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NOTE

From :	Presidency
To :	CATS
Prev. doc.	14641/10 COPEN 207 EJN 45 EUROJUST 101 CODEC 983
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 - Outstanding issues

Further to the strategic guidance provided by CATS on 5-6 July, the Working Party on cooperation in criminal matters has started to discuss the proposal for a Directive regarding the European Investigation Order (EIO).

In order to obtain guidance in view of the future negotiations on the instrument, two questions are herewith submitted to CATS for its appraisal. The current draft of Articles 1 to 10 is also included in the Annex to reflect the state of play of the discussions at the working group level.

QUESTION 1: Issuing authorities

The working group discussed on several occasions the issue of the nature of issuing authorities.

In the original proposal for a Directive on the EIO, the definition of the issuing authority included both :

- a judge, prosecutor or investigating magistrate; and
- another competent authority as long as that authority has the power to take the measure concerned according to the law of the issuing State.

This solution is in line with the current regime of mutual legal assistance (MLA), where MLA requests have to be issued by "judicial authorities", but where it is left to the Parties to designate these authorities and where it has always been understood that these may include authorities other than a judge, prosecutor or investigating magistrate.

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 decided 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 give an overview of the situation in the Member States (see doc. 13049/1/10 COPEN 170 EJN 32 EUROJUST 81 CODEC 754).

On this basis, the Presidency suggested (see doc. 14641/10 COPEN 201 EJN 45 EUROJUST 101 CODEC 983) to work on the basis of a solution similar to the one found in Framework Decision 2008/978/JHA on the European Evidence Warrant (FD EEW). The notion 'issuing authority' would also cover authorities other than a prosecutor, judge or investigating magistrate. However, Member States could declare that they will not execute EIOs issued by such authorities unless they have been validated by a judge, prosecutor or investigating magistrate.

Discussions on this proposal showed that several delegations opposed a solution where the EIOs could in principle be issued by an authority other than a judge, prosecutor or investigating magistrate. Among the options proposed by the Presidency with regard to the validation procedure, a majority of delegations indicated, for reasons of greater clarity and certainty of application, that they would prefer a validation procedure for which a preliminary, general declaration by the Member States is required in which they state that they will only accept validated EIOs. The Presidency underlined that this option would imply in practice that EIOs executed without validation would be the exception.

Therefore, the Presidency submitted, through a working document[1] discussed on 19 October in the Working Party, an alternative solution reversing the principle of the previous proposal. In this new proposal, only judges, prosecutors or investigating magistrates would be competent to issue an EIO. As an exception, Member States would be authorized to designate other authorities, but such authorities would only be able to issue EIOs where these EIOs are to be executed in a Member State which has made a declaration whereby it indicates that it will recognize such EIOs.

The Council Legal Service, however, indicated that none of the solutions based on a system of declarations would be compatible with the Treaty, since not all of the elements of the Directive would apply to all the Member States. It would create "variable geometry" in situations other than those explicitly allowed by the Treaty.

This opinion of the Council Legal Service reduces significantly the options which can be envisaged. The Presidency is of the opinion that two main options remain available.

Before describing these two options, it is important to recall that the Presidency intends to limit the debate to cases where the EIO is issued in the framework of criminal proceedings and therefore to cases referred to under Article 4(a).[2]

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1 DS 1709/10

2 This issue and other important aspects of the Directive, such as grounds for refusal, will be reviewed later on to see if different solutions have to be found for some non criminal proceedings, should such proceedings be included in the scope of this instrument as currently provided under Article 4.

Option 1: Limiting the notion 'issuing authority' to a judge, prosecutor or investigating magistrate

In the first option, Member States would only be allowed to designate judges, prosecutors or investigating magistrates as issuing authorities.

It should be noted that it is up to each Member State to set up the procedure leading to the issuing of the EIO. Nothing prevents Member States, neither in the current version of the proposal for a Directive, nor in already existing mutual recognition instruments, to provide that the issuing of the EIO has to be triggered by authorities other than the issuing authority.

In order to take into account the fact that, in some Member States, the authority mainly involved, in practice, in the issuing of the EIO might actually be an authority other than the issuing authority, it would be possible to make sure that this non-judicial authority may be involved in direct contacts with the authority in charge of the execution of the EIO.

Option 2: Extending the notion ' issuing authority' to other authorities by means of a validation procedure

In the second option, authorities other than a prosecutor, judge or investigating magistrate could also be designated as issuing authorities, as long as they would be competent to take the measure concerned at national level. However, EIOs issued by such authorities would always need to be first validated by a judge, prosecutor or investigating magistrate of the issuing State, before being forwarded to the executing State.

