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NOTE

From :	Presidency
To :	CATS
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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 - Follow-up document of the meeting of the Council on 8-9 November 2010 and the Working Party on 17-18 November 2010

I. INTRODUCTION

The Working Party on Cooperation in Criminal Matters met on 17 and 18 November 2010 with a view to continuing the examination of the initiative for a Directive on the European Investigation Order on the basis of the document issued by the Presidency (document 15999/10 COPEN 251 EJN 62 EUROJUST 128 CODEC 1226) in follow up to the meeting of the Council on 8-9 November 2010 and a Room document presented by the Finnish delegation (doc. DS 1818/10). A number of delegations issued both general and specific scrutiny reservations. Discussions were focused on 4 questions contained in the Presidency document, and in particular on the issue of categories of measures. The latter is submitted to CATS for further discussion. The current text of Articles 1 to 10 of the proposal for a Directive is contained in Annex I.

II. ISSUES SUBMITTED TO CATS

1. Grounds for non recognition or non execution based on categories of measures

According to the principle of mutual recognition, the executing authority may refuse the 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.

During the discussions in the Council, most delegations agreed that grounds for refusal should only be specific ones and that a broad ground for refusal should be avoided in the proposal. Most delegations also endorsed the approach proposed by the Presidency to work with different categories of investigative measures, based on the coerciveness or intrusiveness of the measures concerned, in order to specify the grounds for refusal applicable to each of the categories

The main objectives of establishing such categories are:

- to create a minimum level playing field and ensure legal certainty for the issuing authority;
- to limit the number and extent of the grounds for refusal;
- to ensure more flexibility for the executing authority in function of the intrusiveness or coerciveness of the measure.

The Presidency presented to the Working Party its proposal for grounds for refusal based on four categories as contained in Article 9a (see Annex I to the present document). In this regard, it is recalled that other grounds for refusal referred to in Article 10 of the current text (for example, immunity and privilege, essential national security interests, etc) will be applicable irrespective of the measures concerned.

When drafting this new proposal, the Presidency has born in mind the following principles highlighted during the discussion at Council level:

- there should be no regression compared to the *acquis* (both MLA and mutual recognition instruments), in terms of availability of the measure and possibility to check double criminality;

- the current cooperation should be further improved: in this regard, the Presidency stated that most of the ordinary measures should fall in the first and second categories of Annex I;
- this new approach should not add complexity for practitioners.

The discussion in the Working Party showed that a number of delegations had substantive problems with several measures contained in the 4 categories presented by the Presidency and that further discussion would be needed either on their meaning or where to place several of them. Suggestions were also made to merge some of the categories.

As an alternative the Finnish delegation presented its proposal, which aimed at a more generic categorisation of the measures, whereby the first category would concern evidence in the possession of the executing authority, whereby no coercive measure would be taken or whereby hearings would be involved. A second category of measures would concern search and seizure and a third category would concern all other measures.

Following the discussion in the Working Party, the Presidency distributed an alternative proposal for an Article 9a (see Annex II), which is a combination of a specific approach and a generic approach. This alternative approach makes the following distinction: paragraph 1 covers non-coercive measures and hearings for which no additional grounds for refusal are provided; paragraph 2 covers all other coercive measures, without listing the specific measures covered, and provides for additional grounds for refusal; paragraph 3 limits the possibilities to refuse the execution of measures referred to in paragraph 2 in case it concerns offences included in the EAW list.

Paragraph 1 poses as the rule that the EIO may not be refused in 6 specified cases. The modalities of execution under national law of the executing State (Article 8) as well as the general grounds for refusal (Article 10) will however continue to apply. Paragraph 1 b) would not be applicable to, for instance, transcripts of interceptions which would be governed by paragraphs 2 and 3. As regards paragraph 1 e) it should be noted that this measure is often contained in a majority of letters rogatory issued today, in particular as regards witnesses. During the evaluation of the EAW, it has transpired that some judicial authorities issue EAWs simply in order to hear the suspect and to close the case. This paragraph could be a solution to remedy this situation. Paragraph 1 f) seeks to remedy another investigative measure which is common in letters rogatory where the legal situation is different in the member states.

Paragraph 2 concerns all other coercive measures not covered by paragraph 1 and contains 4 specific grounds for refusal (double criminality, similar domestic case, the investigative measure does not exist or the use of it is restricted to a list or category of offences).

