

SFO OPERATIONAL HANDBOOK

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European Investigation Orders

Overview of the European Investigation Order

The aim of this chapter is to provide an overview of the European Investigation Order and a summary of the main changes that its implementation involves for the SFO. A suite of desk instructions, process maps and accompanying guidance can be found in the **SFO EIO Procedure Guidance**.

Introduction

On 22 May 2017, a single new instrument, the European Investigation Order ("EIO") replaced most of the existing instruments governing arrangements between Member States of the European Union ("Member States") for the cross jurisdictional gathering and transfer of evidence for criminal investigations and prosecutions. The EIO was brought into force by the implementation of EU Directive 2014/41/EU. It does not apply to arrangements with Ireland and Denmark.

The intention behind the EIO is to make cross-border investigations faster and more efficient, while at the same time providing legal remedies to protect the rights of concerned persons, by adopting the principles of mutual recognition rather than mutual legal assistance (MLA). The EIO sets deadlines for carrying out investigative measures and requires decisions about the recognition and execution, as well as the actual execution of the requested measure or measures, to be carried out with the same priority and speed as for a similar domestic case.

The EIO takes the obtaining of evidence in, and its transfer to another Member State, out of the scope of mutual legal assistance mechanisms (where the requested State has a discretion to comply with the request) and adopts a mutual recognition mechanism which means that **the EIO must be accepted and acted upon by the receiving State without further formality, subject only to a limited number of exceptions.**

How is the Directive transposed into domestic legislation?

The Criminal Justice (European Investigation Order) Regulations 2017 (the Regulations) cover all investigative measures in the Directive and transpose the Directive into domestic law.

The procedural implementation of those parts of the Regulations which require the intervention of the courts is by the Criminal Procedure Rules, parts 18, 47 and 48.

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In which countries does the EIO apply?

The Directive applies in all the Member States except Denmark and Ireland.

Transposition of the Directive into participating countries' domestic legislation was required by 22 May 2017. The UK General Election delayed domestic implementation and other Member States also missed the deadline. To check whether a Member State has implemented the EIO you can consult the EIJN website or send an email to +SFOEIO.

Overarching principles

The EIO is an order issued by a judicial authority of one Member State (the issuing Member State), using a standard form. Unless one of the limited grounds for postponement or non-recognition applies, it must be acted upon by the authorities of the receiving Member State without further formality. The form can be found at Annex A of the Directive. [See "EIO Form (Annex A)" in Operational Stock Forms].

It can only be issued if the investigative measure:

- would be available in the issuing Member State in a similar domestic case; and
- is necessary and proportionate.
- There are a limited number of grounds for the receiving Member State to refuse the request which are set out at article 11 of the Directive, examples include:
 - there is an immunity or privilege under the law of the executing Member State which makes it impossible to execute the EIO;
 - execution would harm essential national security interests;
 - execution would jeopardise the source of the information;
 - execution would be contrary to the principles of *ne bis in idem*;
 - execution would be incompatible with fundamental rights;
 - the alleged activity does not constitute a crime in the receiving Member State. However, in respect of certain specified serious criminal activity, listed in Annex D of the Directive, an absence of dual criminality cannot be a ground for refusal.

Can the EIO be used for all offences?

If the offence in question is not an offence in the executing State, then the absence of dual criminality may be a ground for refusal of the EIO. However, if the criminality in question falls within the list of serious criminal activity to be found at Annex D of the Directive, then the absence of dual criminality cannot constitute a ground for refusal. The offences at Annex D most relevant to the SFO are:

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- Corruption
- Fraud, including that affecting the financial interests of the European Union within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests
- Laundering of the proceeds of crime
- Swindling

What types of evidence or measure can be requested?

The EIO applies to evidence already in the possession of the executing authority as well as to the gathering of evidence. The focus of the EIO is the investigative measure to be carried out. It is applicable to all investigative measures aimed at gathering evidence for a criminal investigation or prosecution (other than the setting up of a Joint Investigation Team and the gathering of evidence by such a team, and cross border surveillance under the Schengen Convention). For example companies register checks, a search of premises, interviewing witnesses, obtaining information or evidence already in the possession of the executing authority, real time monitoring of bank accounts, temporary transfer of prisoners, covert investigations, obtaining communications data and interception of telecommunications. It can also be used to request provisional measures to preserve evidence.

It covers investigative measures that have hitherto been carried out on a police to police basis. Early enquiries tend to suggest that other jurisdictions will retain police to police co-operation in its present form and you are encouraged to continue use of this method where possible and practicable.

