

## ANNEX A

### EUROPEAN INVESTIGATION ORDER (EIO)

This EIO has been issued by a competent authority. The issuing authority certifies that the issuing of this EIO is necessary and proportionate for the purpose of the proceedings specified within it taking into account the rights of the suspected or accused person and that the investigative measures requested could have been ordered under the same conditions in a similar domestic case. I request that the investigative measure or measures specified below be carried out taking due account of the confidentiality of the investigation and that the evidence obtained as a result of the execution of the EIO be transferred.

#### SECTION A

Issuing State: **Hungary /Team Hungary**

Executing State: **Themisland**

#### SECTION B: Urgency

Please indicate if there is any urgency due to

- Evidence being concealed or destroyed
- Imminent trial date

**X Any other reason**

Please specify below:

Time limits for execution of the EIO are laid down in Directive 2014/41/EU. However, if a shorter or specific time limit is necessary, please provide the date and explain the reason for this:

***The execution should be carried out until 4<sup>th</sup> of May 2021 in order for the issuing State (Team Hungary) to be able to participate in the Themis Competition, with the written paper titled: "Be the light in the darkness - Reflections on the First Years of the European Investigation Order in Use".***

## “BE THE LIGHT IN THE DARKNESS”

### Reflections on the First Years of the European Investigation Order in Use

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#### 1. Introductory remarks

Eleven years have passed since a group of European Union (hereinafter EU) Member States<sup>1</sup> led by the Kingdom of Belgium filed the *Proposal for a Directive of the European Parliament and the Council regarding the European Investigation Order in criminal matters* (hereinafter EIO Proposal) in April 2010,<sup>2</sup> which set in motion the adoption of the *Directive regarding the European Investigation Order in criminal matters* (hereinafter EIO DIR)<sup>3</sup>, and nearly three years since the transposition of the EIO DIR by all participating Member States on 15 September 2018.<sup>4</sup> However, these were only the latest steps in the lengthy process of creating and tightening judicial cooperation in criminal matters among EU Member States.

The process of enhancing judicial cooperation in criminal matters among the Member States of the European Communities kicked off with the *Schengen Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders* (hereinafter Schengen Agreement) in 1985 and continued with the *Convention on the Implementation of the Schengen Agreement* (hereinafter SIC) in 1990.<sup>5</sup> The *Treaty on European Union* (hereinafter Maastricht Treaty) and the *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts* (hereinafter Treaty of Amsterdam) took the initiative even further by establishing “justice and home affairs” as one of the pillars of the newly created EU and establishing the principle of the “area of freedom, security, and justice” in 1992 and 1997, respectively. A few years later, the *Convention of 29 May 2000*

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<sup>1</sup> Austria, Bulgaria, Estonia, Slovenia, Spain and Sweden.

<sup>2</sup> <https://www.statewatch.org/media/documents/news/2010/apr/eu-council-investigation-order-9145-10.pdf>

<sup>3</sup> Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

<sup>4</sup> [https://www.ejn-crimjust.europa.eu/ejn/EJN\\_Library\\_StatusOfImpByCat.aspx?CategoryId=120](https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=120)

<sup>5</sup> Not all EU Member States have become a member of the Schengen Implementing Convention, however. It has currently 22 EU Member States, although, it has some non-EU Member States as well (e.g. Iceland, Norway, Switzerland, Liechtenstein).

on Mutual Assistance in Criminal Matters between the Member States of the European Union (hereinafter the 2000 Convention) was signed.<sup>6</sup>

In 2009, the direction setting the *Stockholm Programme*<sup>7</sup> declared the need for a more comprehensive cross-border evidence gathering system based on the mutual recognition principle to replace the EU's fragmented, earlier system foreshadowing the EIO Proposal of 2011 and the adoption of the EIO DIR in 2014.

The EIO DIR's original idea was to create a judicial measure that can serve as the basis of a comprehensive system of evidence gathering connected to criminal cases with an international element; to create – following the direction set by the aforementioned Stockholm Program – a judicial measure that is based upon the principle of mutual recognition and that can be used for all types of evidence gathering in a standardized, straightforward way while replacing previous, more limited tools such as the *European Evidence Warrant*<sup>8</sup> (hereinafter EEW). Its scope needed to be as broad and comprehensive as possible, while the grounds for refusal needed to be kept as limited as possible. Also, it needed to set out strict deadlines for the execution of the requests.

## 2. Our concept and hypothesis

Our written paper aims to achieve nothing more than reflecting upon the EIO DIR's achievements and possible shortcomings. It is a timely endeavour in our mind not only because four years have passed since the original deadline of 22 May 2017, set by Article 33 of the EIO DIR for its implementation, but also because the internationalization – if not globalization – of crime makes it a more and more pressing concern what tools we possess to deal with the new challenges and how effective these tools are.

Fortunately, we can now rely on a considerable body of statistical data and casework while evaluating the EIO DIR's use and practicality. As we will show in the following pages, the growing need for fast, effective and easy-to-use tools in criminal proceedings is clearly indicated by the statistical data provided by the Prosecution Service of Hungary. Furthermore, the first reports and scholarly articles have been published with a similar aim recently. Among these publications is the *Report on Eurojust's casework in the field of the European Investigation Order* (hereinafter Report),<sup>9</sup> which aims to give an

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<sup>6</sup> [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:42000A0712\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:42000A0712(01)&from=EN)

<sup>7</sup> [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010XG0504\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010XG0504(01)&from=EN)

<sup>8</sup> Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.

<sup>9</sup> Published in November 2020 by Eurojust.

overview of the difficulties legal practitioners had to face during the first years of the use of the EIO and how Eurojust tried to help to overcome them. However, we have another reason for evaluating the EIO DIR's role in European judicial cooperation: the withdrawal of the United Kingdom (hereinafter UK) from the EU. With Brexit – as most people call it – the EIO DIR lost one of its most populous implementing states. In the wake of this decision, many questions and uncertainties arose regarding judicial cooperation in criminal matters between the UK and the remaining EU Member States.<sup>10</sup>

It is also worth mentioning that choosing the EIO as our written paper's topic has a less scholarly reason. Namely, despite the importance of the topic, there have been no written papers in the THEMIS competition related to the EIO in recent years. We believe we have to remedy this. Under the aegis of the European Judicial Training Network, the THEMIS competition cannot go on without a written paper examining the EIO DIR and its practical application in detail.