Paragraph 3 makes an exception to paragraph 2, where the EIO may not be refused, with some limited exceptions referring to paragraph 2 c) and d) under the same conditions as is valid for the EAW (list of 32 offences). In that sense, the conditions for arresting a person in the Union and for obtaining an investigative measure in a Member States would become comparable. There is no exception for paragraph 2 b) as the executing authority would normally not be informed of all aspects of the case, in particular when they relate to the serious cases contained in the 32 categories of offences.

The Working Party will need to discuss further these issues. Before doing so however, *CATS is requested to give guidelines on whether it wishes that it should continue to work in the direction of the more detailed approach contained in Annex I or whether the more generic approach contained in Annex II should be followed.*

2. Proportionality

During the discussions in the Council, most delegations supported the approach of the Presidency which can be described as follows:

- proportionality should systematically be checked by the issuing authority (see Article 5a);
- the executing authority should be entitled to opt for a less intrusive measure than the one indicated in the EIO if it makes it possible to achieve similar results (see revised Article 9);
- proportionality should not constitute a general ground for refusal for the executing authority applicable to all kind of measures (see also the non-regression principle).

Delegations also insisted on the importance of direct communication between the issuing and executing authority.

Finally, further reflection was needed as regards the minor offences, as highlighted by practical experience of applying EAW. In this regard, the discussions in the Working Party showed that most delegations were not in favour of a ground for refusal, relating to a maximum level of penalties or to the nature and content of the offence, as it is the prime responsibility of the issuing authority to ensure that the request is proportional. Delegations were however in agreement that direct communication between the issuing and the executing authorities should be ensured in order to resolve any difficulty in a specific case.

As a result of the discussions, the Presidency makes the following compromise proposal. *CATS is invited to give its orientation on this approach.*

Article X
Minor offences

Where the executing authority has reasons to believe that

a) the investigative measure concerns an offence which it might consider being very minor, or

b) it is likely that the final penalty in the case may be very minor,

the executing authority shall consult the issuing authority on the importance to execute the investigative measure in the specific case if such an explanation has not been made in the EIO, or in case the executing authority, after having received the EIO, is of the opinion that it may not be proportionate to execute the EIO regarding this minor offence. After such consultation, the issuing authority may decide to withdraw the EIO.

3. Costs

During the discussion in the Council, most delegations supported the approach proposed by the Presidency which can be described as follows:

- disproportionate costs or lack of resources in the executing State should not be a ground for refusal for the executing authority;
- further reflection should focus on possible alternative solutions (direct communication between the competent authorities, extension of deadlines, sharing of costs, etc).

The Presidency is of the opinion that particular attention should be paid to the possibility to make, in exceptional circumstances, the execution of the investigative measure subject to the condition that the costs will be born by (or shared with) the issuing State. In this case, the issuing authority should have the possibility to withdraw the EIO.

As a result of the discussions in the Working Party, the Presidency makes a proposal for a new Article. *CATS is invited to give its orientation on this approach..* The idea is that this issue will become a general rule of the Directive and that other provisions relating to costs (e.g. Article 20 (9) or Article 27) will be maintained for particular measures.

Article Y

Costs

1. *Unless otherwise provided in the Directive, all costs undertaken on the territory of the executing State which are related to the execution of an EIO shall be born by the executing State.*

2. *Where the executing authority considers that the costs for the execution of the EIO will become exceptionally high, it shall consult with the issuing authority on whether and how the costs could be shared. If such a consultation cannot lead to a result, the executing authority may request the issuing authority to cover all costs or, as a last resort, to withdraw the EIO.*

III. FOLLOW-UP OF LAST CATS DISCUSSION

Issuing authorities

The Working Party discussed on several occasions the issue of the nature of issuing authorities. From the beginning of the discussions, several delegations indicated that they could not accept an obligation to recognize EIOs issued by authorities other than a judge, prosecutor or investigating magistrate. Others insisted, on the contrary, on the fact that measures covered by the Directive may be ordered by other authorities according to their national law and that these authorities should

therefore be able to issue an EIO. In this regard, replies to the questionnaire sent by the Presidency gave an overview of the situation in the Member States (see doc. 13049/1/10 COPEN 170 EJM 32 EUROJUST 81 CODEC 754). Discussions were also held during the meeting of CATS on 26 October.

