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From : General Secretariat of the Council
To : delegations

Prev. doc. 11569/11 COPEN 154 EUROJUST 95 EJN 79 CODEC 1027

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
- strategic debate regarding Chapter IV of the draft directive at CATS

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 in April 2010 and since then has been discussed on several occasions in the Working Party on Cooperation in criminal matters. A partial general approach on the general issues (Articles 1 to 18, including Article Y) has been reached at the meeting of the Council on 9/10 June 2011, allowing to proceed with the examination of the specific provisions on certain investigative measures¹. It is possible to revert to the provisions of Articles 1-18 in light of the discussions carried out in respect of Chapter IV of the initiative.

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

At its meeting on 22 June 2011 CATS carried out a strategic debate concerning Chapter IV of the draft directive. Discussions were based on the discussion paper set out in 11569/11 COPEN 154 EUROJUST 95 EJM 79 CODEC 1027. The objective of the debate was to steer the ongoing work in respect of certain investigative measures included in Chapter IV of the initiative. Main elements of these discussions are set out under II below.

II. CATS DISCUSSIONS

1. Scope:

At the Council meeting on 9/10 June, it has been confirmed that the new instrument should cover all investigative measures aimed at the obtaining of evidence. In the light of that statement CATS was requested to confirm the approach by which the flexibility provided for by the existing regime of mutual legal assistance should be preserved in the final shaping of Chapter IV provisions. CATS agreed that there should be no steps backwards compared to the current legal framework, but the practical experience in the application of the 2000 Convention should be assessed with a view to simplify, where appropriate, the current legal framework.

As far as particular issues are concerned, CATS was first requested to agree that the Working Party on cooperation in criminal matters should first focus on the provisions already contained in the draft Directive and on specific provisions that should be introduced regarding the various forms of interception of telecommunications. A number of delegations took the opportunity of this debate to reiterate their support for the inclusion of all forms of interception of telecommunications with the scope of the draft Directive. It was noted however, that regarding the coerciveness of this measure some specific grounds for non recognition and non execution may need to be included and that careful attention should be given to the practical experience in the application of the current provisions of the 2000 Convention.

In addition CATS representatives were invited to express their opinion on the need to replace the Framework Decision 2003/577/JHA on the execution of orders freezing property or evidence in its entirety and thus enlarging the scope of the proposal to measures aimed at freezing of assets in view of their confiscation. The views of the delegations differed in this respect, and the Commission and the Council Legal Service appealed to the Member States to carefully weight pros and cons of such inclusions. Some delegations also recalled that the draft Directive only covers investigative measures aimed at gathering evidence. Having considered this background, CATS concluded that further discussions should still be carried out in order to clarify the relation of the EIO with the Council Framework Decision 2003/577/JHA.

Furthermore, some delegations reiterated their regrets that the scope does not cover the provisions of the 2000 MLA Convention on service of documents.

2. Derogatory grounds for non recognition or non execution

At the meeting of the JHA Council in December 2010 the Council concluded that grounds for non recognition or non execution should only be specific ones and that a wide ground for non recognition or non execution, drafted in general terms as in the existing regime of mutual legal assistance, should be avoided. The Council also concluded that a differentiation should be introduced between categories of investigative measures and grounds for non recognition or non execution linked to them.

As far as grounds for non recognition or non execution related to the measures contained in Chapter IV are concerned, according to the general orientations drawn from the discussions at the level of the Council in November 2010, a wide ground for non recognition or non execution based on the fact that the measure would not be authorized in a similar national case or under national law was not considered appropriate, except for the most sensitive measures. It is noted that the text of the partial general approach adopted at the last Council meeting, in particular Articles 9 and 10 of the draft Directive, provides for greater flexibility for most of the coercive measures. Accordingly, the derogatory grounds for non recognition or non execution, where provided for a certain measure in Chapter IV, would apply in addition to the other grounds for non recognition or non execution already provided for in the draft Directive.

These principles were confirmed by CATS as basis for further examination of measures listed in Chapter IV in respect of the grounds for non execution or non recognition. Number of delegations could agree with the Presidency suggestion that, given the flexibility already provided in Articles 9 and 10 of the current proposal, the insertion of additional derogatory grounds for refusal in Chapter IV should be avoided or at least restricted to the most sensitive measures.

3. Relation to previous instruments

CATS also addressed the question of the relationship between the draft Directive and the existing legal instruments on the subject matter. At present Article 29 of the proposal lists the instruments that are replaced by the Directive, by referring to them as “corresponding provisions” of applicable MLA conventions. Some delegations agreed with such an approach, indicating, along the lines of the statement made in the explanatory memorandum, that such general wording seems more suitable than listing the articles that are maintained and those that are replaced, in order to avoid any legal vacuum, as these MLA conventions will still be applicable to forms of cooperation that do not concern the gathering of evidence.

However, majority of delegations considered useful to actually strive for the clearest possible wording of Article 29, and in particular by setting up of a list of relevant provisions. In this respect, in its intervention, the Council Legal Service on the request of some delegations expressed its willingness to assist the Member States in identifying the relevant provisions and further clarify the meaning and consequences of the use of the term "corresponding provisions" in view to provide delegations with all pertaining arguments. In addition the CLS pointed out, as already stated by it in its opinion², to the need of specifically addressing in the text the relationship between the proposed Directive and the existing instruments, in particular in respect of the Member States, which do not participate in the adoption of the draft Directive.

² c.f. 13514/10 JUR 371 COPEN 188 EUROJUST 90 EJM 39 CODEC 807