The European Investigation Order and its Relationship with Other Judicial Cooperation Instruments

Establishing Rules on the Scope and Possibilities of Application

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Article

ABSTRACT

The European Investigation Order (EIO) is a major step forward in judicial cooperation in criminal matters within the EU. It has become the main legal tool to gather trans-border evidence, replacing the traditional MLA conventions mainly used for this purpose so far. It co-exists with other instruments, however, which can also be used under certain conditions. This article analyses the EIO Directive and draws rules that guide practitioners as to when EIOs are necessary, when they are merely convenient, and when they cannot be used at all. The article defines a Basic Rule, a Replacement Rule, and a Compatibility Rule, which aim at making the legal scenario easier for practitioners to navigate. In an excursus, the article also deals with the question whether the speciality principle as known in tradition mutual legal assistance cooperation is also applicable to the EIO. The author argues that the speciality principle has not been affected by the EIO Directive and continues to be valid.

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> "Evolution is a change from an indefinite, incoherent homogeneity,
> to a definite coherent heterogeneity".
>
> Herbert Spencer (First Principles, 1862)

I. Introductory Remarks

The Directive regarding the European Investigation Order,[1] is fully applicable in practice now that 26 EU Member States, which are bound by the new instrument of judicial cooperation, have completed the transposition process.[2] It is a significant step forward in judicial cooperation when it comes to the trans-border gathering of evidence. The EU legal framework has been aligned with the provisions of Art. 82 TFEU, which indicates that "judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions (…)."

However, the European Investigation Order (hereinafter: EIO) is not the only applicable instrument for the purpose of trans-border gathering of evidence within the EU. Not all EU Member States are bound by the EIO Directive.[3] In fact, under certain circumstances, the Directive does not preclude the application of other international conventions on mutual legal assistance (MLA) by judicial authorities. Therefore, practitioners need a clear idea as to the situations in which it is compulsory to use an EIO, when it would be merely convenient to use it, or when it would be impossible to gather evidence abroad by means of an EIO.

Against this background, this article analyses the Directive and establishes a number of rules that clarify the scope and possibilities of application of the new instrument. These rules will help legal practitioners to decide whether an EIO is possible or not in any given case. They also offer guidance on the question of which provisions have been replaced by the EIO Directive and when certain conventions retain their applicability for trans-border evidence-gathering purposes. The rules will be categorised as follows:[4]

- A ***Basic Rule*** that defines the elements necessary for the issuing of an EIO (II. below);
- A ***Replacement Rule*** (III. below) that regulates the substitution of the following:
  - Certain parts of traditional MLA conventions and protocols that governed the gathering of evidence abroad between the EU Member States before the EIO;[5]
  - Two specific instruments of mutual recognition, i.e.:
    - Framework Decision 2008/978/JHA on the European Evidence Warrant (hereinafter: FD EEW), which was fully replaced by the EIO;
    - Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence (hereinafter: FD Freezing) that was only partly replaced by the EIO (as regards provisions connected with freezing of evidence).
- A ***Complementarity Rule*** that enables judicial authorities to continue to use other conventions for evidence-gathering purposes, provided that certain conditions are met (cf. below IV.).

II. The Basic Rule

As a starting point, it is necessary to analyse when the EU legislator wants the EIO to be used, because this will avoid misunderstandings in practice and ensure that the correct instrument of judicial cooperation is chosen in each individual case. We should therefore look at the following general provisions of the Directive, which indicate parameters on the applicability of the EIO:

> Art. 1(1): "A European Investigation Order (EIO) is a judicial decision which has been issued or validated by a judicial authority of a Member State ('the issuing State') to have one or several specific investigative measure(s) carried out in another Member State ('the executing State') to obtain evidence in accordance with this Directive. The EIO may also be issued for obtaining evidence that is already in the possession of the competent authorities of the executing State".
>
> Art. 3: "The EIO shall cover any investigative measure with the exception of the setting up of a joint investigation team and the gathering of evidence within such a team (…)".

