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*****I**

DRAFT REPORT

on the adoption of a Directive of the European Parliament and of the Council
regarding the European Investigation Order in criminal matters
(09288/2010 – C7-0185/2010 – 2010/0817(COD))

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Nuno Melo

Symbols for procedures

- * Consultation procedure
- *** Consent procedure
- ***I Ordinary legislative procedure (first reading)
- ***II Ordinary legislative procedure (second reading)
- ***III Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

Amendments to a draft act

In amendments by Parliament, amendments to draft acts are highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the draft act which may require correction when the final text is prepared – for instance, obvious errors or omissions in a language version. Suggested corrections of this kind are subject to the agreement of the departments concerned.

The heading for any amendment to an existing act that the draft act seeks to amend includes a third line identifying the existing act and a fourth line identifying the provision in that act that Parliament wishes to amend. Passages in an existing act that Parliament wishes to amend, but that the draft act has left unchanged, are highlighted in **bold**. Any deletions that Parliament wishes to make in such passages are indicated thus: [...].

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DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on the adoption of a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters
(09288/2010 – C7-0185/2010 – 2010/0817(COD))

(Ordinary legislative procedure: first reading)

The European Parliament,

- having regard to the initiative of a group of Member States submitted to the European Parliament and to the Council (09288/2010),
 - having regard to Article 76(b) and Article 82(1)(a) of the Treaty on the Functioning of the European Union, pursuant to which the draft act was submitted (C7-0185/2010),
 - having regard to Article 294(3) and (15) of the Treaty on the Functioning of the European Union,
 - having regard to [the reasoned opinions sent to its President by national parliaments/the reasoned opinion sent to its President by a national parliament] on whether the initiative complies with the principle of subsidiarity,
 - having regard to the opinion of the Commission ...,
 - having regard to Rules 44 and 55 of its Rules of Procedure,
 - having regard to the report of the Committee on Civil Liberties, Justice and Home Affairs (A7-0000/2011),
1. Adopts its position at first reading hereinafter set out;
 2. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

Amendment 1

Draft directive

Recital 1

Text proposed by the group of Member States

(1) The European Union has set itself the objective of maintaining and developing an area of freedom, security and justice.

Amendment

(1) The European Union has set itself the objective of maintaining and developing an area of freedom, security and justice ***with respect for fundamental rights and the different legal and constitutional systems and traditions of the Member States.***

Justification

Amendment to the text in accordance with Article 67(1) TFEU, which states: ‘The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States’. The aim is also that this first recital should ensure absolute respect for the legal and constitutional differences between the Member States, without which the goal of this Directive cannot be achieved.

Amendment 2**Draft directive****Recital 1 a (new)**

Text proposed by the group of Member States

Amendment

(1a) The Treaty of Lisbon introduced, for the first time in the EU criminal law legislation, appropriate parliamentary scrutiny through the European Parliament as co-legislator, and the National Parliaments as regards the principle of subsidiarity. Through the Treaty of Lisbon, the Charter of Fundamental Rights of the European Union has become a legally binding document, thereby initiating a new phase with regard to the protection of human rights in the European Union, including fundamental rights in criminal proceedings, such as the right to life (Article 2), the right to the integrity of the person (Article 3), prohibition of torture and inhuman or degrading treatment or punishment (Article 4), the right to liberty and security (Article 6), respect for private and family life (Article 7), the right to an effective remedy and to a fair trial (Article 47), the presumption of innocence and right of defence (Article 48), the principles of legality and proportionality of criminal offences and penalties (Article 49), and the right not to be tried or punished twice in criminal proceedings

for the same criminal offence (Article 50).

Or. pt

Justification

The entry into force of the Treaty of Lisbon introduced improved democratic scrutiny through the European Parliament and the National Parliaments. At the same time, any measures adopted in the area of criminal law must fully comply with the Charter of Fundamental Rights of the European Union, as a legally binding document: when applying Union law, the European institutions and the Member States are now bound by a series of fundamental rights that protect citizens.

