Note on the meaning of “corresponding provisions” and the applicable legal regime in case of delayed transposition of the EIO Directive

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NOTE

I. INTRODUCTION

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

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

The questions surrounding Article 34 EIO DIR have a direct impact on the operational work of Eurojust and a clear understanding of this issue is needed for

Concerns on these issues have been raised by practitioners on different occasions and the Consultative Forum of Prosecutors General voiced its worries on these topics, at its 11th meeting of June 2016 organised under NL and SK Presidencies[2], insisting on the need of a timely transposition since "*failing to do so would have serious negative consequences for on-going and future cases, given the substitution of the corresponding provisions of the Conventions used so far in this field by the Directive, as established by its Article 34*".

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

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

[1] The updated status of implementation of the EIO Directive is published in the Judicial Library on the EJN website here
[2] Council doc. 12393/16.

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

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

In its Opinion of 4 March 2011,[3] Eurojust already underlined the vagueness of the term "corresponding provisions" and pointed at the need to have clarification on the meaning of this term. Apart from a Council document of 2011,[4] which mentions a number of provisions of MLA legal instruments that may be affected by the EIO Directive, there is not (yet) a detailed list available indicating which provisions exactly will be replaced[5].

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

- Service and sending of procedural documents (Article 5 of the MLA 2000 Convention); some EJN Contact Points disagreed and believed that service of documents is included as part of the scope of the EIO DIR;
- Spontaneous exchange of information (Article 7 of the MLA 2000 Convention);
- Transfer of criminal proceedings (Article 21 of the MLA Convention and the CoE Convention 1972 on the Transfer of Proceedings);
- Returning of an object to the injured party (Article 8 of the 2000 Convention and Article 12 of the Second Additional Protocol) including a seizure only for this purpose;
- Freezing/seizure of property for the purpose of confiscation (FD 2003/577);
- Confiscation (FD 2006/783);
- Freezing/seizure of the accused assets for the purpose of compensation of the victim;
- Exchange of criminal records (2009/315/JHA FD (ECRIS FD), with the exception of Article 13 of 1959 MLA Convention, which has not been replaced by the ECRIS FD, and where the EIO should be sent between judicial authorities;
- Measures on cooperation between customs authorities (Naples II Convention);
- A request for consent to use information as evidence that has already been provided via police cooperation (Article 1(4) of FD 2006/960/JHA on simplifying the exchange of information and intelligence and Article 39(2) of the Convention Implementing the Schengen Agreement);
- International police cooperation measures, such as cross-border surveillance and cross-border pursuit (hot pursuit) (Articles 40 and 41 of the Convention Implementing the Schengen Agreement and recital (9) of the EIO DIR). However, some EJN Contact Points believed that the EIO DIR might be used for some types of cross-border surveillance measures. One Member States explicitly excluded cross-border surveillance from the scope of its national EIO legislation.

[3] Council doc. 6814/11.
[4] Council doc. 14445/11.
[5] It is even doubtful that such a list could be produced at this stage, given the difficulties to determine its legal effects as means of interpretation of a Directive, and the problematic identification of a suitable and competent institution to issue such a list.

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

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

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

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

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

Following a strict, literal reading of Article 34 EIO DIR, national authorities of the Member States that are bound by the EIO DIR, can no longer use the corresponding provisions of the "old" MLA Conventions from 22 May 2017 onwards as, on that day, these provisions will be replaced by the

[6] See recitals 44 and 45 EIO DIR.
[7] For a similar reasoning in relation to Article 31(1) EAW FD, see CJEU, Case C-296/08 PPU, *Goicoechea*, paras 55-56.
[8] G. VERMEULEN, W. DE BONDT and C. RYCKMAN, *Rethinking international cooperation in criminal matters in the EU*, 2012, p. 372-374 and p. 542.
[9] *Ibidem*.

EIO DIR. Consequently, they would lack a legal basis to carry out cross-border cooperation actions. Such an interpretation thus creates a legal vacuum and can seriously jeopardise judicial cooperation.