Following the discussions in the Working Party, where the new compromise proposal of the Presidency was generally supported by the delegations, the Presidency proposes the following new amendments. *CATS is invited to submit any comments if deems appropriate.*

Article 2

Definitions

For the purposes of this Directive:

a) "issuing authority" means:

- i) a judge, a court, an investigating magistrate or a public prosecutor competent in the case concerned; or*
- ii) any other competent authority as defined by the issuing State and, in the specific case, acting in its capacity as an investigating authority in criminal proceedings with competence to order the gathering of evidence in accordance with national law,*

Article 5, paragraph 3 would read as follows:

Article 5a

Conditions for issuing and transmitting an EIO

1. An EIO may be issued only when the issuing authority is satisfied that the following conditions have been met:

- (a) the issuing of the EIO is necessary and proportionate for the purpose of the proceedings referred to in Article 4; and*
- (b) the investigative measure(s) mentioned in EIO could have been ordered under the same conditions in a similar national case.*

2. *These conditions shall be assessed by the issuing authority in each case.*

 3. *Where an EIO is issued by an authority referred to in Article 2(a)(ii), the EIO shall be validated, after examination of its conformity with the conditions for issuing an EIO under this Directive, by a judge, prosecutor or investigating magistrate before it is transmitted to the executing authority.*
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**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**

of

regarding the European Investigation Order in criminal matters

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 82 (1)(a)¹ thereof,

Having regard to the 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,

After transmission of the draft legislative act to the national Parliaments,

Acting in accordance with the ordinary legislative procedure,

¹ Question from UK/DE about the need to extend the legal basis selected for this initiative to Article 82 (1) (d).

Whereas:

- (1) The European Union has set itself the objective of maintaining and developing an area of freedom, security and justice.
- (2) According to Article 82(1) of the Treaty on the Functioning of the European Union, judicial cooperation in criminal matters in the Union is to be based on the principle of mutual recognition of judgments and judicial decisions, which is, since the Tampere European Council of 15 and 16 October 1999, commonly referred to as a cornerstone of judicial cooperation in criminal matters within the Union.
- (3) Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property and evidence², addressed the need for immediate mutual recognition of orders to prevent the destruction, transformation, moving, transfer or disposal of evidence. However, since that instrument is restricted to the freezing phase, a freezing order needs to be accompanied by a separate request for the transfer of the evidence to the issuing state in accordance with the rules applicable to mutual assistance in criminal matters. This results in a two-step procedure detrimental to its efficiency. Moreover, this regime coexists with the traditional instruments of cooperation and is therefore seldom used in practice by the competent authorities.
- (4) 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 matters³ was adopted to apply the principle of mutual recognition in such respect. However, the European evidence warrant is only applicable to evidence which already exists and covers therefore a limited spectrum of judicial cooperation in criminal matters with respect to evidence. Because of its limited scope, competent authorities are free to use the new regime or to use mutual legal assistance procedures which remain in any case applicable to evidence falling outside of the scope of the European evidence warrant.

² OJ L 196, 2.8.2003, p. 45.

³ OJ L 350, 30.12.2008, p. 72.

- (5) Since the adoption of Framework Decisions 2003/577/JHA and 2008/978/JHA, it has become clear that the existing framework for the gathering of evidence is too fragmented and complicated. A new approach is therefore necessary.
- (6) In the Stockholm programme, which was adopted on 11 December 2009, the European Council decided that the setting up of a comprehensive system for obtaining evidence in cases with a cross-border dimension, based on the principle of mutual recognition, should be further pursued. The European Council indicated that the existing instruments in this area constitute a fragmentary regime and that a new approach is needed, based on the principle of mutual recognition, but also taking into account the flexibility of the traditional system of mutual legal assistance. The European Council therefore called for a comprehensive system to replace all the existing instruments in this area, including the Framework Decision on the European evidence warrant, covering as far as possible all types of evidence and containing deadlines for enforcement and limiting as far as possible the grounds for refusal.
- (7) This new approach is based on a single instrument called the European Investigation Order (EIO). An EIO is to be issued for the purpose of having one or several specific investigative measure(s) carried out in the executing State with a view to gathering evidence. This includes the obtaining of evidence that is already in the possession of the executing authority.
- (8) The EIO has a horizontal scope and therefore applies to almost all investigative measures. However, some measures require specific rules which are better dealt with separately, such as the setting up of a joint investigation team and the gathering of evidence within such a team. Existing instruments should continue to apply to these types of measures.
- (9) This Directive does not apply to cross-border observations as referred to in Article 40 of the Convention of 19 June 1990 implementing the Schengen Agreement⁴.

⁴ OJ L 239, 22.9.2000, p. 19.