The following provision would be inserted in the Directive :

"*Where an EIO is issued by an authority referred to in Article 2(a)(ii), the EIO shall be validated by a judge, prosecutor or investigating magistrate before it is transmitted to the executing State*."

The Presidency is of the opinion that such solution does not require to define what a "validation" is, because the notion "issuing" is not defined either. In fact, nothing prevents Member States, neither under option A, nor in the existing mutual recognition procedure, to set up a procedure whereby the role of the issuing authority is actually limited to validating a decision taken by another national authority.

The advantage of option B is that the authority which is concretely at the origin of the EIO will be the contact point of the authorities competent to execute the EIO. However, as explained above, a similar result could also be achieved under option A.

In conclusion, the Presidency is of the opinion that a solution can be found under both options, in order to take into account the diversity of legal systems, without introducing variable geometry and without obliging Member States to recognize an EIO the issuing of which has not been supervised by a prosecutor, judge or investigating magistrate. It is however important to move forward on this issue which affects the rest of the instrument.

CATS is therefore invited to confirm that these options represent a possible solution and to indicate a preference for option A or option B.

QUESTION 2: grounds for refusal

During the discussions in July at CATS level, delegations agreed that grounds for refusal should be examined on a case by case basis and in the light of the objective concretely pursued (cf doc. 11842/10 COPEN 154 EUROJUST 66 EJN 23 CODEC 657).

The Presidency is of the opinion that there should be no step backwards compared to the current legal framework. On the contrary, the application of the mutual recognition principle should ensure more automaticity in the execution of an EIO.

The original proposal contained several grounds for refusal on which there seems to be a wide consensus; other grounds were subsequently added. However, further discussion will be necessary. At this stage the Presidency does not intend to discuss all the grounds for refusal that are referred to in Article 10 of the draft proposal, but suggests to focus on the main difficulties.

In the original proposal, execution of an EIO may be refused (combination of Article 9 and 10) if :

(a) the measure referred to in the EIO does not exist under its national law; or

(b) the measure is limited to a list or a category of offences under its national law and the offence referred to in the EIO is not covered by that list or category.

The original proposal did not refer to the double criminality requirement as such.

During the discussions in the Working Party, however, NL indicated that points (a) and (b) would constitute a step backwards with respect to the current legal framework, by introducing wide grounds for refusal linked to the existence and availability of the measure under national law, as well as to double criminality. Indeed, for the latter, if a measure is limited to a category of offences (for example offences punishable by a minimum penalty), the executing State will first have to assess whether the offence concerned exists in its national law before checking whether the measure concerned may be ordered in relation to that offence.

This seems to be a valid point and the Presidency is therefore of the opinion that a new approach is needed in this regard with a view to finding the right balance. In defining this new approach, attention should also be paid to requests from some delegations to deal with the issue of proportionality.

A new approach based on categories of investigative measures

One of the interesting features of the proposal was the fact that it provided for a general regime applying to all measures without distinction (with limited exceptions for specific measures referred to in Chapter IV). As explained above, this general regime may cause difficulties in relation to the ground for refusal outlined above with regard to the possibility to refuse the execution of an EIO

where the measure does not exist under national law of the executing State or is limited to a list or a category of offences under its national law and the offence referred to in the EIO is not covered by that list or category.
The Presidency is of the opinion that the only solution to avoid these difficulties is to differentiate between categories of investigative measures and to enter into more details on the grounds for refusal applicable to these different categories of measures.

The Presidency suggests to work on the basis of four categories. Examples of measures which could fall under these categories are given to illustrate the solution proposed by the Presidency. The exact scope of each category should, however, not be discussed at this stage.

The advantage of this approach is that it would create a minimum level playing field, which would be constituted by measures covered in the first and second categories. For these measures, issuing authorities would have from the outset a clear idea of the situation with regard to the use of grounds for refusal. These two categories would cover most of what currently forms MLA, while the third category would be a residual one and the fourth only applicable to very specific and highly sensitive measures.

Though the use of such categories complexifies the instrument, it should be noted that these categories already correspond to a large extent to existing categories under MLA where there is a general regime for most measures, a specific regime for search and seizure (possibility to apply double criminality requirement) and a separated regime for interceptions of telecommunications (possibility to refuse the execution if the measure would not be authorized in a similar national case).

1. The first category would cover a list or description of non coercive/intrusive measures. Examples could include hearing of witnesses on a voluntary basis and the obtaining of evidence already in the possession of law enforcement authorities.