Amendment 3

Draft directive

Recital 1 b (new)

Text proposed by the group of Member States

Amendment

(1b) The European Convention on Human Rights (ECHR) and the case-law of the European Court of Human Rights (ECtHR) have helped to substantially raise the level of human rights, including the right to a fair trial in Europe. The Treaties and the Charter establish a special role for the Convention mechanism, as enshrined in Article 6 of the Treaty on European Union envisaging accession of the EU to the Convention, and defining the fundamental rights of the Convention as general principles of the Union's law, and as enshrined in Article 52 of the Charter, which guarantees a harmonious interpretation between the Charter and the Convention of these rights.

Or. pt

Justification

Due to the serious implications for various fundamental rights that the Directive on the European Investigation Order could have, as highlighted by the opinion of the European

Union Agency for Fundamental Rights on the EIO, it must be stressed that the Charter refers directly to the understanding of these rights as provided under the European Convention on Human Rights.

Amendment 4

Draft directive

Recital 2

Text proposed by the group of Member States

(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.

Amendment

(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.
Without calling into question its positive effects and central role, mutual recognition is to be applied in legal areas that are not harmonised and that have different legal traditions and criminal procedural systems, and may therefore result in legal anomalies to the detriment of the rights of suspects, as demonstrated by the experience gained with using the European Arrest Warrant. Measures must be established which will allow a national court to substantially intervene in cases where such anomalies may arise. In addition, any application of the concept of mutual recognition must also guarantee the fundamental rights enshrined in the Charter and in the European Convention on Human Rights. Any intervention in court based on an exception of fundamental rights must occur on an exceptional basis where there is clear and prima facie evidence that a fundamental procedural right enshrined in the Charter or in the European Convention on

Human Rights has been infringed or where the application of a measure would constitute an infringement of fundamental national constitutional rights.

Or. pt

Amendment 5

Draft directive Recital 2 a (new)

Text proposed by the group of Member States

Amendment

(2a) There are substantial differences between the Member States in constitutional and legal terms, particularly with regard to the role of prosecutors and the admissibility of evidence that the EIO must necessarily take into account. As a result, the EIO cannot obviate these differences by requiring less than is necessary in the executing States, and the fact that fundamental constitutional rules in the Member States involved may be infringed must form an additional ground for refusal.

Or. pt

Justification

In order to avoid constitutional problems in certain Member States, a procedure is necessary whereby a court can validate a measure before transmitting the EIO. This will ensure the legality of the measure to be issued as well as compliance with the various constitutional regimes and the implications for the administration and application of justice.

Amendment 6

Draft directive Recital 2 b (new)

Text proposed by the group of Member States

Amendment

(2b) Account must be taken of the fact that, despite the double criminality check having in principle been ruled out with regard to a list of 32 offences in the area of mutual recognition, there are still essential differences between the national definitions of these offences. Therefore, Member States must avoid using the EIO where extraterritorial jurisdiction clauses may be involved, when a Member State initiates criminal proceedings against national citizens or residents in respect of acts committed outside its national territory and when the same act would not be punishable under the law of the executing State. Proceedings associated with tax, customs and exchange offences do not fall into this category.

Or. pt

Amendment 7

Draft directive Recital 2 c (new)

Text proposed by the group of Member States

Amendment

(2c) Police authorities cannot be regarded as judicial authorities within the meaning of Article 82(1)(a) TFEU. Any request for an EIO made by the police in the issuing State must be validated by a prosecutor, magistrate or judge, taking into account the fundamental requirements of the executing State. The investigative authority in criminal proceedings, which

is competent to order the gathering of evidence, is an authority that exercises judicial power, i.e. an authority that delivers, in accordance with the procedures laid down by law, binding decisions that are classified as 'judicial decisions'.

Or. pt

Justification

This recital is crucial in order to ensure that any request for an EIO is assessed by a prosecutor, magistrate or judge, while respecting the principle of legality. Article 82(1) TFEU clearly restricts the application of the principle of mutual recognition to decisions of judicial cooperation in criminal matters and does not envisage its application to acts of police cooperation in accordance with Article 87 TFEU.

Amendment 8

Draft directive

Recital 6

Text proposed by the group of Member States

(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

Amendment

(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 ***and*** 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.

possible all types of evidence and containing deadlines for enforcement and limiting as far as possible the grounds for refusal.

