11(1)(f) EIO DIR).

However, occasionally, differences between national laws led to certain discussions related to fundamental rights. For instance, in one case, which is also discussed below (see below, Section 9.2.2), the executing authority had raised concerns about the right to a fair trial, and more specifically, the prohibition of self-accusation. The requested investigative measure was the hearing of a person as a witness who could potentially become a suspect in that case. The executing authority had some reservations in light of the executing Member State's procedural law and the prohibition of self-accusation. Further clarifications revealed that the alleged obstacle was not so much an issue related to Article 6 TEU and/or the CFR, but rather an issue of how two Member States' national legal orders, addressed a core fundamental right differently, but both in compliance with the Charter. By looking at both approaches, and applying in the executing Member State a 'letter of rights' (description of rights under the issuing Member State's law), the EIO could be executed successfully.

9. Specific investigative measures

In its casework, Eurojust handled EIOs covering a wide range of investigative measures, including the obtaining of information or evidence already in the possession of the executing Member State, information contained in databases held by police or judicial authorities, house searches, the identification of persons subscribing to a specified phone number or IP address, the identification of persons holding a bank account and the obtaining of banking evidence. Under this heading, the focus is on four other frequently requested specific investigative measures: temporary transfer (see below, Section 9.1), hearing by videoconference (see below, Section 9.2), covert investigations (see below, Section 9.3) and interception of telecommunications (see below, Section 9.4).

9.1. Temporary transfer to the issuing state of persons held in custody for the purpose of carrying out an investigative measure

In relation to temporary transfers, the most frequent issues that Eurojust encountered in its casework concerned, first, the use of the correct legal instrument (on this point, see Section 3.2.2.1 above) and, second, the legal basis for the deprivation of liberty in the issuing Member State. On this second point, it has been argued that, to secure the presence of the person in the proceedings in the issuing Member State, a national arrest warrant needs to be issued. Problems could arise if the persons first consented and then withdrew their consent once they were on the territory of the issuing Member State. Questions were raised about on what legal basis these persons could then be deprived of their liberty in the issuing Member State. In some Member States, the penitentiary authorities were reluctant to deprive someone of liberty in the absence of a national arrest warrant, but, at the same time, the courts were reluctant to issue such an order, arguing that Article 22(6) EIO DIR was not a sufficient legal basis for them to do so. Evidently, the national law concerning this matter is not always adjusted adequately to the EU legal framework and therefore should be adapted accordingly. As best practice, it was suggested, to be on the safe side, that the executing authority should perhaps ask for a guarantee that the person would indeed be kept in custody during the temporary transfer.

9.2. Hearing by videoconference

In a considerable number of Eurojust cases, assistance was requested to facilitate the setting up of, coordinate, or provide general or specific information on a hearing by videoconference. The most frequent issues that Eurojust encountered in its casework concerned practical and/or technical issues (see below, Section 9.2.1), questions related to status of subject (see below, Section 9.2.2) and videoconference during trial sessions and/or appeal proceedings (see below, Section 9.2.3). Only a few cases were opened in relation to hearings by telephone conference. The main issue identified in those cases was related to difficulties arising in the implementation in national law.

9.2.1. Practical or technical issues

Urgency. Most cases referring to a hearing by videoconference were transmitted via Eurojust on account of their urgency. It is noticeable that national authorities often do not realise the sometimes extensive requirements needed when dealing with cross-border hearings, issues arising mainly from differences in national legislation. Therefore, often last-minute requests were sent to Eurojust to assist in a timely manner. Occasionally, again mainly owing to the urgency, the EIOs were not properly drafted or translated and therefore the requests for specific hearings, including additional measures, were not communicated well. This often caused misunderstandings concerning the timings or where the hearing was to take place. Sending the request via Eurojust could avoid these issues, as the National Desks can bilaterally discuss these matters and clear up any confusion, particularly when dealing with the more practical and technical matters. Furthermore, Eurojust's wide range of networks facilitates speedy communication between national authorities, including related to the setting up of videoconferences.

Missing information. In some EIOs, certain information related to the video hearing was missing, such as the questions to be used for the hearing of witnesses or an indication of the requested presence of

judicial/police authorities from the issuing Member State, particularly in parallel investigations. In other cases, the difficulties encountered were mainly of a technical nature. For instance, the technical details (e.g. IP address, type of connection, login and password of the intended videoconference) were neither included in the EIO nor provided by the executing authority when acknowledging receipt or immediately after. In addition, technicians often needed language support to understand each other. Eurojust assisted in providing the missing information speedily and ensuring smooth communication between the authorities involved.

When the hearing should take place. In some cases, the witnesses in question were unavailable on the initially agreed date. On several occasions, new dates were proposed and repeatedly adjusted. All these scheduled new dates for conducting a videoconference could be described as creating practical problems in the execution of the EIO. Reaching agreements on new dates via Eurojust has, in many cases, proved to be valuable, as new dates could be agreed very quickly and were easily adapted, when needed.

Where the hearing should take place. Some Member States have different laws on where a hearing by videoconference can take place. Numerous Eurojust cases were opened to facilitate communication between the Member States, specifically to clarify if, under national law, it is permitted to carry out a videoconference at, for instance, the Prosecutor's Office, the police station or a court. In some cases, the executing authorities urged all the requested formalities and procedures to be sent to them via Eurojust, including translations, to ensure the correct execution of the EIOs.

Coordination. The complexity of organising the hearing of multiple suspects/witnesses by videoconference is also a criterion often used when requesting Eurojust's assistance. For instance, national authorities referred a case to Eurojust in which various videoconferences were to be held with several witnesses in places under the jurisdiction of different courts and even in different time zones, when it was uncertain that the witnesses would appear in court. Eurojust accommodated a streamlined process and close communication, which resulted in a positive outcome.

Cost issues. Some cases opened at Eurojust questioned which Member State was to cover the costs of a hearing by videoconference. According to Article 21 EIO DIR, 'Unless otherwise provided in [the EIO DIR], the executing State shall bear all costs undertaken on the territory of the executing State which are related to the execution of an EIO', with the exception, among others, of where the executing authority considers that these costs may be deemed exceptionally high. For example, there were discussions on which Member State was to bear the higher costs when the issuing authority had explicitly requested the presence of a particular interpreter, which then led to a considerable higher invoice than in similar cases, and there was no prior agreement. In this case, after several emails between the different authorities and with Eurojust clarifying certain matters, the issuing Member State eventually paid the invoice, although not legally obliged to, as it had expressed an explicit wish for a particular interpreter.