These provisions on the aim and scope of the Directive must be read together with Art. 34(1), which does not provide for all provisions of the traditional MLA conventions and protocols to be replaced by the EIO but only the "corresponding provisions" (see further the Replacement Rule below III.). An accurate definition of the scope of the EIO by means of a Basic Rule is a precondition for clarification of which provisions of traditional MLA conventions and protocols can no longer be applied.

Instead of simply listing the provisions to be replaced by the EIO, the proposed approach is a guiding norm. From this norm it can be established when an EIO is necessary and, vice versa, when, due to lack of some of the elements of this Basic Rule, an EIO is not possible. First, this approach should be followed, because the legislator expressly decided not to include a legal list in the Directive, which would indeed have solved many uncertainties and led to legal certainty.[6] Second, attempts (by Eurojust and the EJN in a Joint Note,[7] as well as by some national authorities[8]) to set up a list including the various provisions from traditional MLA conventions and protocols deemed to still be valid resulted in an excessively casuistic approach. Such lists – no matter how comprehensive they are – risk opening the door to new examples and interpretations, thus even undermining the much needed legal certainty.

Taking the norms concerning the scope and aim of the EIO as the foundation of the Basic Rule, the rule can be formulated as follows:

"The EIO is

1. **a decision issued (or validated) by a judicial authority;**
2. **within criminal proceedings (in the sense defined in Art. 4 of the Directive);**
3. **consisting in investigative measures of trans-border nature;**
4. **aimed at gathering evidence;**
5. **among the Member States bound by the EIO Directive.**

When conditions set out in numbers 2 to 5 concur, the judicial authority must issue an EIO, unless other instruments are better placed to produce the desired results provided the conditions in the Compatibility Rule under Art. 34(3) of the Directive are met.

Conversely, if any of the five conditions above is missing, an EIO cannot be issued."

The new system based on the EIO is to be considered the preferred option whenever the necessary conditions are met, and this is reflected in recital 35.[9] It can also be seen to be a consequence of the general principle already quoted in Article 82.1 TFEU above, placing criminal judicial cooperation under the umbrella of the mutual recognition principle.

However, the applicability of this Basic Rule is subject to two caveats. In other words, there are two specific situations[10] in which the EIO cannot be used, even though all criteria of the Basic Rule are met:

- Evidence gathered within Joint Investigations Teams (hereinafter: JITs), because Art. 3 of the EIO Directive declares the continuation of the regulation on JITs as provided under Art. 13 of the 2000 MLA Convention and in Council Framework Decision 2002/465/JHA.
- Evidence-gathering rules provided by former or future EU mutual recognition instruments that must be considered *lex specialis* (e.g., requests for criminal records[11] or the gathering of e-evidence under a possible future Regulation[12]).

III. The Replacement Rule

The Basic Rule must be supplemented by a Replacement Rule. The latter takes up the provision in Art. 34 of the EIO Directive, which reads as follows:

> "1. Without prejudice to their application between Member States and third States and their temporary application by virtue of Article 35, this Directive replaces, as from 22 May 2017, the corresponding provisions of the following conventions applicable between the Member States bound by this Directive:
>
> (a) European Convention on Mutual Assistance in Criminal Matters of the Council of Europe of 20 April 1959, as well as its two additional protocols, and the bilateral agreements concluded pursuant to Article 26 thereof;
>
> (b) Convention implementing the Schengen Agreement;
>
> (c) Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and its protocol.
>
> 2. Framework Decision 2008/978/JHA is hereby replaced for the Member States bound by this Directive. Provisions of Framework Decision 2003/577/JHA are replaced for Member States bound by this Directive as regards freezing of evidence.
>
> For the Member States bound by this Directive, references to Framework Decision 2008/978/JHA and, as regards freezing of evidence, to Framework Decision 2003/577/JHA, shall be construed as references to this Directive."

Art. 34(1) clarifies that the EIO prevails over traditional MLA conventions and protocols that were the main legal basis for evidence-gathering in the context of judicial cooperation in criminal matters. The EIO is now the instrument to be used for such purposes, as the corresponding provisions of said conventions have been replaced.

