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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 Working Party on 22 July 2011

I. INTRODUCTION

The initiative for a Directive of the European Parliament and the Council regarding the European Investigation Order in criminal matters (hereafter “the EIO”) has been presented to the Council in April 2010. At its meeting in June 2011 the Council reached a partial general approach on the main regime (Articles 1-18, and Article Y).¹ Some delegations maintain parliamentary scrutiny reservations on the draft Directive.

¹ 11735/11 COPEN 158 EUROJUST 99 EJN 80 CODEC 1047.

At its meeting on 22 July 2011 the Working Party on Cooperation in criminal matters carried out the first reading examination of certain measures set out in Chapter IV of the initiative on the basis of document 12250/11 COPEN 175 EUROJUST 105 EJM 86 CODEC 1125. The Presidency invited delegations to submit by 5 September 2011 further contributions, in writing, in respect of the examined provisions.

On these basis the Presidency introduced modifications into the text of Chapter IV set out in the Annex to this note. Specific observations made by delegations are set out in the footnotes to particular provisions.

Main outstanding issues and amendments introduced into the text are set out under II below.

Number of delegations entered scrutiny reservations on specific Articles set out in Chapter IV.

II. OUTSTANDING ISSUES

The objective of the Directive presented to the Council is to end the fragmented regime on obtaining evidence between the Member States by replacing the existing legal framework with a single legal instrument. Once adopted the Directive will therefore set a single regime for collection of evidence in another Member State. This assumption underpinned the examination of all of the specific provisions set out in Chapter IV. On a number of occasions, specifically indicated further, delegations were exploring whether further modifications could be introduced into the text in order to still improve the existing regime. Yet, it was confirmed as crucial principle that in the process of examination of the EIO the existing provisions be regarded as a benchmark and the work on the new Directive carried out in line with the principle of "droit constant". To that end the provisions of the initiative on the EIO are inspired by the existing provisions² adjusted in order to correspond to the mutual recognition principle while preserving the flexibility provided for by the traditional regime of mutual legal assistance.

² Various Articles of the 2000 EU MLA Convention and the 2001 EU MLA Protocol or various Articles of the 1959 Council of Europe Convention and its additional Protocols.

It is noted that the discussions regarding the grounds for non recognition or non execution were carried out against the conclusions reached on the partial general approach in respect of Articles 9 and 10.

Furthermore, the Presidency reaffirmed that further examination will be held in the future in order to clarify the relation of the EIO Directive with the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution of orders freezing property or evidence. Legislative package on this matter is expected to be presented by the Commission this year.

With respect to the particular issue of the interception of telecommunications, it has been confirmed at the Council meeting on 9-10 June that the new instrument should cover all investigative measures aimed at obtaining evidence and that all forms of interception of telecommunications should be covered by the Directive. To this end, specific provisions should be introduced in Chapter IV³. As preparatory work for the Working Party, a technical meeting between some experts of the Member States will be held on 13 September 2011 with a view to assess the current legal framework and to reflect on possible solutions.

At the meeting of the Working Party on 22 July, the following outstanding issues were raised in respect of specific investigative measures set out under Articles 19 to 27 of the draft Directive:

A. Temporary transfer to the issuing State or the executing State of persons held in custody for purpose of investigation (Articles 19 and 20)

Delegations made similar comments in respect of Articles 19 and 20 and therefore these two provisions are considered jointly here. At the Working Party meeting the discussion focused on the question of the retaining or not of additional grounds for non-recognition or non-execution, also in light of the changes introduced in Articles 9 and 10. The issue of the requirement of the consent of the person was extensively discussed, and while it was felt as an essential condition for some delegations, it was perceived by the others as a possibility for the person to obstruct the proceedings held against him.

³ C.f. note on Article 27.

Some delegations suggested that Articles 19 and 20 be merged. The Presidency is however of the opinion that the situations covered by these provisions, although similar, should however be treated separately since the position of the person concerned is different and thus the regime for the issuing and the recognition of an EIO should be different. If at a later stage, it appears that identical solutions are deemed adequate for both Articles, the question of the merging could be brought up again.

In the light of the above changes have been introduced into both of the Articles.