Or. pt

Justification

The aim of this Directive is to establish a single effective instrument for obtaining evidence in criminal cases so as to overcome the problems of fragmentation and complexity in the current legal framework and the limited scope of application of the principle of mutual recognition in this area. Based on the principle of mutual recognition, the grounds for refusing to execute a foreign order will be set out in an exhaustive but objective list and the time-limits will be clearly fixed to facilitate judicial cooperation in this area.

Amendment 9

Draft directive Recital 7 a (new)

Text proposed by the group of Member States

Amendment

(7a) Another aim of this Directive is to provide an effective and flexible instrument, thereby ensuring swifter action; admissibility of evidence; procedural simplification; high level of protection of fundamental rights, particularly procedural rights; reduction in financial costs; increased mutual trust and cooperation between Member States; and protection of the specific characteristics of national systems and their judicial culture, all in accordance with the legal and constitutional systems of the Member States.

Or. pt

Justification

The aims of this Directive need to be highlighted. In order to swiftly and effectively combat cross-border crime, and other types of particularly serious crime, given the significant ease of movement of persons and goods, the national authorities need clear and flexible rules on

cooperation, but once again confirming the need for this to be in accordance with the legal and constitutional differences between the Member States.

Amendment 10

Draft directive

Recital 10

Text proposed by the group of Member States

(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.

Amendment

(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 ***in the specific case*** or because the other type of measure will achieve the same result as the measure provided for in the EIO by less coercive means, ***where the result to be achieved will be the same as with an EIO and will interfere less with the fundamental rights of the person in question.***

Or. pt

Justification

If the issuing authority can decide on the type of measure to be used, the executing authority, respecting the principle of proportionality, should be able to use another less coercive measure respecting fundamental rights, in particular, if the requested measure is not possible under its jurisdiction or would not be possible in the particular case, and would provide the same results.

Amendment 11

Draft directive Recital 10 a (new)

Text proposed by the group of Member States

Amendment

(10a) The EIO should be chosen where the execution of an investigative measure appears to be proportionate, necessary and adequate in the case in question. The issuing authority should therefore check whether the evidence sought is necessary and proportionate for the purpose of the proceedings, if the chosen measure is necessary and proportionate for the purpose of gathering evidence, and if, by issuing an EIO, another Member State may be involved in gathering evidence. An appropriate assessment of the proportionality is a constitutional requirement in several Member States and also a requirement pursuant to Article 8 of the European Convention on Human Rights. As a result, a clear and obvious lack of proportionality may represent an infringement of human rights and/or an infringement of fundamental national constitutional principles.

Or. pt

Amendment 12

Draft directive Recital 10 b (new)

Text proposed by the group of Member States

Amendment

(10b) In view of ensuring the transmission of an EIO to the competent authority of the executing State, the issuing authority may make use of any possible or relevant means of

transmission, including for example the telecommunications system of the European Judicial Network, Eurojust or other channels used by competent judicial authorities. Where an EIO has been validated by a judicial authority, that authority may also be regarded as an issuing authority for the purposes of transmitting an EIO.

Or. pt

Amendment 13

Draft directive Recital 11

Text proposed by the group of Member States

(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 to 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.

Amendment

(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 to 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. ***The executing authority should comply with such request, if necessary by setting conditions as to the scope and nature of the attendance of the authorities of the issuing State. In this way, a system is established to encourage judicial authorities to cooperate with each other, in a spirit of mutual trust, by promoting mechanisms not only to facilitate cooperation between authorities, but also to improve the judicial protection of individual rights.***

Amendment 14

Draft directive Recital 12

Text proposed by the group of Member States

(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.

Amendment

(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 ***insofar as is necessary to prevent adverse effects when the principle of mutual recognition is applied in a non-harmonised legal area with regard to criminal law and criminal proceedings, in particular in respect of the protection fundamental rights and fundamental constitutional rules of the Member States.***

Or. pt

Justification

Clarification must be given on the existence of grounds for refusal due to the application of mutual recognition in a non-harmonised legal area in which criminal procedures differ.

