

**Beiträge zum Internationalen und
Europäischen Strafrecht**

**Studies in International and
European Criminal Law and Procedure**

Band / Volume 56

The European Investigation Order

**Legal Analysis and Practical Dilemmas
of International Cooperation**

Edited by

**Kai Ambos, Alexander Heinze, Peter Rackow
and Miha Šepec**



Duncker & Humblot · Berlin

KAI AMBOS, ALEXANDER HEINZE, PETER RACKOW
and MIHA ŠEPEC (Eds.)

The European Investigation Order

Beiträge zum Internationalen und
Europäischen Strafrecht

Studies in International and
European Criminal Law and Procedure

Herausgegeben von / Edited by

Prof. Dr. Dr. h.c. Kai Ambos, Richter am Kosovo Sondertribunal

Berater (amicus curiae) Sondergerichtsbarkeit für den Frieden, Bogotá, Kolumbien

Band / Volume 56

The European Investigation Order

Legal Analysis and Practical Dilemmas
of International Cooperation

Edited by

Kai Ambos, Alexander Heinze, Peter Rackow
and Miha Šepec

With Assistance of
Luca Petersen



Duncker & Humblot · Berlin

In cooperation with the Göttingen Association for Criminal Law, Criminal Justice
and Criminology and their Application



The EIO-LAPD Project was implemented in the period 01/05/2019 – 31/01/2022.
It was funded by the European Union's Justice Programme (2014 – 2020).

Bibliographic information of the German national library

The German national library registers this publication in
the German national bibliography; specified bibliographic data
are retrievable on the Internet about <http://dnb.d-nb.de>.

All rights reserved. No part of this book may be reproduced, translated,
or utilized in any form or by any means, electronic or mechanical,
without the expressed written consent of the publisher.

© 2023 Duncker & Humblot GmbH, Berlin
Typesetting: 3w+p GmbH, Rimpf
Printing: CPI books GmbH, Leck
Printed in Germany

ISSN 1867-5271
ISBN 978-3-428-18708-9 (Print)
ISBN 978-3-428-58708-7 (ebook)

Printed on no aging resistant (non-acid) paper
according to ISO 9706 ☞

Internet: <http://www.duncker-humblot.de>

Preface

This monograph is the last and final part of the project ‘European Investigation Order – legal analysis and practical dilemmas of international cooperation – EIO-LAPD’ within the framework of the EU Justice Programme. It presents a contribution to the Europe-wide discourse on how to enhance the effectiveness and the practical implementation of the EIO. Its objective is to equip target groups with specialised knowledge about the cross-border evidence gathering procedure described in the Directive 2014/41/EU. Unlike other parts of the project, this monograph is targeted at the legal community, students of law, NGOs and the interested public. Its goal is to achieve a greater inclusion of dilemmas connected with the practical application of the Directive into the legal and public discourse.

The partners of the project were chosen according to the following criteria: (a) only institutions where the members of the applicant’s department for criminal law personally know and vouch for at least one person to participate in the project were considered; (b) institutions which previously successfully cooperated with the applicant or members of its department for criminal law in EU funded projects were given priority; (c) institutions which do not have sufficiently experienced personnel or connections with the relevant State institutions to perform the project activities were not considered.

We would like to thank, first and foremost, all authors from the project partners who contributed to this monograph. Our special thanks goes to Jan Stajnko and his team for his efficient and smooth coordination of the project and the assistance in communicating with authors and project partners; to Luca Petersen for his assistance, and to Julian Vornkahl for his assistance in copy-editing the manuscript.

Göttingen and Maribor, July 2023

*Kai Ambos,
Alexander Heinze,
Peter Rackow,
Miha Šepec*

Table of Contents

Introduction	13
--------------------	----

Part I

National Reports

<i>Charlotte Genschel, Lara Schalk-Unger and Nikolina Kulundžija</i> The European Investigation Order – National Report Austria	19
<i>Elizabeta Ivičević Karas, Zoran Burić, Marin Bonačić and Aleksandar Maršavelski</i> European Investigation Order in Croatia – Normative Framework and Practical Challenges	29
<i>Kai Ambos, Peter Rackow and Alexander Heinze</i> The European Investigation Order – a German Perspective	51
<i>Laura Scomparin, Valeria Ferraris, Andrea Cabiale, Caroline Peloso</i> and <i>Oscar Calavita</i> Abbreviated National Report – Italy	69
<i>Mário Simões Barata, Ana Paula Guimarães and Daniela Serra Castilhos</i> The European Investigation Order in Portugal – Legal Analysis and Practical Dilemmas	87
<i>Miha Šepec, Tamara Dugar, Anže Erbežnik and Jan Stajnko</i> Legal Implementation and Practical Application of the EIO Directive in Slovenia	105
<i>Miha Šepec, Tamara Dugar and Jan Stajnko</i> European Investigation Order – A Comparative Analysis of Practical and Legal Dilemmas	123