Art. 34(2) establishes a similar rule, but it addresses two specific evidence-related instruments of mutual recognition, the FD EEW and the FD Freezing. Both instruments overlap with the scope of the new EIO Direct-

ive. Whereas the FD EEW has been fully replaced, the FD Freezing has only been partially replaced, i.e., as regards its provisions on the freezing of evidence (see also above).

On this basis, a Replacement Rule could be formulated as follows:

"Evidence-gathering provisions (the "corresponding provisions") from the traditional MLA conventions and protocols, the entire FD EEW, and provisions concerning freezing of evidence under FD 577/2003/JHA, are replaced by the EIO Directive and cannot be used, provided the Basic Rule applies."

The connection with the Basic Rule is necessary insofar as the replaced provisions are not to be used when an EIO is applicable.[13]

1. Replacement vs. repeal

Emphasis must be placed on the fact that the Directive is *replacing* but not *repealing* the traditional MLA conventions and protocols and the two specific mutual recognition instruments, respectively.[14] There are three main reasons for this approach:

- Formal reasons: The Directive cannot repeal the traditional MLA conventions and Protocols (even if that had been its intention), because specific formal rules exist for repealing or withdrawing from international treaties. The same holds true for repealing EU instruments, e.g., the FDEEW (see also below).
- Territorial reasons: The EIO is not a binding instrument for all EU Member States. Therefore, the traditional MLA conventions and protocols must remain in place in order to continue cooperation with Denmark and Ireland as well as with third countries that are parties to these international treaties.
- Substantive reasons: As mentioned above, the replacement is limited to the "corresponding provisions" connected to the gathering (or to the freezing) of evidence, i.e., the EIO Directive takes only a sectorial approach.

It should be noted, however, that, despite the provision in Art. 34(2) of the EIO Directive, the FD EEW was repealed by Regulation 2016/95 of 20 January 2016.[15] Although this led to the FD EEW being fully expelled from the EU legal framework, the EIO Directive did not foresee this consequence. The repeal was made two years after publication of the EIO Directive and by means of a specific repeal instrument; thus, it did not stem from Art. 34(2). The legislator of the EIO Directive initially did not want to permanently eliminate the EEW from the legal scenario.

2. Examples of non-replaced provisions

As a complement to the system of the Basic Rule and as clarification for the Replacement Rule, the following text passages offer several examples of specific provisions that can be considered not to have been replaced by the EIO Directive. The various cases, in which certain provisions from the traditional MLA conventions and protocols appear to remain applicable, have been systematised in three categories. As we will see, the Basic Rule as discussed above (II.) serves as the basis for the findings below.

a) Non-replaced provisions due to the policing (and non-judicial) nature of the cooperation

First, cooperation can have a non-judicial nature. This affects, for instance, trans-border surveillance (provided for in Art. 40 CISA), which is even specifically mentioned as not being a covered measure – and

therefore not being replaced by recital 9 of the Directive. Another example is hot pursuit (provided for in Art. 41 CISA).

Both measures are also specifically mentioned in the Joint Note Eurojust-EJN, and there seems to be wide consensus among practitioners that the EIO does not replace them. In my view, this is true, as long as they are considered police measures.

It can also happen that a judicial authority decides to carry out trans-border surveillance.[16] In the affirmative, this would not be a police but a judicial measure and must therefore be vetted in accordance with the criteria of the Basic Rule. It follows that such cases would require an EIO: the provision of Art. 40 CISA would not be applicable, because it is not a measure of police cooperation but a judicial one.[17]

In addition, the Joint Note Eurojust-EJN includes the provisions of Framework Decision 2006/960/JHA on simplifying the exchange of information and intelligence, the measures mentioned in Art. 39(2) CISA, and the measures under the Naples II Convention (customs cooperation) as not being replaced by the EIO. In contrast to the Joint Note, which mentions these provisions/measures in the context of the corresponding provisions not replaced by Art. 34(1) of the Directive, it must be borne in mind that these are different instruments – they are therefore *per se* not subject to the Replacement Rule of the Directive.