9.2.2. Status of subject

Clarifications on the status of the person to be heard. In relation to various investigative measures, but particularly hearings by videoconference, several cases were opened at Eurojust referring to the different status of a subject, namely as a suspected or accused person or as a witness. Some questions were referred to Eurojust solely to clarify the subject's status, without any further implications. A few

cases were opened in which national authorities issued an EIO to interview a person as a witness but the executing authorities instead considered that the subject should be interviewed as a suspect. In some cases the status of the subject was then changed, and in other cases the issuing authorities refused to alter the subject's status, sometimes resulting in non-execution of the EIO, despite Eurojust's attempts to mediate and to find an alternative solution. It is regrettable that for some cases no solution could be found, and it can be questioned whether or not the executing authority had a legal basis to bluntly refuse to execute the EIO on that ground.

Procedural status of the person to be heard. A recurring issue refers to the different rights of a suspect and of an accused person in some Member States' national laws. In a certain case, clarification of the procedural status of the person involved was requested via Eurojust, as in the pre-trial stage of criminal proceedings the national laws of the Member States involved only made a distinction between the status of a witness and an accused person and therefore did not distinguish the position of a suspect. The main question here was if, according to the national law in the issuing Member State, the suspect in pre-trial proceedings was the same as an accused person, and if he was entitled the rights of an accused person, as mentioned in the executing Member State's national law.

Right to remain silent and not to incriminate oneself. Different interpretations in the Member States of the right to remain silent also triggered some discussions in Eurojust's casework. One case concerned a hearing of witnesses in relation to the bank account of a suspected legal person (see also above, Section 8.5). At the time, a criminal investigation was still being carried out into a crime of money laundering by an unknown perpetrator. The executing authority mentioned the prohibition of self-accusation in the executing Member State's procedural law, which may hinder witness hearings requested in EIOs if the person to be heard as witness is a potential suspect of the crime. The issuing authority acknowledged that the executing authority's argument, which was based on the principle of prohibition of self-incrimination, was a very valid point. However, the issuing authority explained that it could provide a guarantee under the issuing Member State's law that protected the principle and thus the right to a fair trial. According to the issuing Member State's constitution, everyone has a right to remain silent in front of the law enforcement authorities in case he or she risks exposing himself or herself to criminal charges. Moreover, this general rule was further developed in the Code of Criminal Procedure, which specified that a witness must be informed of this right before the interview and it must be granted to him or her in general, not in relation to the specific questions. In line with these provisions, the issuing Member State provided a 'letter of rights' and the executing authority executed the EIO, as initially requested.

Different national interpretations in the Member States could result in non-recognition of an EIO requesting to hear a witness who could later become a suspect in the case. Some national authorities raised the point that execution of the EIO would not be possible under their national law. Others stated that their national law does not regulate it, but noted that, since it is not explicitly prohibited and it is considered not contrary to the fundamental principles of law of the executing Member State, EIOs have been executed, provided that the defendant's rights were guaranteed as in the case mentioned above. That approach could be considered good practice to overcome differences in national laws.

Legal representation during the hearing of a witness. Several cases brought to Eurojust concerned different rights in relation to legal representation during witness interviews. In the issuing Member State, a lawyer was allowed to take part during a witness interview, and therefore his presence was requested in an EIO. The executing authority confirmed receipt of the EIO, but stated that no permission was given for the lawyer to participate in the hearing of the witness, since that application, given the status of the subject, would be contrary to the principles of its national law. The execution of the EIO could therefore not take place as requested. Eurojust questioned how the appointment of a lawyer could be considered 'contrary to the fundamental principles of law of the executing Member State', as per Article 9(2) EIO DIR, particularly taking into account that all Member States are bound by the Charter of Fundamental Rights of the EU. The fact that a Member State's national law does not explicitly regulate this, and a formal approach was taken, should not be sufficient reason to refuse the EIO.

9.2.3. Videoconference during trials and/or appeal proceedings

As there was a constant need for clarification when it came to hearings by videoconference, particularly those during trials and appeal proceedings, the Italian National Desk opened an operational topic in October 2019, covering several aspects that are further discussed below. The conclusions of the questions asked under this topic, can be summarised as follows.

Hearings at different procedural phases. The first question was whether or not national authorities, as executing authorities, recognise and execute EIOs for the hearing of a suspected or accused person by videoconference in any procedural phase (investigation, trial and/or appeal).

- The vast majority of National Desks replied that their national law implementing the EIO DIR allows the competent authorities to recognise and execute an EIO for the hearing of a suspect or accused person by videoconference at any stage of the proceedings, including at trial and at appeal.
- Two National Desks replied that in their Member State the competent authorities are allowed to recognise and execute such an EIO only if it is issued during the investigation stage, whereas it is not possible to execute such an EIO if issued during trial or at the appeal stage.
- Although Ireland has not opted in to the EIO DIR, it allows the execution of MLA requests for the hearing of a suspect by videoconference, but only if issued during the investigation stage. These requests are to be executed even without the consent of the person involved.

Lack of the accused person's consent. The second question addressed how the home authorities as executing authorities deal with the situation if the suspected or accused person does not consent to the hearing by videoconference (see Article 24(2) EIO DIR). Most National Desks replied that the lack of consent of the suspect or accused to the hearing by videoconference will or can lead to a refusal of the execution of an EIO issued for the purpose of hearing that person by videoconference. In only one Member State can the judicial authority order the hearing by videoconference *ex officio* and only under certain circumstances does the accused have a legal remedy against such a decision.

Accused person's consent. The third question was if there is a difference in the home authorities' approach to the execution of EIOs for hearings by videoconference if (i) the accused person is imprisoned in the executing Member State and cannot appear for the hearing in the issuing state and/or (ii) the accused person consents and/or explicitly asks for the hearing by videoconference. In response

to this question, almost all National Desks explained that the circumstance that the accused person is detained in the executing state's territory or consents to – or explicitly asks for – the hearing by videoconference does not entail any derogation from the general rules described above. In only one Member State does a special rule apply when the accused person is detained, namely that it is not possible for the person to request to be physically present at the court hearing.

Hearing of witness in the trial phase. The fourth question was whether or not the national authorities would recognise and execute an EIO for the hearing of witnesses by videoconference in the trial phase. All National Desks provided an affirmative reply.

9.3. Covert investigations

In general, not many cases were opened at Eurojust concerning covert investigations. However, it is noticeable there are clear differences between the Member States. In some Member States, covert investigations fall solely under police cooperation, whereas other Member States require judicial involvement, or even a judicial decision to execute this measure. Therefore, the requirements could differ on whether or not an EIO is required in a specific case. Occasionally, additional measures are required; for instance, in one case, owing to the sensitivity of the measure sought in the case in question, the best way to transmit the EIO to the executing Member State was a physical handover of the EIO between the competent authorities at the Member States' border. The communication went via Eurojust and the authorities were able to carry out their investigations as required.