Because of the non-sensitive nature of these measures, the executing authority would not be able to refuse the execution of such a measure for the reason that it does not exist or is not available according to its national law, nor would it be able to check double criminality.

2. The second category would cover all the familiar coercive/intrusive measures which would have to be listed, such as search and seizure, compulsory hearing of witness, etc.

   The following rules would be applicable as regards the grounds for refusal :
   - the measure does not exist or is not available according to the national law of the executing State : these grounds would not apply because the list would be elaborated by making sure that it contains measures existing in the MS or which could be executed in the MS even if they do not explicitly exist or are not available according to national law.
   - Double criminality : double criminality could be required unless the offence is contained in the 32 listed offences of the EAW and is punishable by at least 3 years of imprisonment under the law of the issuing State.

3. The third category would be a residual one, which would cover coercive/intrusive measures not listed under the second category. Examples could include the use of a lie detector, etc.

   The executing authority would have the possibility to refuse execution where the measure does not exist under its national law.
   Other aspects would require further discussion. Refusal on the basis of double criminality would be allowed but it remains to be seen whether the exception for the 32 offences should exist or not for this category. Since this category would cover non usual coercive/intrusive measures, it could also be argued that some margin of manoeuvre should be left to the executing authority where the measure concerned exists but its use is limited to a list or category of offences which does not include the offence covered by the EIO.

4. The fourth category would cover measures implying the gathering of evidence in real time, continuously or over a certain period of time (such as interception of telecommunications, infiltration, observation, etc), as currently defined in Article 27 of the draft proposal.

As already proposed under Article 27, the executing authority would be able to refuse to execute an EIO related to those measures if they would not have been authorized in a similar national case. Such ground for refusal would apply in addition to all other grounds for refusal provided in the Directive, even if it is clear that such ground for refusal encompasses the other grounds and also includes for example, where necessary under national law, a proportionality test.

The Presidency also underlines that this new approach would only be advisable if the first and second categories encompass as much investigative measures as possible in relation to current practice.

Avoiding a general and wide ground for refusal based on similar national cases

In this regard, during the discussions in the Working Party, some Member States have asked to insert a general ground for refusal, similar to the one suggested for the fourth category, in case the measure would not have been authorized under the law of the executing State.

While the Presidency understands the concerns expressed by delegations, it is of the opinion that a wide ground for refusal would not be an adequate solution for the issue, since it would counter the achievements reached under the system of MLA. Moreover, such a wide ground for refusal would not only allow the executing Member State to look at the substantive reasons for issuing the EIO and to refuse the execution for example on the basis of lack of proportionality (see below), but would also give predominance to the law of the executing State, which would clearly be contrary to the logic of mutual recognition.

The Presidency is therefore convinced that such a ground for refusal should be only applicable to highly sensitive measures of the fourth category and that another approach should be applied in order to prevent situations in which executing authorities would be asked to execute investigative measures the execution of which would be illegal according to their domestic law.

It should for example be recalled that Article 8(1) clearly states that the national law of the executing Member State applies to the procedural rules for the execution. Furthermore, solutions could be found by further elaborating specific grounds for refusal.

Proportionality check

Most delegations are of the opinion that proportionality should only be checked by the issuing authority, as provided under the current Article 5a of the draft proposal. However, they also agree that the executing authority could opt for another measure if it uses less coercive/intrusive means, while achieving the same result, according to the current text of Article 9(1)(c).

Furthermore, as mentioned above, the executing authority would also be able to check proportionality for the measures covered by the fourth category. However, proportionality should not be a ground for refusal for the other categories, even if the Presidency recognizes that further discussions might be needed with regard to minor offences.

Regarding the impact on costs and resources of the executing State, the Presidency is of the opinion that proportionality should not constitute a ground for refusal but that alternative solutions should be looked for, such as:

- the possibility to extend the deadlines (as already provided in Article 11(6));
- a condition for the execution, in exceptional cases, that the costs would be born by the issuing State.

CATS is invited to confirm that:

- **the differentiation between the four categories mentioned above is the right approach and that the grounds for refusal indicated for each category represent a good basis for further discussions;**

- **a wide ground for refusal based on the fact that the measure would not be authorized in a similar national case or under national law is not appropriate, except for the most sensitive measures;**

- **it can accept the approach described above on proportionality.**

ANNEX

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) [3] 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,

[3] 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 evidence[4], 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 matters[5] 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.