- (10) The EIO should focus on the investigative measure which has to be carried out. The issuing authority is best placed to decide, on the basis of its knowledge of the details of the investigation concerned, which measure is to be used. However, the executing authority should have the possibility to use another type of measure either because the requested measure does not exist or is not available under its national law or because the other type of measure will achieve the same result as the measure provided for in the EIO by less coercive means.
- (11) The execution of an EIO should, to the widest extent possible, and without prejudice to fundamental principles of the law of the executing State, be carried out in accordance with the formalities and procedures expressly indicated by the issuing State. The issuing authority may request that one or several authorities of the issuing State assist in the execution of the EIO in support of the competent authorities of the executing State. This possibility does not imply any law enforcement powers for the authorities of the issuing State in the territory of the executing State, unless the execution of such powers in the territory of the executing State is in accordance with the law of the executing state and has been agreed between issuing and executing authorities.
- (12) To ensure the effectiveness of judicial cooperation in criminal matters, the possibility of refusing to recognise or execute the EIO, as well as the grounds for postponing its execution, should be limited.
- (12a) The principle of *ne bis in idem* is a fundamental principle of law in the European Union. Therefore the executing authority should be entitled to refuse the execution of an EIO if its execution would be contrary to such principle. Given the preliminary nature of the proceedings underlying an EIO, this ground for refusal should only be used by the executing authority when it is firmly confirmed that the trial of the person concerned has been finally disposed of for the same facts and under the conditions set out in Article 54 of the Convention of 19 June 1990 implementing the Schengen Agreement. Such ground for refusal is without prejudice to the obligation of the executing authority to consult the issuing authority in accordance with Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings.⁵

⁵ OJ L 328, 15.12.2009, p. 42.

- (13) Time restrictions are necessary to ensure quick, effective and consistent cooperation between the Member States in criminal matters. The decision on the recognition or execution, as well as the actual execution of the investigative measure, should be carried out with the same celerity and priority as for a similar national case. Deadlines should be provided to ensure a decision or execution within reasonable time or to meet procedural constraints in the issuing State.
- (14) The EIO provides a single regime for obtaining evidence. Additional rules are however necessary for some types of investigative measures which should be included in the EIO, such as the temporary transfer of persons held in custody, hearing by video or telephone conference, obtaining of information related to bank accounts or banking transactions or controlled deliveries. Investigative measures implying a gathering of evidence in real time, continuously and over a certain period of time are covered by the EIO, but flexibility should be given to the executing authority for these measures given the differences existing in the national laws of the Member States.
- (14a) When making a declaration concerning the language regime, Member States are encouraged to include at least one language which is commonly used in the European Union other than their official language(s).
- (15) This Directive replaces Framework Decisions 2003/577/JHA and 2008/978/JHA as well as the various instruments on mutual legal assistance in criminal matters in so far as they deal with obtaining evidence for the use of proceedings in criminal matters.
- (16) Since the objective of this Directive, namely the mutual recognition of decisions taken to obtain evidence, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the action, be better achieved at the level of the Union, the Union may adopt measures in accordance with the principle of subsidiarity, as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve that objective.

- (17) This Directive respects the fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and by the Charter of Fundamental Rights of the European Union, notably Title VI thereof. Nothing in this Directive may be interpreted as prohibiting refusal to execute an EIO when there are reasons to believe, on the basis of objective elements, that the EIO has been issued for the purpose of prosecuting or punishing a person on account of his or her sex, racial or ethnic origin, religion, sexual orientation, nationality, language or political opinions, or that the person's position may be prejudiced for any of these reasons.
- (17a) Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters (OJ L 350 , 30.12.2008, p.60) applies to the transmission processing of personal data on the basis of an EIO, including its Article 11 on limitation of purposes for which the personal data may be further processed, and provides for an adequate level of data protection in the context of evidence transmitted between Member States.⁶
- (18) [In accordance with Article 3 of Protocol N° 21 on the Position of the United Kingdom and Ireland in respect of the area of Freedom, Security and Justice annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, the United Kingdom and Ireland have notified their wish to take part in the adoption of this Directive.]
- (19) In accordance with Articles 1 and 2 of Protocol N° 22 on the Position of Denmark annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application,

⁶ Following the discussion on 28 September 2010 concerning the data protection issues, the delegations were inclined to agree on an additional recital specifying that the provisions of the Council Framework Decision 2008/977/JHA will apply to the processing of personal data transmitted in the framework of the Directive regarding the EIO. In the Opinion of the European Data Protection Supervisor (EDPS) on this initiative – which is contained in doc. 15122/10 COPEN 226 CODEC 1085 EUROJUST 113 EJM 52 – the EDPS recommends the introduction of a similar recital. Other suggestions made in this opinion should be further examined in the Working Party.