To clarify certain matters concerning questions raised on covert investigations, the Czech National Desk at Eurojust opened an operational topic in July 2018. The included questionnaire concerned the conditions for an authorisation of covert investigations conducted by officers acting covertly or using false identities (hereinafter referred to as 'agents') as understood by Article 14 of the 2000 Convention and Article 29 EIO DIR. Member States were asked to indicate whether they would use an LoR/EIO or international police cooperation to request the use of a foreign agent in their investigation in the territory of their country. In addition, they were also asked to say which cooperation instrument they, as executing state, would expect a foreign authority to use if the latter were asking for an agent from the executing state to be used in the investigation in the territory of the issuing state.

The outcome of the questionnaire confirmed that there are clearly diverging views in the Member States on whether covert investigations are dealt with as judicial cooperation or police cooperation. A small majority of the National Desks that replied to the questionnaire indicated that no EIO is required, either when a foreign agent is used on the territory of their Member State or when a foreign authority is asking to use an agent of the executing state in the investigation in the territory of the issuing state. In these Member States, the requests are made on a purely police-to-police basis. Conversely, some other Member States' national legislation transposing Article 29 EIO DIR, require an EIO for covert investigations. A handful of National Desks mentioned there are some exceptions, based on bilateral agreements, which could either exempt a specific Member State from requiring an EIO or, on the contrary, explicitly state that an EIO, although as a general rule it would not be required, now would be required. Some National Desks mentioned that, although a request concerning covert investigations is

done on a police-to-police basis, the prosecutor still has the authority to decide whether or not to accept or request the 'loan' of an agent, and it is therefore still seen as a judicial request.

9.4. Interception of telecommunications

In several cases, Eurojust was requested to provide support in cases involving the interception of telecommunications, either with technical assistance from another Member State (see below, Section 9.4.1) or without technical assistance (see below, Section 9.4.2).

9.4.1. Interception with technical assistance from another Member State

In cases requiring technical assistance from another Member State, the most recurrent questions identified in Eurojust's cases related to insufficient information, different views concerning the scope of interception, the purpose of the use of the intercepted material (for evidence or intelligence), the authorisation period for the interception and the status of the person.

Insufficient information. A few cases were opened at Eurojust because the content of the EIO was not sufficient, as the description of the crime was missing, it was poorly translated, or the relationship between the intercepted and accused person had not been indicated sufficiently and had to be clarified via Eurojust (see also above, Section 4.2).

Scope of interception. Some cases concerned the bugging of a car, in the contexts of both Article 30 and Article 31 EIO DIR (see below, Section 9.4.2). Different views prevail in the Member States concerning whether or not Article 30 EIO DIR could be applied to a request to install a covert listening device (e.g. bugging of a car). In the context of Eurojust cases, a few National Desks specifically mentioned that, according to their national law, this should not fall within its scope.

Use of intercepted material for evidence or intelligence purposes. According to Article 30(5) EIO DIR, there is an additional ground for refusal when the measure would not have been authorised in a similar domestic case. There have been several Eurojust cases in which the executing authority required an assurance from the issuing authority that any 'intercept product' obtained would only be used for intelligence purposes. Therefore, the executing authority did not supply the intercept material 'as evidence' (as this would not have been authorised in a similar domestic case), but only for intelligence purposes.

Authorisation period for the interception. Eurojust's casework revealed that differences in authorisation periods for interception in the Member States sometimes created problems. In some cases, issuing authorities were confronted with an unexpected termination of the interception. In practice, it did not always seem clear who had to inform whom when the interception came to an end and/or was not extended. Best practice would be that the executing authority informs the issuing authority well in advance of the expiration of the authorisation so that the latter will be in a position to issue a new EIO in time.

Status of the person. In one case, the issue concerned the possibility of intercepting the communications of a person who was not formally a suspect. Under the law of the executing Member

State, the possibilities of intercepting the communications of a witness were much more limited than in the issuing Member State. In the executing Member State, interception of communications was, in principle, possible only in relation to suspects and not to witnesses, unless there was a clear indication that the suspect would contact a witness or the witness was expected to transmit messages on behalf of the suspect. In the case in question, these conditions were not met and the interception could not be carried out.

9.4.2. Interception without technical assistance (Annex C)

Many cases addressed difficulties in relation to the different interpretations by Member States of Article 31 EIO DIR, which regulates the notification of a Member State where the subject of the interception is located and from which no technical assistance is needed (Annex C). In many cases, the Annex C form was not used and/or relevant information was missing, such as details of the validation by an investigating judge, or date/period when the authorities became aware that the person subject to the interception had moved abroad. The main issue identified was in relation to notified authorities concluding that the interception did not fall under the provisions regulating 'a similar domestic case'. Whereas most authorities agreed that this should be a merely formal, procedural check, several others indicated it is – in their Member State – a very substantive examination whereby additional information is requested to make the assessment, and it often leads to decisions imposing a termination of the interception (if it is still ongoing) and/or a prohibition on using the intercepted material. In addition, a lack of notification and/or a lack of approval could lead to concerns about the admissibility of the evidence.

9.4.2.1. Operational topic in relation to Article 31 EIO DIR and Annex C

Following difficulties in the application of Annex C, the Italian National Desk decided to open an operational topic in July 2018, asking questions related to the provisions of Article 31 EIO DIR and its Annex C. The conclusions of this questionnaire can be summarised as follows.

Legal requirements under national law. The first question asked was how national issuing/executing authorities implement and apply the provisions of Article 31 EIO DIR in their Member State, with specific reference to the legal requirements necessary to authorise the continuation of the interception abroad. Most National Desks replied that their national legislation has transposed Article 31 EIO DIR literally. Some National Desks indicated that there are no specific provisions regarding the legal requirements necessary for their issuing authorities to authorise the interception abroad. Some National Desks indicated a number of factors that their executing authorities use to assess when 'interceptions would not be authorised in a similar domestic case' in their national law. For instance, National Desks mentioned the following factors: the crimes are intentional, the information cannot be obtained in a different way and it is essential for the purpose of the proceedings; the measure does not impinge upon essential rights more than necessary for the purpose of proceeding; the measure is likely to provide information or evidence in connection with the crime investigation; the offence is serious (e.g. in some countries the punishment would be at least 4 or 5 years of imprisonment); the offence generates a serious violation of the legal order, taking into account its nature or its connection with

other serious offences committed by the suspect; there are sufficient information and grounds to apply for a court order.

