PROKURATURA KRAJOWA

EUROPEAN JUDICIAL NETWORK
20 YEARS OF BUILDING MUTUAL TRUST

Report from the 2nd Regional Meeting of Contact Points of the European Judicial Network in Poland

On 1 and 2 October 2018 in Warsaw took place the 2nd Regional Meeting of the EJN Contact Points, representing Austria, the Czech Republic, Germany, Latvia, the Netherlands, Poland, Slovakia and Sweden (list of the participants in the attachment).

There were two main topics on the agenda:

1. Execution of freezing orders with a view of confiscation, with a special focus on orders concerning real estate, and
2. European Investigation Order – an added value of a new model of cooperation between EU Member States? EJN best practices for the European Investigation Order

Additionally Ola Löfgren, the Secretary to the EJN, presented the website of the EJN and its latest developments, but also different features with regard to the EIO, e.g. possibility of using the EJN Compendium in creating the form A, raising the question of using the Compendium as the secure channel of transmitting of the EIO forms between the issuing and executing authorities (the EJN secure channel is dedicated only to the exchange of information between the EJN CP, the Compendium could be used by all practitioners). He also mentioned a new initiative of the Commission regarding e-Evidence and involvement of the EJN in preparing practitioners' remarks to this proposal.

Ad 1

This topic was presented by the participants from each participating Member States. Among many issues the following were raised during discussions. Freezing of property for the purpose of confiscation can be requested on both legal basis – 2003 FR and MLAT. However, the freezing order would be recommended in more complicated cases as the merits for the issuing such orders are examined by the issuing State, otherwise than under the MLA regime where it takes place under the law of the executing State. Recovery of proceeds of crime means a possibility of confiscation. In this respect flexibility of the Dutch recovery and confiscation system was underlined, including an essential role of the criminal financial investigation (CFI). The objective of CFI is determination of gains obtained unlawfully. For the purpose of confiscation it is not required that a gain has been obtained through the offence that led to conviction. All decisions concerning real estates are announced to the land registry helping in identification of immovable property (example of Austria, Poland, the Slovak Republic and Sweden). Real estates are usually secured "on the paper", not physically, and under conditions determined by the law can be sold even without a consent of an accused (example of the Czech Republic). In the participating Member States there are different

solutions in regard to the administration of the seized real estate, e.g. in Germany it is in hands of a prosecution service; in the Slovak Republic – an administrator or a different – established person. Some of participants suggested that in situations where both – the freezing order and the EIO could be applicable, it would be advisable to use the EIO form and reduce a number of orders as the later confiscation of the seized object would be still possible (Germany). However, it was argued that after the change of the purpose a subsequent freezing order still would be needed (the Czech Republic). Some participant raised the value of the national guideline on tracing and seizure of property (e.g. Poland and the Netherlands).

Ad 2

The issues discussed with regard to the EIO were as follows:

a) Scope of the Directive (Latvia)
b) Central authorities and ways of facilitating communication between competent authorities (Germany)
c) EIO forms and their use by practitioners (Slovakia)
d) Time limits for execution and urgent EIOs (The Netherlands)
e) Grounds for refusal and alternative measures (Sweden)
f) Legal remedies (The Czech Republic)
g) Interceptions of communications with and without technical assistance of an executing Member State (Austria)
h) Use of preliminary investigation activities within the frames of an EIO procedure (Poland)

Scope of the Directive

The issue was introduced by Latvia. It was stated that according to the Directive an EIO is a judicial decision which has been issued or validated by a judicial authority of a Member State to have one or several specific investigative measure(s) carried out in another Member to obtain evidence. Additionally, in accordance with a point (34) of the preamble, the Directive, by virtue of its scope, deals also with provisional measures, but only with a view to gathering evidence. In this respect, it should be underlined that any item, including financial assets, may be subject to various provisional measures in the course of criminal proceedings, not only with a view to gathering evidence but also with a view to confiscation. Furthermore, for the same reason, the assessment of whether the item is to be used as evidence and therefore be the object of an EIO should be left to the issuing authority. The scope of the EIO is defined in the Article 3 of the Directive which implies that it covers any investigative measure and clearly excludes from its scope only the setting up of a JIT and gathering of evidence within such a team. Furthermore, in the Article 34 the relations of the Directive to other legal instruments, agreements and arrangements are determined.