Part II

Special Topics

<i>Kai Ambos and Peter Rackow</i> Developments and Adaptations of the Principle of Mutual Recognition – Reflections on the Origins of the European Investigation Order with a View to a Practice-Oriented Understanding of the Mutual Recognition Principle	141
--	-----

Laura Scomparin and Caroline Peloso

Defend Yourself, by Contesting: Considerations on the Relationship Between the Right of Defence and the Right to Contest in the European Investigation Order	163
--	-----

Caroline Peloso and Oscar Calavita

Interception of Telecommunications: Strengths and Weaknesses of the European Investigation Order Directive (2014/41/EU)	179
---	-----

Miha Šepec and Lara Schalk-Unger

Special Part of EU Criminal Law: The Level of Harmonization of the Categories of Offences Listed in Annex D in EU Legislation and Across Selected Member States	203
---	-----

Laura Scomparin and Andrea Cabiale

The Principle of Proportionality in Directive 2014/41/EU – Challenges of the Present and Opportunities for the Future	225
---	-----

Anže Erbežnik and Marin Bonačić

European Investigation Order, E-Evidence and the Future of Cross-Border Co-operation in the EU	243
--	-----

*Part III***Short Comments***Jan Stajanko, Mário Simões Barata and István Szijártó*

Comments re <i>Gavanozov I</i> and <i>Gavanozov II</i>	265
--	-----

Peter Rackow, Elizabeta Ivičević Karas, Zoran Burić, Marin Bonačić and Aleksandar Maršavelski

Comments re <i>Parquet de Lübeck</i>	271
--	-----

List of Editors	277
-----------------------	-----

List of Authors	279
-----------------------	-----

Subject Index	283
---------------------	-----

List of Abbreviations

AICCM	Act on International Cooperation in Criminal Matters
AJCEU	Act on Judicial Cooperation in Criminal Matters with Member States of the European Union
AO	Abgabenordnung (Fiscal Code of Germany)
ARHG	Auslieferungs- und Rechtshilfegesetz
Art.	Article
Arts.	Articles
Assoc.	Associate
AVIDICUS	Assessment of Video-Mediated Interpreting in the Criminal Justice System
BGBI.	Bundesgesetzblatt
BlgNR	Beilage(-n) zu stenographischen Protokollen des Nationalrates
BT-Drs.	Bundestagsdrucksache
BVerfG	Bundesverfassungsgericht (German Federal Constitutional Court)
Cass. Pen.	Cassazione penale
CCMMSEUA	Act Amending the Cooperation in Criminal Matters with the Member States of the European Union
CFR	Charter of Fundamental Rights of the EU
CISA	Convention Implementing the Schengen Agreement
CJEU	Court of Justice of the European Union
Corte cost.	Italian Constitutional Court
CPA	Croatian Code of Criminal Procedure/Slovenian Code of Criminal Procedure
CPP	Codice di procedura penale (Italian Code of Criminal Procedure)/Código de Processo Penal (Portuguese Code of Criminal Procedure)
Dir. Pen. Cont. online	Diritto penale contemporaneo online
Dir. Pen. Proc.	Diritto penale e processo
Dir. Un. Eur.	Il diritto dell'Unione Europea
Doc.	Document
DRB	Deutscher Richterbund
EAW	European Arrest Warrant
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
e-CODEX	e-Justice Communication via Online Data Exchange
ECtHR	European Court of Human Rights
EEA-VStS-G	Federal Act on the European Investigation Order in Administrative Criminal Matters (Austria)
eEDES	e-Evidence Digital Exchange System
EEW	European Evidence Warrant
EIO	European Investigation Order