National guidelines. The second question was if there are there guidelines, issued by the home authorities, regarding how the notified state evaluates Annex C forms received. Various National Desks mentioned that there are. These guidelines differ in content. One National Desk stated that the guidelines are to assist the judicial authority in checking whether or not the seriousness of the offence would also allow the interception in a similar domestic case, without evaluating either the threshold of evidence for the required interception or the necessity and proportionality of the measure (as the latter has already been assessed by the issuing authority). The majority of Member States only have more general guidelines on the implementation of the EIO.

Eurojust cases. The third question sought information about relevant work cases that the National Desks had handled recently in the matter in which problems arose. The following issues were mentioned.

- **Missing information and/or poor translation.** In some cases, the content of Annex C was not sufficient because the description of the crime was missing or the relationship between the person subject to the interception and the accused person had not been indicated sufficiently, or a poor translation resulted in problems when trying to figure out the concrete circumstances and the offence. When the additional information was provided, consent was usually given.
- **Similar domestic case.** In some cases, it was argued that the interception requested in the case in question did not fall under the provisions regulating 'a similar domestic case', and/or problems surrounding the interpretation of this concept were raised.
- **Bugged cars travelling abroad.** In some cases, it was held that the case of bugged cars travelling abroad is not regulated by Article 31 EIO DIR or is not recognised on the grounds that prior authorisation was needed according to the domestic rules. When the Annex C form was sent to the relevant authority after the communication in the car had taken place, the authority could not permit the use of the evidence.

Interpretation of the term 'telecommunications'. The fourth question was how the term 'telecommunications' was transposed and interpreted in the national legislation. The replies to this question confirmed that many national authorities have different ways of interpreting the term 'telecommunications' and the legal scope differs depending on the exact term. A few Member States distinguish between the object and the person when deciding if this falls under interception of telecommunications.

9.4.2.2. *The meaning and scope of 'interception of telecommunication'*

The crucial question that underlies a common issue identified in several Eurojust cases, which was also briefly touched upon in the operational topic mentioned in Section 9.4.2.1, is whether or not, when a bugged car crosses a border unexpectedly, and the authorities do not need the technical assistance of the authorities in the other Member State, Article 31 EIO DIR can apply. In other words, can the bugging of a car fall under the term 'interception of telecommunications' of the Directive?

It should be noted that the EIO DIR does not define the term 'telecommunications', not in Articles 30–31 (interception of telecommunications), Article 2 (definitions) or the preamble. Moreover, in relation to the interpretation of the term 'telecommunication', the Directive does not refer back to the law of the Member States. This is relevant for the following reason. The terms of a provision of EU law that makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Union, having regard to the context of the provision and the objective pursued by the legislation in question ⁽²⁵⁾. In the absence of any preliminary ruling on this issue so far by the CJEU, it is uncertain what interpretation this term should have.

In order to understand the meaning of the term 'telecommunication', reference could, first of all, be made to a Council resolution of 1995 on the lawful interception of telecommunications, which defines telecommunication as 'any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo-electronic or photo-optical system' ⁽²⁶⁾. Moreover, since Articles 30–31 EIO DIR are largely inspired by Articles 17–20 of the 2000 MLA Convention, it is also relevant to consider the explanatory report on that Convention ⁽²⁷⁾. This explanatory report emphasises the Council of the European Union's deliberate choice not to define the term 'telecommunications' in the Convention. Yet, at the same time, the report states that the term should be understood 'in the widest sense of the word' and that 'Due to this lack of a definition, it is self-evident that the provisions on the interception of telecommunications may apply to all forms of communication made possible by current and future technologies. However, when negotiating the Convention, it was absolutely impossible to foresee every conceivable hypothetical case given the speed of technological development in this area' (p. 16). Therefore, although calling for a wide interpretation of the term 'telecommunications', to include any possible future telecommunications technology, the explanatory report nevertheless postulates the use of some sort of technological means enabling the communication. In the light of the above, it seems that the term '**telecommunication**', as opposed to the more general term 'communication', requires the use of some type of telecommunications technology and does not seem to cover direct live communication between two people, without the use of any technological means. From a strictly literal interpretation, it would thus not include two people talking together in a room or the interception of direct live conversation within a car.

Yet, often, the CJEU refrains from an approach focused on a mere literal interpretation. Purposive and systematic considerations and the practical effectiveness of EU law (*effet utile*) frequently seem to be the main drivers of the CJEU in its interpretation and development of EU law. Therefore, it is important to look also at the system of the EIO DIR, the purpose of its provisions and the link with primary law, particularly the aim of establishing an area of freedom, security and justice. From such an approach, it is worth considering the following.

- Scenarios of cross-border surveillance in which the technical assistance of another Member State is not needed do not seem to fall within the ambit of the 'general' EIO regime (as there is

⁽²⁵⁾ This follows from the CJEU's case-law. See, for instance, CJEU, Case C-66/08, *Kozłowski*, para. 42.

⁽²⁶⁾ Council resolution of 17 January 1995 on the lawful interception of telecommunications, 96/C 329/01, p. 6.

⁽²⁷⁾ 'Explanatory report on the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union', Council doc. 2000/C 379/02, pp. 20–26.

no issuing and no executing authority and no 'order' to be executed) ⁽²⁸⁾, but rather come within the ambit of the very specific 'notification' regime of Article 31 EIO DIR.

- Prior authorisations seem very justified in domestic scenarios, but considerably less so in a cross-border context, when criminals often cross borders unexpectedly during an interception (which has already been authorised *ex ante* by the judicial authority of another Member State). Article 31 EIO DIR, which includes the possibility of *ex post* authorisations, reflects this reality. An absolute and rigid prohibition on using material intercepted without prior authorisation might risk jeopardising the objective of creating an area of freedom, security and justice (moreover, with an *ex post* authorisation the notified authority can still refuse or limit the use of the intercepted material on other grounds, Article 31(3) EIO DIR).
- The EU legislature explicitly allows the possibility of *ex post* authorisations: the intercepting Member State must notify the competent authority of the notified Member State of the interception 'during the interception **or after** the interception **has been carried out**, immediately **after it becomes aware** that the subject of the interception is **or has been** ⁽²⁹⁾ during the interception, on the territory of the notified Member State' (Article 31(1)(b) EIO DIR, emphasis added).
- Although the methods of interception are different in wiretapping (interception of communication by telephone or other telecommunication technology) and bugging (installation of a small microphone in the place to be bugged and transmission to some nearby receiver), both types of electronic surveillance have the same purpose and effect: the secret interception of communications. Accordingly, they also entail the same level of interference with the right to privacy. It seems illogical that the safeguards and rights set by the EU legislature would apply to the former but not the latter and/or other more intrusive measures.
- There is no indication whatsoever that it was the EIO legislature's aim to exclude surveillance measures from the EIO DIR (except for those that fall within the scope of Article 40 of the Convention implementing the Schengen Agreement (CISA) and/or from the scope of Articles 30–31 EIO DIR. In light of the broad scope of the Directive 'to cover all investigative measures', it could be argued that the EU legislature aimed to deal in a non-restrictive manner with the question of interceptions carried out for the purpose of criminal investigations, regardless of the nature of the interception.
- From a comparative law perspective, there is an additional argument that other jurisdictions, while acknowledging the difference between the two types of interception, nevertheless treat them under the same provisions ⁽³⁰⁾.

