Statewatch analysis

The proposed European Investigation Order: Assault on human rights and national sovereignty

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Introduction

In April 2009, a group of seven Member States tabled an initiative for a Directive to establish a European Investigation Order (EIO). This proposal would make a number of changes to the current rules governing the gathering and transfer of evidence in criminal cases as between EU Member States.

Although it is certainly desirable to consolidate the complex legal framework in this area, and some of the provisions of the proposed Investigation Order are unobjectionable, many of the changes proposed to the current legal framework would constitute a **reduction in human rights protection** and even (due to the abolition of the traditional 'territoriality' exception, explained below) an **attack on the national sovereignty** of Member States.

Moreover, the unclear drafting of this proposal, as regards its relationship with other measures, means that it **would not improve legal certainty** in this area **sufficiently**, particularly as regards the question of what happens if some Member States opt out from it.

Background

Currently, the transmission of criminal evidence between Member States of the EU is governed by a number of different legal instruments. First of all, the **Council of Europe** established back in 1959 a **Convention on mutual assistance in criminal matters**, which all Member States have ratified. The **First Protocol** to that Convention, adopted in 1978, has been ratified by all but one Member State (Malta). The **Second Protocol** to that Convention, adopted in 2001, has been ratified by only eleven Member States, but signed by thirteen more (the three non-signatories are Austria, Italy and Spain). These Council of Europe measures also have many non-Member States as contracting parties.

The EU has adopted a number of different measures building upon the Council of Europe Convention and its Protocols, namely: part of the **Schengen Convention** (Articles 48-53), which applies to all of the Member States except Ireland, plus also Norway, Iceland, Switzerland and (in future) Liechtenstein; an **EU Convention**

dating from **2000**, which entered into force in 2005 and which twenty-three Member States have ratified; a **Protocol** to that Convention dating from **2001**, also in force in 2005 and which twenty-two Member States have ratified; and a Framework Decision adopted in December 2008, establishing the **'European Evidence Warrant'** (EEW). Member States have to apply the Framework Decision by January 2011. Norway, Iceland, Switzerland and Liechtenstein will in future be covered by the 2000 EU Convention and its 2001 Protocol, but the Framework Decision establishing the EEW has not been extended to them. There is also a 2003 Framework Decision concerning **freezing orders** in relation to assets or evidence, which only applies to (all) EU Member States; a freezing measure under this Framework Decision is a preparatory step pending the subsequent transfer of evidence.

The proposed 'European Investigation Order' Directive

Relationship with existing rules

The proposal would repeal the Framework Decision establishing the European Evidence Warrant, and replace the 'corresponding' provisions of the Council of Europe mutual assistance Convention and its two protocols, as well as the EU mutual assistance Convention and its protocol, and the relevant provisions of the Schengen Convention, *as between participating EU Member States*. It would equally 'substitute' itself for the Framework Decision on freezing orders, as far as the freezing of evidence is concerned. To the extent that those acts apply to *non-*Member States (see above), they would remain in force as between the EU Member States and those non-Member States. (On the position as regards non-participating EU Member States, see below).

This raises the question of the extent to which the proposed Directive 'corresponds' to the prior EU and Council of Europe Conventions and Protocols – an issue discussed further below.

Legal basis and decision-making

The Directive has been proposed on the basis of Article 82(2)(a) of the Treaty of the Functioning of the European Union, concerning mutual recognition in criminal matters. This 'legal base' means that the proposal is subject to qualified majority voting in the Council with 'co-decision' of the European Parliament (known now as the 'ordinary legislative procedure'). This means that there is no veto for any Member State. Also, there is no power for any Member State to pull an 'emergency brake' to halt discussions if they perceive that the proposal threatens basic principles of their criminal justice system (such a procedure exists where other types of criminal law proposals are being discussed).

It might be questioned whether the part of the Directive dealing with 'controlled deliveries', as well as the clause dealing with surveillance, go beyond powers dealing with mutual recognition in criminal matters and extend to policing operational matters – in which case, the voting rule would be unanimity in Council and consultation of the EP.