Firstly, modifications made in paragraph 1 of the Article 19 aim at clarifying the relationship between the transfer of the person for evidential purposes made on the basis of an EIO and the transfer based on the EAW where the person is transferred for the purposes of conducting criminal prosecution in another MS. The Presidency considers that the wording in paragraph 1 of this Article should allow the practitioners to have a clear indication as to the relevancy of each of the instruments for a particular case.

Secondly, in both Articles specific provision related to costs have been deleted, and thus the general and flexible regime set out by Article Y on the costs shall be applicable.

B. Hearing by videoconference and telephone conference (Articles 21 and 22)

Articles 21 and 22 refer to the hearing the person on a distance by the use of videoconference, audio-visual transmission or telephone or other audio transmission. Provision related to the hearing of the accused person by videoconference or other audio-visual transmission has been moved into paragraph 1a in order to grant it more visibility. Yet, for such cases additional grounds for non-recognition and non-execution as already foreseen before have been preserved.

It is noted that the specific rules and guarantees for carrying out the hearing set out in paragraph 6 of Article 21 apply also to hearing carried out under Article 22. On the other hand, majority of delegations considered that the grounds for non-recognition and non-execution provided initially in paragraphs 2 and 3 are redundant in view of the content of Article 10 and of the technological development. Thus these paragraphs were deleted.

Some delegations put forward that certain issues related to procedural rights i.e. access to lawyer could be regulated more in detail. The Presidency is however of the opinion that the present text provides for the guarantee of these rights, where the execution of an EIO is taking place in accordance with the law of the executing state, and that, any further more specific wording could infringe with the new legislative proposal currently negotiated within the Council in this respect.

Finally, in both Articles specific provision related to costs have been deleted, and thus the general and flexible regime set out by Article Y on the costs shall be applicable.

C. Information on banking and other financial institutions accounts and transactions.
(Articles 23 and 24)

Articles 23 and 24 have now been revised on the basis of observations put forward by the delegations.

In particular, both provisions provide now for the possibility of requests being made also to the financial institutions other than banks. In order to address the concerns raised by some delegations in respect of the thus enlarged scope of the request, an additional ground for non-recognition or non-execution referring if the execution of the measure would not be authorised in a similar national case has been introduced in paragraph 7.

D. Investigative measures implying gathering of evidence in real time, continuously and over a certain period of time and sensitive measures (Article 27)

Modifications introduced into Article 27 are twofold. Firstly they are the consequence of streamlining the text of Chapter IV and therefore of the deletion of Articles 25 and 26. Secondly additional points have been introduced into the list of measures covered by this provision, thus to include also a direct reference to covert investigations and interception of telecommunications. It has to be noted however, that the list contained in Article 27(1) is not a "numerus clausus" catalogue and it only gives examples of the most sensitive measures, for which a specific regime, as set out in this Article, is foreseen. Furthermore, the inclusion of reference to interception of communications is preliminary and subject to further discussions.

The revised text of the Article also provides for balanced criteria and conditions in respect of the execution of the EIO such as conditions set out in paragraphs 2 and 3 which have been reproduced from previous Articles 25 and 26. In particular in accordance with paragraph 3 the issuing state should indicate the relevance of the requested information for the proceedings. Furthermore, except for the interception of telecommunications, the executing authority is indicated as the one directing the operations related to the execution of the EIO.

III. CONCLUSIONS

Delegations are invited to continue the examination of the modified provisions of Articles 19-27 contained in Chapter IV of the draft Directive as set out in the Annex.

CHAPTER IV⁴

SPECIFIC PROVISIONS FOR

CERTAIN INVESTIGATIVE MEASURES

Article 19⁵

*Temporary transfer to the issuing State of
persons held in custody for purpose of criminal proceedings*

- 1⁶. An EIO may be issued for the temporary transfer of a person in custody in the executing State for the purpose of criminal proceedings other than for standing trial for which his presence on the territory of the issuing State is required, provided that he shall be sent back within the period stipulated by the executing State.
- 2⁷. In addition to the grounds for non-recognition or non-execution referred to in Article 10 (...), the execution of the EIO may also be refused if:
- (a) the person in custody does not consent⁸; or
 - (b) the transfer is liable to prolong his detention.