b) Non-replaced provisions because there is no evidence-gathering purpose

Widespread consensus has been reached that certain measures, which are not specifically aimed at gathering evidence – and therefore do not meet the corresponding criteria of the Basic Rule, can be considered excluded from the scope of the EIO. As a result, traditional rogatory letters (hereinafter: LoRs) or mutual legal assistance requests must be used for such activities in accordance with the traditional conventions and protocols. This comprises, for instance, service of documents and summons (Art. 5 of the 2000 MLA Convention), the spontaneous exchange of information (Art. 7 of the 2000 MLA Convention), returning objects to the injured party (Art. 8 of the 2000 MLA Convention), and transfer of proceedings or information with a view to proceedings being opened by another country (Art. 21 of the 1959 MLA Convention).[18] The EIO never intended to cover these cases (cf. Art. 1 and 3 of the Directive).Although this matter has not been the subject of in-depth discussions yet, judicial requests aimed at taking down an Internet server should be added to this category of measures, which pursues a different goal than evidence-gathering. Such requests are becoming increasingly common in cases of cybercrime and cyberattacks, where this measure is necessary – not so much to gather evidence but to ensure that the criminal activity is discontinued. It is therefore a sort of precautionary measure but not an evidence-gathering one. Thus, it also does not meet the Basic Rule but would instead require a traditional LoR.[19]

c) Non-replaced provisions by virtue of law

As indicated under II., Art. 3 of the EIO Directive specifically provides for the continuation of previous JIT provisions under the 2000 MLA Convention and the so-called JIT Framework Decision. This is a logical exclusion from the EIO scope, because the very nature of a JIT allows evidence-gathering measures to be taken internally, and the evidence gathered is automatically put at the disposal of all parties to the JIT without the need to resort to other judicial cooperation instruments. Therefore, the JIT legal framework excludes LoRs, which is why it makes sense to maintain the same regime in the EIO context that (only) replaces most traditional LoRs.

Without prejudice to the express provision of Art. 3, in my view, the exclusion of JITs can also be deduced from the Basic Rule: the trans-border nature of the measures adopted as part of a JIT does not in practice mean that any of the judicial authorities involved actually issue orders to be executed beyond its jurisdiction.

Quite the opposite is true: measures are discussed and agreed following an operational plan for each specific case as provided for in the JIT Agreement; each judicial authority issues orders and executes measures exclusively within its own jurisdiction. As a result, judicial decisions lack the trans-border element of the Basic Rule, which is why an EIO would not have been possible anyway. In sum, the exclusion of JITs from the scope of the EIO may be considered more natural than apparent at first sight. The rationale of Art. 3 is, on the one hand, to legally establish the remaining validity of Art. 13 of the 2000 MLA Convention (and thus clarify that it is not part of the replaced "corresponding provisions") and, on the other, to protect the normal functioning of a JIT, precluding the use of EIOs as long as the JIT is operational.

IV. The Compatibility Rule

Whereas Art. 34(1) of the EIO Directive posits the EIO as the heir to traditional Conventions and Protocols, Art. 34 (3) and (4) open the way for the applicability of other cooperation instruments if the purpose of the EIO can be better achieved by them. The wording of the relevant paragraphs of Art. 34 is as follows:

> "3. In addition to this Directive, Member States may conclude or continue to apply bilateral or multilateral agreements or arrangements with other Member States after 22 May 2017 only insofar as these make it possible to further strengthen the aims of this 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
>
> 4. Member States shall notify to the Commission by 22 May 2017 the existing agreements and arrangements referred to in paragraph 3 which they wish to continue to apply. Member States shall also notify the Commission within three months of the signing of any new agreement or arrangement referred to in paragraph 3."

Art. 34(3) indicates that other cooperation instruments can be applied only under certain conditions, which can be traced back to the default situation, as stated in Art. 82 TFEU, that judicial cooperation must be based on the mutual recognition principle. As a result, we can formulate a *Compatibility Rule* as follows:

"Even in cases where the Basic Rule would apply, existing or future bilateral or multilateral agreements or arrangements (but not the traditional MLA conventions and protocols replaced under Article 34(1)) could be used instead of the EIO, if the alternative instrument complies with all three of the following conditions:

a) further strengthens the aims of the EIO Directive,

b) simplifies or further facilitates the procedures for gathering evidence, and

c) respects the level of safeguards set out in the Directive.