The Latvian implementation provides for the following exceptions from the scope of the EIO:

1) setting up of a joint investigation team and collection of evidence conducted by JIT;
2) cross-border surveillance (provided for in the Convention on Implementing Schengen Agreement);
3) service and sending of procedural documents;
4) freezing property for the purpose of subsequent confiscation.

However, every case is evaluated on an individual basis.

Some of the participants were of the opinion that the Directive also covers the cross-border surveillance mentioned in the Article 17 of the Second Protocol to the 1959 MLAT. As measures outside of the EIO scope a transfer of proceedings on the basis of the Article 21and a spontaneous transfer of information in accordance with the Article 7 of the 2000 MLAT and the Article 11 of the Second Protocol to the 1959 MLAT were mentioned, as well as a return of property to the injured party (Article 8 of the 2000 MLAT and the Article 12 of the Second Protocol to the 1959 MLAT). There was a general agreement that the Directive does not cover gathering of extracts of the criminal records register, cross-border hot pursuit and observation "insofar it is considered to be a measure of police cooperation", and a hearing of a suspect by video-conference without his/her consent or by telephone conference (no matter if consenting).

Central authorities and ways of facilitating communication between competent authorities

Germany introduced discussion on the point of "ways of communication" between issuing and executing authorities. The issue was considered from the point of view of the nature of the EIO. In urgent cases electronic means for transmitting were suggested. It appeared during the discussion that there is a variety of systems regarding execution of the EIO (previously MLA requests) in participating Member States. In the Czech Republic, the Netherlands and the Slovak Republic there is "one jurisdiction" meaning that one prosecutor is responsible for coordination of execution of the EIO on the whole territory of the country. In Austria, Germany and Poland one EIO will be shared and subsequently sent in parts to competent – according to the place where the EIO is to be executed – authorities. However, it was proposed that before sending the EIO to the federal states it would be advisable to consult with representatives of the EJN/Eurojust whether coordination of execution will take place or more effective solution would be to send more than one EIO, but at once to different competent authorities. In Sweden there is also "the national competence" of prosecutors, but for instance in Latvia one EIO can be sent to the central authority for coordination.
Furthermore, the issue of secure channels of communication was raised due to the new data protection regime.

EIO forms and their use by practitioners

Slovakia raised several issues in regard to the use of the EIO forms. It was mentioned, among others, that due to a different EIO form in a Slovak transposition law and in the Directive (slight differences at the beginning – information in this form are considered as confidential, some words are different) a problem appeared which form should be used by translators and a solution regarding the use of the EIO form from the Directive was proposed.
Among general remarks in regard to the use of forms it was stressed that it is necessary to tick the box and fulfil the text; using block letters was recommended; in a case when there is more measures requested in one EIO sometimes the orientation is problematic, especially vis-à-vis sections C and I).
There were also practical remarks concerning specific sections of the EIO.

It was said that in the Section B reasons for urgency should be included, such as e.g.: a person being detained in custody, upcoming hearing dates, electronic evidence to be expired, statute of limitations, coordination with other requests and measures, expiring term for preliminary measures.
The Section C should include a brief explanation of the measure mentioned (connected formalities in the Section I). If an interrogation is requested questions should be put in this section or in the annex; information from the Police databases should be requested only if it is to be transformed into evidence; in some legal systems during the interrogation the status of victims can be problematic as they are also witnesses.
In regard to the Section D it was argued that also information on previous MLA request(s) should be stated.
The Section E should include an identity of a person concerned by investigative measure and not of an accused/suspected person as this information is to be included in the Section G.
In the Section F in Slovakia criminal proceedings will always be indicated.
The Section G covers the summary of the facts. Short and simple sentences are recommended in this respect. Additionally a clear description of the links between the offence and the person/investigative measure requested should be indicated. While giving a specification of criminal proceedings information of the known/unknown perpetrator should be given. An order authorising the investigative measure according to the national law when appropriate should be enclosed.
The Section I cover formalities connected with interrogation to be followed (e.g. signature of the person concerned, instruction about special rights and duties and if the statement of the person concerned should be enregistered in the written record). This Section also covers an instruction according to the national law of the issuing state (usually most important parts, the whole instruction in the annex). Interrogation can be preceded by a delivery of a formal decision (e.g. on charges).
In relation to the Section K the following elements were mentioned: information on a prosecutor issuing the EIO (not a prosecutor formally representing an office); an e-mail address of the office (not a person); an alternative authority if necessary (e.g. language skills, authority responsible for making practical arrangements for the transfer of evidence or person held in custody - temporary transfer).