In the course of the following pages, we intend to examine whether the EIO DIR managed to live up to the expectations and necessities of international judicial cooperation in criminal matters. We wish to answer whether the EIO DIR is the product of a bold-enough legislation to replace the previous, fragmented regime that governed the international judicial cooperation among the EU Member States. ***Is the EIO DIR a step forward to an increased European judicial cooperation in criminal matters? Is the EIO going to be the light that will navigate European judges and prosecutors through the darkness: the complex and fragmented regime of cross-border evidence transfer in criminal cases?*** To answer these questions, beyond the analysis of the practice developed in the past year in connection with the EIO, we will present the reader with a summary of the comparison of the other existing tools and instruments that can be used in cross-border evidence-gathering. Towards the end of our written paper, we will delve into the issue of Brexit in some depth. We will try to grasp how Brexit affected judicial cooperation in criminal matters in Europe and what kind of new challenges it has raised. We will also spend some time pondering about the possible future of European judicial cooperation in criminal matters, and we will discuss the role of the EIO and the European Public Prosecutor's Office (hereinafter EPPO).

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<sup>10</sup> It is worth noting here that there are also member states which do not participate in the implementation of the EIO DIR since Denmark and Ireland previously opted out of the “justice and home affairs” pillar of the EU and the “area of freedom, security and justice” established by the Maastricht Treaty and the Treaty of Amsterdam.

On the one hand, we hypothesize that the EIO DIR made evidence gathering a somewhat faster, more straightforward process among the participating EU Member States. But on the other hand, we think that *the EIO DIR could not fundamentally change the fragmented regulatory regime legal practitioners have to deal with* in any Member State encountering a criminal case with a foreign element. In our mind, the EIO at this point can be considered as an imperfect tool even for its intended purposes. However, we will argue that *this fragmented regime of international judicial cooperation in criminal matters is an obstacle rooted in the inherent character of the sovereign states' international cooperation in our day, and many of the EIO DIR's shortcomings can be attributed to this contemporary reality of foreign relations*. We believe that Eurojust's casework Report will demonstrate that the EIO cannot be considered a failure, rather it can be regarded as a stepping stone on the long road of the European social, political integration and, of course, judicial cooperation, which process needs to take its proper course. We will argue for the 'need to learn' from the EIO DIR's shortcomings and to continue improving judicial cooperation in criminal matters.

### **3. The landscape of cross-border evidence gathering in criminal matters**

Before we attempt to assess the EIO DIR's successes and possible shortcomings, we need to take a brief detour and place the instrument into the system of judicial cooperation to understand the instrument's novelty compared to other instruments with a similar purpose in this field. We also need this detour to illustrate that the EU is not an isolated entity in international relations, and it is not even a homogenous one. While enhancing cooperation among the Member States is an important step in European integration, one additional tool with limited usefulness does not necessarily make legal practitioners' lives simpler or make cross-border evidence gathering an easy task.

We can categorize judicial cooperation in several different ways. For instance, judicial authorities may cooperate in vertical, horizontal and diagonal ways, and participation may occur in the criminal and civil legal fields. Also, we can differentiate among the levels of judicial cooperation, such as global level (e.g. United Nations and the several UN Conventions<sup>11</sup> or the OECD<sup>12</sup>), regional level (e.g. the Council of Europe) or

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<sup>11</sup> The most significant UN Conventions regarding cooperation in criminal matters include: the UN Convention against Transnational Organized Crime adopted in Palermo in 2000; the UN Convention against Corruption adopted in Merida in 2003.

<sup>12</sup> The Organization for Economic Co-operation and Development, for further details see: [www.oecd.org](http://www.oecd.org)

sub-regional level (e.g. the Benelux Union<sup>13</sup> and the Visegrád Group<sup>14</sup>), and last but not least, the special judicial cooperation system of the EU.

As the most significant milestones of judicial cooperation among EU Member States are well known by practitioners, we will disregard covering them in detail. Therefore, we will not deal with the EEW, the European Freezing Order<sup>15</sup> and joint investigation teams<sup>16</sup> (hereinafter JIT) either. The Member States never really implemented and applied the EEW, while the latter two have a procedural purpose slightly different from the EIO. In addition, we will not go into details of the Schengen Agreement and the SIC, although they played an essential role in extending European cooperation.<sup>17</sup>

We would rather like to highlight those legal instruments that had a significant role in the evolution of the EIO or still have a significant role in European criminal cooperation. These are:

- the Council of Europe’s (hereinafter CoE) *European Convention on Mutual Assistance in Criminal Matters*, adopted in Strasbourg on 20 April 1959 and its additional protocols (hereinafter Strasbourg Convention);<sup>18</sup>
- the *2000 Convention*, which aimed to facilitate the application between the Member States of the EU and to supplement the provisions of – among others – the Strasbourg Convention and its Protocol, the Schengen Agreement and the SIC.<sup>19</sup>

To compare these legal instruments with the EIO and each other, we have created the following table. We have chosen to examine four features of these legal instruments to highlight their main characteristics. These four main features include the territorial scope of the conventions and legal instruments, the deadline for executing a request – where applicable and codified; the form of the issued request; the transmission of the request – the way the request is forwarded to the competent judicial authority; and the subject of the request.

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<sup>13</sup> The Benelux Union is a political-economic union and formal international intergovernmental cooperation of three neighbouring states in western Europe: Belgium, the Netherlands, and Luxembourg. <https://www.benelux.int/nl/>

<sup>14</sup> The cooperation of the Prosecutors General of the Visegrad Group (Hungary, Slovakia, the Czech Republic, Poland) is manifested in intensive contact and regular consultations having begun in 2012.

<sup>15</sup> Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders. Hereinafter *European Freezing Order*.

<sup>16</sup> Council Framework Decision of 13 June 2002 on joint investigation teams (2002/465/JHA).

