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NOTE

From : Presidency
To : Delegations

Subject : Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters
- Proposal from the Presidency regarding EIO (grounds for refusal of recognition)

Delegations will find in the Annex a proposal from the Presidency in respect of the Draft Directive on the European Investigation Order in criminal matters (grounds for refusal of recognition).

According to the principle of mutual recognition, the executing authority may refuse execution of an EIO only if a ground for refusal is applicable. The modalities of the procedure of execution of the EIO are however governed by the law of the executing State.

The Hungarian Presidency submitted two options to the COPEN Working Party, one was based on previous Council discussions („Option A”), and a new one („Option B”). Both of these proposals were discussed during the last COPEN WP meeting on the 8th of March and most of the delegations preferred „Option A”.

Having considered the reactions of the delegations, the Hungarian Presidency attempted to draw up an alternative proposal for grounds for refusal

- based on the original „Option A”,
- taking into account the proposal of the UK delegation presented in a working document (DS 1002/11)
- including the deletion of Article 9a.

The new proposal of the Presidency seeks to consolidate the provisions on the grounds for non-recognition and non-execution into one single Article, in Article 10. This new Article 10 is governed by the following principles:

- Paragraph (1) the proposal leaves the provisions of the original Article 10 unaffected.
- Paragraph (1a) takes over the provisions of Article 9a paragraph (2) with some appropriate modifications. Paragraph (1a) covers all coercive measures and provides for a possibility for an executing authority to refuse the execution of an EIO in 4 specific situations.
- Paragraph (1b) is based on the provisions of the original Article 9a paragraph (3). The original proposal [Article 9a paragraph (3)] limited the possibilities to refuse the execution of an EIO covering measures referred to in paragraph 2, with some limited exceptions for the categories of offences and under conditions which are already known from the FD on EAW (list of 32 offences).

The Presidency's new proposal introduces two points where the execution or recognition of an EIO may not be refused because of the rules of paragraph (1a):

- a) where the investigative measure indicated in the EIO concerns the hearing of a witness, suspect or third party in the territory of the executing State;
- b) where the investigative measure has been requested in relation to the following categories of offences, as indicated by the issuing authority in the EIO, if they are punishable in the issuing State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of that State, and they shall not be subject to verification of double criminality under any circumstances

The Presidency's new proposal thus leaves the original paragraph (2) as it stands, but introduces some modifications in the text: the consultation seems necessary if there is an immunity or a privilege under the law of the executing state [para (1) point a)] and if the execution of an EIO would infringe the *ne bis in idem* principle [para (1) point e)]. However, referring to point c) of paragraph (1) is not necessary, because this point does not cover any measure.

Delegations are invited to examine the proposal.

Article 10

[General] *Grounds for non-recognition or non-execution*

1. ~~[Without prejudice to Article 9a, r]~~ Recognition or execution of an EIO may ~~[also]~~ be refused in the executing State where:
 - a) there is an immunity or a privilege under the law of the executing State which makes it impossible to execute the EIO;
 - b) in a specific case, its execution would harm essential national security interests, jeopardise the source of the information or involve the use of classified information relating to specific intelligence activities;
 - c) (...)
 - d) the EIO has been issued in proceedings referred to in Article 4(b) and (c) and the measure would not be authorised in a similar domestic case;
 - e) its execution would infringe the *ne bis in idem* principle.

- 1a. Without prejudice to ~~[Articles 8 and 10, and]~~ paragraph (1) where the investigative measure indicated by the issuing authority in the EIO concerns a coercive measure ~~[not covered by paragraph 1, under the law of the executing State]~~, the recognition or execution of the measure may also be refused in any of the following cases:
- a) if the ~~[acts]~~ conduct for which the EIO has been issued ~~[do not constitute an offence]~~ is not punishable under the law of the executing State, or;
 - b) if the measure concerned would not have been authorised by the executing authority in a similar domestic case, or;
 - c) if the measure does not exist under the law of the executing State and there is no other measure that will have the same result in accordance with Article 9, or;
 - d) if the measure exists under the law of the executing State, but its use is restricted to a list or category of offences which does not include the offence covered by the EIO ~~[and there is no other measure that will have the same result in accordance with Article 9]~~.

- 1b. Notwithstanding paragraph~~s 1 and 2~~ 1a, ~~[and without prejudice to Articles 8 and 10,]~~ the execution or recognition of an EIO may not be refused in the following cases: ~~[, except as]~~

- a) where the investigative measure indicated in the EIO concerns the hearing of a witness, suspect or third party in the territory of the executing State;
- b) provided for in paragraphs ~~[2 e) and 2 d)]~~ 1a a) and 1a b), where the investigative measure has been requested in relation to the following categories of offences, as indicated by the issuing authority in the EIO, if they are punishable in the issuing State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of that State, and they shall not be subject to verification of double criminality under any circumstances:

[insert list of 32 offences in accordance with Article 2(2) of the Framework Decision on the European Arrest Warrant]

2. In the cases referred to in paragraph 1(a), (b) and ~~[(e)]~~ (e), before deciding not to recognise or not to execute an EIO, either totally or in part, the executing authority shall consult the issuing authority, by any appropriate means, and shall, where appropriate, ask it to supply any necessary information without delay.