Time limits for execution and urgent EIOs

The Netherlands contributed to the point in regard to the time limits under the EIO Directive. Firstly the legal framework of the EIO Directive was presented as follows:

Art 12(1)	speed & priority as in a similar domestic case
Art 12(2)	urgency/procedural deadlines
Art 16(1)	1 week for confirmation of receipt
Art 12(3)	30 days for recognition
Art 12(5)	recognition delayed > reasons + 30 days
Art 16(2)	incomplete form > inform *without delay*
Art 11(4)	supply additional information *without delay*
Art 10(4)	first, announce recourse to alternative measure

Art 16(3)	inform *without delay* decision to refuse/recourse to alternative
Art 12(4)	90 days for execution
Art 12(6)	execution delayed > reasons + consultation
Art 16(2)	problems > inform *without delay*
Art 13(1)	transfer of results *without undue delay.*

The Dutch implementation is compatible with the mentioned above provisions of the EIO Directive. Organisation of execution of the incoming EIOs provides for the dedicated capacity of resources and monitoring through shared registration system. Delay in transfer of materials may be caused if there is a demand to collect results in person. If additional information is required for the recognition the direct contact is needed. Problems in this regard may concern the language barrier or lack of awareness of the indicated authority on the EIO. A very flexible approach of the Dutch implementation in relation to execution of the urgent cases was underlined, for instance in such situation a digital EIO (via an e-mail) suffices, it is also possible to start execution as parallel investigation until EIO is received, furthermore all measures can be ordered verbally.

Grounds for refusal and alternative measures

Sweden introduced discussion on grounds for refusal and alternative measures. The Swedish legislation provides for the five compulsary and two optional grounds for refusal. The first group includes the following ones: if an execution should be in conflict with the legislation on immunity and privileges or in conflict with the protection for information hosted by certain persons (priests, doctors, lawyers, psychologists, etc.), if the EIO concerns seizure of documents that are protected from seizure due to the Swedish legislation (documents held by persons mentioned above); if the measure may jeopardize national security or the safety for a private person or for revealing intellegence activity; if the criminal act has been comitted outside the issuing country's territory and fully or partly in Sweden and the act is not a crime due to the Swedish law; if the measure asked for is not a measure described in the EIO Directive, however if another measure can be used that leads to the same result as the issuing country asked for, Sweden cannot refuse to execute the abovementioned. Optional grounds for refusal include: the *ne bis in idem* principle – if there is a final decision in Sweden or another country; lack of double criminality (unless it is one of the so-called catalogue crimes); if it, in order to take a corresponding measure in a Swedish pre-trial investigation or trial, is compulsary that it is a crime on which a custodial sentence in a certain time is followed and that demand is not fulfilled then the execution may be refused; due to the Swedish legislation (and the Directive) another measure may be used if the same result can be achieved with a less intrusive measure, however according to the Swedish gouvernment bill, before deciding of a less intrusive measure a prosecutor should consult the issuing authority before taking action. It was also mentioned that in Sweden a special act regulates an access to the bank records – a prosecutor just asks a bank to provide the bank records and the bank is obliged to present the documents.