<sup>17</sup> The SIC contained several now common provisions in the field of criminal cooperation (i.e. direct contact), and for the first time, it regulated police cooperation at the international level (cross-border pursuit, and surveillance, controlled deliveries etc.).

<sup>18</sup> ETS No.030, ETS No.099, ETS No.182.

<sup>19</sup> Article 1.

	<b>TERRITORIAL SCOPE</b>	<b>EXECUTION DEADLINES</b>	<b>FORM OF THE REQUEST</b>	<b>SUBJECT OF THE REQUEST</b>	<b>TRANSMISSION OF THE REQUEST</b>
<b>STRASBOURG CONVENTION</b>	members of CoE (incl. EU27) + Chile, Israel, Republic of Korea	does not lay down a specific time limit (depends on the requested Party)	- official LoR without any specific or unified formalities	- obtaining evidence - service of writs and records of judicial verdicts - appearance of witnesses, experts and prosecuted persons	between Ministry of Justices (except for urgent cases)
<b>SECOND ADDITIONAL PROTOCOL (2001)</b>	CoE40 <sup>20</sup> + Chile, Israel	see above	see above	see above	directly
<b>2000 CONVENTION</b>	members of EU (excluding Greece, Croatia) <sup>21</sup>	- „as soon as possible”, - taking into account the procedural and other deadlines indicated by the requesting Member State. (explain the reasons)	in writing, or by any means capable of producing a written record under conditions allowing the receiving Member State to establish authenticity	supplements the Strasbourg Convention	directly
<b>EIO</b>	members of EU (excluding Denmark, Ireland)	- recognition within 30 days (+ max. 30 days) - execution: 90 days	- standard form (Annex A)	investigative measure (exceptions)	- directly - central authority - via EJN

<sup>20</sup> Available at: [https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/182/signatures?p\\_auth=8BG9AvgK](https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/182/signatures?p_auth=8BG9AvgK)

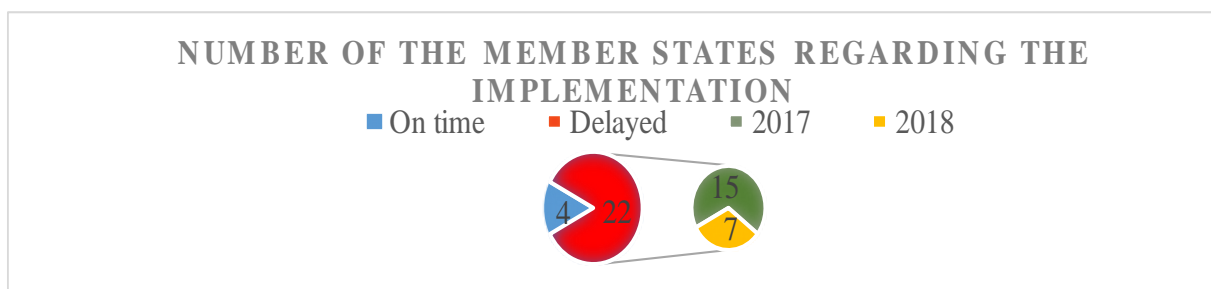
<sup>21</sup> Available at: [https://www.ejn-crimjust.europa.eu/ejn/EJN\\_Library\\_RatificationsByCou/EN](https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_RatificationsByCou/EN)

#### 4. The implementation of the EIO DIR

The EIO DIR was adopted on 3 April 2014. Member States were obliged to take the necessary measures to comply with the EIO DIR by 22 May 2017 at the latest, which means that Member States had a little bit more than three years to implement the EIO DIR into their national legal systems.<sup>22</sup>

To evaluate the Member States' implementation of the EIO DIR, we used the data provided by the European Judicial Network's (hereinafter: EJN) website.<sup>23</sup> The EIO DIR applies to all EU Member States except Denmark and Ireland, which opted out;<sup>24</sup> therefore, we have examined 26 Member States. It should be noted that the statistics below also include the UK, which no longer uses the EIO. According to the available data, *85% of the Member States did not implement the EIO DIR on time*, with only 15% implementing it by 22 May 2017. However, it should be emphasized that 15 of the 22 Member States that were late in implementing the EIO DIR still did so in 2017, compared to the other 7 Member States that implemented it only in 2018.

This statistics raises the following question: *what was the reason for the delay?* The EIO-LAPD research<sup>25</sup> and the national reports – the primary goal of which is to provide an overview of the legal and practical implementation of the EIO DIR – also dealt with this question. The research project covered five Member States that were late in implementing the EIO DIR. The EIO-LAPD research did not include Hungary; however, it should also be noted that in Hungary the EIO DIR entered into force on 23 May 2017. So Hungary had a one day delay.



Graph No.1: The numbers shown indicate the number of the Member States' implementation in 2017/2018

<sup>22</sup> EIO DIR Article 36.

<sup>23</sup> Status of implementation of the EIO DIR is available at [https://www.ejn-crimjust.europa.eu/ejn/EJN\\_Library\\_StatusOfImpByCat.aspx?l=EN&CategoryId=120](https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?l=EN&CategoryId=120)

<sup>24</sup> [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A230301\\_2](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A230301_2)

<sup>25</sup> Seven higher education and research institutions teamed up to cooperate in a project called European Investigation Order – Legal Analysis and Practical Dilemmas of International Cooperation – EIO-LAPD. The EIO-LAPD project (funded by the European Union's Justice Programme 2014-2020) is carried out as a partnership of 7 project partners from 6 different countries: Slovenia, Austria, Croatia, Germany, Italy and Portugal. <https://eio-lapd.eu/about-project/>



Among the first questions in the national reports was whether the EIO DIR had been implemented on time. If it had not been, then what had been the official and unofficial reasons for the delay in its implementation? The possible explanations were the following:

Member State	Reason(s) for the delay
Italy	- late planning - length of the process
Austria	- comments were to be submitted within a deadline of 12 calendar days - opposite statements were hardly considered
Slovenia	- the delay was caused by the fact that the Ministry of Justice had many other important projects that took priority - only a limited number of staff was working in the field of criminal law
Croatia	- no official reasons for the delay in its application - the draft was announced to the public on 6 April 2017, which was already too late, because the draft was open for public discussion for two weeks, and then it had to be adopted by the Government - on 18 May 2017 - followed by readings at two sessions of the Croatian Parliament while one session was already ongoing
Portugal	- no official reason

Table 1 (Source: National Report on legal implementation and practical application of the EIO in Italy, Austria, Slovenia, Croatia and Portugal)<sup>26</sup>

Based on the available data, it can be concluded that it was neither the lack of mutual trust, nor the purpose and benefits of the instrument being questioned by the Member States that caused the late implementation. The delay was presumably caused by internal legal problems or internal political reasons.