Failing to comply with the obligation defined under Article 34(4) to notify to the Commission the above agreements does not affect applicability of the agreements/arrangements.

The Compatibility Rule does not apply to other (existing or future) EU mutual recognition instruments, which could be applicable instead of the EIO as lex specialis, but not due to the provisions of Art. 34(3)."

1. The conditions of the Compatibility Rule

The wording in the EIO Directive indicates that the three conditions indicated in the Compatibility Rule are not alternative but cumulative, i.e., all of them must concur so that an alternative instrument is possible. Thus, any other bilateral or multilateral instrument can be used instead of an EIO only inasmuch as it offers at least

a similar standard on safeguards (condition c)) and provided that the use of this alternative instrument results in better, simpler, and faster cooperation (conditions a) and b)).

2. The scope of the Compatibility Rule

The Compatibility Rule refers to "*bilateral or multilateral agreements or arrangements with other Member States.*" This concept includes all sorts of international instruments (treaties and conventions) which the EU Members States concerned are parties to (even if it is a multilateral convention that also includes third countries, e.g., the conventions concluded in the framework of the Council of Europe or the United Nations). This opens the door for the applicability of a number of specific instruments (e.g., the 2001 Budapest Convention on Cybercrime) if the above-mentioned specified conditions are met.

By contrast, the wording of the Compatibility Rule entails that it cannot be applied to (existing or future) EU mutual recognition instruments– because they are not "*agreements or arrangements*", but pieces of EU legislation. The provision of Art. 34(4) also underpins this argument because a notification to the Commission can logically not include pieces of EU legislation that are perfectly known to the Commission. As mentioned under II. other EU legislation on cross-border gathering of evidence can apply instead of an EIO as *lex specialis*, as it is e.g. the case for criminal records or – as far as future instruments are concerned – under the *lex posterior* rule (e.g. the European Preservation and Production Orders on e-evidence), but not as a consequence of the Compatibility Rule.

3. The relationship between the Compatibility and the Replacement Rule

There is much discussion among practitioners as to whether the Compatibility Rule can be applied also to provisions affected by the Replacement Rule.[20] In my opinion, Art. 34(1) of the Directive, i.e., the Replacement Rule, takes precedence over Art. 34(3), i.e., the Compatibility Rule. Consequently, a judicial authority is not able to use a LoR instead of an EIO, even if the use of a replaced provision on evidence-gathering in the traditional conventions and protocols would fulfil the conditions of the Compatibility Rule in a given case. The Replacement Rule is not conditional or optional, but a clear imperative legislative decision that allows for no exceptions.

This position is backed by the ECJ case law.[21] With regards to similar provision in Art. 31 of the Framework Decision on the European Arrest Warrant, the ECJ held in *Goicoechea*:[22]

> "Article 31(2) of the Framework Decision allows the Member States to continue to apply bilateral or multilateral agreements or arrangements in force at the time of adoption of the decision, or to conclude such bilateral or multilateral agreements or arrangements after the entry into force of the decision in so far as they allow the prescriptions of the decision to be extended or enlarged and help to simplify or facilitate further the procedures for surrender of persons who are the subject of European arrest warrants.
>
> However, that provision cannot refer to the conventions mentioned in Article 31(1) of the Framework Decision, since the objective of the decision is precisely to replace them by a simpler and more effective system (…)."

Albeit, the ECJ's decision refers to a different cooperation instrument, i.e., the European Arrest Warrant. The parallelism to Art. 34 of the EIO Directive is obvious, and there are no reasons to sustain a different interpretation for the EIO in this respect.