Amendment 15

Draft directive Recital 12 a (new)

Text proposed by the group of Member States

Amendment

(12a) This Directive respects the principle of ne bis in idem, which means that no one should be tried or punished twice on the same facts and for the same offence. This is established as an individual right in international legal instruments on

human rights, such as Protocol No 7 to the European Convention on Human Rights (Article 4) and the Charter of Fundamental Rights of the European Union (Article 50), and is recognised in all legal systems based on the concept of respect for and protection of fundamental freedoms. Consequently, the principle of ne bis in idem is a fundamental principle of law in the European Union. As a result, the executing authority should have the right to refuse to execute an EIO where its execution would contravene this principle and where it is confirmed that the person in question has already been tried on the same facts, with a final decision having been made, under the conditions laid down in Article 54 of the Convention of 19 June 1990 applying the Schengen Agreement and also taking in account the case-law of the Court of Justice of the European Union. Given the preliminary nature of the proceedings underlying an EIO and the complexity of analysis of the conditions required by Article 54, the executing authority should inform and consult with the issuing authority, which should in turn consider this information and take the necessary measures in relation to the proceedings underlying the issuing of an EIO. Such consultation should be 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.

Or. pt

Justification

This concerns to the introduction of an additional ground for refusal, based on the principle of 'ne bis in idem', which means that no one should be tried twice on the same facts and for the same offence, which is established as an individual right in international legal instruments on human rights.

Amendment 16

Draft directive Recital 13 a (new)

*Text proposed by the group of Member
States*

Amendment

(13a) The legal remedies available against an EIO should at least be the same as those available in domestic cases against the investigative measure in question. In accordance with their national law, Member States should ensure that these legal remedies can be used and should promptly inform interested parties about the possibilities and methods of legal remedy. In cases where objections against an EIO are made by an interested party in the executing State with regard to more substantive reasons for the issue of an EIO, it is advisable that such information is transmitted to the issuing authority and that the interested party is duly informed. There is a need to ensure the right to information and access to the courts for those affected by an EIO. The right of defence forms part of the right to a fair trial (Articles 47 and 48 of the Charter) during all stages of the proceedings.

Or. pt

Amendment 17

Draft directive Recital 13 b (new)

*Text proposed by the group of Member
States*

Amendment

(13b) The costs incurred in the territory of the executing State in order to execute an EIO should be borne exclusively by that

Member State. This is in line with the general principle of mutual recognition. However, the execution of an EIO may involve exceptionally high costs in the executing State. These exceptionally high costs may stem from, for example, the need to obtain complex opinions from experts, extensive police operations or long-term surveillance activities. This should not prevent the execution of an EIO, which is why the issuing and executing authorities should try to determine at what level costs are considered to be exceptionally high. If no agreement can be reached, the issuing authority may decide to withdraw the EIO or maintain it and cover the part of the costs which is considered by the executing State to be exceptionally high. This mechanism does not constitute an additional ground for refusal and should not be abused in such a way as to delay or prevent execution of an EIO.

Or. pt

Justification

The issue of the costs incurred in the territory of the executing State is extremely important in terms of ensuring recognition of the principle of mutual recognition. Moreover, making an effort to recognise and execute an EIO involves bearing the costs of its execution, as both the issuing State and the executing State are contributing to the same objective: achieving an area of justice and freedom, which will certainly benefit everyone.

Amendment 18

Draft directive Recital 14 a (new)

Text proposed by the group of Member States

Amendment

(14a) By making a declaration on the use of languages, Member States will be encouraged to include at least one language that is commonly used in the

European Union, in addition to their official language. The use of this language should not in any way be detrimental to the rights of the suspect in terms of interpretation and translation in criminal proceedings, as laid down in Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.

Or. pt

Amendment 19

Draft directive Recital 16

Text proposed by the group of Member States

(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.

Amendment

(16) ***The principle of subsidiarity, as set out in Article 5 of the Treaty on European Union, was introduced by the Treaty of Maastricht and expresses the fact that anything which can be better decided or managed at the national, regional or local level should not be regulated at Union level. According to this principle, Union decisions are therefore limited to cases in which they will be more effective and satisfactory than national action. Given the need to consolidate the process of European integration by establishing measures that increase the effectiveness of judicial cooperation between Member States and 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.