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I
THE EUROPEAN INVESTIGATION ORDER

Article 1

*Definition of the European Investigation Order
and obligation to execute it*

1. The European Investigation Order (EIO) shall be a judicial decision issued by a competent authority⁷ of a Member State ("the issuing State") in order to have one or several specific investigative measure(s)⁸ carried out in another Member State ("the executing State") with a view to obtaining evidence within the framework of the proceedings referred to in Article 4⁹. The EIO may also be issued for obtaining evidence that is already in the possession of the competent authorities of the executing State.
2. Member States shall execute any EIO on the basis of the principle of mutual recognition and in accordance with the provisions of this Directive.

⁷ NL expressed some concerns as to the use of the wording '*competent authority*' instead of '*judicial authority*', since the EIO is referred to as a judicial decision. However, this point should be further considered once the definitions in Article 2 are decided.

⁸ DE proposed the following wording: '*... one or several specifically mentioned investigative measure(s) ...*'. The Presidency is of the opinion that the text already clearly indicates that the requested investigative measure should be specified.

⁹ DE suggested to insert the following text: '*on the basis of and in accordance with the relevant national law*'. CZ supported this proposal and suggested that reference should be made to the "law of the executing State".

3. This Directive shall not have the effect of modifying the obligation to respect the fundamental rights and legal principles as enshrined in Article 6 of the Treaty on European Union, and any obligations incumbent on judicial authorities in this respect shall remain unaffected. [This Directive shall likewise not have the effect of requiring Member States to take any measures which conflict with their constitutional rules relating to freedom of association, freedom of the press and freedom of expression in other media.]¹⁰

Article 2

Definitions

For the purposes of this Directive¹¹:

- a) "issuing authority" means¹²:
- i) a judge, a court, an investigating magistrate or a public prosecutor competent in the case concerned; or
 - ii) any other (...) competent¹³ authority as defined by the issuing State and, in the specific case, acting in its capacity as an investigating authority in criminal

¹⁰ During the discussion in the Working Party, differing opinions on both the nature and extend of the reference to constitutional rules, as well as on the way to address the issue were expressed. The position of SE can be found in document 14984/10. Certain Member States support the point of view of SE, but believe that reference should be made to all constitutional rules. AT raised the question whether the protection of certain professional groups (in this case journalist) can be addressed differently, for example by applying the ground for refusal mentioned in Article 10(a): immunities or privileges. This idea found support by EL/FR, but was rejected by IT. IT/IE/DE indicated that this issue was closely linked with the need and desirability to introduce a ground for refusal based on the impossibility for the executing authority to execute the investigative measure concerned in a similar national case. During the meeting of the JHA Ministers on 9 November 2010, it became clear that only a small minority of the delegations supported the introduction of such a wide ground for refusal. Furthermore, the Council Legal Service emphasised that directives prevail over constitutional rules in the hierarchy of legal norms. A reference to constitutional rules would cast a cloud over upon the range of the instrument, since constitutional rules are often accompanied by interpretations of the Constitutional Court. The Presidency therefore invites delegations to reflect on the possibility to remove the text between brackets and add the following new recital: "*this directive shall not have the effect of requiring Member States to take any measures which conflict with their constitutional rules relating, amongst others, to freedom of association, freedom of the press and freedom of expression in other media*".

¹¹ COM proposed to insert also the definition of 'investigative measure'. DE suggested that also a definition for 'freezing order' be included in this article.

¹² Reservation on substance by MT.

¹³ EL/SK/RO expressed their preference for the previous wording, *i.e.* 'judicial' authority.

proceedings with competence to order the gathering of evidence in accordance with national law,

- b) "executing authority" shall mean an authority having competence to recognise an EIO and ensure its execution in accordance with this Directive.

Article 3

Scope of the EIO

1. The EIO shall cover any investigative measure with the exception of the measures referred to in paragraph 2.
2. The following measures shall not be covered by the EIO:
 - a) the setting up of a joint investigation team and the gathering of evidence within such a team as provided in Article 13 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union¹⁴ (hereinafter referred to as "the Convention") and in Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams¹⁵, except for the purposes of applying, respectively, Article 13(8) of the Convention and Article 1(8) of the Framework Decision;

(...)¹⁶

¹⁴ OJ C 197, 12.7.2000, p. 3.

¹⁵ OJ L 162, 20.6.2002, p. 1.

