



Statewatch Analysis - Update

The Proposed European Investigation Order

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Introduction

In April 2010, 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.

A **previous analysis for Statewatch**, at the time that the proposal was released, argued that ‘many of the changes proposed to the current legal framework’ by this initiative ‘would constitute a **reduction in human rights protection** and even...an **attack on the national sovereignty** of Member States’, and that ‘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’.

Over six months after the initial proposal was made, it has been discussed intensively in the Council, and a number of significant changes have been made to the text. This updated analysis examines the potential impact of these changes. It will be seen that while the proposed changes will entail a significant improvement as compared to the original proposal, there remain significant flaws with the proposed EIO.

Background

The previous Statewatch analysis explained the background to this proposal, in particular the large number of different legal instruments which govern the transmission of criminal evidence between Member States of the EU, notably a Council of Europe Convention on mutual assistance with two Protocols, and EU measures building upon those treaties: parts of the **Schengen Convention** (Articles 48-53); an **EU Convention** dating from **2000**; a **Protocol** to that Convention dating from **2001**; a Framework Decision adopted in December 2008 (and which Member

States must apply from January 2011), establishing the ‘**European Evidence Warrant**’ (EEW); and a 2003 Framework Decision concerning **freezing orders** in relation to assets or evidence. Some of these measures apply (or will apply) wholly or in part to non-Member States, whereas some have not yet been ratified or are otherwise not yet applicable to some Member States.

Issues arising from the Directive - update

Relationship with prior measures

As pointed out in the previous analysis, the proposed Directive 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).

Issues of legal basis

Also, it was questioned in the previous analysis whether the proposed legal basis of the Directive – Article 82(2)(a) of the Treaty of the Functioning of the European Union (TFEU), concerning mutual recognition in criminal matters – is in fact adequate, given that the Directive appears also to regulate issues concerning police operations and cross-border activities by police or judicial bodies – the subject of Articles 87(3) and 89 TFEU. The relevance of this point is that if Article 82(2)(a) alone applies, 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, and 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. However, if Articles 87(3) and 89 apply in part, then the Directive is subject to unanimous voting. The discussions to date have not yet recognized this potential issue.

Opt-outs

The UK and Ireland had three months to decide whether to opt in or out of the proposal, whereas Denmark is not bound by it at all. The UK has opted in (*after* the change in government to a Conservative and Liberal Democrat coalition in May), while Ireland did not, although it is possible for Ireland to opt in after adoption of this measure. According to the rules in the ‘Title V’ Protocol governing the British and Irish opt-outs from EU Justice and Home Affairs law, the question now arises

whether the proposal can be regarded as ‘amending’ an EU act by which those Member States are already bound. 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, 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.

However, an underlying issue is whether the Directive can be regarded as building in part upon the Schengen *acquis* (ie the prior rules emanating from the Schengen Convention), 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*. If that is the 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 Ireland, because it had a *prima facie* obligation to opt in to measures building upon the *acquis*. Furthermore, in that case the proposal would also apply to some extent 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.

Another question was 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 question is whether the Member State not participating in the new measure would no longer be bound by the prior EU act that has been repealed (which was the view of the prior UK government). This point arguably also arises as regards the other EU measures which would be ‘replaced’ or ‘substituted’ by this proposal. It should be noted that this issue is relevant not just to this proposal but to a number of other proposals now under discussion – such as the proposals on trafficking in persons (which the UK has opted out of) and on asylum legislation (which the UK and Ireland have mostly opted out of, except for the rules on responsibility for asylum applications).

It is understood that the **Council legal service has issued an opinion** on these issues in general and as regards the EIO proposal in particular. This opinion is not available to the public, but it is understood that the Council legal service has argued that:

- a) the proposal does not build upon the Schengen *acquis*, since it concerns *mutual recognition* as distinct from mutual assistance (the Framework Decision establishing the EEW was also assumed not to build upon the Schengen *acquis*, following the same logic);
- b) the repeal of a previous EU act by a later measure is not binding on those Member States which participated in the earlier measure, but which did not