Opt-outs

The UK and Ireland have three months to decide whether to opt in or out of the proposal, whereas Denmark is not bound by it at all. If the UK and/or Ireland decide not to opt in to discussions, the question will arise whether the proposal can be regarded as 'amending' an EU act by which those Member States are already bound. It will 'repeal' one EU act and 'substitute' itself partly for another, and 'replace' the corresponding provisions of some other EU acts (see above), but it is not clear whether such changes can be considered to be 'amendments'. In the event (and to the extent) that this proposal is considered to be an *amendment* of existing EU measures and the UK and/or Ireland opt out of it, the Council has the power (but not the obligation), acting by a qualified majority vote of participating Member States, to terminate the UK or Ireland's participation in existing EU measures – but *not* the relevant Council of Europe measures – to the extent that the non-participation of the UK and/or Ireland makes the situation 'inoperable' for the other Member States or the EU as a whole.

There are two further issues however. First of all, it might be argued that the proposed Directive builds in part upon the Schengen *acquis*, given that it replaces the corresponding provisions of the Schengen Convention, as well as the corresponding provisions of the EU's mutual assistance convention and the Protocol to that Convention which build upon the Schengen *acquis*. In this case, a different procedure relating to opting out applies: the Council (or failing that, the European Council or the Commission) will be *obliged* to disapply aspects of the existing acquis to the UK or Ireland. Furthermore, in that case then different rules would also apply to Denmark and the non-EU States associated with Schengen (Norway, Iceland, Switzerland, and Liechtenstein). The Member States proposing the European Investigation Order implicitly believe that it does not build upon the Schengen acquis, but the point might be disputed.

The second other issue is whether a specific unwritten rule applies where an EU act in which the UK, Ireland or Denmark *does not* participate in repeals a previous act in which one or more of those Member States *does* participate in. In that case the current UK Labour government has argued that the UK would no longer be bound by the prior EU act (it is not known what view is taken by the Irish or Danish government, by the Commission, Council, or other Member States, or which view would be taken by a future Conservative government in the UK, if there is one). If this view is correct, then Denmark (at least) and the UK and/or Ireland (if they opt out of this proposal) would automatically no longer be bound by the Framework Decision European Evidence Warrant, if it is repealed as proposed here. It might even be argued that the other EU measures which are 'replaced' or 'substituted' by this proposal would also not apply to Denmark, the UK or Ireland in this scenario, at least to the extent to which they are replaced or substituted. However, even if this interpretation is correct, again the UK, Ireland and Denmark will remain bound by the Council of Europe measures which they have ratified (and the other Member States which participate in the current proposal will remain obliged to apply those Council of Europe measures to those non-participants). It should be noted also that this interpretation, which is relevant also to issues like EU asylum legislation, can be contested, on the grounds that Member States' obligations to apply EU rules can only be terminated by means of the rules *explicitly* set out in Protocols to the Treaties (ie the rules mentioned in the two previous paragraphs).

Substance of the proposal: scope

The proposed Directive is based on the wording of the European Evidence Warrant, with certain amendments, and with the inclusion of some 'special' means of judicial cooperation which previously appeared in the 2000 EU mutual assistance Convention and its Protocol.

The scope of the EEW Framework Decision and the proposed EIO Directive is different. The EEW was conceived as a 'first-phase' measure, and it applied only to 'objects, documents or data' which already existed, and not to a series of sensitive issues, as follows (Article 4, Framework Decision):

> *2. The EEW shall not be issued for the purpose of requiring the executing authority to:*
> *(a) conduct interviews, take statements or initiate other types of hearings involving suspects, witnesses, experts or any other party;*
> *(b) carry out bodily examinations or obtain bodily material or biometric data directly from the body of any person, including DNA samples or fingerprints;*
> *(c) obtain information in real time such as through the interception of communications, covert surveillance or monitoring of bank accounts;*
> *(d) conduct analysis of existing objects, documents or data; and*
> *(e) obtain communications data retained by providers of a publicly available electronic communications service or a public communications network.*

The EEW Framework Decision also did not apply to obtaining criminal records (Article 4(3)), as this issue was subject to a separate EU measure which built upon the Council of Europe Convention and its Protocols (subsequent EU measures on this specific subject have since been adopted in 2009).