¹⁶ All forms of interception of telecommunications are covered by the Directive and specific provisions will be introduced in Chapter IV. AT/FR expressed some concern that the insertion of these specific types of interception would needlessly complicate the debates. Scrutiny reservation by DE.

Article 4

*Types of procedure for which the EIO can be issued*¹⁷

The EIO may be issued:

- a) with respect to criminal proceedings brought by, or that may be brought before, a judicial authority in respect of a criminal offence under the national law of the issuing State;
- [b)¹⁸ in proceedings brought by administrative authorities in respect of acts which are punishable under the national law of the issuing state by virtue of being infringements of the rules of law and where the decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters;
- c) in proceedings brought by judicial authorities in respect of acts which are punishable under the national law of the issuing state by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters,]¹⁹ and
- d) in connection with proceedings referred to in points (a), [(b), and (c)] which relate to offences or infringements for which a legal person may be held liable or punished in the issuing state.

¹⁷ Scrutiny reservation by CZ, which suggested that points b) and c) be deleted.

¹⁸ DE, while agreeing on inclusion of administrative procedures in the scope of EIO instrument, stated that this should not imply that EIO in connection with such proceedings is issued by an administrative authority.

¹⁹ The discussion on this point is not yet finalised. The Presidency would therefore like to indicate that further discussions, including with regard to Articles 9 and 10, should focus on cases referred to in Article 4(a) (criminal proceedings). Once agreement is reached on the main Articles of the Directive for cases referred to in Article 4(a), further evaluation will be necessary in order to see if the agreed solution has to be adapted with regards to cases referred to in Article 4(b), (c) and (d).

Article 5
Content and form of the EIO

1. The EIO set out in the form provided for in Annex A shall be completed, signed, and its content certified as accurate by the issuing authority.
2. Each Member State shall indicate the language(s) which, among the official languages of the institutions of the Union and in addition to the official language(s) of the Member State concerned, may be used for completing or translating the EIO when the State in question is the executing State.

Article 5a
Conditions for issuing and transmitting an EIO²⁰

1. An EIO may be issued only when the issuing authority is satisfied that the following conditions have been met:
 - (a) the issuing of the EIO is necessary and proportionate for the purpose of the proceedings referred to in Article 4; and
 - (b) the investigative measure(s) mentioned in EIO could have been ordered under the same conditions in a similar national case.
2. These conditions shall be assessed by the issuing authority in each case.

²⁰ This new provision has been inserted in view of addressing some concerns, providing a proportionality check by the issuing authority which should encompass the verification of the following three elements:

- whether the evidence sought is necessary and proportionate for the purpose of proceedings,
- whether the measure chosen is necessary and proportionate for the gathering of this evidence, and
- whether, by means of issuing the EIO, another MS should be involved in the gathering of this evidence.

These three elements of the proportionality check could need to be mentioned in a recital. Scrutiny by PL on this Article.

3. Where an EIO is issued by an authority referred to in Article 2(a)(ii), the EIO shall be validated, after examination of its conformity with the conditions for issuing an EIO under this Directive²¹, by a judge, prosecutor or investigating magistrate before it is transmitted to the executing authority.

²¹ EL/ES/IT/NL/PT/SI/SK support the idea of establishing minimum standards for the validation procedure. NL stated that the validating authority should examine of the EIO is in conformity with the provisions of the Directive as well as with the national law of the issuing state. The Presidency proposes a new compromise text on this basis.

CHAPTER II
PROCEDURES AND SAFEGUARDS FOR THE ISSUING STATE

Article 6

Transmission of the EIO

1. The EIO shall be transmitted in accordance with Article 5²² from the issuing authority to the executing authority²³ by any means capable of producing a written record under conditions allowing the executing State to establish authenticity. All further official communication shall be made directly between the issuing authority and the executing authority.
2. Without prejudice to Article 2(b), each Member State may designate a central authority or, when its legal system so provides, more than one central authority, to assist the competent authorities. A Member State may, if necessary as a result of the organisation of its internal judicial system, make its central authority(ies) responsible for the administrative transmission and receipt of the EIO, as well as for other official correspondence relating thereto.
- 3.²⁴ If the issuing authority so wishes, transmission may be effected via the secure telecommunications system of the European Judicial Network.
4. If the executing authority is unknown, the issuing authority shall make all necessary inquiries, including via the European Judicial Network contact points, in order to obtain the information from the executing State.
5. When the authority in the executing State which receives the EIO has no competence to recognise it and to take the necessary measures for its execution, it shall, *ex officio*, transmit the EIO to the executing authority and so inform the issuing authority.