Or. pt

Justification

There is a need to highlight that, given the subject-matter in question and bearing in mind that crimes are becoming increasingly complex and cross-border in nature, the effectiveness of the mechanisms for obtaining evidence cannot be duly achieved through separate and individual action by each Member State. If a State is ineffective in its investigation, this could potentially prejudice the whole EU area, which therefore justifies the pooling of efforts and the utmost cooperation.

Amendment 20

Draft directive

Article 1 – paragraph 1

Text proposed by the group of Member States

1. The European Investigation Order (EIO) shall be a judicial decision issued by a competent authority of a Member State ('the issuing State') in order to have one or several specific investigative measure(s) carried out in another Member State ('the executing State') with a view to gathering evidence within the framework of the proceedings referred to in Article 4.

Amendment

1. The European Investigation Order (EIO) shall be a judicial decision issued by a competent authority of a Member State ('the issuing State') in order to have one or several specific investigative measure(s) carried out in another Member State ('the executing State') with a view to gathering evidence ***in accordance with the provisions of this Directive, and specifically*** within the framework of the proceedings referred to in Article 4.

Or. pt

Amendment 21

Draft directive

Article 1 – paragraph 3

Text proposed by the group of Member States

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.

Amendment

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, **including the right of defence of persons subject to criminal proceedings**, and any obligations incumbent upon 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 **fundamental** constitutional rules, **including** freedom of association, freedom of the press and freedom of expression in other media.

Or. pt

Amendment 22

Draft directive

Article 2

Text proposed by the group of Member States

For the purposes of this Directive:

Amendment

For the purposes of this Directive:

(-aa) ‘issuing State’ shall mean the Member State in which the EIO is issued;

(-ab) ‘executing State’ shall mean the Member State executing the EIO, in which the person covered by the investigative measure requested or the document, object or data to be seized, examined or inspected is to be found;

(a) ‘issuing authority’ **means**:

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

(ii) **any other judicial 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,**

(b) ‘executing authority’ shall mean **an** authority having competence to recognise or execute an EIO in accordance with this Directive. The executing authority shall be an authority competent to **undertake** the investigative measure mentioned in the EIO in a similar national case.

(a) ‘issuing authority’ **shall mean** a judge, a court, an investigating magistrate or a public prosecutor competent in the case concerned;

(b) ‘executing authority’ shall mean **a judicial** authority having competence to recognise or execute an EIO in accordance with this Directive. The executing authority shall be an authority competent to **order** the investigative measure mentioned in the EIO in a similar national case.

Or. pt

Amendment 23

Draft directive

Article 5 – paragraph 1

Text proposed by the group of Member States

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.

Amendment

1. The EIO set out in the form provided for in Annex A shall be completed, signed, and its content certified as accurate **and correct** by the issuing authority.

Or. pt

Justification

This amendment aims to ensure that the issuing authority certifies not only that the content of the EIO form is accurate, but also that it is correct.

Amendment 24

Draft directive Article 5 a (new)

Text proposed by the group of Member States

Amendment

Article 5a

1. An EIO may only be issued where the issuing authority is convinced that the following conditions are met:

(a) the issuing of the EIO is necessary and proportionate for the purpose of the proceedings referred to in Article 4;

(b) the investigative measures mentioned in the EIO would be ordered under the same conditions in a similar national case.

2. These conditions shall be assessed by the issuing authority in each case. Exceptionally they shall be assessed by the executing authority where there are firm grounds to believe, based on clear and objective evidence, that the measures are not proportionate and cannot be used in an internal procedure of the issuing state.

3. After its compliance with the conditions for its issue have been assessed, the EIO shall be validated, in accordance with the Directive, by a judge, a court, an investigating magistrate or a prosecutor before being transmitted to the executing authority.

Or. pt

Justification

Paragraph 1 is justified due to the increased importance of the principle of proportionality as a constitutional requirement in many Member States, as set out in Article 8 of the European Convention on Human Rights (any interference with the right to privacy is only justifiable in a democratic society where this is necessary). This means that the intensity of the action must

always be in line with the intended objective. It also reaffirms the obligation for an EIO to be validated by a judge, a court, an investigating magistrate or a prosecutor.