## 5. Eurojust's casework in the field of the EIO

In September 2018, Eurojust organized a meeting at which practitioners discussed their first experiences and best practices in the application of the EIO. The results of these discussions were gathered in an outcome report.<sup>27</sup> Finally, in 2019, Eurojust together with the EJM published a Joint Note on the practical application of the EIO.<sup>28</sup>

The aim of the Report from 2020 - mentioned earlier in Chapter 2 -, which is complementary to previously mentioned documents by Eurojust and EJM, is to inform both practitioners and policymakers of the main difficulties encountered in the practical application of the EIO on the basis of Eurojust's casework and to highlight, where relevant, the role that Eurojust has played in overcoming such difficulties. The Report is primarily

<sup>26</sup> Available at: <https://eio-lapd.eu/materials/>

<sup>27</sup> Eurojust meeting on the European Investigation Order, The Hague, 19–20 September 2018: Outcome Report, Council doc. 15735/18.

<sup>28</sup> Eurojust and EJM, Joint Note of Eurojust and the European Judicial Network on the practical application of the European Investigation Order, Council doc. 11168/1/19.

based on the analysis of cases addressing issues related to the EIO registered at Eurojust between May 2017 and May 2019, and is complemented by views expressed during dedicated discussions with some Eurojust National Desks. The Report clearly indicates that the EIO is not yet functioning like a well-oiled machine. There are still several ongoing issues encountered throughout the life cycle of the EIO.<sup>29</sup>

Based on Eurojust's casework, solutions and best practices were identified, but the Report also stresses some challenges that one should be aware of and sets out the main conclusions reached and the recommendations proposed. The Report identified the following ten most relevant issues, and where it was possible, Eurojust's recommendations. These issues were:

- 1) *the definition of the temporal, material and territorial scope of the EIO;*<sup>30</sup>
- 2) *the clarification of the correct content of the EIO and the assistance with requests for additional information;*<sup>31</sup>
- 3) *the differences between national legal systems and the further clarification on the scope and the meaning of certain crucial concepts;*
- 4) *the correct and restrictive interpretation of the grounds for non-execution;*<sup>32</sup>
- 5) *the speed of the execution of EIOs, with special regard to urgent cases;*<sup>33</sup>
- 6) *the facilitation of direct contact and exchange of information between issuing and executing authorities;*
- 7) *language issues and the quality of the translations;*<sup>34</sup>
- 8) *the encouragement of the use of Annexes B and C;*<sup>35</sup>
- 9) *the transmission of EIOs to the competent executing authority and the identification of the competent executing authorities in the Member States;*<sup>36</sup>
- 10) *the coordination of the execution of EIOs in the different Member States and/or together with other instruments, with special regard to multiple requests and the early involvement of Eurojust in complex cases.*<sup>37</sup>

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<sup>29</sup> Report p.6.

<sup>30</sup> Report p.14.

<sup>31</sup> Report p.10-11.

<sup>32</sup> Report p.32-36.

<sup>33</sup> Report p.12, p.25.

<sup>34</sup> Report p.13-14.

<sup>35</sup> Report p. 56.

<sup>36</sup> Report p.29.

<sup>37</sup> Report p.29.

According to the Report, the EIO DIR is generally seen as an improvement on the legal framework of mutual legal assistance (hereinafter MLA). In many cases, the existence of standard forms (available in all languages), the increased role of judicial authorities, the limited grounds for refusal and the time limits have proved successful and had a positive impact on judicial cooperation. Time limits – at the time seen as one of the major improvements compared with the MLA regime – are not always met.<sup>38</sup>

According to our hypothesis and the concept of our written paper, we have to highlight that the Report did not deal with such international and cross-border cases in which parallel with EIOs, traditional MLA requests had to be issued simultaneously.

## 6. National Practice – Case Studies about the Application in Hungary

The Office of the Prosecutor General of Hungary carried out a thorough analysis<sup>39</sup> of national experiences and practice connected with the EIO. The analysis covered the period between 1 July and 31 December 2018 and examined 1,050 EIO cases altogether. Among them, 396 were EIOs issued by the Hungarian prosecution offices, and 654 were EIOs sent to the Hungarian prosecution offices for execution by other EU Member States. The Report is 34 pages long; therefore, we would like to summarize only the major findings and observations in the following:

*Received EIOs:* During the period under review, the execution was refused only in 6 cases out of the received 654 EIOs (the reasons included, for example: the EIO was incomplete and inaccurate; irregular submission without the standard form, exclusively in the language of the issuing State). Regarding the deadlines, the investigative measures requested in the EIOs were executed mostly within 90 days by the Hungarian prosecution offices (hereinafter PPO). The reasons for the delays were, for example, time-consuming execution of the requested multiple investigative measures or that the persons requested to be questioned did not appear in spite of several summonses.

*Issued EIOs:* Member States' authorities refused to execute the EIOs issued by Hungarian PPOs in 6 cases out of 394 ones, based on, e.g. „*de minimis principle*” or the lack of double criminality. With regard to deadlines, the execution of the majority of the EIOs took place within 120 days, but, even in urgent cases, the execution of the requested investigative measures did not always comply with the deadlines. However, there were

<sup>38</sup> Report p.51.

<sup>39</sup> Report of the Office of the Prosecutor General: “*Összefoglaló jelentés az európai nyomozási határozat kibocsátása és végrehajtása ügyészégi gyakorlatának vizsgálatáról*”, Budapest, 2019, 1-34.

also examples of execution within 30-40 days if the requested data or document was already in possession of the executing authority, or its acquisition was not difficult. Another problem was the demarcation between the EIO and the freezing order; thus, it happened that a PPO issued an EIO instead of a freezing order.