Where the receiving State can achieve the same result using less intrusive means than the measure requested in the EIO it may do so. Where the measure requested is not available in the receiving State it should use an alternative measure.

Some terminology

The Directive requires the EIO to be issued or validated by a judicial authority prior to transmission of the order to the Executing State. In the Directive the term 'judicial authority' encompasses both public prosecutors and judges. The Regulations however define a judicial authority as a judge or justice of the peace and make a distinction between the functions of judges and the functions of "designated public prosecutors."

The Regulations also use the term "making" rather than "issuing" an order and make provision both for making and validating EIOs in the UK.

The Regulations distinguish between designated public prosecutors and prosecuting authorities.

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Designated public prosecutors are listed in part 1 of schedule 1 of the Regulations and include the Director of the SFO and persons with section 1(7) designations as well as Crown Prosecutors, the FCA and others.

Prosecuting authorities can be found in part 2 of schedule 1.

Designated investigating authorities can be found in part 3 of schedule 1. The SFO is not a designated investigating authority.

EIOs from other EU Member States to the UK are executed by designated executing authorities which can be found in part 4 of schedule 1. The Director of the SFO is one of the designated executing authorities. All incoming EIOs sent to the SFO are dealt with by the International Assistance Team.

Who can make or validate an EIO in the UK?

Part 2 of the Regulations sets out who can make or validate an EIO in the UK and in what circumstances. Only judicial authorities and designated public prosecutors can make or validate an EIO.

Prosecuting authorities who are not also designated public prosecutors, and defendants must apply to a court to make an EIO. Investigators (but only designated investigating authorities) must apply to the court or a designated public prosecutor. This does not apply to the SFO.

When can an EIO be made or validated in the UK?

Judicial Authorities (Judges and Justices of the Peace)

Regulation 6 provides that if it appears to a judicial authority that an offence has been committed or there are reasonable grounds for suspecting that an offence has been committed **and** that proceedings in respect of the offence have been instituted or it is being investigated, the judicial authority, may make an EIO on the application of:-

- a prosecuting authority, or
- a constable but only with the consent of the prosecuting authority
- a defendant, or their representative but only where proceedings to which they are a party have been instituted in respect of the offence

But the judicial authority can only make an EIO where it appears to them that:-

- it is necessary and proportionate to make the order for the purposes of the investigation or proceedings in question; and
- the investigative measures to be specified in the order could lawfully have been ordered or undertaken under the same conditions in a similar domestic case; and

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- if it is an order for any investigative measure in chapter 2 of part 2, the conditions imposed in the provision are satisfied.

Designated Public Prosecutors

Regulation 7 provides that if it appears to a designated public prosecutor that an offence has been committed or there are reasonable grounds for suspecting that an offence has been committed **and** that proceedings have been instituted in respect of the offence in question or it is being investigated, the designated public prosecutor may make an EIO or, on the application of a designated investigating authority, validate an EIO.

But the designated prosecuting authority can only make or validate an EIO under this regulation where it appears to them that:-

- it is necessary and proportionate to make or validate the order for the purposes of the investigation or proceedings in question; and
- the investigative measures to be specified in the order could lawfully have been ordered or undertaken under the same conditions in a similar domestic case; and
- if it is an order for any investigative measure in chapter 2 of part 2, the conditions imposed in the provision are satisfied.

Meaning of "under the same conditions in a similar domestic case"

This is set out at regulation 11.

Meaning of "under the same conditions in a similar domestic case"

(1) When deciding for the purposes of regulation 6(4)(b) or 7(4)(b) whether an investigative measure could lawfully have been ordered or undertaken under the same conditions in a similar domestic case, the judicial authority or designated public prosecutor ("the relevant authority") must consider in particular the following matters.

(2) Where the investigative measure requested is one which would require the issue of a relevant instrument before it could be lawfully carried out in the United Kingdom, the relevant authority must consider whether it could have issued such an instrument taking into account in particular—

- (a) the nature of the evidence to be obtained;
- (b) the purpose for which that evidence is sought (including its relevance to the investigation or proceedings in respect of which the European investigation order is sought);
- (c) the circumstances in which the evidence is held;
- (d) the nature and seriousness of the offence to which the investigation or proceedings relates;

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(e) any provision or rule of domestic law applicable to the issuing of such an instrument.