However, the EIO will cover **every** 'investigative measure' except only the following:

> *a) The setting up of a Joint Investigation Team and the gathering of evidence within a Joint Investigation Team as provided in Article 13 of the Convention of 29 May 2000 and in Framework Decision 2002/465/JHA;*
> *b) Interception and immediate transmission of telecommunications referred to in Articles 18(1)(a) of the Convention of 29 May 2000; and*
> *c) Interception of telecommunications referred to in Article 18(1)(b) of the Convention of 29 May 2000 insofar as they relate to situations referred to in Article 18(2)(a) and (c)*
> *and Article 20 of the same convention.*

The concept of 'investigative measure' is not defined, so it might also be questioned whether many other types of investigative processes are covered by the Directive or not. For instance, although the preamble to the proposed Directive excludes cross-border surveillance by police officers from its scope, the 2000 EU Convention also covers the separate issue of 'covert investigations' (Article 14, 2000 Convention). Is this an 'investigative measure' covered by the proposed Directive? If so, then the rules governing such investigations would change significantly, since the 2000 EU Convention gives the requested Member State a lot of leeway to refuse covert investigations on its territory, whereas the proposed Directive would take most of that leeway away. Also, the regulation of covert investigations arguably needs a different legal base – Article 89 of the Treaty,

which is the legal base for measures on the regulation of cross-border police activity, and which is subject to unanimity in Council and consultation of the EP.

Certainly it seems that the proposed Directive would regulate most issues excluded from the EEW – hearings, bodily examinations, analyzing data, and similar actions, along with obtaining bank data (which is mentioned in specific provisions of the Directive). The Directive also refers (Article 27(1)) to cases where (emphasis added):

> *…the EIO is issued for the purpose of executing a measure, including the one referred to in Article 25 and 26 [bank account monitoring and controlled deliveries], implying gathering of evidence in real time, continuously and over a certain period of time…*

This suggests that certain types of secret investigations will be covered by the proposed Directive, besides those explicitly mentioned; again such measures surely need a 'police operations' legal base (unanimous voting in Council). It is also not clear whether all forms of telecoms interception are outside the scope of the Directive, or only some (for instance, is the transfer of data retained by service providers, pursuant to the controversial data retention Directive, covered?). In principle it would also seem that the Directive possibly applies to obtaining criminal records, despite the existence of separate EU rules in this area.

Finally, it should be noted that the EU and Council of Europe mutual assistance rules apply to issues that probably cannot be considered as 'investigative measures', such as the restitution of property (mentioned in Article 8 of the 2000 EU Convention), plus a series of issues mentioned in Article 49 of the Schengen Convention:

> b) proceedings for claims for damages arising from wrongful prosecution or conviction;
> (c) clemency proceedings;
> (d) civil actions joined to criminal proceedings, as long as the criminal court has not yet taken a final decision in the criminal proceedings;
> (e) in the service of judicial documents relating to the enforcement of a sentence or a preventive measure, the imposition of a fine or the payment of costs for proceedings;
> (f) in respect of measures relating to the deferral of delivery or suspension of enforcement of a sentence or a preventive measure, to conditional release or to a stay or interruption of enforcement of a sentence or a preventive measure.

Presumably such provisions of the prior measures would not be replaced by the Directive, but the proposed Directive does not offer any clarity on the meaning of 'corresponding' provisions of previous measures which are replaced. In light of this, it is not clear whether the conditions to disapply the Council of Europe Convention on mutual assistance (Article 26(4) of the Convention) are in fact met:

> *Where, as between two or more Contracting Parties, mutual assistance in criminal matters is practised on the basis of uniform legislation or of a special system providing for the reciprocal application in their respective territories of measures of mutual assistance, these Parties shall, notwithstanding the provisions of this Convention, be free to regulate their mutual relations in this field exclusively in accordance with such legislation*

or system. Contracting Parties which, in accordance with this paragraph, exclude as between themselves the application of this Convention shall notify the Secretary General of the Council of Europe accordingly.

Grounds for refusal of investigation orders

The proposed Directive (Article 10) provides for a 'bonfire' of the main grounds that have traditionally been available to refuse a request for mutual assistance (or the execution of a European evidence warrant – see Article 13 of the Framework Decision), going far beyond other EU measures (like the European Arrest Warrant Framework Decision) on this point.

In particular, there would be **no grounds to refuse an order on the basis of double jeopardy** (*ne bis in idem*), even though this was a possible ground for refusal of an EEW (and freezing orders), is a *mandatory* ground for refusal of a European Arrest Warrant, and is a basic right enshrined in the EU's Charter of Fundamental Rights (Article 50).