The report also detected a slight failure in connection with the implementation of the EIO DIR into the Hungarian national legal system. In a specific case, the executing Hungarian PPO considered that the criminal activity described in the German EIO did not constitute a crime under the Hungarian law. Therefore, the execution of the EIO had to be refused due to the lack of double criminality. It should be noted, however, that this crime was not included in the catalogue of crimes (Annex D of the EIO DIR). Due to the incorrect implementation, it was included in the relevant Hungarian act<sup>40</sup> that in such cases, it was compulsory for the Hungarian judicial authorities to refuse the execution of the EIO. The German authorities stated in their reply that the lack of double criminality could not be an obstacle to the execution. The Prosecutor General of Hungary agreed with that, and the EIO was finally executed. The Prosecutor General of Hungary also highlighted that the EIO DIR, due to its inadequate implementation, is in conflict with the rules transposing the EIO DIR, which could only be resolved through legislation. Accordingly, the Office of the Prosecutor General launched a legislative initiative towards the Ministry of Justice. The Hungarian Parliament solved and remedied the problem by modifying the act, which right now states that in such a case the execution “may be refused”, rather than making the refusal compulsory.

## **7. Circumstances increasing fragmentation**

### **7.1. Brexit**

The UK joined the European Economic Community (as it then was) on 1 January 1973, alongside Denmark and Ireland,<sup>41</sup> raising the number of member states to nine.<sup>42</sup>

On 23 June 2016, the UK voted to leave the EU, and in 2017 the UK triggered Article 50 of the Treaty on European Union, the withdrawal clause. From that moment on, the EU and the UK carried out negotiations on a withdrawal agreement (hereinafter WA), which was agreed upon on 17 October 2019, delaying the date for the UK to leave the EU until 31 January 2020.

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<sup>40</sup> Act CLXXX of 2012 on Judicial Cooperation in Criminal Matters with Member States of the European Union.

<sup>41</sup> [https://europa.eu/european-union/about-eu/history/1960-1969\\_en](https://europa.eu/european-union/about-eu/history/1960-1969_en)

<sup>42</sup> [https://europa.eu/european-union/about-eu/history/1970-1979\\_en](https://europa.eu/european-union/about-eu/history/1970-1979_en)

From 1 February 2020 until 31 December 2020, the UK was in a transition period, as agreed in the WA. During this period, the UK was no longer an EU Member State but remained a member of the single market and the customs union.<sup>43</sup> On 30 December 2020, the EU and the UK signed a trade and cooperation agreement (hereinafter TCA)<sup>44</sup>, which became provisionally applicable as of 1 January 2021.

We would like to highlight the main changes concerning judicial cooperation in criminal matters between the EU and the UK,<sup>45</sup> but following the concept of our written paper, we will only reflect on the changes of evidence gathering and the EIO. As of 1 January 2021, in principle, EU legal instruments will no longer apply between the EU and the UK. However, in accordance with Article 62(1) and (2) WA there are certain exceptions for ongoing judicial cooperation proceedings in criminal matters: “*As of 1 January 2021, Articles 113–122 of Part Three, Title VIII of the TCA supplement, in relation to the UK, the Strasbourg Convention and its two Additional Protocols, without being a self-standing title; and the EIO DIR will no longer apply, in relation to the UK.*”

This new regime was largely inspired by the EIO DIR. The TCA refers back to the definitions in the Strasbourg Convention. The main novelty is that it makes specific reference to EU bodies within the concept of a competent authority.<sup>46</sup> The TCA differs slightly from the EIO DIR as the time limit to decide on the execution is 45 days under the TCA. The 90 days to execute the measure remains the same.<sup>47</sup> The TCA also deals with the form of the request, the conditions for issuing a request for mutual assistance, the availability of investigative measures, the transmission of requests for mutual assistance.<sup>48</sup>

The new regime guiding MLA between the EU and the UK is based on the Strasbourg Convention and the EIO, creating a hybrid system. We consider that it also increases fragmentation, contrary to the fact that the two mentioned instruments are well-known by practitioners. EU Member States have to adapt to another new system and apply a mixture of new and already existing rules, which will result in confusing practitioners.

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<sup>43</sup> Article 126 WA.

<sup>44</sup> Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (OJ L 444, 31.12.2020, pp. 14–1462).

<sup>45</sup> For further details see: Eurojust’s report on *Judicial cooperation in criminal matters between the European Union and the United Kingdom from 1 January 2021*, <https://www.eurojust.europa.eu/judicial-cooperation-criminal-matters-between-european-union-and-united-kingdom-1-january-2021>

<sup>46</sup> Article 114

<sup>47</sup> Article 120

<sup>48</sup> Articles 115-119, 121

## 7.2. The EPPO

As we pointed out earlier, we will briefly touch on the EPPO and its impact on criminal cooperation, particularly the EIO and on the cross-border evidence gathering system's fragmentation.

The EPPO is a new EU-body in charge of conducting criminal investigations and prosecutions for crimes against the EU budget. Expected to be operational as of 1 June 2021<sup>49</sup>, the EPPO will strengthen the Union's capacity to protect taxpayers' money.<sup>50</sup> It will be the first supranational PPO. The EPPO will investigate and prosecute fraud and other crimes affecting the EU's financial interests<sup>51</sup>. The EPPO can also investigate and prosecute any other illegal activity that is 'inextricably linked' to an offence against the EU budget. The EPPO will operate as a single office headed by a European Chief Prosecutor working with one European Prosecutor from each participating EU Member State. Currently, 22 EU Member States participate in the enhanced cooperation that has established the EPPO.