- participate in the later measure (ie the non-participants remain bound by the previous act), unless the later measure explicitly states otherwise;
- c) there should be a rule that in such circumstances, if a new measure does not either establish a system for cooperation between national bodies or create a structure like an agency or information system, the non-participants in the new rules should remain bound by the rules in the previous act (which would mean the UK and Ireland will remain bound by the existing EU legislation on asylum, and the UK will remain bound by the existing EU legislation on trafficking in persons);
 - d) where the later act concerns a system for cooperation between national bodies or creates a structure like an agency or information system, the special rules in the 'Title V Protocol' which permit the Council to remove the UK or Ireland from its participation in existing measures on the grounds that non-participation in the new measures makes the system 'inoperable' for other Member States or the EU apply;
 - e) the same rule applies to Denmark, even though the provisions on this point in a special protocol relating to Denmark and JHA matters have not been invoked by Denmark and cannot apply until Denmark invokes them;
 - f) a repeal of a prior measure must also be considered to be an 'amendment' of that prior measure (so that the special rules on potentially removing the UK or Ireland from participating in that prior measure would apply);
 - g) applying these rules to the facts, however, the continued application of Council of Europe and EU conventions between Ireland and other Member States (given that Ireland does not in fact apply some of the measures concerned) will not result in an 'inoperable' situation;
 - h) however, it is up to the Council to assess whether the same is true for the EU Framework Decisions which would be repealed by the Directive; and
 - i) according to the rules in the Title V Protocol, the Commission would first of all have to propose the removal of Ireland from the prior EU legislation in which it now participates; if this does not happen, the Directive should expressly make clear that the prior legislation still applies as between Ireland and Denmark and other Member States.

A number of criticisms can be made of the opinion which it is understood was delivered by the Council legal service:

- a) as regards point (a) above, the opinion only referred to non-Member States as regards this point, and fails to understand its importance also to the position of Ireland and Denmark;
- b) given that the proposal would replace corresponding provisions of the Schengen Convention, and in light of the very broad definition of the concept of 'building upon' the Schengen *acquis* in the case law of the Court of Justice (according to three Court judgments which the Council has won!), it must be doubted whether it is correct to say that the proposal in no way builds upon the Schengen *acquis*;
- c) it must seriously be doubted whether the Council (with the EP) has the power, as the legal service assumes, to decide as part of a legislative act whether or

not a previous EU act can be repealed as regards a Member State *not participating* in the later act, given that there is a separate special procedure in the Treaties for ending the participation of States in such a case, the Member State concerned is not participating in the legislative act providing for the repeal, the Title V Protocol for the UK and Ireland expressly states that JHA measures in which those States do not participate do not bind those States in any way, and the fundamentally important decision to remove a Member State from its participation in a legal act can surely only take place according to procedures expressly set out in the Treaties;

- d) as regards Denmark in particular, when the opinion argues that the Council can decide to terminate Denmark's involvement in an existing third pillar measure, it fails to take account of the specific provision in the Protocol relating to Denmark that: 'acts of the Union in the field of police cooperation and judicial cooperation in criminal matters adopted before the entry into force of the Treaty of Lisbon which are amended shall continue to be binding upon and applicable to Denmark unchanged' (Art 2, protocol on Denmark);
- e) the analysis of whether the Council of Europe instruments could be disappplied as regards Ireland assumes that the EU even has the power to remove a Member State from its participation in legal measures which stem from an entirely different legal source than EU law – which surely cannot be correct;
- f) the argument that there is no complication as regards pre-existing Conventions because Ireland has not yet ratified or applied some of them raises the awkward question of whether such a complication could develop in future if Ireland ratified or applied them later; in practice this would deter Ireland from facilitating mutual assistance in criminal matters with other Member States by ratifying the EU Convention and Protocol, and deter or prevent the Council from applying the Schengen Convention mutual assistance rules to Ireland – this surely cannot be correct either;
- g) the opinion also fails to recognize that the proposal would not repeal pre-existing Conventions but only 'replace' their 'corresponding' provisions; moreover the proposal would in any event only do this as regards Member States bound by the Directive, once adopted;
- h) the test for 'inoperability' of the continued application of prior legislation as between Member States which do not participate in new legislation and Member States which do is arguably higher than the Council legal service suggests (although in fact the legal service does not suggest a definition of this concept) – surely it is not enough that it is inconvenient or awkward to continue to apply prior legislation to relations between Member States which do and do not participate in a later measure, rather it must be genuinely *impossible* to do so to consider the situation to be 'inoperable'.