Also, there is **no ground for refusal on grounds of dual criminality** – although the EEW (and the freezing orders Framework Decision) had retained this possibility as regards search and seizure, except for a standard list of 32 crimes where the dual criminality requirement was abolished, subject to a sentencing threshold (three years' possible sentence), and an extra safeguard for Germany as regards certain crimes. For search and seizure requests falling outside the scope of the EEW (such as requests for bank information, or body searches), Member States are currently free to retain dual criminality requirements as much as they wish (see Article 5 of the Council of Europe Convention, as modified by Article 51 of the Schengen Convention). This is the first time that any EU measure on mutual recognition has fully dropped this requirement. Even in the case of the European Arrest Warrant, Member States can refuse to exercise the warrant if the alleged act is not on the list of 32 crimes where the dual criminality requirement has been abolished.

Next, the exception for **territoriality**, ie the possibility to refuse where the alleged crime was committed in the territory of the requested (executing) Member State, would be dropped also – again for the first time in any EU measure.

The combination of these changes would mean that a person who committed an act which is **legal in the Member State where the act was carried out** could be subject to **body, house and business searches, financial investigations, some forms of covert surveillance**, or any other investigative measures within the scope of the Directive as regards **any 'crime' whatsoever** which exists under the law of **any other Member State**, if that other Member State extends jurisdiction for that crime beyond its own territory. Note that there is nothing in EU law or any other set of rules in this area which restricts a State from extending its extraterritorial jurisdiction over criminal offences.

A number of sundry other restrictions would also be removed:

a) the requirement that EEWs must be **proportionate** would be **dropped** (compare Article 7, EEW Framework Decision);
b) the requirement that an EEW could only be issued if the documents, etc could also be obtained in the issuing state under its law (if they had been present there) would be dropped –

allowing **blatant 'forum-shopping**' by prosecutors (compare Article 7, EEW Framework Decision);

c) the **data protection clause** in the EEW Framework Decision (Article 10) would be **dropped** along with the repeal of that Framework Decision, with no replacement clause suggested (it is possible that Article 23 of the 2000 EU Convention, or the EU's 2008 Framework Decision on personal data protection would apply, but there is no mention of this);

d) the flexibility of the executing Member State **not to carry out coercive measures**, and the possibility of applying a **validation procedure** where the order was not issued by a judge, etc (ie was **issued by a police officer**), would be **dropped** (see Articles 11 and 12, EEW Framework Decision);

e) the rules relating to **remedies** have been significantly **weakened** (Art 13 of EIO proposal, compared to Article 18, EEW), including dropping the rule that evidence transfers could be suspended pending appeal (Article 11(5), EEW Framework Decision);

f) the possibility of **videoconferences with suspects** is **no longer** subject to an **express protection for human rights**, and the requested Member State no longer has a blanket power to refuse these requests (Article 21(10) of EIO proposal; compare to Article 10(9), 2000 Convention);

g) many **restrictions** relating to **controlled deliveries** (ie 'sting' operations by police or customs officers) would be **dropped** (Article 26 of EIO proposal; compare to Article 12, 2000 Convention);

h) certain **restrictions** concerning **bank information** would be **dropped** (Articles 23-25 of EIO proposal; compare to Art 1(5), 2(4) and 3(3), 2001 Protocol).

Would there be any substitute protection for human rights? Article 1(3) of the proposed Directive is the same as the EEW Framework Decision, except for the addition of the second sentence below in the EIO proposal:

> This Directive shall not have the effect of modifying the obligation to respect the fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty, and any obligations incumbent on judicial authorities in this respect shall remain unaffected. This Directive shall likewise not have the effect of requiring Member States to take any measures in contradiction of its constitutional rules relating to freedom of association, freedom of the press and freedom of expression in other media.

However, such vague and general provisions, which have not yet been the subject of interpretation by the Court of Justice, are **not precise enough** to establish detailed obligations **to protect human rights** in Member States. Sufficient mutual trust can only be guaranteed by specific rules relating to issues such as search and seizure – and the current plans for EU legislation on suspects' rights do not even mention this issue.

In any event, the combined abolition of dual criminality *and* territoriality requirements represents both a **fundamental threat to the rule of law** in criminal law matters – which is required by Article 7 ECHR (legal certainty of criminal offences) and Article 8 ECHR in this field (invasions of privacy must be in

accordance with the law) – and an **attack on the national sovereignty** of Member States, which would in effect lose their power to define what acts are in fact criminal if committed on the territory of their State.

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Sources

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