⁴ FI entered scrutiny reservation on entire Chapter IV.

⁵ DE entered scrutiny reservation on paragraphs 1, 2 and 3.

⁶ Some delegations called for further clarification of the wording of this paragraph. IT claimed that it should be clarified that this measure be used only where there is no other possibility of hearing the person.

⁷ DE/FI/SK proposed to add the ground for refusal based on 1959 MLA Convention, namely the necessity of presence of the person at criminal proceedings pending in the executing State. CZ/NL/UK proposed to add the same ground for non recognition or non execution as included in former Article 20(2b) in relation to the agreement on the arrangements for the transfer.

⁸ While most of the delegations were in favour of maintaining this specific ground for non recognition or non execution, some of them questioned it. The latter argued that this could allow for the person to obstruct the proceedings carried out in the issuing State, which, could not be the case when the investigative measure be carried out on the territory of that State. CY/IT/LU suggested that the evaluation regarding the consent of the person could be carried out on case-by-case basis. The Presidency is of the opinion that the text already gives this flexibility as the grounds for refusal are merely optional.

- 3⁹. In a case under paragraph 1, transit of the person in custody through the territory of a third Member State shall be granted on application, accompanied by all necessary documents.
4. The practical arrangements regarding the temporary transfer of the person and the date by which he must be returned to the territory of the executing State shall be agreed between the Member States concerned.
5. The transferred person shall remain in custody in the territory of the issuing State and, where applicable, in the territory of the Member State through which transit is required, unless the executing Member State applies for his release.
6. The period of custody in the territory of the issuing Member State shall be deducted from the period of detention which the person concerned is or will be obliged to undergo in the territory of the executing Member State.
7. A transferred person shall not be prosecuted or detained or subjected to any other restriction of his personal liberty for acts or convictions which precede his departure from the territory of the executing State (...).
8. The immunity provided for in paragraph 7 shall cease when the transferred person, having had for a period of fifteen consecutive days from the date when his presence is no longer required by the judicial authorities an opportunity to leave, has nevertheless remained in the territory, or having left it, has returned.
- 9¹⁰. (deleted)

⁹ CZ/DE/LT questioned to know the details of the procedure set out in this paragraph.

¹⁰ Some delegations considered that a specific provision on costs should be maintained in respect of this measure.

Article 20

*Temporary transfer to the executing State of persons
held in custody for the purpose of criminal proceedings*

1. An EIO may be issued for the temporary transfer of a person held in custody in the issuing State for the purpose of criminal proceedings for which his presence on the territory of the executing State is required.
- 1a. Before issuing the EIO the person concerned shall be heard by the issuing authority on the temporary transfer.
2. (deleted)
3. (deleted)
4. (deleted)
5. Paragraphs 3 to 8 of Article 19 are applicable *mutatis mutandis* to the temporary transfer under this Article.
6. (deleted)

Article 21

Hearing by videoconference or other audio – visual transmission¹¹

1. If a person is in the territory of the executing State and has to be heard as a witness or expert by the judicial authorities of the issuing State, the issuing authority may (...) ¹², issue an EIO in order to hear the witness or expert by videoconference or other audio – visual transmission, as provided for in paragraphs 6 to 9.
 - 1a. An EIO may also be issued for the purpose of the hearing of an accused person by videoconference or other audio - visual transmission. ¹³ (...) In addition to the grounds for non-recognition or non-execution referred to in Article 10, the execution of the EIO may also be refused if:
 - a) the accused person does not consent; or
 - b) the execution of such a measure would be contrary to the law of the executing State.
 - 1b. The practical arrangements regarding the hearing shall be agreed between the issuing and the executing authority. When agreeing such arrangements, the executing authority shall undertake to:
 - (a) notify the witness or expert concerned of the time and the venue of the hearing;
 - (b) ensure the identification of the witness or expert.
- 2.¹⁴ (deleted)
3. (deleted)

¹¹ IT suggested that some clarification could be added into the text in order to set out the order in which measures contained in Articles 19-21 should be applied. Videoconference being the first of them because of its limited intrusiveness. CZ argued, in addition, that the person should be entitled to indicate which of the measures it prefers to be applied.