EIO Directive	Directive 2014/41/EU regarding the European Investigation Order in Criminal Matters
EIO-LAPD	European Investigation Order – Legal Analysis and Practical Dilemmas of International Cooperation
EJN	European Judicial Network
EU	European Union
eucrim	European Criminal Law Associations' Forum (Journal)
EU-FinStrZG	Federal Law on Cooperation in Financial Criminal Matters with the Member States of the European Union (Austria)
EU-JZG	Federal Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union (Austria)
Eurojust	European Union Agency for Criminal Justice Cooperation
EVIDENCE2e-CODEX	Linking EVIDENCE into e-CODEX for EIO and MLA procedures in Europe
EXEC	Electronic Xchange of e-Evidences
FD	Framework Decision
FinStrZG	Federal Act on Financial Criminal Cooperation with the Member States of the European Union
GIP	Giudice per le Indagini Preliminari (Italian Judge for preliminary investigations)
GP	Gesetzgebungsperiode (Austria)
GSC	General Secretariat of the Council
IP	Internet Protocol
IRG	Gesetz über die international Rechtshilfe in Strafsachen (German Act on International Cooperation in Criminal Matters)
IT	Information Technology
Italian Decree	Italian Legislative Decree no. 108 of 21 June 2017
JHA	Justice and Home Affairs
JI	Justiz und Inneres (Justice and Home Affairs)
MLA	Mutual Legal Assistance
mn.	marginal number(s)
MS	Member State
n.	footnote
Nice Charter	Charter of Fundamental Rights of the European Union (7 Dec. 2000)
OJ	Official Journal of the European Union
OJ C	C-Series of Official Journal of the European Union
OJ L	L-Series of Official Journal of the European Union
OWiG	Ordnungswidrigkeitengesetz (German Administrative Offences Act)
PGR	Procuradoria-Geral de República (Portugal)
RB	Rahmenbeschluss (Framework Decision)
Report on legal implementation	Slovenian Report on legal implementation and practical application of the EIO
RiVAsT	Richtlinien für den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten (Germany)
RL EEA	Richtlinie Europäische Ermittlungsanordnung
RV	Regierungsvorlage
Sec.	Section
SMMP	Sindicato dos Magistrados do Ministério Público (Portugal)

SPSA	State Prosecution Service Act
StAG	Staatsanwaltschaftsgesetz
StPO	Strafprozessordnung (Code of Criminal Procedure)
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TREIO	TRaining on European Investigation Order
WKStA	Wirtschafts- und Korruptionsstaatsanwaltschaft (Public Prosecutor's Office for Combatting Economic Crime and Corruption) (Austria)
ZfiStW	Zeitschrift für Internationale Strafrechtswissenschaft (Journal)
ZIS	Zeitschrift für Internationale Strafrechtsdogmatik (Journal; since 2022 ZfiStW)

Introduction*

Directive 2014/41/EU on the European Investigation Order in Criminal Matters of the European Parliament and of the Council of 3 April 2014 (EIO) was to be transposed into national law by the Member States by 22 May 2017. As is well known, the basic concern of the idea to create a European Investigation Order was to convert traditional mutual legal assistance (in evidentiary matters) to the principle of mutual recognition.¹ The idea of (consistently) converting this complex area to the principle of mutual recognition (principally) held potential for quite profound changes to the *status quo*. Nevertheless, the EIO-Directive, in the form in which it finally entered into force, remarkably follows the principles and structures of traditional mutual assistance in essential elements.² For instance, having been a key issue during the drafting negotiations, the Directive allows Member States to retain requirements for authorisation by a judge (to use the German term, *Richtervorbehalt*) without any restrictions.³ This is probably an indicator that the conversion of the heterogeneous area of mutual legal assistance to a consistently understood principle of mutual recognition (still) poses greater difficulties than the application of the recognition principle in other areas. Against this background, it is noteworthy that the European Court of Justice (ECJ) ruled that the requirements for a judicial authority under the European Arrest Warrant (EAW) cannot be transposed to the field of the EIO, which ultimately amounts to an affirmation that there is at least no such thing as a one-size-fits-all principle of mutual recognition.⁴ The fact that the principle of mutual recognition in the

* The content of this publication represents the views of the authors only and is their sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

¹ Cf. Commission Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility of 2009 (COM(2009) 624 final), p. 5 ('... most effective solution ... would seem to lie in the replacement of the existing legal regime on obtaining evidence in criminal matters by a single instrument based on the principle of mutual recognition and covering all types of evidence') that initiated the development leading to the EIO.

² Cf. in this respect, for example, *Ambos*, European Criminal Law, 2018, p. 456 ('to a large extent following the principles of traditional mutual assistance'); *Daniele*, Evidence Gathering in the Realm of the European Investigation Order, *New Journal of European Criminal Law* ('NJECL'), 6 (2015), 179, 183 ('hard core of the Directive is composed of provisions often comparable to those contained in previous European regulations').

³ Cf. below Part I, contributions of *Genschel/Schalk-Unger/Kulundžija* and *Ambos/Rackow/Heinze*, Part II contribution of *Ambos/Rackow*.