In sum, in the absence of clear EU legislation and/or CJEU case-law in relation to interception by means of surveillance devices, it remains difficult to give clear guidance on how these provisions should be

⁽²⁸⁾ See Explanatory Report, p. 21, where it is indicated that the Council made the political decision to deal in a non-restrictive manner with the question of interceptions carried out for the purpose of criminal investigations, and not only with the question of international mutual assistance in the area of interception.

⁽²⁹⁾ Compare Article 20(2)(b) of the 2000 MLA Convention, which was more restrictive, as it held that the notification should take place 'immediately after it becomes aware that the subject of the interception **is** on the territory of the notified Member State' (emphasis added).

⁽³⁰⁾ See, for instance, Chapter 119 of Title III of the US Code, which addresses the interception and disclosure of wire, oral, or electronic communications and gives in Section 2510 definitions of 'wire' versus 'oral' communication (available at: <https://www.law.cornell.edu/uscode/text/18/part-1/chapter-119>). It is noteworthy that, although the US legislature distinguishes between these two types of interception, the legal regime applicable to them is identical (they are governed by the same provisions).

interpreted. Nevertheless, national authorities should, when interpreting the national law that implements EU law, do this in a way that pursues the objectives of the EIO DIR, and EU law in general.

III. Coordination

Pursuant to Article 2(1) Eurojust Regulation, Eurojust shall support and strengthen coordination and cooperation between national investigating and prosecuting authorities. In addition to facilitating the execution of EIOs in a bilateral context (see Part II), Eurojust has often assisted practitioners with the execution of EIOs in a cross-border context involving several EU Member States and/or third countries.

If parallel or linked proceedings are ongoing in different Member States, the coordination of the execution of the different EIOs that are involved is often crucial. Both coordination meetings ⁽³¹⁾ and coordination centres ⁽³²⁾ organised by Eurojust have proved very useful to ensure this coordination.

In some cases, Eurojust assisted in the simultaneous transmission of urgent EIOs to several Member States in order to ensure a simultaneous execution. Joint action days were often first intensively prepared with the support of Eurojust during coordination meetings and then further supported by means of a coordination centre. Practical or legal issues could be anticipated and/or immediately addressed in the preparation of the action day or remedied during the coordination centre where all competent authorities were in close contact with each other. Additional/improved EIOs were often issued in time before the action day or sometimes during the action day.

For instance, in one case authorities asked for the assistance of Eurojust in liaising with the authorities of another Member State to organise a joint action day with house searches and seizures in both countries, and to support these parallel intrusive measures in the two countries with a coordination centre at Eurojust. The executing authority informed the National Desk concerned at Eurojust that it needed additional information to be able to submit the request for a search warrant to a judge. The request for additional information arrived at Eurojust only a few days before the action day and the answer from the issuing authority was required before 12.00 the next day, as the executing authority needed it to prepare the documents that were to be submitted to the court. Furthermore, the court would only accept the additional information in a formally amended EIO. The issuing authority prepared the additional information and the National Desk at Eurojust translated it into English the same night. The final version of the supplementary EIO and its English translation were forwarded and the authorities acknowledged receipt 5 minutes before the deadline. The same day another clarification request arrived, with a 1-hour deadline to reply. The National Desk immediately called the prosecutor in charge, who answered all the questions, and a few minutes before the deadline all the answers were transmitted. Another information request arrived on the same day in the evening and the National Desk

⁽³¹⁾ See above, footnote 8.

⁽³²⁾ During an action, the Eurojust coordination centre, held in a specifically developed a meeting room within Eurojust, a unique tool in Europe, is used to provide real-time exchanges of information among judicial and law enforcement bodies involved in complex cross-border cases, and synchronise operations (arrests, searches, seizures) in the different states concerned.

concerned was able to provide the necessary answers the same night. Despite the difficulties encountered and because of the continuous and smooth support of Eurojust, the request turned out to be a success, as the court granted the search warrant. The coordination centre was organised and the joint action day was fruitful. The authorities executed the house searches and seized laptops, iPads, USB sticks and mobile phones, and obtained information about bank accounts and business contracts..

Throughout its casework, Eurojust has often organised coordination meetings at which different issues related to different phases of the EIOs were discussed.

In relation to the **issuing phase of EIOs**, coordination meetings often served to address different issues, including:

- providing information on the **state of play** of the investigations in the Member States involved and agreeing on the **best way forward**, including the issuing of EIOs;
- discussing, in view of the information exchanged, the **content of EIOs** to ensure the issuing of accurately drafted (additional) EIOs;
- discussing, in view of the information exchanged, the advantages/disadvantages of issuing several EIOs and/or the **setting up of a JIT**;
- discussing the need to keep the information provided in the EIOs as **confidential** as possible in order not to jeopardise the investigation in other Member States involved (and, if needed, specify in the EIO the required level of secrecy).

In relation to the **execution phase of EIOs**, coordination meetings were often dedicated to issues such as the following.