Legal remedies

The point regarding the legal remedies vis-à-vis the EIO procedure was introduced by the Czech Republic. It was stressed that the Article 14 and the point (22) of the EIO Directive do

not stipulate obligation to introduce new legal remedies, but if domestic law stipulates legal remedies against certain actions in criminal proceedings, the EU Member States should ensure that equal remedies applied also to the corresponding actions of legal assistance on the basis of EIO. The substantive reasons for issuing the EIO may be challenged only in an action brought in the issuing state – without prejudice to the guaranties of fundamental rights in the executing state. The issuing and executing authorities should find a balance between confidentiality of investigation and providing information for the parties concerned about domestic remedies to allow their effective application, including time limits. A legal challenge shall not suspend the execution of the investigation measure – unless it is provided in similar domestic cases. The rights of the defence and the fairness of the proceedings have to be respected when assessing evidence obtained through the EIO. The issuing authority and the executing authority shall inform each other about the legal remedies sought against the issuing, recognition or execution of an EIO. Certificate – section J – an indication whether a legal remedy against the issuing of the EIO is applied and further details about it (it is not applicable in the Czech Republic). The issuing State shall take into account a successful challenging of the recognition or execution of EIO in accordance with its own national law. The Article 9(1) of the Directive states that the executing authority shall recognise EIO without any further formality being required. For this reason there is no formal decision on recognition in the Czech Republic and no legal remedies against recognition exist. In this respect as not grounded a preliminary ruling from the Spetsializiran nakazatelen sad (Bulgaria) lodged on 31 May 2017 — Criminal proceedings against Ivan Gavanozov (C-324/17) was mentioned. The case is still pending.

Interceptions of communications with and without technical assistance of an executing Member State

The issue of interception of telecommunications was introduced by Austria. The Austrian implementation of the Directive is included in Section 55 to 56b of the Federal Law on Judicial Cooperation in Criminal Matter with the Member States of the EU and it is valid since 1st July 2018.

If interceptions is carried out with the help of Austrian authorities the form A is necessary – no court order should be attached. A double criminality test will be introduced unless the offence is a list-offence and it is ticked, or it is a measure relating to the access and subscriber data. Compatibility with Austrian law is required. A decision is to be made by a public prosecutor with an authorisation of a court by an order subject to legal remedy.
In case of interception of telecommunications without the help of Austrian authorities the form C is required. It is up to a Public Prosecutor´s Office to check grounds for refusal, such as: facts committed outside the territory of the issuing state and not punishable under Austrian law; *ne-bis-in-idem*; incompatibility with Austrian law; immunities; circumvention of a right not to testify granted under Austrian law to a witness. The reaction (prohibition) on such interception is to be made within 96 hours. It was also mentioned that unlike in other countries in Austria the decision may be undertaken only before the interceptions has started. When interception is ongoing or has been finished using of form A was recommended, however some argued with this interpretation as the evidence is already in a possession of the

issuing authority. Additionally, the questions of "qualification" of bugging were raised (the trans-border observation vs. interception without technical assistance of the executing State; the issue of "tele" communications).

Use of preliminary investigation activities within the frames of an EIO procedure

The last point on the agenda was introduced by Poland – with the indication that under the EIO regime the division between judicial and Police cooperation is less clear than under the "old" MLA. In regard to the concept and examples of preliminary investigation activities under the Polish law it was indicated that there is no legal definition of such activities. However, it is believed that they cover covert activities of State's authorities, conducted on a statutory basis, having information, detective, preventive and evidentiary function. They include e.g.: surveillance, controlled delivery, covert investigation, operational control (interception). They are conducted by the Police and intelligence services, under special requirements (a list of offences, with a consent of a court and/or a prosecutor). Their results can be admissible as evidence in criminal proceedings.
Preliminary investigative measures indicated in the EIO Directive cover: the cross-border surveillance, the controlled deliveries as an example of investigative measures implying the gathering of evidence in real time, continuously and over a certain period of time and covert investigations. Previously all measures were indicated in the Second Protocol and/or 2000 MLAT. To execute such measures under the EIO procedure in Poland the following conditions need to be fulfilled: arrangement with a competent law enforcement service on the duration and conditions of execution of the measure; the EIO shall not be authorised by a prosecutor or a court without information on such; the execution may be refused if it does not contain information on the arrangement and the issuing authority fails to complete this information within the time limit specified by the court or the prosecutor; finally, the execution shall be refused if the measures specified would not be admissible in a similar national case.

ZASTĘPCA DYREKTORA
Biura Współpracy Międzynarodowej
Beata Hławacz
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