In accordance with Article 105(3) of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office<sup>52</sup> (hereinafter EPPO Regulation), the competent authorities of the Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO, the Member States shall notify the EPPO as a competent authority for the purpose of implementation of the applicable Union acts on judicial cooperation in criminal matters in respect of cases falling within the competence of the EPPO, in their relations with the Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO. This provision enables cooperation between the EPPO and the non-participating Member States from the start of operations by the EPPO. Article 105(3) of the EPPO Regulation does not as such impose any new legal obligations on the non-participating Member States. This provision is essentially based on the idea that the EPPO is a 'legal successor' to the (previously) competent national authorities of the participating Member States<sup>53</sup> within the scope of their competencies and that the non-participating Member States are thus obliged to accept

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<sup>49</sup> <https://www.eppo.europa.eu/news/start-date-eppo-operations-european-chief-prosecutor-proposes-1-june-2021-european-commission>

<sup>50</sup> [https://ec.europa.eu/info/eppo-brochures-0\\_en](https://ec.europa.eu/info/eppo-brochures-0_en)

<sup>51</sup> The so-called 'PIF' offences as defined in Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law transposed into their national laws.

<sup>52</sup> OJ L 283, 31.10.2017, p. 1

<sup>53</sup> See document 12341/16, available at: <https://db.eurocrim.org/db/en/doc/2587.pdf>

the notification (by the participating Member States) of the EPPO as a competent authority. That obligation was considered to stem from that legal succession, from the principle of sincere cooperation,<sup>54</sup> and/or from the relevant provisions of the EU instruments on mutual recognition obliging the executing State to recognize and execute orders (such as an EIO) that have been issued by a competent authority of the issuing State.

Medium to long-term relations among the EPPO and authorities of third countries and non-participating Member States can be regulated through working arrangements.<sup>55</sup> They may cover, in particular, the exchange of information and the secondment of liaison officers or contact points to improve practical cooperation.<sup>56</sup>

The instruments on mutual recognition refer to the authorities of the Member States which are competent under their national law. The EPPO is not an authority of the Member States, but of the EU, and is competent under EU law. The notification of the EPPO as the competent authority may raise a number of questions of interpretation of the respective instruments on mutual recognition as they have not been designed explicitly for the possibility of an EU body being notified as competent authority.<sup>57</sup> For example, the provisions of the EIO DIR refer to *issuing State* rather than *issuing authority*. In accordance with Article 2 point (a) of the EIO DIR, the term 'issuing State' means the Member State in which the EIO is issued.

We consider the EPPO being deemed as a competent authority based on the principle of sincere cooperation as a step towards a more complex system, where not only the traditional criminal cooperation legal instruments had to be taken into consideration and applied on a daily basis, but also the EPPO Regulation along with the Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law and the working arrangements with the non-participating Member States.

## 8. E-Evidence Digital Exchange System

In the digital world we are living, it is inevitable for law enforcement authorities to keep up with the developing technologies used by criminals. To effectively and

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<sup>54</sup> Article 4(3) TEU

<sup>55</sup> Such as the recently signed working arrangement between the EPPO and the Office of the Prosecutor General of Hungary, <https://www.eppo.europa.eu/press-releases/eppo-signs-working-arrangement-office-prosecutor-general-hungary>

<sup>56</sup> [https://ec.europa.eu/info/eppo-brochures-0\\_en](https://ec.europa.eu/info/eppo-brochures-0_en)

<sup>57</sup> The CJEU has examined the definitions of 'issuing authority' and 'judicial authority'. See: CJEU, Case C-584/19, Staatsanwaltschaft Wien, 8 December 2020.



successfully combat cross-border crimes, there is a need to improve the possibilities for judicial authorities to exchange electronic evidence among them in any stage of the criminal procedure.

For this purpose, the Council on 9 June 2016 called for the establishment of “a secure online portal” for requests and responses concerning electronic evidence.<sup>58</sup> Then the Commission set up a Project team of Member States’ experts to develop specifications for a so-called e-evidence platform. As a result of the Commission’s cooperation with the Member States, a secured platform providing a secure communication channel for digital exchanges of requests for e-evidence and replies between EU judicial authorities under the EIO DIR was established<sup>59</sup> based on the e-CODEX system.<sup>60</sup> Technically, the Commission prepared a reference implementation - available to the Member States as of April 2020<sup>61</sup> - for the Member States, which they can then install nationally. The e-Evidence Digital Exchange System (hereinafter: EDES)<sup>62</sup> establishes a secure decentralized system between the Member States’ competent judicial authorities, allowing them to communicate swiftly and expediently with respect to electronic exchanges in the context of the EIO and the various MLA in criminal matters.<sup>63</sup> In practice, the EDES will work as a file exchange system. The issuing authority can upload the signed EIO in a digital form (e.g. in a pdf format) into the EDES, then chooses the competent EU authority from a drop-down menu based on EJM’s Atlas.<sup>64</sup> The issued EIO is sent ‘digitally’ and directly to the competent executing authority within the means of the platform, which can download the EIO. The executing authority will also upload the gathered electronic evidence to the EDES, and it is also sent directly to the issuing authority.

On 2 December 2020, the European Commission adopted the “Proposal for a Regulation on a computerized system for communication in cross-border civil and criminal

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<sup>58</sup> <https://ec.europa.eu/futurium/en/content/action-21-it-platform-exchange-electronic-evidence-between-judicial-authorities-new-may-2017>

<sup>59</sup> <https://ec.europa.eu/futurium/en/content/action-21-it-platform-exchange-electronic-evidence-between-judicial-authorities-new-may-2017>. For further details see: <https://www.e-codex.eu/>

<sup>60</sup> e-CODEX (e-Justice Communication via Online Data Exchange) provides easy access to cross-border justice for citizens, business and legal professionals all over Europe. e-CODEX offers a European digital infrastructure for secure cross-border communication in the field of justice. <https://www.e-codex.eu/>

<sup>61</sup> See note 59.

<sup>62</sup> <https://evidence2e-codex.eu/a/matching-evidence-to-ecodex>

<sup>63</sup> See note 59.