4. Notification to the European Commission

Some clarifications need to be made as regards the notification of existing or future agreements/arrangements in accordance with Art. 34(4) of the EIO Directive. Questions have been raised as to the nature of this provision and as to whether the lack of notification would prevent an EU Member State from continuing to use such bilateral or multilateral conventions. In my opinion, the lack of notification should not affect the applicability of the conventions themselves. The first reason for this stance is that the notification is not included in Art. 34(3) as a further condition for application of the Compatibility Rule. The EU legislator conceived it as a separate Member State obligation. Accordingly, notifications are considered to be different from a legal condition, instead intended to give clarity to the applicable legal framework. While the conditions set out under Art. 34(3) are addressed to individual judicial authorities (which assess the applicability of a different instrument instead of an EIO), Art. 34(4) addresses the Member States as such. With the regulation in two different paragraphs of Art. 34, it is thus made clear that the purpose and consequences of the two provisions are fundamentally different.

Secondly, a too rigid interpretation would lead to every Member State having to notify virtually any convention or treaty ever concluded in the area of international cooperation in criminal matters – and those concluded from this moment onwards – in order to avoid the risk of doubt as to the validity of the evidence gathered through other instruments.

Third, it would be contrary to the established international rules if the mere lack of communication to the Commission produces legal effects of validity, because international treaties follow their own formal rules (see also above III.1.).

V. Excursus: The Continuing Applicability of the Speciality Principle

During the discussions on the applicable rules, a specific question was raised as to whether the speciality principle continues to apply under the EIO. The speciality principle was originally developed in the area of extradition law and can be understood in the present context as precluding the issuing authorities from using the evidence received via the execution of an EIO for any other purposes and proceedings than those for which the EIO was originally issued, unless specifically authorised to do so by the executing authority. The issue on the continuation of the speciality principle under the EIO regime surely deserves more in-depth reflection, but in view of its high practical relevance, some brief comments on this problem are appropriate, especially since the question is also connected to the rules developed above.

The issue was discussed at the 2018 Eurojust Meeting on the EIO[23] without consensus being reached and the unclear situation was subsequently acknowledged at the level of the Council Working Group.[24] In my opinion, the speciality principle has not been affected by the EIO Directive and continues to be valid.[25]

A first reason relates to Art. 6 of the EIO Directive. It establishes that the issuing authority must assess the necessity and proportionality of the measures "for the purpose of the proceedings" and whether those measures "could have been ordered under the same conditions in a similar domestic case." These factors can also be controlled by the executing authority, triggering a consultation process. In my view, this implies the remaining validity of the speciality principle, because, otherwise, it would be absurd to establish a system based on the necessity and the proportionality check of measures linked to a concrete case if, after having received the results of the execution, the issuing authority remained free to use them for any other proceedings, thus rendering the safeguards provided for in Art. 6 completely useless.

Second, another element of the speciality principle is data protection rules, which stipulate the purpose limitation principle. However, this principle of data protection law is governed by Art. 23 of the 2000 MLA Convention 2000[26] – a provision that, in my opinion, has not been replaced by the EIO Directive. In this context, the Basic and Replacement Rules come into play: Art. 23 cannot be considered a replaced corresponding provision and therefore remains fully applicable and unaffected by the EIO Directive. The understanding that the purpose limitation principle has not been cast aside by the EIO is also mirrored by some transposition legislation, e.g., the Spanish Law on Mutual Recognition.[27] It also seems to be the position of the European lawmaker as regards the future Regulation on European Preservation and Production Orders.[28]

From a practical viewpoint, a third argument is, ultimately, that it hardly seems encouraging if executing authorities do not have assurance that information provided will not be used for other purposes or proceedings than those specifically stated in any given EIO.

VI. Conclusions

This article illustrated that the question on the relationship between the EIO and other – existing or future – legal instruments of judicial cooperation in criminal matters is currently one of the major challenges in practice. I strived to develop a theoretical blueprint from which decisions can be drawn in each concrete case. The developed rules include the necessary clarification for all legal practitioners as to when an EIO is to be used:

Basic Rule

(defining when an EIO is to be used):

"The EIO is

1. **a decision issued (or validated) by a judicial authority;**
2. **within criminal proceedings (in the sense defined in Art. 4 of the Directive);**
3. **consisting in investigative measures of trans-border nature;**
4. **aimed at gathering evidence;**
5. **among the Member States bound by the EIO Directive.**

When conditions set out in numbers 2 to 5 concur, the judicial authority must issue an EIO, unless other instruments are better placed to produce the desired results provided the conditions in the Compatibility Rule under Art. 34(3) of the Directive are met.