⁴ ECJ, Grand Chamber Judgment of 8 December 2020 – C-584/19, para. 74: 'In the light of the textual, contextual and teleological differences noted in the foregoing considerations between Framework Decision 2002/584 and Directive 2014/41, the Court's interpretation of

area of mutual legal assistance in evidentiary matters indeed seems to have reached its limits, is probably related to the fact that the criminal law systems of the Member States or, more specifically, the respective rules on the gathering and use of evidence differ considerably from each other. Furthermore, it is likely to play a role that an EIO – in contrast to an EAW in particular – can be understood less well as a kind of completed product of a Member State’s criminal proceeding that can be subjected to the principle of mutual recognition, as it were, like a commodity. An EIO, on the other hand, is more akin a part of an ongoing process whose outcome is by no means fixed.⁵

In light of the fundamental questions it raises, the EIO is of great interest from both a theoretical and policy-perspective. Furthermore, fundamental questions on the implementation on the principle of recognition in the area of mutual assistance in evidentiary matters impact several issues revolving around the application practice of the EIO. This concerns, for example, the question of the extent to which there can be any room for a proportionality test in the executing State in mutual recognition proceedings,⁶ and the aspect of ensuring adequate means of defence.⁷ The contributions collected in this volume stem from the EU-funded project EIO-LAPD (Legal Analysis and Practical Dilemmas of International Cooperation).⁸

The focus of this project, which involved research institutions from six countries,⁹ was not only and not primarily the academic perspective. For after several years of practical experience with the EIO in the Member States, the overriding question from the practitioners’ point of view has been how the EIO proves itself in practice. Another issue is the application practice of the EIO and the combination of its improvement with the improvement of the Defence in the corresponding cross border investigations. Thus, the practical perspective was to be integrated with the theoretical. Accordingly, the essential element of the project was the collection of assessments from prosecutorial and judicial practice as well as from the Defence. For this purpose, practitioners from or based in Austria, Croatia, Germany, Italy, Slovenia and Portugal were surveyed on their experience with the EIO and their assessments and evaluations by means of standardised questionnaires. On the basis of these surveys,

Article 6(1) of Framework Decision 2002/584 in the judgments of 27 May 2019, OG and PI (Public Prosecutor’s Offices in Lübeck and Zwickau) (C-508/18 and C-82/19 PPU, EU:C:2019:456), and of 27 May 2019, PF (Prosecutor General of Lithuania) (C-509/18, EU:C:2019:457), according to which the concept of ‘issuing judicial authority’, within the meaning of that provision, does not cover the public prosecutor’s offices of a Member State which are exposed to the risk of being subject to individual instructions from the executive, is not applicable in the context of Directive 2014/41’.

⁵ *Ambos*, European Criminal Law, 2018, p. 451 with further references.

⁶ Cf. below Part II contribution *Scomparin/Cabiale*.

⁷ Cf. below Part II contribution *Scomparin/Peloso*.

⁸ Cf. <<https://lapd.pf.um.si/materials/>>, accessed 16 December 2022.

⁹ Univerza v. Mariboru (Maribor, Slovenia); Jožef Stefan Institute (Ljubljana, Slovenia); Universidade Portucalense (Porto, Portugal); Georg-August-Universität (Göttingen, Germany); Karl-Franzens-Universität (Graz, Austria); Università degli Studi di Torino (Turin, Italy); Sveučilište u Zagrebu (Zagreb, Croatia).

which not least reaffirmed that the devil is in the detail, as demonstrated for instance by the fact that quite often changes and improvements to the EIO form were suggested by the interviewed practitioners, the project teams compiled reports on the practical application of the EIO. These are included in the National Reports (Part I) on the participating Member States alongside reports on legal implementation. The (abridged) national reports form the core of this Volume. They are supplemented by a Comparative Summary of the National Reports compiled by Miha Šepec, Anže Erbežnik, Jan Stajniko and Tamara Dugar.

Furthermore, in seven contributions, experts involved in the project addressed specific questions concerning the acceptance and future of the principle of mutual recognition in the field of mutual assistance in evidence (Kai Ambos and Peter Rackow, and also Anže Erbežnik and Marin Bonačić), the neuralgic aspect of the degree of harmonisation of relevant criminal offences in the EU (Miha Šepec and Lara Schalk-Unger), the principle of proportionality (Johanna Waldner and, separately, Andrea Cabiale and Laura Scomparin), the interception of telecommunications (Caroline Peloso and Oscar Calavita) and the the protection of the rights of the Defence within the scope of the EIO (Caroline Peloso and Laura Scomparin). This Volume thus provides some unique insights into the Member States' implementation of the EIO and the related application practice in important Central and South or South-Eastern European Member States. In line with the project's aim of bringing together practice and academia, blog posts on current developments relevant to practice have appeared on the project website. Six of these posts on the ECJ rulings in the *Gavanozov I* and *II* cases¹⁰ as well as on *Parquet de Lübeck*¹¹ and its implications for the EIO sector,¹² which are central to EIO application practice, have also been included in this Volume.

¹⁰ ECJ, Judgement of 24 October 2019 – C-324/17 and ECJ, Judgement of 11 November 2019 – C-852/19.

¹¹ ECJ, Grand Chamber Judgment of 27 May 2019 – C-584/19 and C-82/19 PPU.

¹² See above n. 8.