Amendment 25

Draft directive Article 6

Text proposed by the group of Member States

1. The EIO shall be transmitted from the issuing authority to the executing authority 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.***

Amendment

1. The EIO, ***completed in accordance with Article 5***, shall be transmitted from the issuing authority to the executing authority by any means capable of producing a written record under conditions allowing the executing State to establish authenticity.

Or. pt

Amendment 26

Draft directive Article 6 – paragraph 1 a (new)

Text proposed by the group of Member States

1a. All further official communication shall be made directly between the issuing authority and the executing authority.

Amendment

Or. pt

Amendment 27

Draft directive

Article 6 – paragraph 3

Text proposed by the group of Member States

3. If the issuing authority so wishes, transmission may be effected via the **secure** telecommunications system of the European Judicial Network.

Amendment

3. If the issuing authority so wishes, transmission may be effected via the telecommunications system of the European Judicial Network.

Or. pt

Amendment 28

Draft directive

Article 6 – paragraph 6 a (new)

Text proposed by the group of Member States

Amendment

6a. In the context of this article, authentication systems shall be created to ensure that only authorised bodies have access to databases containing personal data and can operate these databases.

Or. pt

Amendment 29

Draft directive

Article 7 – paragraph 2

Text proposed by the group of Member States

Amendment

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

2. When assisting in the execution of the EIO in the executing State, in accordance with Article 8(3), the issuing authority may, without prejudice to notifications made under Article 28(1)(c), address an EIO which supplements the earlier EIO

earlier EIO directly to the executing authority, while present in that State.

directly to the executing authority, while present in that State.

Or. pt

Justification

This article provides for the possibility to issue an EIO to supplement an EIO previously transmitted (Article 7(1)). It also clarifies the fact that, if the issuing authority is present during the execution of the investigative measure in the executing State, it can, during this execution, address the EIO which supplements the earlier EIO directly to the executing authority. It is therefore not necessary that the new EIO be issued in the issuing State nor is it necessary in this case to transmit the EIO via central authorities where they exist in accordance with Article 6(2).

Amendment 30

Draft directive

Article 8 – paragraph 1

Text proposed by the group of Member States

Amendment

1. The executing authority shall recognise an EIO, transmitted in accordance with Article 6, without any further formality being required, and shall forthwith take the necessary measures for 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.

1. The executing authority shall recognise an EIO, transmitted in accordance with Article 6, without any further formality being required, and shall forthwith take the necessary measures for 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, ***except where*** 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.

Or. pt

Amendment 31

Draft directive

Article 8 – paragraph 3

Text proposed by the group of Member States

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. 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.

Amendment

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 measures 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 ***and does not harm its essential national security interests.***

Or. pt

Amendment 32

Draft directive

Article 8 – paragraph 3 a (new)

Text proposed by the group of Member States

Amendment

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. The issuing State shall not have any law enforcement powers in the territory of the executing State.

Or. pt

Amendment 33

Draft directive

Article 8 – paragraph 3 b (new)

Text proposed by the group of Member States

Amendment

3b. The issuing and executing authorities shall consult each other, by any appropriate means, with a view to facilitating the application of this Article.

Or. pt

Amendment 34

Draft directive

Article 9 – paragraph 1 – point b

Text proposed by the group of Member States

Amendment

(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

(b) the investigative measure indicated in the EIO is not admissible in a similar national case, or

Or. pt

Amendment 35

Draft directive

Article 10 – paragraph 1 – point -aa (new)

Text proposed by the group of Member States

Amendment

(-aa) its execution would infringe the ne bis in idem principle;

Or. pt

Justification

The first ground refers to the ne bis in idem principle, whereby no one should be prosecuted or tried twice for the same facts and the same criminal behavior. It is established as an individual right in international legal instruments concerning human rights, such as the Protocol 7 to the European Convention on Human Rights (Article 4) and the Charter of Fundamental Rights of the European Union (Article 50), and is recognized in all jurisdictions based on the concept of respecting and protecting fundamental freedoms. The ne bis in idem principle is particularly important at a time when trans-border criminality is increasing, and the problems of jurisdiction as regards criminal prosecutions are becoming increasingly complex.