- Clarifying **legal and/or practical issues** that had prevented the full execution of the EIO so that, after the coordination meeting, partially executed EIOs could be fully executed.
- Adjusting EIOs so as **not to jeopardise the linked ongoing investigations** in other Member States.
- Ensuring the **simultaneous execution of specific investigative measures in different countries**. For instance, if in the context of an investigation a Member State issues EIOs to two or more other Member States and requests Eurojust's assistance in coordinating the simultaneous execution of both EIOs, Eurojust can ensure that both EIOs will be executed on the same day in the two countries and help in solving immediately any issues that might be raised.
- Ensuring the **simultaneous execution of different investigative measures and/or involving different mutual recognition instruments**. For instance, in one case, a woman was abusing her own children and an EAW was issued against her together with an EIO requesting a house search and seizure of evidence. Eurojust ensured the prompt coordinated execution of both the EAW and the EIO. In another case, related to a value added tax (VAT) carousel fraud, a coordination centre was set up for the simultaneous execution of several EIOs, EAWs and freezing orders. Eurojust assisted in clarifying various issues, e.g. on the use of the instrument (it was necessary to issue both an EIO

and a freezing certificate, whereas the issuing authority had initially only used the EIO for both purposes); issues of translation; questions on banking information; questions on when the measures had to be executed (if they should take place during the action day, the procedure to obtain an order from the judge should be launched before); and several other questions on the precise scope of the requested measures, as the EIO were not drafted in a very detailed manner.

- Agreeing on an **extension period for the surveillance**. In a case regarding a criminal organisation committing a crime of distribution and production of hormonal substances, EIOs had been issued to several Member States for cross-border surveillance. No issue arose when executing these initial EIOs. However, during the period for which the surveillance was approved, the surveillance needed to be extended. A problem arose in relation to extending this approved surveillance period, as there was no uniform harmonised rule about how this extension was to be requested. Different Member States had different requirements of the formality of the request. Eurojust assisted in obtaining approval from all Member States involved. Some authorities considered that an official document stating that the measure had to be prolonged was sufficient, whereas other Member States required an entirely new EIO.

In relation to **follow-up actions/requests required after a successful execution of EIOs**, Eurojust often ensured a coordinated approach in relation to different issues including the following.

- **EIOs when the evidence that is available in the executing Member State is relevant to more than one issuing Member State**. The execution of '**concurrent EIOs**' is frequently more problematic or challenging than the execution of a single order addressed to a single issuing authority. Issues with precedence, sharing of evidence and integrity of copies, to give just a few examples, may arise and Eurojust is asked by the national authorities to help in finding the most appropriate solutions to overcome those problems. In one of our cases, an EIO was sent by country A to country B. At some point, when the executing authority in country B had already prepared the execution of the EIO, another EIO aimed at gathering the same evidence was received from country C. With the support of Eurojust, it was possible to coordinate the execution and sharing of evidence without detriment to any of the countries involved. It was also agreed among the authorities involved that, for future EIOs, each country would specifically mention the relationship of those EIOs to the parallel investigation in the other Member State. By making that reference, they wanted to ensure that the same unit in the executing Member State would deal with both cases. In another case, a huge amount of information technology material was seized in one Member State and sent to the issuing authority. Later, authorities in two other Member States issued EIOs to obtain the same evidence. The original issuing authority asked the executing authority to make a mirror copy of that evidence and give it to the authorities of the other two Member States that needed the same evidence. The executing authority (which had the original evidence) did not object and the evidence (copies) was shared with the other Member States.

- **Setting up of a JIT.** Sometimes the setting up of a JIT arises as a consequence of the execution of several EIOs/LoRs. Eurojust's casework shows concrete examples when the authorities involved agreed during a coordination meeting to set up a JIT to intensify their cooperation after having issued and executed several EIOs. In the JIT agreement, they included a clause that specified that the evidence obtained previously through EIOs/LoRs would be fall under the scope of the JIT agreement.
- **Decision on which country is best placed to prosecute for which offence.** A first case related to four murders that had occurred in the same Member State. An authority in that country issued EIOs to several other Member States. Cooperation went smoothly and allowed important evidence to be gathered to establish the mafia nature of a linked murder committed in one of the executing Member States. As a result of all the assessments, that Member State agreed to transfer its proceedings on the murder to the issuing Member State. In another case, following house searches and witness hearings in three different Member States, charges against the suspect in the issuing Member State were extended from terrorism to crimes against humanity. At a coordination meeting, authorities discussed the ongoing investigations, listed and explained the collected evidence and decided on the way forward regarding which country would prosecute for which offence. A third case involved the cross-border observation of a transport of heroin. After the execution of various EIOs, a coordination meeting reached agreement on the competent jurisdiction and a transfer of proceedings. Unfortunately, in some other cases, the very late involvement of Eurojust led to a lack of coordination and difficulties in obtaining a timely agreement on the question of jurisdiction. For instance, in a case concerning trafficking of human beings and prostitution, coordination and cooperation among the judicial authorities through Eurojust was only initiated 3 years after parallel investigations had begun, both started when the victim made complaints in two Member States. Between the statements made in the two Member States when EIOs had been executed there were contradictions, especially regarding the way the victim first met the offender and also regarding the circumstances and facts of the case. The authorities involved mentioned as a lesson learnt that earlier involvement of Eurojust would have benefited the discussions on the jurisdiction.

IV. Conclusions and recommendations

This report describes the main issues addressed in Eurojust's casework in the field of the EIO. It explains the role that Eurojust played in relation to these issues, identifies some best practices for practitioners and includes some recommendations for the legislature. With over 1 500 cases registered at Eurojust in the 2-year reference period, experience confirms that the EIO DIR, and its underlying principle of mutual recognition, is not a magical formula.

The EIO DIR is generally seen as an improvement on the legal framework of MLA. In many cases, the existence of standard forms (available in all languages), the increased role of judicial authorities (as issuing or validating authorities), the limited grounds for refusal and the time limits have proved successful and had a positive impact on judicial cooperation. Yet, to be fully successful, it is crucial that the templates be duly filled in, the grounds for non-recognition be applied correctly and time limits be fully respected. This has not always been the case. In particular, time limits (Article 12 EIO DIR) – at the time seen as one of the major improvements compared with the MLA regime – are not always met. Often those countries that had long execution terms under the MLA regime still have long execution terms despite the new EIO regime.

Eurojust has played an important role in facilitating cooperation and ensuring coordination in both bilateral and multilateral cases involving EIOs. Eurojust's bridge-building role has facilitated communication between the judicial authorities involved whenever there was a need for additional feedback or a consultation procedure was triggered between the judicial authorities concerned. In the vast majority of cases handled by Eurojust, the issues mentioned throughout the report were resolved and EIOs could be executed successfully. This conclusion selects the 10 most relevant issues identified in this report.

Defining the scope of the European Investigation Order

At first sight, the scope of the EIO DIR seems quite broad. Yet a lot of measures that need to be taken in the framework of criminal proceedings are not aimed at evidence gathering, and therefore fall outside the scope of the EIO DIR. This implies that practitioners are often faced with the parallel use of different instruments. When there is a need for different instruments for different measures – which under the MLA regime would fall under a single LoR – this requires under the new regime a combination of EIO and LoR. In such cases, it is difficult to speak of the EIO regime as a simplified procedure.