Substance of the proposal: scope

As detailed in the original Statewatch analysis of the EIO proposal, the EIO will go further than the existing Framework Decision on the EEW, since it will in principle apply to all methods of obtaining evidence except for those expressly excluded from

its scope. In the original draft, the EIO would not have applied to setting up joint investigation teams or to certain forms of interception of telecommunications. In the latest draft the EIO *will* apply to *all* forms of interception of telecommunications, and the exclusion of joint investigation teams is also qualified. The detailed rules concerning telecom interception in the proposal will presumably be amended, but these rules have yet to be discussed. Obviously serious questions arise about ensuring the compatibility of the interception of telecommunications with human rights obligations.

The current draft still does not define the concept of ‘investigative measure’, so it might still 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 mutual assistance 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 TFEU, which, as discussed above, is subject to unanimity in Council and consultation of the EP.

In principle it also still seems that the Directive possibly applies to obtaining criminal records, despite the existence of separate EU rules in this area.

Also, as pointed out in the previous Statewatch analysis, it still appears that the Directive would not apply to certain matters that are covered by the EU and Council of Europe mutual assistance rules, but which 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 (listed in the previous analysis). There is still no clarity on this issue in the latest draft of the proposal.

Grounds for refusal of investigation orders

The original draft of the proposed Directive (Article 10) provided 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 have been **no grounds to refuse an order on the basis of double jeopardy** (*ne bis in idem*), dual criminality or territoriality (ie the possibility to refuse where the alleged crime was committed in the territory of the requested (executing) Member State), with the result 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.

It must be stressed that when the UK decided to opt in to the Directive, the UK Home Secretary argued that the dual criminality safeguard would be retained – this assertion was, at the time, totally inaccurate.

The original proposal would also have dropped the requirement that EEWs must be **proportionate**, and 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. It would also have dropped the data protection clause found in prior EU measures, as well as 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**). The rules relating to **remedies** would have been significantly **weakened**, and some specific safeguards relating to **videoconferences with suspects, controlled deliveries** (ie 'sting' operations by police or customs officers) and **bank information** would be **dropped**. The general human rights safeguard would have been the same as in 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.

In the latest draft available, some of these issues have not yet been addressed – namely the specific safeguards relating to videoconferences with suspects, controlled deliveries (ie 'sting' operations by police or customs officers) and bank information, and the issues relating to remedies.

However, there would now be an optional general exception relating to double jeopardy, and the possibility of applying a dual criminality test in relation to certain types of crime (the same list as under the EEW – except a special safeguard for Germany would be dropped) and in relation to certain types of evidence gathering (but *not* as regards search and seizure generally, as the current EU and Council of Europe rules provide). There would not be any territoriality exception.

An data protection clause would be inserted into the preamble (although this refers to the inadequate Framework Decision on data protection), a validation procedure

would be permitted as regards certain types of evidence requests, and the possibility to refuse certain types of evidence requests on the grounds that the type of request was not permitted would be allowed in certain cases. A proportionality test identical to the EEW Framework Decision would be inserted into the Directive.

As regards human rights, the original proposal was **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. Unfortunately, a number of Member States want to weaken the proposal on this point by dropping the new second sentence of the human rights provision. While the Council legal service argues that EU legislation takes precedence over national constitutional law (an argument that stems from the case law of the Court of Justice, but which is not accepted by national constitutional courts), this misses the point – it is surely open to the EU legislature to *permit* an exception for national constitutional principles if it wishes, even if it is open to the EU legislature to override them instead.

So, while there are welcome changes as regards the double jeopardy exception and the proportionality principle, the former exception should be mandatory, not optional, in light of the mandatory rule on this point in the Schengen Convention and the EU Charter of Rights. And while the changes relating to data protection, dual criminality, validation procedures, and the possibility to refuse certain types of evidence collection are a step in the right direction, they do not go far enough in that direction – for the Directive should simply revert to the existing rules on these issues. On the other hand, there has been no progress on this issue of territoriality, and the discussions on human rights are going in the wrong direction. Furthermore, it is too early to tell whether the specific safeguards relating to certain types of data collection, or the remedies rules, will be improved or not.

It remains the case that at least in some cases, the combined abolition of dual criminality *and* territoriality requirements under the Directive 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.

24 November 2010

Documents

Initiative for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters:

<http://www.statewatch.org/news/2010/apr/eu-council-investigation-order-9145-10.pdf>

Previous Statewatch analysis: *The proposed European Investigation Order: Assault on human rights and national sovereignty*:

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

Council document 15999/10 – latest text available:

<http://www.statewatch.org/news/2010/nov/eu-council-european-investigation-order-15999-10.pdf>

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