Amendment 36

Draft directive

Article 10 – paragraph 1 – point -ab (new)

Text proposed by the group of Member States

Amendment

(-ab) the EIO concerns facts that do not constitute a crime or offence under the national law of the executing State;

Or. pt

Justification

The second ground: where the EIO concerns facts that do not constitute a crime or offence under the national law of the executing State.

Amendment 37

Draft directive

Article 10 – paragraph 1 – point -ac (new)

Text proposed by the group of Member States

Amendment

(-ac) the EIO concerns criminal offences that:

(i) under the law of the executing State are regarded as having been committed wholly or for a major or essential part within its territory, or in a place

equivalent to its territory;

(ii) have been committed outside the territory of the issuing State, and the law of the executing State does not permit legal proceedings to be taken in respect of such offences where they are committed outside that State's territory;

Or. pt

Justification

The third ground: (i) If the EIO is related to criminal offenses that under the law of the executing State are regarded as having been committed wholly or for a major or essential part within its territory or in a equivalent place. Obviously, in this case, the executing State will claim the sole power to initiate proceedings and conduct investigations in this area; (ii) If the EIO is related to criminal offenses that have been committed outside the territory of the issuing State, and the law of the executing State does not permit legal proceedings to be taken in respect of such offences where they are committed outside that State's territory.

Amendment 38

Draft directive

Article 10 – paragraph 1 – point a

Text proposed by the group of Member States

Amendment

(a) there is an immunity or a privilege under the law of the executing State which makes it impossible to execute the EIO;

(a) there is an immunity or a privilege under the law of the executing State which makes it impossible to execute the EIO; ***where an authority in the executing State has the power to waive the immunity or privilege, the executing authority may request that this power be exercised immediately; where an authority in another State or an international organisation has the power to waive the immunity or privilege, the issuing authority shall request that this power be exercised;***

Or. pt

Justification

The fourth ground refers to an immunity or privilege existing under the law of the executing State. It is understood that, where there is a likelihood that the immunity or privilege may be lifted within a reasonable time, the executing authority may decide instead to postpone execution in accordance with Article 14.

Amendment 39

Draft directive

Article 10 – paragraph 1 – point aa (new)

Text proposed by the group of Member States

Amendment

(aa) where there are rules determining or limiting criminal liability relating to freedom of the press or the freedom of expression in other media, which make it impossible to execute the EIO;

Or. pt

Justification

The fifth ground refers to the existence of rules connected with the freedom of the press or the freedom of expression in other media, which means that the EIO cannot be executed.

Amendment 40

Draft directive

Article 10 – paragraph 1 – point ba (new)

Text proposed by the group of Member States

Amendment

(ba) there is clear and objective evidence of an infringement of a fundamental right as laid down in the Charter of Fundamental Rights or in the European Convention on Human Rights or where executing a measure would clearly

contradict the fundamental national constitutional principles with regard to criminal proceedings;

Or. pt

Justification

The sixth ground for refusal concerns infringements of fundamental rights enshrined in the main international instruments such as the Charter of Fundamental Rights of the European Union or the European Convention on Human Rights as well as non-compliance with fundamental national constitutional principles with regard to criminal proceedings.

Amendment 41

Draft directive

Article 10 – paragraph 1 – point bb (new)

Text proposed by the group of Member States

Amendment

(bb) the measure has not been validated by a judge in a case where, in the issuing State, the measure has not been issued by a judge, but this requirement exists in the executing State;

Or. pt

Justification

The eighth ground for refusal concerns the case where the investigative measure has not been validated by a judicial authority, namely a judge, where this is required in the executing State, namely under its constitutional traditions.

Amendment 42

Draft directive

Article 10 – paragraph 1 – point d

Text proposed by the group of Member States

Amendment

(d) the EIO has been issued in proceedings

(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 national case.

referred to in Article 4(b) and (c) and the measure would not be authorised **by the law of the executing State** in a similar national case.

Or. pt

Justification

The tenth ground for refusal relates to the fact that the EIO may be used to obtain evidence not only in criminal proceedings but also in some types of administrative proceedings having a criminal dimension (Article 4). It is unreasonable to combine this application to administrative proceedings together with an extension to all investigative measures. In this respect, the executing State must be allowed some room for manoeuvre. Therefore, the fact that the EIO is issued not in the framework of criminal proceedings but in the framework of administrative proceedings is mentioned as a possible ground for refusal.