¹² Deletion suggested by CZ/BE/NL. AT suggested to delete paragraph 5 accordingly.

¹³ Paragraph 10 has been removed to Paragraph 1a in order to increase the visibility of the possibility to use this provision to hearing of accused persons. Some delegations suggested to extend it to hearing of suspected persons. NL supported by COM, suggested to consider the addition of some additional procedural rules in this respect.

¹⁴ Deletion suggested by some delegations. The deletion of Paragraphs 3 and 4 follows the deletion of Paragraph 2 (b).

4. (deleted)
5. [The EIO issued for the purpose of a hearing by videoconference or other audio – visual transmission shall contain (...) the name of the judicial authority and of the persons who will be conducting the hearing.]¹⁵
6. In case of a hearing by videoconference or other audio – visual transmission, the following rules shall apply:
- (a) a judicial authority of the executing State shall be present during the hearing, where necessary assisted by an interpreter, and shall also be responsible for ensuring both the identification of the person to be heard and respect for the fundamental principles of the law of the executing State. If the executing authority is of the view that during the hearing the fundamental principles of the law of the executing State are being infringed, it shall immediately take the necessary measures to ensure that the hearing continues in accordance with the said principles;
 - (b) measures for the protection of the person to be heard shall be agreed, where necessary, between the competent authorities of the issuing and the executing State;
 - (c) the hearing shall be conducted directly by, or under the direction of, the issuing authority in accordance with its own laws;
 - (d) at the request of the issuing State or the person to be heard, the executing State shall ensure that the person to be heard is assisted by an interpreter, if necessary;

¹⁵ Since no consequence on the recognition or execution of an EIO is attached to the noncompliance with the obligation set out in this paragraph or a need for "last moment" change of the information thus provided, the Presidency invites delegations to consider the opportunity of deleting this provision.

- (e) the person to be heard may claim the right not to testify which would accrue to him under the law of either the executing or the issuing State; the person concerned shall be informed about this right in advance of the hearing.
7. Without prejudice to any measures agreed for the protection of the persons, the executing authority shall on the conclusion of the hearing draw up minutes indicating the date and place of the hearing, the identity of the person heard, the identities and functions of all other persons in the executing State participating in the hearing, any oaths taken and the technical conditions under which the hearing took place. The document shall be forwarded by the executing authority to the issuing authority.
8. (deleted)
9. Each Member State shall take the necessary measures to ensure that, where (...) the person is being heard within its territory in accordance with this Article and refuse to testify when under an obligation to testify or do not testify the truth, its national law applies in the same way as if the hearing took place in a national procedure.
10. (moved to paragraph 1a)

Article 22¹⁶

Hearing by telephone conference or other audio transmission

1. If a person is in the territory of one Member State and has to be heard as a witness or expert by judicial authorities of another Member State, the issuing authority of the latter Member State may issue an EIO in order to hear a witness or expert by telephone conference or other audio transmission, as provided for in paragraphs 3 to 4.
2. (deleted)

¹⁶ NL generally opposed this provision. COM suggested inserting the possibility of using the new forms of communication, e.g. via internet. DE opposed it and indicated that, should it stay, an extensive ground for refusal be needed.

3. [The EIO issued for a hearing by telephone conference or other audio transmission shall contain the name of the judicial authority and of the persons who will be conducting the hearing (...).]¹⁷

4.

(Moved to Article 21.1b.)

(...) Unless otherwise agreed, the provisions of Article 21(1b.), (6), (7) and (9) shall apply *mutatis mutandis*.

Article 23

Information on bank and other financial accounts

- 1¹⁸. An EIO may be issued in order to determine whether a natural or legal person that is the subject of the criminal proceedings holds or controls one or more accounts, of whatever nature, in any bank located in the territory of the executing State.
2. Each Member State shall, under the conditions set out in this Article, take the measures necessary to enable it to provide the information referred to in paragraph 1.
3. The information referred to in paragraph 1 shall also, if requested in the EIO and to the extent that it can be provided within a reasonable time, include accounts for which the person that is the subject of the proceedings has powers of attorney.
4. The obligation set out in this Article shall apply only to the extent that the information is in the possession of the bank keeping the account.