²² HU presented alternatives proposals in document 15007/10.

²³ Reference to ‘executing authority’ in this Article will need to be further examined once the definition in Article 2 (b) is agreed upon.

²⁴ CZ suggested to add a following paragraph: ‘*In case of an emergency, the issuing authority may ensure the transmission of an EIO via Interpol or any other relevant mean of transmission*’.

6. All difficulties concerning the transmission or authenticity of any document needed for the execution of the EIO shall be dealt with by direct contacts between the issuing and executing authorities involved or, where appropriate, with the involvement of the central authorities of the Member States.

Article 7

EIO related to an earlier EIO

1. Where the issuing authority issues an EIO which supplements an earlier EIO, it shall indicate this fact in the EIO in accordance with the form provided for in Annex A.
2. Where, in accordance with Article 8(3), the issuing authority assists in the execution of the EIO in the executing State, it may, without prejudice to notifications made under Article 28(1)(c), address an EIO which supplements the earlier EIO directly to the executing authority²⁵, while present in that State.

²⁵ Reference to ‘executing authority’ will need to be further examined once the definition in Article 2 (b) is agreed upon.

CHAPTER III
PROCEDURES AND SAFEGUARDS
FOR THE EXECUTING STATE

Article 8

Recognition and execution

1. The executing authority shall recognise an EIO, transmitted in accordance with Article 6, without any further formality being required, and ensure its execution in the same way and under the same modalities as if the investigative measure in question had been ordered by an authority of the executing State, unless that authority decides to invoke one of the grounds for non-recognition or non-execution provided for in Article 10 or one of the grounds for postponement provided for in Article 14.
2. The executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority unless otherwise provided in this Directive and provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State²⁶.
3. The issuing authority may request that one or several authorities of the issuing State assist in the execution of the EIO in support to the competent authorities of the executing State to the extent that the designated authorities of the issuing State would be able to assist in the execution of the investigative measure(s) mentioned in the EIO in a similar national case. The executing authority shall comply with this request provided that such participation is not contrary to the fundamental principles of law of the executing State or does not harm its essential national security interests.²⁷

²⁶ IE/DE/UK suggested to modify the last part of the sentence so that it reads as follows: *‘provided that they are allowed for under the domestic law of the executing state’*. SE/EL/NL/ES/FR/COM opposed such modification.

²⁷ Some delegations were of the opinion that the decision of the executing State to comply with the request under this paragraph should not be automatic, but rather subject to certain conditions. DE/UK suggested to refer to the domestic law, instead of the fundamental principles of law, of the executing State.

- 3a. The authorities of the issuing State present in the executing State shall be bound by the law of the executing State during the execution of the EIO. They shall not have any law enforcement powers in the territory of the executing State, unless the execution of such powers in the territory of the executing State is in accordance with the law of the executing State and has been agreed between issuing and executing authorities.²⁸
4. The issuing and executing authorities may consult each other, by any appropriate means, with a view to facilitating the efficient application of this Article.

Article 9

Recourse to a different type of investigative measure²⁹

1. The executing authority may decide to have recourse to an investigative measure other than that provided for in the EIO when:
- a) (...)
 - b) (...)
 - c) the investigative measure selected by the executing authority will have the same result as the measure provided for in the EIO by less coercive means.
2. When the executing authority decides to avail itself of the possibility referred to in paragraph 1, it shall first inform the issuing authority, which may decide to withdraw the EIO.

²⁸ Scrutiny reservation by LU/DE/HU. In doc. 15103/10, LU urges to introduce a stricter regime for the attendance of authorities of the issuing State.

²⁹ UK/DE suggested introducing an additional point d), which could read as follows: '*the investigative measure indicated in the EIO would require the use of disproportionate resources by the executing Member State*'.

Article 9a

Specific grounds for non-recognition or non-execution

1. When the investigative measure indicated in the EIO is one of the following measures:
 - a) transmission of evidence already in possession of the executing authority
 - b) transmission of information gathered in databases managed by public authorities
 - c) expert evaluation
 - d) visit and search on the site of an offence
 - e) hearing of a witness, suspect, victim or third party on a voluntary basis
 - f) temporary transfer of a person held in custody to the issuing State referred to in Article 19
 - g) tracing of telecommunications
 - h) identification of users of telecommunications

Recognition or execution may only be refused in the executing State according to Article 10.