Conversely, if any of the five conditions above is missing, an EIO cannot be issued."

Replacement Rule

(developed from Art. 34(1) and (2) of the EIO Directive, defining the exclusion of the applicability of other existing evidence-gathering provisions):

"Evidence-gathering provisions (the "corresponding provisions") from the traditional MLA conventions and protocols, the entire FD EEW, and provisions concerning freezing of evidence under FD 577/2003/JHA, are replaced by the EIO Directive and cannot be used, provided the Basic Rule applies."

Compatibility Rule

(stemming from Art. 34(3) and (4) of the EIO Directive, indicating the co-existence of the EIO with other judicial cooperation instruments):

"Even in cases where the Basic Rule would apply, existing or future bilateral or multilateral agreements or arrangements (but not the traditional MLA conventions and protocols replaced under Article 34(1)) could be used instead of the EIO, if the alternative instrument complies with all three of the following conditions:

1. **further strengthening of the aims of the EIO Directive;**
2. **simplification or further facilitation of the procedures for gathering evidence;**
3. **respect for the level of safeguards set out in the Directive.**

Failure to comply with the obligation defined under Article 34(4) to notify to the Commission of the above agreements does not affect applicability of the agreements/arrangements.

The Compatibility Rule does not apply to other (existing or future) EU mutual recognition instruments, which may be applicable instead of the EIO as lex specialis, but not due to the provisions of Art. 34(3)."

In addition to the above and as regards the speciality principle, it must be understood that it remains valid and applicable to the EIO Directive.

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1. Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, *O.J.* L 130, 1.5.2014, 1.↩
2. The Directive had to be transposed by 22 May 2017. However, it took until 15 September 2018 for the last Member State to complete the transposition, finally making the Directive fully applicable in practice for all.↩
3. According to recitals 44 and 45 of the Directive, Ireland and Denmark are not bound by it, in accordance with Protocols No. 21 and 22 annexed to the TEU and the TFEU.↩
4. I first suggested this three-tiered approach based on "Basic, Replacement and Complementarity Rules" in my presentation on "*The EIO and its Relationship with other Conventions*" at the Summer Course organised by the Universidad Internacional Menéndez Pelayo in Santander on 20–22 August 2018. A similar approach as regards the Basic Rule was also mentioned in the Conclusions of the Eurojust Meeting on the EIO that took place on 19–20 September 2018 (cf. Council doc. 15735/18 and the article of Guerra/Janssens, in this issue).↩
5. According to Article 34.1, these are the European Convention on Mutual Assistance in Criminal Matters of the Council of Europe of 20 April 1959 (hereinafter: 1959 MLA Convention), its two additional protocols, and the bilateral agreements concluded pursuant to Art. 26 thereof; the Convention implementing the Schengen Agreement (hereinafter: CISA); and the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and its protocol (hereinafter: 2000 MLA Convention).↩
6. There was an attempt in 2011 to define a list of corresponding provisions to be replaced by the EIO (Council doc. 14445/11), but the effort was then abandoned and no further progress was made.↩
7. "Note on the meaning of corresponding provisions and the applicable legal regime in case of delayed transposition of the EIO Directive," 2 May 2017, Council doc. 9936/17. The Note contains interesting reflections on these topics.↩
8. A number of Member States have also tried to provide answers to some of the open questions either through provisions in the implementing legislation or through Instructions or Notes prepared by the relevant national authorities (regularly General Prosecution Offices). One example is Note 1/17 issued by the International Cooperation Unit of the Spanish General Prosecutor's Office of 19 May 2017, where consideration is given to which provisions of the traditional conventions and protocols could still be valid after entry into force of the EIO.↩
9. Recital 35 specifically declares: "Where reference is made to mutual assistance in relevant international instruments, such as in conventions concluded within the Council of Europe, it should be understood that between the Member States bound by this Directive it takes precedence over those conventions."↩
10. See also III.2.c) and IV.2 below.↩
11. Framework Decision 2009/316/JHA on the establishment of the European Criminal Record Information System (ECRIS).↩
12. See the proposal by the Commission for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters (COM/2018/225 final), currently being discussed in the European Parliament and Council. For details, see eucrim 4/2018, 206 with further references and *S. Tosca*, eucrim 4/2018, 212 et seq.↩
13. If, for whatever reasons, an EIO is not due, the "corresponding provisions" are applicable (because they have not been replaced). This would be the case, for instance, for requests concerning Denmark or Ireland.↩
14. In line with the Joint Note Eurojust-EJN, mention should be made of a case-law precedent unequivocally supporting this distinction between replacing and repealing. It is connected to a different instrument, the European Arrest Warrant, where a similar situation arose (the EAW Framework Decision also used the mechanism of replacing existing extradition conventions) and where the European Court of Justice (case C-296/08) had the chance to rule 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 (…) also in other situations in which the European arrest warrant system is not applicable."↩