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

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

2.1 Arguments in favour of a teleological/pragmatic interpretation

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

- First of all, it is important to underline that the "replacement" of the corresponding provisions of the conventions mentioned in Article 34(1) EIO DIR does not entail the "abolition" of those conventions or provisions. They will retain their relevance in situations in which the EIO Directive is not applicable, such as for instance in the relations with Denmark and Ireland, but possibly also in situations of non-transposition.[10] One could argue that in cases where the EIO DIR is not yet transposed in the national law, the EIO system as such cannot be "applicable" amongst these Member States, even though the Member States are of course "bound" by the EIO DIR (*see* infra IV).
- Secondly, an interpretation which would allow the continued use of the MLA Conventions by the Member States that have not yet transposed the EIO DIR by 22 May 2017, would be more in line with the objective of the EIO DIR, which is to follow a new approach by creating a single, comprehensive instrument for obtaining evidence in cases with a cross-border dimension, based on the principle of mutual recognition, but also taking into account the flexibility of the traditional system of MLA.[11] It is hard to see how an interpretation which would amount to the absence of a legal basis or the revival of the reciprocity could fit into this objective.

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

[11] Recitals 6-8 EIO DIR.

- Thirdly, the European Commission noted in one of its reports on the implementation by the Member States of Framework Decision 2008/909/JHA on transfer of prisoners,[12] that: "*The non-implementation of the Framework Decisions by some Member States is very problematic since those Member States who have properly implemented the Framework Decisions cannot benefit from their co-operation provisions in their relations with those Member States who did not implement them in time. Indeed, the principle of mutual recognition, which is the cornerstone of the judicial area of justice, requires a reciprocal transposition; it cannot work if instruments are not implemented correctly in the two Member States concerned.* ***As a consequence, when cooperating with a Member State who did not implement in time, even those Member States who did so will have to continue to apply the corresponding conventions of the Council of Europe when transferring EU prisoners or sentences to other Member States***" (emphasis added).[13] In other words, in a strikingly similar scenario to the one being analysed here the Commission, whilst deploring the non-transposition, explicitly acknowledges that in such a scenario the Member States will have to continue to use the "replaced" Conventions.

2.2 Views in the Member States

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

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

As a matter of fact, at the EJN Regular meeting on 22 February 2017, different scenarios and solutions were mentioned and discussed. The replies provided as well as the information gathered via Eurojust confirm that national authorities can indeed take different approaches. For instance,

[12] This instrument, FD 2008/909/JHA, includes a provision that is similar to Article 34 EIO DIR, namely Article 26(1) which states that "*Without prejudice to their application between Member States and third States and their transitional application according to Article 28, this Framework Decision shall, from 5 December 2011, replace the corresponding provisions of the following conventions applicable in relations between the Member States: …*".
[13] COM (2014) 57 final.
[14] On the basis of a consultation by the National Members at Eurojust, national authorities from the following Member States believed that the existing MLA instruments can still be used after the transposition deadline in relation with or between Member States that did not implement on time: BE, BG, CZ, DK, DE, EE, EL, ES, HR, IT, LV, LT, HU, NL, AT (official position will follow), PL, RO, SK, FI and SE.
[15] E.g. the draft laws in HU, RO and SK.
[16] Article 5 of the Ordonnance of 1 December 2016 which transposes the EIO DIR into French law.

when asked about a scenario where the issuing Member State transposed the EIO DIR by the deadline, but the executing Member State did not, some authorities replied that, as issuing authority, they would issue an EIO and ask/expect the executing authority to accept it as a MLA request whilst others said they would issue an MLA request if they knew that the executing Member State had not implemented the EIO DIR. Some authorities said they would first check and/or ask what the executing authority would prefer. When asked what they would do as *executing* Member State in this scenario, and whether they would be able to accept an EIO and treat it as an MLA, a majority replied positively and specified that whilst applying the MLA rules, they would try to do it as much as possible in light of the (non-transposed) EIO DIR (see also *infra* IV). Other authorities, however, stated that they would not be able to execute an EIO and that they would ask for a MLA request. Another scenario that was discussed was the inverse situation where the executing Member State transposed the EIO DIR by the deadline, but the issuing MS did not. Here, the majority of authorities replied that they would be able to execute a MLA request.

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

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

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

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

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

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

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

V. CONCLUSION

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

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

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

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

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