



EUROPEAN INVESTIGATION ORDER

Briefing Paper
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1) Background

- The proposal for a Directive regarding the European Investigation Order was first made on the **29th April 2010**.
- The proposal was made by **Belgium, Bulgaria, Estonia, Spain, Luxembourg, Austria, Slovenia and Sweden**.
- If implemented the Directive would replace **Framework Decision 2003/577/JHA**, which covers orders for freezing property or evidence, and **Framework Decision 2008/978/JHA**, which is the **European Evidence Warrant** provision.
- The justification given for this proposal is that *“with the adoption of Framework Decisions 2003/577/JHA and 2008/978/JHA it has become clear that the existing framework for the gathering of evidence is too fragmented and too complicated. A new approach is therefore necessary.”*¹
- This is a proposal that comes within the EU policy area of **Freedom, Security and Justice**. Thus the UK and Ireland have the option to **‘opt-in’** to this provision in accordance with Article 3 of Protocol No 21, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union.
- Such an ‘opt-in’ decision has to be made within 3 months of the proposal being made. **Therefore the deadline for the UK and Ireland to officially opt-in to this proposal for a Directive is the 28th July 2010**. HM Government formally announced their decision to opt-in on 27th July 2010.

2) European Investigation Order

- The EIO is based on the principle of **mutual recognition** of judgments and judicial decisions that underpins all judicial cooperation in criminal matters within the EU.

¹ Paragraph 5 of the proposal, Interinstitutional File: 2010/0817 (COD)

- Per Article 3, paragraph 2 the only specified measures **not** to be covered by the EIO are:
 - a) The setting up of a Joint Investigation Team and the gathering of evidence within a Joint Investigation Team²;
 - 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.

All else is permissible.

- According to Article 8, paragraph 1, the state which receives the EIO i.e. the executing authority, shall recognise an EIO transmitted in accordance with the Directive (Article 6) without any further formality being required.
- Once the EIO is transmitted the executing authority then must take the necessary measures for the EIO's execution in the same way and under the same protocols as if the investigative measure in question had been ordered by an authority of the executing State.
- The only grounds for refusing to execute the EIO is through invoking one of the very limited grounds for non-recognition or non-execution provided for in Article 10 or one of the grounds for postponement provided for in Article 14.
- These grounds are:

Article 10: Grounds for non-recognition or non-execution

- a) if there is an immunity or a privilege under the law of the executing State which makes it impossible to execute the EIO;
- b) if, in a specific case, its execution would harm essential national security interests, jeopardise the source of the information or involve the use of classified information relating to specific intelligence activities;
- c) if, in the cases mentioned in Article 9(1)(a) and (b) (where the investigative power does not exist in the executing state or is restricted to a certain category of offences), there is no other investigative measure available which will make it possible to achieve a similar result; or
- d) if the EIO has been issued in proceedings referred to in Article 4 (b) and (c) (infringements of the rule of law) and the measure would not be authorised in a similar national case.

Article 14: Grounds for postponement of recognition or execution

- a) its execution might prejudice an ongoing criminal investigation or prosecution until such time as the executing State deems reasonable; or
- b) the objects, documents, or data concerned are already being used in other proceedings until such time as they are no longer required for this purpose.

² As provided in Article 13 of the Convention of 29 May 2000 and in Framework Decision 2002/465/JHA

3) Concerns regarding the EIO

- There have been widespread concerns expressed regarding this proposal. Criticism of the proposal has not only focused on the threat to civil liberties but also the potential to put already overstretched police forces under even greater operational strain and the impact it will have on data protection and personal privacy. These concerns have not only been voiced in the media but also by civil liberty groups.
- For example, **Fair Trials International** highlight the below areas as key points of concern³:
 - The lack of express grounds for refusing to execute and EIO in key areas such as:
 - **breach of fundamental rights;**
 - **proportionality** (the offence is trivial and/or the request would involve disproportionate use of resources or unnecessary infringement of privacy or other fundamental rights)
 - **double jeopardy** (the person being investigated has already been tried for the same offence);
 - **territoriality** (the alleged offence was not committed in the issuing but in the executing State)
 - The absence of a **dual criminality** requirement (meaning one State could be required to investigate conduct it does not itself treat as criminal);
 - The **lack of protection for individuals in custody** who are transferred to other States for questioning;
 - The **absence of necessary safeguards** relating to evidence given via telephone and videoconferencing;
 - **The absence of provisions enabling the defence to request an EIO** to be issued where necessary in the interests of justice.
- **Fair Trials International⁴ concludes that the consequence of the EIO proposal would be injustices occurring because the defence team would be unable to gather and cite evidence effectively.** Ultimately there would be an inequality between the prosecution and the defence regarding evidence gathering.
- A **Statewatch** paper⁵ written by Steve Peers, Professor of Law, University of Essex, highlights many of the problems associated with the EIO proposal. It emphasises that this proposal removes the main grounds that have been traditionally available to refuse a request for mutual assistance. Professor Peers states that this proposal goes far beyond other EU measures, including the European Arrest Warrant.
- Professor Peers concludes that the combination of there being no grounds to refuse an order on the basis of double jeopardy or dual criminality, and the removal of the exception for territoriality⁶ 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

³ 29th June 2010. <http://www.fairtrials.net/images/uploads/European-Investigation-Order.pdf>

⁴ 29th June 2010 <http://www.fairtrials.net/images/uploads/European-Investigation-Order.pdf>

⁵ Statewatch May 2010: *The proposed European Investigation Order: Assault on human rights and national sovereignty*

<http://www.statewatch.org/analyses/no-96-european-investigation-order.pdf>

⁶ Territoriality is the possibility to refuse a request where the alleged crime was committed in the territory of the executing state

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."

4) What next?

1. The proposal will be discussed in the **Council of the European Union** (Council of Ministers) for the final draft. The Home Secretary, Theresa May said in the House of Commons, that the EIO was, "*not perfect*" but by opting in at this stage "*we have the opportunity to influence its precise outcome*", this is simply not true: HM Government cannot precisely influence its outcome. The outcome of the final Directive as it will be decided by Qualified Majority Voting. **There is no national veto that can be deployed if the Directive is unacceptable to the UK.**
2. The draft Directive will then be passed to the **Civil Liberties, Justice and Home Affairs Committee of the European Parliament** (of which the author is a member) for discussion and probable amendment.
3. The amended draft will then go before the **European Parliament**. The Parliament has the power to suggest amendments and vote 'Yes' or 'No' to the whole Directive. The final amended Directive is then approved, or not, by the Council. Under the Parliament's 'ordinary procedure' powers (previously co-decision procedure) the Council does not have the power to implement the Directive if they refuse the Parliament's amendments without a compromise being reached. However the Parliament is notoriously in favour of all measures that extend the power of the European Union and promote the 'European project' and are extremely unlikely to reject the Directive or propose amendments that are unacceptable to the Council.
4. **The Directive would then have to be implemented by HM Government by an Act of Parliament** – they have no choice in this matter. So even if the UK had a different Government in two years time they would be obligated to implement the Directive into law.
5. The timescale for implementation is estimated to be about two years from the entry into force of this Directive.

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