Questions on the scope of the EIO DIR and its interrelationship with other instruments sometimes complicated the execution of EIOs. For cross-border surveillance and covert investigations, Member States are divided between those that define these instruments as judicial cooperation (EIO) and those that define them as police cooperation. Based on its experience, Eurojust can inform national authorities of the different approaches in the Member States and which instruments are used in which Member State. In the relationship between the EIO DIR and the EAW FD, several cases concerning requests for a temporary transfer created confusion and misunderstandings among practitioners but were, after further discussions via Eurojust, mostly executed successfully. The relationship between the EIO DIR and the Freezing FD also raised concerns and difficulties in the execution of many requests. In several

cases, Eurojust assisted in clarifying the purpose of the freezing measure and, where relevant, advised issuing authorities to replace the EIO with a freezing order (or vice versa) or to complement the EIO with an additional freezing order. Finally, the relationship between EIOs and LoRs also sometimes resulted in problems, and Eurojust assisted in clarifying the scope of the EIO DIR and choosing the appropriate instrument in the light of the specific elements of the case in question.

Further clarification on the scope of the EIO DIR would be recommended, particularly in relation to the term 'corresponding provision', taking into consideration the current lack of a comprehensive list specifying which provisions have been replaced by the EIO DIR. Furthermore, there might be a need for further guidance on the single or combined use of EIOs/LoRs when certain requests are instrumental or linked to requests aimed at the gathering of evidence.

Clarifying the content of the European Investigation Order and assisting with requests for additional information

In many cases, the execution of the EIO was put on hold because of missing, unclear or contradictory information regarding the content of an EIO. Eurojust assisted in clarifying misunderstandings, replying to questions and providing additional information or documents. In many cases, requests for additional information were absolutely justified to clarify poorly drafted EIOs that led the executing authority to struggle with understanding crucial aspects of the EIO such as the object of and reasons for the EIO, the persons concerned, the criminal act or the requested investigative measure. Clarifications provided via Eurojust led to improved drafting of the EIOs and sometimes the issuing of other and/or additional instruments (e.g. EAWs or freezing orders). However, in some cases, Eurojust observed requests for additional information that seemed to go beyond what could reasonably be considered justified under the mutual recognition regime. For instance, the legitimacy of requests for full access to the file in the issuing Member State, excessive requests for the available evidence in the issuing Member State in order to assess the guilt of the person subject to one of the investigative measures requested, or questions on the reasons for the delays in the investigation in the issuing Member State could be questioned and sometimes led, unfortunately, to decisions not to execute the EIO.

Annex A has sometimes been criticised for being more cumbersome than a standard LoR. Especially if additional information is needed, which brings about the need for subsequent EIOs, this template is not really suitable and is considered excessive when the investigation is simple and a specific measure is requested. The template is also not really suitable when the investigation is difficult, the case is complex and/or against numerous suspects, and/or multiple and varied investigative measures are requested. There may be a need to make the standard forms more user friendly.

For an overview of best practices, Eurojust would like to refer to the Joint Eurojust–EJN Note on the practical application of the EIO, which includes some suggestions in relation to the filling in of the different sections of the EIO ⁽³³⁾.

⁽³³⁾ See Eurojust and EJN, *Joint Note of Eurojust and the European Judicial Network on the practical application of the European Investigation Order*, Council doc. 11168/1/19, mentioned above in footnote 3, pp. 4–5.

Bridging differences between national legal systems

Like the MLA regime, the EIO DIR operates without prior harmonisation of rules on admissibility of evidence. Therefore, issues resulting from differences in national laws, which existed under the MLA regime, continue to exist under the mutual recognition regime.

Differences between national legislations have often triggered questions in Eurojust's casework. Although the EIO DIR pursues simplicity, concrete EIOs that were at first easy and straightforward sometimes ended up being more extensive or complex because of differences in national legal systems. For example, the different status of the person subject to a hearing and his or her related rights often required in-depth discussions before an agreement could be reached via Eurojust. Different formalities for the execution of a measure, the maximum duration of certain investigative measures or different definitions of criminal offences in the national criminal codes also often complicated the execution of EIOs. Compromise solutions were reached via Eurojust to accommodate the different positions in the Member States.

Article 9(2) EIO DIR, referring to the compliance with certain formalities and procedures of the issuing Member State, is an important provision in the EIO DIR and reflects the need to accommodate differences between national legal systems. In many cases, it was indeed a key factor to ensure the execution of the EIO in a way that would ensure the subsequent admissibility of the evidence in the issuing Member State. Section I is thus quite important but, unfortunately, in practice sometimes it is not filled in, it is overlooked or the executing authority considers it difficult to comply with. In some cases, questions could be raised about whether or not the executing authority legitimately considered that certain formalities and procedures could not be met as they were 'contrary to the fundamental principles of law of the executing Member State' (e.g. the refusal of an executing authority to allow a witness to be accompanied by a lawyer during a hearing).

Sometimes national authorities invoked 'differences between national legal systems', which sometimes related to crucial aspects of the EIO DIR, for instance the following.

- Interception of telecommunications.
 - Interception of telecommunications with technical assistance (Article 30 EIO DIR). Different views prevail concerning whether or not this provision could be applied to a request to install a covert listening device (e.g. bugging of a car).
 - Interception of telecommunications without technical assistance (Article 31 EIO DIR). Different views exist on whether or not this provision also applies in the case of a covert listening device (e.g. bugging of a car).
 - Extent to which a notified authority should check if the interception would not be authorised 'in a similar domestic case' (Article 31(3) EIO DIR). Different opinions exist, ranging from a merely formal procedural check to a substantive examination, for which additional information is requested.
- Temporary transfer to the issuing state (Article 22 EIO DIR). There are different views on the basis of national laws in relation to the provision that 'The transferred person shall remain in custody in the territory of the issuing State' (Article 22(6) EIO DIR), which complicates the execution of such EIOs.

- The speciality rule. The EIO DIR does not expressly regulate the speciality rule, and the Member States have diverging views regarding whether or not the rule applies in the context of the EIO DIR.
- Cross-border surveillance. The different interpretations of the scope of the EIO regarding cross-border surveillance can create problems. One issue is the limitation on the use of evidence obtained through cross-border surveillance. In some Member States, evidence gathered using this measure can be used in court, whereas in other Member States it cannot.

In such cases, a common EU interpretation would be more helpful than diverging formalistic national interpretations, which could jeopardise the functioning of the EIO DIR or compromise the admissibility of the evidence in a concrete case (e.g. unjustified refusal to authorise the intercepted material).

