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# Guidelines for applying the EIO in Sweden

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## Background to the project

- Interviews, desk research, conference, stakeholder meeting, 2 workshops.
- 6 guidelines drafted as questions or problems, suggestions for further research or change in the legislation or application.



# Conclusions of the empirical research

- Gavanazov II has had very little effect on the everyday workings of the EIO in Sweden.
  - Mutual recognition and mutual trust are still the pillars for the cooperation for prosecutors and judges and prosecutors and judges demonstrate a very high level of confidence for other countries' application of the EIO and their respect of fundamental rights.
  - Depending on how "judicial control" is interpreted and applied, judicial control of the lawfulness of EIOs and the subsequent decisions is possibly sometimes missing.
- From the perspective of the prosecutors the EIO works very smoothly and well. There are some practical tweaks to correct:
  - The dialogue is often not working between the Member States' authorities;
  - Long times for contact to happen (some MS still operate via traditional postal services);
  - The defence is often left outside of the EIO process;
  - Language difficulties.





# 1. Does the Swedish legal system provide an effective remedy according to the Directive, as interpreted by *Gavanozov II*?

- **Uncertainty if the Swedish system really complies with the requirement of effective remedies in *Gavanozov II*:**

*"In the light of all the foregoing considerations, the answer to the second question is that Article 6 of Directive 2014/41, read in conjunction with Article 47 of the Charter and Article 4(3) TEU, must be interpreted as precluding the issuing, by the competent authority of a Member State, of an EIO, the purpose of which is the carrying out of searches and seizures as well as the hearing of a witness by videoconference, where the legislation of that Member State does not provide any legal remedy against the issuing of such an EIO."*



# 1. Does the Swedish legal system provide an effective remedy according to the Directive, as interpreted by *Gavanozov II*?

- Important to make a distinction between the issuing of an EIO and the decision to undertake the investigative measure itself?
- No possibility of an *ex ante* judicial control of the issuing of an EIO.
- Prosecutors issue and execute EIOs and the corresponding investigative measures.





# 1. Does the Swedish legal system provide an effective remedy according to the Directive, as interpreted by *Gavanozov II*?

## Swedish remedies to review the legality of the measures taken due to an EIO

- Review by a higher prosecutorial authority; The judiciary's decision to allow a measure under e.g. 2 Ch 5 § Law on the EIO, 27 Ch 21 § the Code of Judicial Procedure) (*ex ante*), is not a remedy;
  - Limited possibility to have an *ex post* review (see e.g. for seizure 27 Ch. 6 § the Code of Judicial Procedure). What possibility to review the legality of e.g. a house search or a hearing? Hesitance by the judiciary to review the legality of investigative measures that have already taken place. The Swedish system allows for different measures;
  - The Parliamentary Ombudsmen;
  - Compensation from the State;
  - Ex post review in the subsequent trial, if any;
  - Effect on the evidentiary value in the subsequent trial within the Swedish theory of free sifting of evidence.
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- Are those remedies judicial and effective (issued by a court, *restitutio ad integrum*)?



**1. Does the Swedish legal system provide an effective remedy according to the Directive, as interpreted by *Gavanozov II*?**



**Guideline 1:** In light of the uncertainty concerning what would be an effective legal remedy against an unlawfully issued EIO and the measures taken on the basis of that EIO in Sweden, the issue should be investigated in more detail, preferably by the legislator with a view to amend the existing legislation







## 2. Is there any fundamental rights check of incoming European investigation orders?

- Mutual recognition and mutual trust are the guiding principles.
- The interviews show that Swedish judges and prosecutors have great confidence in the systems of other MSs and trust that their colleagues adequately protect the defendant's rights in respect Article 6 FEU and the Charter.
- In practice certain problems are dealt with through consultations.
- CJEU requires a certain control that incoming EIOs respect of Article 6 TEU and the Charter (Se e.g. C-16/22 *Staatsanwaltschaft Graz* och C-852/19 *Gavanozov II*).





## 2. Is there any fundamental rights check of incoming European investigation orders?

- Is the Swedish system, with an unwritten overarching principle that the judiciary and prosecutors respect fundamental rights sufficient (legally and in practice)?
- There might be a need to emphasise this principle in relation to the principle of mutual recognition.
- Optional ground for refusal in Article 11.1 f of the Directive:  
*"there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligation in accordance with Article 6 TEU and the Charter."*





## 2. Is there any fundamental rights check of incoming European investigation orders?

**Guideline 2:** Clarify that there is a responsibility in the executing state to make a certain pro-active check that fundamental rights are respected (and will be respected) in the issuing state.

It would be desirable to introduce a refusal ground in line with 11.1. f of the Directive as well as clarifying the matter further in the Prosecutors' handbook on the EIO.





### 3. Proportionality control of incoming EIOs?

- No proportionality check of incoming EIOs.
- Requests can result in disproportionate measures e.g. truck loads of bank statements.
- In practice dealt with through consultations and the possibility to request reimbursement of costs.
- **Guideline 3:** Look at how to best ensure that such a proportionality check is carried out.



#### 4. Is it proportionate to carry out an *ex ante* judicial control for certain measures and *ex post* for others, when the measures have similarly far-reaching consequences for fundamental rights (in case of incoming EIOs)?

- Judicial review of investigative measures are either *ex ante* or *ex post*.
- Secret coercive measures require the prosecutor to apply for authorisation by a court *ex ante* given the far-reaching consequences such measures have on fundamental rights.
- Other coercive measures (if still ongoing after it has been carried out, such as a seizure) judicial review *ex post*. If not ongoing, *ex post* in the possible subsequent trial.





- In today's digitalised society, measures such as a search or a seizure can have as far-reaching effects on fundamental rights as covert coercive measures (evidence in computers or the phone).
- The fundamental problem in this equation is not the EIO itself, but Swedish legislation that dates from the 1940s, not being designed for the current situation.
- Is it reasonable to have different types of control when the effect on fundamental rights can be the same?
- **Guideline 4:** The legislator should review which investigative measures justify an *ex ante* control as they are more likely to infringe the defendant's fundamental rights.





## 5. What practical problems remain due to the cross-border nature of the procedure?

- The EIO procedure was seen as well-functioning by judges and prosecutors.
- Practical difficulties remain:
  - Respect of the time-limits in the Directive;
  - Long procedures as some MSs only communicate by traditional mail
  - Other systems are much more formal than the Swedish system and have requirements we cannot fulfil (e.g. signature on each page of a hearing);
  - Difficulties to have consultations and communicate due to language difficulties in other Member States.
- Measures at EU level (e.g. E-Codex, EJTN language courses, EJM website).





- **Guideline 5:** Actions at European level to facilitate cooperation with European investigation orders such as language training for court staff, support from the EU to digitize prosecution chambers and courts so that there are effective, fast and secure communication systems.







## 6. Further education and guidance?

- Prosecutors have good access to internal training and there is a detailed handbook extensively used. Language training by EJTN.
- Judges have good access to training at "domstolsakademin" but not specifically on EIO. Handbook in EU criminal cooperation is under preparation.
- Defence lawyers have less access to knowledge. There is no handbook and courses are few. Very positive to further educational measures, especially together with judges and prosecutors.
- **Guideline 6:** Further training and guidance for judges and lawyers on the EIO. For defence lawyers, more training on the various EU criminal law instruments, including the EIO, is necessary.





Thank you for your attention!



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