Position paper

Fair Trials International’s response to the adopted European Investigation Order Directive

March 2014

Fair Trials International’s vision: A world where everyone’s right to a fair trial is respected, whatever their nationality, wherever they are accused.
1. On 14 March, the European Council adopted the European Investigation Order Directive (“EIO”)\(^1\) which is intended to facilitate cross-border evidence-gathering in criminal cases. The EIO will enable one Member State to obtain evidence which is located in another and has been the topic of lengthy negotiations between the EU institutions since 2010. The EIO will replace the existing mutual legal assistance (MLA) regime for cross-border evidence-sharing in EU Member States.

2. In cross-border cases, the process of obtaining evidence from other EU countries is a common cause of delays, often leading to defendants spending extended periods of time in pre-trial detention. Fair Trials therefore welcomes the introduction of a legal measure which will facilitate the lawful gathering and sharing of lawfully-obtained evidence. However, when the EIO was first proposed, based on our experience of the flagship mutual recognition measure the European Arrest Warrant, we expressed serious concerns\(^2\) about the way the EIO will operate in practice.

3. We are pleased that a number of our key concerns have been addressed in the adopted measure, including:

   a. **A fundamental rights ground for refusal:** Fair Trials was concerned that the original EIO text provided inadequate safeguards against fundamental rights violations during the execution of EIOs. We are therefore pleased that Article 11 of the adopted text establishes a ground for refusal where there are substantial grounds to believe that the execution of the EIO would violate the person’s fundamental rights.

   b. **Other rights-based grounds for refusal:** Fair Trials initially expressed serious concern about the failure to include a variety of principled grounds for refusal on the basis of dual criminality, territoriality, *ne bis in idem*, and a requirement that the investigative act be lawful in both issuing and executing states. To Fair Trials’ gratification, these grounds have been included in the adopted text by Article 11.

   c. **Equality of arms:** Fair Trials was concerned that the original EIO text did not entitle the defence to use EIOs in order to obtain evidence needed for a fair trial and highlighted the importance of the defence having access to the EIO in order to develop a positive defence case or to challenge the evidence of the prosecution. Article 1(3) of the adopted text which entitles suspects or accused persons to request that an EIO be issued in conformity with national criminal procedure is therefore welcome.

   d. **Data protection:** Fair Trials highlighted the absence from the original EIO text of any reference to the duty of both issuing and executing States to keep proper records of how evidence is gathered, stored, analysed and transferred so as to prevent the defence or the

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court itself from being unaware of the contamination or loss of evidence. It is therefore encouraging that Recitals 40-42 and Article 20 of the adopted text set out the data protection legislation which must be complied with when dealing with evidence gathered under an EIO.

e. **Legal Status of Visiting Police:** Fair Trials has highlighted the importance of ensuring that visiting police executing an EIO maintain a passive role vis a vis local police, to ensure that any investigation complies with the laws of the executing state. Article 9(5) of the adopted text clarifies that law enforcement authorities of the issuing state have no law enforcement powers in the executing state except where it is both lawful and agreed to by the issuing state.

f. **Decision to issue an EIO:** Fair Trials has expressed concern that the issuing authority be sufficiently independent from the executive, or be reviewed by such an authority, and that the process around the issuance of an EIO utilise sufficient transparency. Article 2(c)(ii) of the adopted text requires that any decision to issue an EIO taken by an authority other than a judge, court, investigating magistrate, or public prosecutor must be validated by one of those bodies, thus resolving Fair Trials’ concerns.

4. Despite these major improvements to the EIO Directive, however, some of our original concerns remain unaddressed. These include:

a. **Disproportionate EIOs:** The adopted text does not provide executing states with a ground to refuse to execute a disproportionate EIO in order to prevent time and money being wasted on unnecessary evidence-gathering and to ensure that fundamental rights are not infringed for trivial reasons or to a greater degree than is necessary. Article 6 of the adopted text requires the issuing state to be satisfied that the EIO is “necessary and proportionate”, placing responsibility for scrutiny almost entirely in the hands of the issuing state, with the executing state entitled only to consult with the issuing state where it does not consider that this requirement has been met.

b. **Notification of affected individuals:** The adopted text contains no requirement for the suspect or any other affected individual to be informed that evidence-gathering is taking place under an EIO. While such notification would not be appropriate in cases where it might jeopardise the investigation, notification should take place where there is no such risk and, in any event, defendants should be informed well in advance of any trial to enable them to challenge the admissibility of such evidence and seek their own responsive evidence in time for trial. It is disappointing that the adopted text makes no such provision.

c. **Transfers of persons in custody:** The adopted text contains inadequate protections of people in custody who are subject to transfer under an EIO. While Article 11 states that transfer “may” be refused if the individual does not consent, this is not a mandatory ground for refusal. Further, there is no requirement for similar or improved prison conditions to be guaranteed following transfer and the inappropriateness of transfer of minor or vulnerable suspects is not acknowledged.
d. Remedies: Effective remedies for breaches of individual rights in the issuance or execution of an EIO are necessary to properly safeguard these rights and to ensure that systemic problems are identified and addressed. The language in the adopted text regarding remedies is somewhat stronger than in previous drafts. The text now reflects in Article 14 that “remedies equivalent to those available in a similar domestic case are available to the investigative measures indicated in the EIO.” It also includes provisions ensuring that information about remedies is provided, that time limits are reasonable, and that the rights of the defence are considered. However, it limits challenges to the substantive reasons for issuing an EIO to the issuing country only. Fair Trials has been concerned that limiting challenges in this way may discourage people from taking them, as they will be faced with the daunting prospect of mounting a legal challenge in what may be a foreign jurisdiction.

e. Telephone and videoconferencing: Fair Trials welcomes the potential use of the EIO to allow suspects to participate in proceedings remotely, minimising disruption to the suspect’s life and in some cases avoiding the use of a European Arrest Warrant. However, we remain concerned by the lack of safeguards relating to evidence given via telephone and videoconferencing. Crucially, the adopted text contains no requirement that the original recordings are retained for examination by the defence and trial judge, only requiring in Article 21(7) that minutes are drawn up by the executing authorities. In many cases, these minutes will not be sufficient to allow suspects and judicial authorities adequately to examine the material, including for example the quality of any interpretation services which have been used.

f. Admissibility: Fair Trials has suggested that the absence of minimum standards for the EU in the area of evidence-gathering creates a significant risk that the mandatory nature of the EIO will lead to a rise in cross-border evidence requests, and the possibility of greater numbers of rights infringements with attendant failed prosecutions and wasted costs. If no common approach to the admissibility of cross-border evidence is taken, there is no guarantee that evidence collected through an EIO will be useful in court, thus leading to the possibility of wasted time and resources. The adoption of the EIO therefore presents an urgent opportunity to review the need for minimum standards in this area.

5. As Member States acquire a further mutual recognition instrument to facilitate judicial cooperation in the fight against crime in Europe, the inadequate protection of fair trial rights within the European area of freedom, security and justice becomes increasingly significant. In recent years, the EU has made notable progress in improving the legal framework for protection of fair trial rights by adoption of three Directives on fair trial rights. We remain concerned, however, that without further safeguards against abuse and overuse, these measures are not sufficient guarantees that mutual recognition instruments such as the EAW and the EIO are used with appropriate respect for the rights of suspects and witnesses. Fair Trials will continue to monitor the implementation and use of the EIO and work towards a fair and just use of this powerful law enforcement tool.

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