(3) Where the investigative measure requested is one which would require authorisation under any enactment relating to the acquisition and disclosure of data relating to communications, or the carrying out of surveillance, before it could be lawfully carried out in the United Kingdom, the relevant authority must consider whether such authorisation—

(a) has in fact been granted, or

(b) could have been granted, taking into account in particular—

(i) the matters specified in sub-paragraphs (a) to (d) of paragraph (2), and

(ii) the provisions of the enactment applicable to the granting of such authorisation.

(4) Where the investigative measure requested is in connection with, or in the form of, the interception of communications, the relevant authority must consider whether any additional requirements relating to the making of such a request, imposed by any enactment other than these Regulations, have been complied with.

(5) Paragraph 2)(e) does not require the relevant authority to take into account any provision of domestic law imposing a procedural requirement which the judicial authority or designated public prosecutor considers cannot effectively be applied when making a European investigation order for the investigative measure concerned.

(6) For the purposes of this regulation—

(a) "relevant instrument" includes a warrant, order, notice, witness summons, citation or equivalent instrument.

(b) "enactment" means an enactment whenever passed or made and includes—

(i) an enactment contained in subordinate legislation within the meaning of the Interpretation Act 1978([1])...

What does this mean for the SFO?

It will be necessary to give careful consideration to the above provision of the Regulations and to carefully record decision making about whether the investigative measure(s) under consideration could lawfully have been ordered or undertaken under the same conditions in a similar domestic case.

Where the measure would require the issue of a warrant, order, notice, witness summons or other instrument before it could be carried out in the UK in an equivalent domestic case the judicial or designated prosecuting authority must consider whether it could have issued such an instrument taking into account all the relevant facts and circumstances of the case including provision or rule
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of domestic law applicable to the issuing of the warrant, order notice or other instrument.

In practice this means that the Director of the SFO and any person designated under section 1(7) CJA 1987 can make an EIO in line with the Director's powers in domestic cases. If an application to court would be required in a domestic case, an SFO prosecutor must apply to the court for an EIO.

For example, if in a domestic case the Director of the SFO could have issued a notice, such as a section 2 banking notice, then the Director can make the EIO for banking material to be gathered. If only a judge would have jurisdiction to make the order, such as to issue a search warrant or a customer information order, then the EIO can only be made by a judge.

Within the SFO, the authority to make an EIO rests with the Director, General Counsel and the Heads of Division only.

See "SFO Procedures for making an EIO"

How should an EIO be drafted?

Regulation 8 sets out the form and content of an EIO. The form at Annex A of the Directive must be used.

What time limits apply?

The Directive requires EIO to be executed with the same speed and priority as for a domestic case and sets time limits within which the EIO must be recognised and executed (subject to any grounds for postponement). The executing authority should adopt a shorter deadline in cases of urgency.

Relevant time limits:

- The competent executing authority must make a decision on whether to recognise the EIO without delay and no later than 30 days from receipt. If it is not practicable to do so within 30 days; it must, without delay, inform the issuing authority giving the reasons for the delay and the estimated time necessary for the decision to be taken. The time limit may be extended by a maximum of 30 days.
- Once a decision has been made to recognise the EIO, the executing authority must carry out the investigative measure without delay and no later than 90 days following the decision on recognition. If it is not practicable to meet this time limit, it must inform the issuing authority giving the reasons for the delay and must consult with the issuing authority on the appropriate timing to carry out the investigative measure.

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How is an EIO varied or revoked?

Regulation 10 makes provision for variation and revocation of an EIO.

Only the judicial authority or designated public prosecutor that made or validated the EIO may vary or revoke it. The judicial authority may only do so upon application of the person who applied for the EIO, a prosecuting authority or any other person affected by the order.

The variation or revocation must be made without delay. It must be communicated, in writing, to the relevant executing authority. A variation must meet the requirements of Regulation 8 (form and content of the EIO) and be translated into the appropriate language.

If the intended or actual effect of issuing the varied EIO is to supersede the earlier EIO then the earlier EIO should be revoked.

If the EIO is no longer required it is imperative that it is revoked immediately.

What about an EIO related to an earlier EIO?

Where an EIO supplements an earlier EIO the Directive requires that this is indicated in section D of the Annex A form. Other than this minor variation, the supplementing EIO is subject to the same requirements and time limits as the earlier EIO.

Challenges and Remedies

The Directive specifies that a challenge to the substantive reasons for the issue of the EIO must be brought in the issuing State. In the majority of cases this means that any challenge to the SFO's decision to issue the EIO will be by judicial review.