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NOTE

From : The Dutch Delegation
To : Working Party on Cooperation in Criminal Matters
Subject : Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters
- Proposal of the Netherlands regarding the use of videoconferencing for the questioning of suspects and accused persons

Delegations will find in the Annex proposal from the Netherlands regarding the use of videoconferencing for the questioning of suspects and accused persons under 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 for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters.

*Article 21bis**Questioning of a suspect or accused person by videoconference*

1. If a person is in one Member State's territory and has to be questioned as a suspect or accused person by the judicial authorities of another Member State, the latter may issue an EIO in order to question the suspect or accused person by videoconference. The authorities of the issuing State will provide information about the rights of the suspect or accused person under the law of the issuing State.

2. The executing State shall agree to the questioning by videoconference provided that the use of videoconferencing to question a suspect or accused person, in the particular case, is not contrary to fundamental principles of its law. Article 10 is applicable *mutatis mutandis*.

3. The practical arrangements regarding the questioning shall be agreed between the authorities of the issuing State and the executing State. The authority of the executing State shall summon the suspect or accused person to appear for the questioning in accordance with the forms laid down by its law, in such a time as to allow him to exercise his rights of defence effectively. At the occasion of the summons, the suspect or accused person shall be informed about his rights as a suspect or accused person under the law of the issuing State.

4. The questioning of a suspect or accused person by videoconference shall be conducted directly by, or under the direction of, the judicial authority of the issuing State, in accordance with the laws of the issuing State. Before the questioning starts, the judicial authority of the issuing State verifies whether the suspect or accused person has been notified his rights under the law of the issuing State. Article 21, paragraph 6, subparagraph a, b and d, as well as paragraph 7, are applicable *mutatis mutandis*.¹

5. If according to the law of the issuing State the suspect or accused person is to be assisted by a lawyer during the questioning, the issuing State may demand that a lawyer for the suspect or accused person shall be granted access to the suspect or accused person in the executing State.

Explanatory Memorandum

(1) In order to contribute to a maximum to the cooperation in criminal matters, the possibility to using videoconferencing for the questioning of suspects or accused persons should be available as widely as possible. Furthermore, the use of videoconference for the questioning should be available in all stages of the pre-trial phase. This is reflected in the use of both the terms “suspect” and “accused person” (wording cf. proposal for Directive on the right of access to a lawyer in criminal proceedings).² However, we would be reluctant to allow for the use of videoconferencing for the questioning of an accused person during the trial phase, given the different character, setting and consequences of such a questioning.

(2) As a matter of principle, the same grounds for non-recognition or non-execution should apply for an EIO demanding for the use of videoconferencing to question a suspect or accused person as for other EIO’s; notably immunities and privileges, or bis in idem (Article 10, paragraph 1).

¹ All references are made to Article 21 as it is drafted in doc. 12841/11 (COPEN 186).

² It should be considered to introduce the term “accused person” in relevant provisions in Articles 1-18.

The questioning of a suspect or accused person falls within the regime of Article 10, paragraph 1a. However, the new wording of Article 21, paragraph 1a, sub b, seems to suggest that the use of videoconferencing for questioning a suspect or accused person, could – additionally – be made dependent on the law of the executing State. This is an even wider ground for refusal than “not contrary to fundamental principles of its law”³, which was used in prior versions. Furthermore the criterion laid down in Article 21, paragraph 1a, sub b, seems to suggest that Member States should under no circumstance be obliged to consider to make the use of videoconference for questioning of suspects or accused persons possible.

With reference to Article 21, paragraph 6, sub a – which will be applicable *mutatis mutandis* – we could however imagine that the use of videoconferencing would be contrary to fundamental principles of the law of the executing State *in the particular case*.

With regard to the extra ground for refusal that the suspect or accused person does not consent to the questioning by videoconference (suggested in Article 21, paragraph 1a, sub b), it could be argued that such a requirement, in the context of a questioning of a suspect or accused person, seems a little odd. Normally, in national proceedings, a suspect or accused person will not be asked for his consent to be questioned; however he will be informed of his rights – a.o. to remain silent.

(3) In this paragraph, for the sake of clarity it is repeated that the authorities of the issuing State and the executing State arrange for the practical elements of the questioning. Added is the obligation for the executing State to provide the suspect or accused person with information about the rights under the law of the issuing State, when he is summoned for questioning.

(4) Following the application of the principle of mutual recognition, it should be the national law of the issuing State which determines the procedure for the actual questioning. The authority of the issuing State conducting the questioning should under all circumstances be a judicial authority. Most of the formalities for the hearing of witnesses are applicable *mutatis mutandis* (Article 21, paragraph 6).

³ The question pops up in which Member State the use of videoconferencing for the questioning of suspects or accused persons would always be considered contrary to fundamental principles of its law?

As for the rights of the suspect or accused person with regard to the questioning, these will also be determined by the law of the issuing State. Where at this moment the national law of the issuing State and the national law of the executing State can differ on this point, we should reassure ourselves that in a near future, after the implementation of the proposal for a Directive on the right to information, the proposal for a Directive on the right of access to a lawyer in criminal proceedings, and the Directive on the rights to interpretation and translation in criminal proceedings, the rights of suspects and accused persons will be to a great extent equivalent in every MS. In the meantime, the possibility for the authorities of the executing State to supervise whether the questioning respects the fundamental principles of the law of their State should be sufficient to counter-balance the application of the principle of mutual recognition.

(5) If according to the national law of the issuing State, the suspect or accused person can be assisted by a lawyer, this lawyer – in principle a lawyer practicing in the issuing State – should have the possibility to assist to the questioning alongside the suspect or accused person in the executing State. Since Member States often require that a lawyer should be admitted to the national bar or be officially accredited to practice law in their country as a precondition to exercising any legal (defence) activity in their territory, it should be stipulated explicitly that a lawyer commissioned to defend the suspect or accused person will be granted access to him in the executing State.

The Netherlands delegation, 15 September 2011