<sup>64</sup> Atlas allows the identification of the locally competent authority that can receive your request for judicial cooperation and provides a fast and efficient channel for the direct transmission of requests according to the selected measure. <https://www.ejm-crimjust.europa.eu/ejm/AtlasChooseCountry/HU>



proceedings”, the e-CODEX Regulation. The Commission highlights e-CODEX as the gold standard for secure digital communication in cross-border judicial proceedings.<sup>65</sup>

## 9. Concluding remarks

### 9.1. The concept

In this written paper, we have been searching for the answer to the question: **is the EIO DIR a step forward to increased European judicial cooperation in criminal matters?** The EU intended to create a unified and efficient system with the EIO DIR, a comprehensive stand-alone instrument of cross-border evidence-gathering that can replace the previously fragmented system. We hypothesized that the EIO DIR could not fundamentally change the fragmented regulatory regime legal practitioners had to deal with in the past. We pointed out that in some regards, fragmentation even increased since the adoption of the EIO DIR. For instance, Brexit enforced the already existing fragmentation.

### 9.2. Main achievements

Contrary to our hypotheses, we believe that our analysis demonstrated that the EIO DIR is indeed a step forward in tightening and enhancing European judicial cooperation in criminal matters. The TCA with the UK following Brexit indicates this in our view. The new regime adopted in the EU-UK relations uses the EIO DIR’s most novel regulatory solutions, the deadline for the execution of the request and the standardized form, even if it slightly modifies them (e.g. the deadline for deciding on the execution is 45 days instead of 30 days). In our relatively limited professional experience, these tools are the most significant achievements of the EIO DIR compared to previous regulatory regimes.

In the concluding pages of our written paper, we will first summarize our thoughts in connection with the deadlines and the standardized form before returning to the issue of fragmentation. Naturally, we are well aware that we are not the first who examined the EIO DIR, among others, the Eurojust did so too. Still, we would like to go beyond its analysis and raise attention to details missed so far in earlier studies.

#### 9.2.1. Has the procedure become simpler? Thoughts on the EIO form

It should be noted that even though the blank standardized form is 17 pages long, one can still rightfully claim that it offers a practical, useful and transparent tool for legal

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<sup>65</sup> <https://www.e-codex.eu/>

practitioners requesting legal assistance from abroad.<sup>66</sup> The form includes the details of the exact postal address, phone number and e-mail of the issuing authority, while the issuing state may also add further information.<sup>67</sup> A typical example of the latter is the language spoken by the designated caseworker in the event the executing authority would like to clarify something or get into direct contact. Previously, in many cases, we faced the problem that only the envelope contained information on the requesting authority, sometimes in languages unknown to the members of the executing judicial authorities (e.g. using Cyrillic letters). The letter of request for MLA contained only the request itself translated into Hungarian, without other postal address or phone number. The EIO form eliminates this problem.

Some argue that the EIO is, in some cases, too short and concise and does not contain enough information. Furthermore, some consider it inflexible regarding certain kinds of investigative measures.<sup>68</sup> We cannot agree with this critique at this point. According to our limited experience, in the cases we handled so far, the EIO form proved to be precise enough. We were able to fill in all the relevant information of the case (such as the state of facts, the requested investigative measures etc.).

We have one practical observation, however. A change that, in our opinion, would improve the ergonomics of EIO requests. We suggest changing the order of Section C and Section G of the EIO form, as it is preferable to read the facts of the crime first (section G of the EIO form). Otherwise, it is not easy to understand what investigative measures are being asked for in Section C. This might not make easier the issuing authority's task since the facts of the crime and the requested investigative measures still have to be described. However, from the perspective of the executing authority, it is much easier to process and understand the request with the suggested change.

### **9.2.2. Has the procedure become simpler? Another benefit: strict deadlines**

Although the EIO DIR does not contain a sanction if an authority fails to meet the deadlines, the introduction of deadlines is a step forward. We agree with *Lorena Bachmaier*

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<sup>66</sup> See: CJEU, Case C-324/17, *Gavanozov*, 24 October 2019. [„Article 5(1) of EIO DIR, read in conjunction with Section J of the form set out in Annex A to that directive, must be interpreted as meaning that the judicial authority of a Member State does not, when issuing an EIO, have to include in that section a description of the legal remedies, if any, which are provided for in its Member State against the issuing of such an order.”]

<sup>67</sup> See: section K of the EIO form.

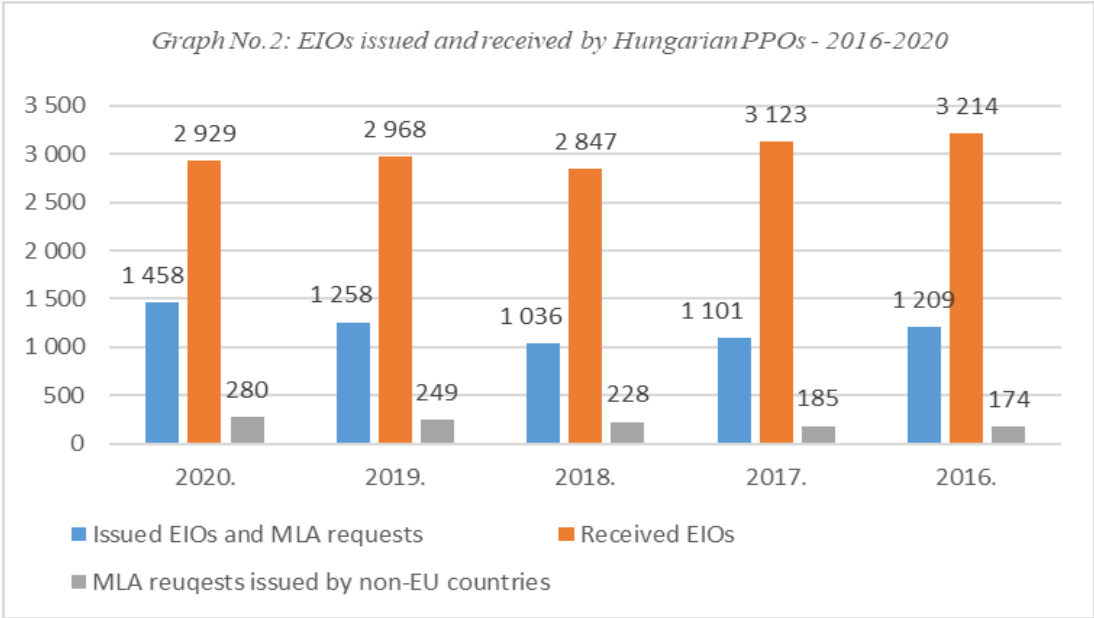
<sup>68</sup> Papucharova, Georgia: „The Request for Mutual Assistance and the European Investigation Order – Is the Modern Legal Assistance Instrument Better than its Predecessor”, *International conference KNOWLEDGE-BASED ORGANIZATION*, 2020, 26(2), 213. <https://doi.org/10.2478/kbo-2020-0078>