2. When the investigative measure indicated in the EIO is one of the following measures:
 - a) body search
 - b) taking of blood/DNA sample
 - c) psychiatric medical examination
 - d) information on bank accounts and transactions referred to in articles 23 and 24
 - e) freezing/seizure of evidence
 - f) search of homes, premises, vehicles or information systems
 - g) hearing of a witness, suspect, victim or third party on a compulsory basis
 - h) temporary transfer of persons held in custody to the executing State referred to in Article 20

The execution or recognition of an EIO may, in addition to the grounds for non recognition or non execution provided in Article 10, also be refused in the executing State if the acts for which the EIO has been issued do not constitute an offence under the law of the executing State. The following offences, 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, 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]

3. When the investigative measure indicated in the EIO is one of the following measures in accordance with Article 27:
 - a) interception and recording of telecommunications and other forms of communication
 - b) interception of mails
 - c) observation, with or without technical means
 - d) infiltration
 - e) handling of informers
 - f) monitoring of bank transactions referred to in Article 25
 - g) controlled deliveries referred to in Article 26
 - h) any other measure implying the gathering of evidence in real time, continuously or over a certain period of time

The recognition or execution of the EIO may, in addition to the grounds for non recognition or non execution provided in Article 10, also be refused in the executing State if the measure would not have been authorized in a similar domestic case³⁰.

³⁰ Article 27 (1), which already refers to this ground for refusal, will have to be changed accordingly.

4. ³¹If the investigative measure indicated in the EIO is not one of the measures referred to in paragraph 1, 2 or 3, the recognition or execution of the EIO may, in addition to the grounds for non recognition or non execution provided in Article 10, also be refused in the executing State if:
- i) 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;
 - ii) 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, or;
 - iii) the acts for which the EIO has been issued do not constitute an offence under the law of the executing State.

Article 10

General grounds for non-recognition or non-execution³²

1. Without prejudice to Article 9a, 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;

³¹ This paragraph corresponds to the third category but, as it is a residual category, it seems more consistent from a legal point of view to include it at the end of the Article.

³² Some delegations proposed insertion of other grounds for refusal in addition to doc 13822/10. FI suggested to add the following discretionary ground for refusal: "*under the law of the executing State, the suspected person cannot, because of his/her age, be held criminally responsible for the offence covered by the EIO*". In addition, DE proposed the introduction of the ground of refusal linked with 'territoriality principle' and UK/DE/IT proposed the following ground for refusal: "*the measure provided for in the EIO would not be authorised in a similar domestic case*". The latter was supported by CZ/IT, but opposed by LT/PL. CZ suggested also that there should be a possibility to refuse EIO in cases where there is of lack of information concerning the evidence.

- 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 case³³;
- e)³⁴ its execution would infringe the *ne bis in idem* principle.

2. In the cases referred to in paragraph 1(b) and (c), 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.

³³ LT was in favour of being more restrictive by referring explicitly to the law of the executing State.

³⁴ FR/CZ opposed to the use of the *ne bis in idem* principle as a ground for refusal of an EIO. PT proposed that this point is replaced by the following text: '*there are strong reasons to believe that its execution would infringe the ne bis in idem principle*'. UK suggested the following wording: '*the proceedings to which the EIO relates would infringe the ne bis in idem principle*'.

Alternative text for Article 9a distributed by the Presidency following the discussion in the Working Party on 18.11.2010

Article 9a

Specific grounds for non-recognition or non-execution

1. Without prejudice to Articles 8 and 10, recognition or execution of an investigative measure requested by the issuing authority in the EIO may not be refused by the executing authority in any of the following cases:
 - a) the person concerned by the investigative measure consents to the measure, or
 - b) the evidence sought after is already in the possession of the executing authority, and it has not been obtained by using a coercive measure under the law of the executing Member State, or
 - c) the evidence sought after is contained in databases held by police or judicial authorities or accessible by the executing authority in the framework of criminal proceedings, or
 - d) the investigative measure indicated in the EIO does not require the use of coercion in accordance with the law of the executing State, or
 - e) the investigative measure indicated in the EIO concerns the hearing of a witness, suspect, victim or third party in the territory of the executing State, or
 - f) the investigative measure indicated in the EIO concerns the identification of persons holding a subscription of a specified telephone or e-mail account.

2. Without prejudice to Articles 8 and 10, and 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 be refused in any of the following cases:
- a) if the acts for which the EIO has been issued do not constitute an offence 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.
3. Notwithstanding paragraphs 1 and 2, and without prejudice to Articles 8 and 10, the execution or recognition of an EIO may not be refused, except as provided for in paragraphs 2 c) and 2 d), for 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]*
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