¹⁷ C.F. comment to paragraph 5 of Article 21.

¹⁸ Some delegations suggested to extend the scope of this provision also to persons other than suspects.

5.¹⁹ (deleted)

6. The issuing authority shall state in the EIO why it considers that the requested information is likely to be of substantial value for the purpose of the criminal proceedings and on what grounds it presumes that banks in the executing State hold the account and, to the extent available, which banks may be involved. It shall also include in the EIO any information available which may facilitate its execution.

7. An EIO may also be issued for the purpose of identifying information in the possession of non-bank financial institutions. Paragraphs 2 to 6 shall apply *mutatis mutandis*. In such case and in addition to the grounds for non-recognition and non-execution referred to in Article 10, the execution of the EIO may also be refused if the execution of the measure would not be authorised in a similar national case.

Article 24²⁰

Information on banking and other financial operations

1. An EIO may be issued in order to obtain the particulars of specified bank accounts and of banking operations which have been carried out during a specified period through one or more accounts specified within, including the particulars of any sending or recipient account.
2. Each Member State shall, under the conditions set out in this Article, take the measures necessary to be able to provide the information referred to in paragraph 1.

¹⁹ A large number of delegations (PT/BE/CZ/NL/LV/UK/HU/SI/IT/ES/AT) suggested the deletion of this paragraph on additional grounds for refusal taken into account the current version of Article 10. However, some MS argued that before its deletion consequences for the application of Article 10 should be examined. These delegations put forward the example of the 2005 European Convention which does not contain such additional grounds for refusal. While DE argued to maintain point (a) of this paragraph.

²⁰ UK entered scrutiny reservation on the relationship of these provisions and Article 10.1b.

3. The obligation set out in this Article shall apply only to the extent that the information is in the possession of the bank holding the account.
- 4.²¹ The issuing State shall indicate in the EIO why it considers the requested information relevant for the purpose of the criminal proceedings.
5. An EIO may also be issued with reference to the financial operations other than banking one. Paragraphs 1 to 4 shall apply *mutatis mutandis*. In such case and in addition to the grounds for non-recognition and non-execution referred to in Article 10, the execution of the EIO may also be refused if the execution of the measure would not be authorised in a similar national case.

Article 25

The monitoring of banking transactions

(Moved to Article 27)

Article 26

Controlled deliveries

(Moved to Article 27)

²¹ UK questioned keeping this paragraph in the text.

Article 27²²

*Investigative measures implying the gathering of evidence in real time,
continuously and²³ over a certain period of time*

1²⁴. When the EIO is issued for the purpose of executing a measure (...) implying the gathering of evidence in real time, continuously and over a certain period of time, such as:

(a) monitoring banking or other financial operations that are being carried out through one or more specified accounts;²⁵

(b) controlled delivery on the territory of the executing State;²⁶

(c) covert investigations;

[(d) interceptions of the telecommunications on the territory of the executing State;]²⁷

its execution may be refused, in addition to the grounds for non-recognition and non-execution referred to in Article 10, if the execution of the measure concerned would not be authorised in a similar national case.

2. (...) Each Member State shall, under the conditions set out in the Article, take the measures necessary to enable it to provide the information or to carry out the investigation measures referred to in paragraph 1.

²² Scrutiny reservation by DE/UK/SK/EL on this Article.

²³ DE proposed to replace "and" with "or" in the title and throughout this Article.

²⁴ Some delegations argued that the text should be further specified in order to clarify with sufficient legal certainty which measures fall within its scope.

²⁵ Scrutiny reservation by DE/UK.

²⁶ Some delegations questioned the inclusion of this measure in the EIO arguing that it is a form of police cooperation.

²⁷ Subject to further discussion; cf. cover note under II.D.

3. (...) The issuing State shall indicate in the EIO why it considers the requested information relevant for the purpose of the criminal proceedings.

 4. The right to act and to direct and control operations related to the execution of an EIO referred to in paragraph 1(a)(b)(c) shall lie with the competent authorities of the executing State.
-