Winter’s prediction that „the provision of deadlines will not entirely solve this problem, its mere existence might contribute to foster the rapid execution of requests”.<sup>69</sup>

**9.3. The fragmented regime**

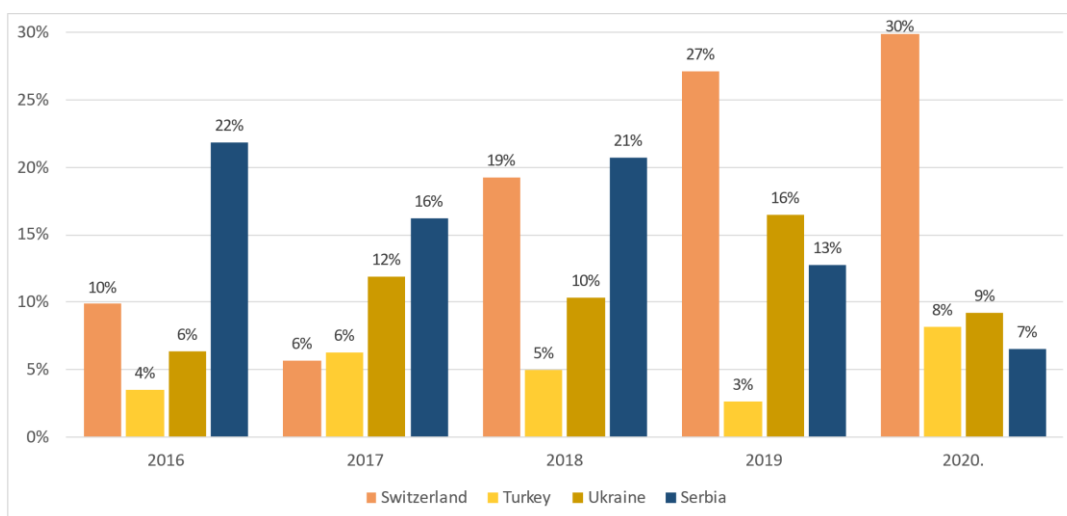
Above all, we think the EIO DIR possess the possibility of improvement. The proof of this is the EDES which could significantly speed up the execution of the requests and foster direct cooperation and consultation. To sum up and emphasize our concept regarding fragmentation, we need to point out that it is an invincible obstacle that we cannot overcome at this time. The perfect proof of this is Hungary. As a landlocked European country, it has seven neighbouring countries, two of which (Ukraine and Serbia) are not EU members, and it has a lively judicial cooperation with its neighbours. Thus, the arrival of the EIO DIR did not cause a significant change in the challenges Hungarian judicial authorities still have to face. The old tools predating the EIO DIR still have to be used.

The statistical data provided by the Office of the Prosecutor General of Hungary illustrates this. The Hungarian Prosecution Service received 280 requests for legal assistance from non-EU countries last year, which is about 10% of the requests received from the EU. The number of requests received from third countries steadily grew during the past years.



<sup>69</sup> Lorena Bachmaier Winter: *European investigation order for obtaining evidence in the criminal proceedings Study of the proposal for a European directive*, *Zeitschrift für Internationale Strafrechtsdogmatik*, 9/2010., 586. [http://zis-online.com/dat/artikel/2010\\_9\\_490.pdf](http://zis-online.com/dat/artikel/2010_9_490.pdf)

At least 10% (sometimes 30%) of the requests received from third countries are from the two neighbouring countries (*Grap No.3: MLAs and EIOs issued by Hungarian PPOs towards non-EU countries*):



Despite all its shortcomings and anomalies in everyday practice,<sup>70</sup> it is undeniable that the EIO is a significant milestone in international judicial cooperation in criminal matters. It is a major achievement in eliminating the previous and persisting fragmented system. The EIO DIR covering cross-border evidence gathering in a broad sense made a massive step towards a faster, more efficient European criminal cooperation.

### ***Bibliography***

*All of the references (books, edited books, chapters in books, articles, internet sources etc.), EU documents, texts, as well as the domestic legislation are available in their full extent, without abbreviations and with access path in the footnotes.*

<sup>70</sup> See: CJEU, Case C-852/19, *Gavanzov II* is pending. [Questions referred: "Is national legislation which does not provide for any legal remedy against the issuing of an EIO for the search of residential and business premises, the seizure of certain items and the hearing of a witness compatible with Article 14(1) to (4), Article 1(4) and recitals 18 and 22 of Directive 2014/41/EU and with Articles 47 and 7 of the Charter, read in conjunction with Articles 13 and 8 of the ECHR? Can an EIO be issued under those circumstances?"]

SECTION L Details of the judicial authority which validated the EIO

Please indicate the type of judicial authority which has validated this EIO:

- (a) judge or court
- (b) investigating judge
- (c) **public prosecutor**

Official name of the validating authority:

**TEAM HUNGARY**

Name of its representative:

**Lilla Tünde Gulyás**

**Máté Gergely Walsh**

**Viktor Zóna**

Post held (title/grade):

**prosecutor trainee**

File no: **EIO.0405/2021**

Address: **Hungary**

Tel. No: (country code) (area/city code) + **36-1-354056 35**

Fax No: (country code) (area/city code) + **36-1-354056 35**

E-mail: **teamhungary@themis.competition.eu**

Languages in which it is possible to communicate with the validating authority:

**English, Hungarian**

Please indicate if the main contact point for the executing authority should be the:

- issuing authority
- validating authority**

Signature and details of the validating authority

Name: **Dr. Törő Andrea**

Post held (title/grade): **tutor**

Date: **26 – 04 - 2021**

Official stamp (if available):

*Andrea Törő*