[4] OJ L 196, 2.8.2003, p. 45.
[5] 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 as well as some specific forms of interception of telecommunications, for example, interception with immediate transmission and interception of satellite telecommunications. 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 Agreement[6].

[6] 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.[7]

[7] 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.

(18) [In accordance with Article 3 of Protocol Nº 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 Nº 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,

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 authority[8] of a Member State ("the issuing State") in order to have one or several specific investigative measure(s)[9] 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 4[10]. 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.

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[8] 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.

[9] 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.

[10] 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.] [11]

Article 2

Definitions

For the purposes of this Directive[12]:

a) "issuing authority" means[13]:

i) a judge, a court, an investigating magistrate or a public prosecutor competent in the case concerned; or

[ii) any other judicial[14] 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][15],

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[11] During the discussion, 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. LU expressed doubts on the entire Article. Concerning the actual reference to constitutional rules in this Article, BG/COM/ES/LV/NL suggested to delete this reference,,while several other delegations (EL/DE/IT/SE/AT) suggested that this reference could be maintained. Moreover, DE/EL/IT/FI/CZ were of the opinion that additional reference to other principles and freedoms should be added. Following the discussions, a significant number of delegations considered that a compromise solution might be the introduction of a new recital, while deleting the last sentence of this paragraph. The suggested recital could follow the text incorporated in EEW Framework decision, albeit slightly amended: '*This Directive does not prevent any Member State from applying its constitutional rules, including those relating to due process, freedom of association, freedom of the press and freedom of expression in other media"*. In a written comment, DE proposed the following alternative wording: "*This Directive shall likewise not have the effect of requiring Member States to take any measures which conflict with their constitutional rules relating to due (conduct of) investigation proceedings and to due process, or with their constitutional rules relating to freedom of association, freedom of the press and freedom of expression in other media.*"
Furthermore, AT raised the question whether the protection of certain professional groups (in this case journalist) can fall under the ground for refusal mentioned in Article 10(a): immunities or privileges.

[12] COM proposed to insert also the definition of "investigative measure". DE suggested that also a definition for "freezing order" be included in this article.

[13] Reservation on substance by MT.

[14] FI proposes the following wording in ii): '*any other competent authority…*'.

[15] See question 1 of the cover note.

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 Union[16] (hereinafter referred to as "the Convention") and in Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams[17], (…) except for the purposes of applying, respectively, Article 13(8) of the Convention and Article 1(8) of the Framework Decision;

   (…)[18]

[16] OJ C 197, 12.7.2000, p. 3.
[17] OJ L 162, 20.6.2002, p. 1.
[18] All forms of interception of telecommunications will be covered by the Directive and specific provisions will be introduced in Chapter IV.

Article 4

Types of procedure for which the EIO can be issued[19]

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)[20] 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,][21] 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.

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

20 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.

21 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.[22] 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 an EIO[23]

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.

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[22] See new Recital (14a).

[23] 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. This reservation is linked to the general discussion on the issue of proportionality check.

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 5[24] from the issuing authority to the executing authority[25] 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.[26] 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.

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[24] HU presented alternatives proposals in document 15007/10.

[25] Reference to 'executing authority' in this Article will need to be further examined once the definition in Article 2 (b) is agreed upon.

[26] CZ suggested to add a following paragraph: *'In case of an emergency, the issuing authority may effectuate 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 authority[27], while present in that State.

[27] 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 State[28].

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.[29]

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[28] 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.

[29] 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.[30]

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 measure[31]

1. The executing authority may decide to have recourse to an investigative measure other than that provided for in the EIO when:

   [a) the investigative measure indicated in the EIO does not exist under the law of the executing State;

   b) the investigative measure indicated in the EIO exists in 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, or] [32]

   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.

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30 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.

31 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'*. This proposal was not supported by the delegations. In the opinion of the Presidency and of most of the delegations, the issues of capacity and costs should not be seen as a reason to refuse the execution of an EIO. However, a specific discussion on the issues of capacity and costs shall take place in the future.

32 See question 2 of the cover note.

Article 10

Grounds for non-recognition or non-execution[33]

1. Recognition or execution of an EIO may 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) in the cases referred to in Article 9(1)(a) and (b), there is no other investigative measure available which will make it possible to achieve a similar result, or] [34]

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[35].

e)[36] its execution would infringe the *ne bis in idem* principle.

[33] 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. RO entered moreover a scrutiny reservation on it. CZ suggested also that there should be a possibility to refuse EIO in cases where there is of lack of information concerning the evidence.

[34] See question 2 of the cover note.

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

[36] 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*'.

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.

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