15. *O.J.* L 26, 2.2.2016, 9–12.↩
16. This caveat would also be valid for hot pursuit measures under Art. 41 CISA, at least in theory. It appears much more difficult to find a realistic example where something as spontaneous and unpredictable as a hot pursuit could be decided beforehand by a judicial authority.↩
17. In addition: Art. 17 of the 2nd Additional Protocol to the 1959 Convention, which refers to *judicial* trans-border surveillance, does not apply either, because it is fully affected by the Replacement Rule and is among the provisions replaced by the EIO Directive.↩
18. See also the Joint Note Eurojust-EJN, op. cit. (n. 7).↩
19. Whether this measure should be based on the traditional MLA conventions and protocols or on a different legal instrument (in particular, the 2001 Budapest Convention on Cybercrime of the Council of Europe) is connected to the Compatibility Rule (see below) but not to the Replacement Rule.↩
20. See, in this context, particularly Germany's declaration of 14 March 2017, which indicated that bilateral agreements supplementing the 1959 MLA Convention are considered to continue to apply to cross-border acquisition of evidence.↩
21. See also Joint Note Eurojust EJN, op. cit. (n. 7), p. 23.↩
22. CJEU, 12 August 2008, case C-296/08 (*Ignacio Pedro Santesteban Goicoechea*), paras 54 and 55 (emphasis added by the author).↩
23. See note 4.↩
24. Council doc. 14750/18 of 27 November 2018.↩
25. See also J. Barbosa e Silva, "The Speciality rule in cross-border evidence gathering and in the EIO – let's clear the air", (2019) 19 *ERA Forum*, 485–504.↩
26. "Personal data communicated under this Convention may be used by the Member State to which they have been transferred: (a) for the purpose of proceedings to which this Convention applies; (b) for other judicial and administrative proceedings directly related to proceedings referred to under point (a); (c) for preventing an immediate and serious threat to public security; (d) for any other purpose, only with the prior consent of the communicating Member State, unless the Member State concerned has obtained the consent of the data subject."↩
27. Article 193 of Law 23/2014, as amended by Law 3/2018, copies the wording of Art. 23(1) of the 2000 MLA Convention stating that the Spanish issuing authority will guarantee use of the personal data obtained by way of execution of an EIO to be limited to the proceedings for which they were requested, or on those directly linked to them, requiring specific authorisation from the executing authority for all other cases.↩
28. Even though the proposal from the Commission did not contain a provision on the speciality principle, negotiations in the Council Working Group apparently ended up including a new article regulating such a speciality principle, roughly along the lines provided for by said Art. 23 of the 2000 MLA Convention. The instrument is still being discussed by the European Parliament, but the reaction at the Council level is an indication of what the opinion of the EU lawmakers might be on this issue.↩

* Author statement

The opinions expressed in this article are purely personal and do not necessarily reflect the opinions or positions of any of the bodies or institutions for which I have worked or currently work for (in particular, the Spanish General Prosecutor's Office and Eurojust).

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