From an EU perspective, further clarification on the scope and meaning of these crucial concepts would be beneficial, rather than leaving it to the interpretation of each Member State. In relation to some of these concepts, this report includes some elements that could be taken into consideration when developing further guidance on the meaning and/or scope of these provisions ⁽³⁴⁾.

Ensuring a correct and restrictive interpretation of the grounds for non-execution

Issues related to grounds for non-execution were not as frequent in Eurojust's casework. Some cases appeared to be, at first sight, *ne bis in idem* or dual criminality cases, but, after further discussions through Eurojust, it was clarified that they were not. Two specific issues are worth mentioning. First, in relation to dual criminality there were recurrent issues with executing authorities invoking the dual criminality ground in relation to investigative measures to which this ground does not apply, such as hearings of a witness or a suspect (Articles 11(1)(g), 11(2) and 10(2) EIO DIR). Eurojust had to intervene several times to clarify, and thus prevented incorrect use of this ground for non-execution. Second, in relation to some list offences that require a predicate offence, there have been cases when the executing authority invoked the dual criminality ground even though for the list offences it is the issuing Member State's law that should be the point of reference.

Speeding up the execution of European Investigation Orders

Speeding up the execution of EIOs has been an important part of Eurojust's casework, in relation to either urgent EIOs (e.g. requested person in pre-trial detention, upcoming court hearing scheduled in the issuing Member State, statutory limitations, imminent risk that the evidence would be destroyed or the nature of the crime) or 'forgotten' EIOs (e.g. the time limit has passed and there is still no sign of execution). In both scenarios, intervention by Eurojust has proved very useful and successful to ensure fast and efficient execution after clarifying, where needed, legal or practical questions.

In relation to the urgency of the case, Eurojust experienced cases in which the 'urgency' box had been misused, i.e. ticked when the measure was not really urgent, or not ticked when the measure was urgent.

⁽³⁴⁾ See for instance, in relation to the concept 'telecommunication', Section 9.4.4.2, 'Interception without technical assistance (Annex C)', above.

Eurojust often had to clarify the urgent nature of some requested investigative measures when this was not clearly indicated in the EIO.

As best practice, it is suggested that, whenever the 'urgency' box is ticked in an EIO, it should be clearly explained why the execution of the requested measure is urgent. If there is no duly justified reason, the 'urgency' box should not be ticked.

Facilitating direct contact and exchange of information between issuing and executing authorities

In many different phases – issuing, transmission, execution and follow-up – Eurojust supported national authorities in transmitting relevant information when needed. Direct contact is an excellent point of departure in judicial cooperation and it definitely works very well in many cases. However, on the basis of Eurojust's casework, it became clear that, for various reasons, direct contact sometimes failed, but, more importantly, could also be restored with Eurojust's intervention. In some cases, there was from the very beginning a complete lack of contact or reaction (no acknowledgement of receipt of the Annex B form, or any other response to subsequent emails or phone calls). In other cases, direct contact began to interfere with proceedings after repeated requests for additional information and/or when differences in legal systems led to confusion and misunderstandings and/or when language barriers complicated basic communication. In most of these cases, involving Eurojust was the crucial step in breaking the deadlock. Eurojust brought clarification and a better understanding of the legal or practical concerns of the national authorities so that, jointly, workable and satisfying solutions could be agreed upon and the EIOs could be executed.

Addressing language issues

A good translation of an EIO is key to avoid misunderstandings and unnecessary delays. This might seem obvious and redundant yet it is a crucial rule that, in practice, is often not complied with and then leads to concern and despair. Incomprehensible Google translations seriously hampered the execution of numerous EIOs and caused considerable delays. All too often, either poorly translated EIOs were sent back to the issuing authority via Eurojust in order to request further clarification and/or a more accurate translation, or problems were resolved at the National Desks themselves in close cooperation with the national authorities.

A second issue was that for urgent EIOs there was no time to wait for the official translation. The National Desks at Eurojust themselves then often prepared, within very short deadlines, an English version of the original EIO so that the executing authority could at least start the preparatory work while the translation into the requested language version would follow soon.

A third language issue concerned EIOs that were not available in the original language but only in the language template of the executing Member State. This is bad practice, as it is mandatory for EIOs to be issued and signed in the original language. Only after the EIO is available in the original language should the official EIO form/template in (one of) the accepted language(s) of the executing Member State be used for the translation.

Encouraging the use of Annexes B and C

In relation to Annexes B and C, it was often the non-use of both templates that was subject to discussion. When issuing authorities said that they had not received an Annex B form, Eurojust assisted in obtaining the missing form from the executing authority, asking that authority to send it, not only this time, but also in the future. In relation to Annex C, Eurojust opened an operational topic to discuss various questions related to the interpretation and application of the provision concerning interception without technical assistance, and to raise practitioners' awareness of the need to use this template.

Transmitting European Investigation Orders to the competent executing authority

Eurojust has been involved in different aspects related to the transmission of EIOs, not only the mere transmission of EIOs, but also retrieving 'lost' EIOs, advising issuing authorities to whom to transmit EIOs (particularly when they included multiple requests and needed to be executed by different authorities) or advising them on sending EIOs digitally or by ordinary mail. Owing to significant differences between the Member States regarding the distribution of competence for 'executing judicial authorities', practitioners often requested support from Eurojust to assist them in identifying the competent authority. When the content of the EIO was not clear and/or lacked information that was crucial to identify the competent executing authorities in the Member States involved, such as the exact location of the suspect, further specification of the crimes, the place of the procedural action, the place where the crime had been committed or the roughly estimated amount of damages, Eurojust assisted in obtaining that information swiftly.

Coordinating the execution of European Investigation Orders in different Member States and/or together with other instruments

In multilateral cases, when parallel or linked proceedings were ongoing in different Member States, Eurojust ensured, through coordination meetings and coordination centres, the simultaneous execution of different EIOs and other judicial cooperation instruments.

Early involvement of Eurojust in complex cases that require coordination has proved beneficial for the outcome in many cases and is therefore highly recommended.



Eurojust, Johan de Wittlaan 9, 2517 JR The Hague, The Netherlands
www.eurojust.europa.eu • info@eurojust.europa.eu • +31 70 412 5000
Twitter & LinkedIn: @Eurojust

Print: Catalogue number: QP-01-20-583-EN-C • ISBN: 978-92-9490-501-7 • DOI: 10.2812/2938
PDF: Catalogue number: QP-01-20-583-EN-N • ISBN: 978-92-9490-502-4 • DOI: 10.2812/465460