Amendment 43

Draft directive

Article 10 – paragraph 1 a (new)

Text proposed by the group of Member States

Amendment

1a. With regard to tax, customs or exchange offences, recognition or execution may not be refused based on the fact that the law of the executing State does not impose the same kind of tax, excise duty, customs duty or exchange duty as in the issuing State.

Or. pt

Amendment 44

Draft directive

Article 10 – paragraph 1 b (new)

Text proposed by the group of Member States

Amendment

1b. Where the EIO is incomplete or has clearly been completed incorrectly and

also in the cases referred to in paragraph 1(aa), (ba), (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.

Or. pt

Amendment 45

Draft directive Article 13

Text proposed by the group of Member States

Legal remedies shall be available for the interested parties in accordance with national law. The substantive reasons for issuing the EIO can be challenged only in an action brought before a court of the issuing State.

Amendment

1. The interested parties, including third parties in good faith, may have legal remedy against recognition and execution of an EIO, in defence of legitimate interests, before a court in the executing State.

2. The substantive reasons for issuing the EIO can be challenged only in an action brought before a court of the issuing State.

3. Where the right of legal remedy is exercised pursuant to paragraph 1, the judicial authority shall be informed of this fact and of the grounds of the legal remedy so that it can exercise its procedural rights.

4. Provided that the need to ensure the confidentiality of an investigation is not called into question, as laid down in Article 18(1), the authorities in the issuing State and executing State shall provide interested parties with relevant and appropriate information to guarantee the effective exercise of the right of legal remedy and the right of action laid down in the above paragraphs.

5. The executing State shall suspend the transfer of evidence obtained in the execution of an EIO pending the outcome of a legal remedy.

Or. pt

Amendment 46

Draft directive

Article 14 – paragraph 1 – point a

Text proposed by the group of Member States

Amendment

(a) its execution might prejudice an ongoing criminal investigation or prosecution, until such time as the executing State deems reasonable; or

(a) the evidence obtained might also be relevant to ongoing criminal investigations or prosecutions or might prejudice such investigations or prosecutions, until such time as the executing State deems reasonable; or

Or. pt

Justification

Article 14 refers to postponement of recognition or execution of an EIO. Such postponement is possible if the execution of the EIO would prejudice an ongoing criminal investigation or prosecution or if the evidence concerned is already used in other criminal proceedings. Note that the postponement must be as brief as possible, as indicated in paragraph 2 of the same article.

Amendment 47

Draft directive

Article 14 – paragraph 1 a (new)

Text proposed by the group of Member States

Amendment

1a. Where the objects, documents or data

concerned are already relevant for other proceedings the executing authority may, at the explicit request and after consultations with the issuing authority, temporarily transfer the evidence under the condition that it be returned to the executing State as soon as it is no longer required in the issuing State or at any other time agreed between the competent authorities.

Or. pt

Amendment 48

Draft directive Article 16

Text proposed by the group of Member States

When present in the territory of the executing State in the framework of the application of this Directive, officials from the issuing State shall be regarded as officials of the executing State with respect to offences committed against them or by them.

Amendment

Where, in the framework of the application of this Directive, officials from the issuing State are present in the territory of the executing State, they shall be regarded as officials of the executing State with respect to offences committed against them or by them.

Or. pt

Justification

There are several situations in which officials of the issuing State may be present in the executing State in the course of the execution of an EIO. Article 8(3) provides for an explicit possibility for such presence, which may also occur for example in the course of undercover operations or controlled deliveries. Rules on civil and criminal liability are therefore necessary. Article 16 therefore deals with the commission of criminal offences against or by these officials of the issuing State and provides for their assimilation to officials of the executing State.

Amendment 49

Draft directive

Article 17 – paragraph 2 a (new)

Text proposed by the group of Member States

Amendment

2a. The issuing State whose officials have caused damage to any person in the territory of the executing State shall reimburse the latter any sums it has paid to the victims or persons entitled on their behalf.

Or. pt

Justification

The purpose is to establish provisions to uphold claims for damages which may be initiated as a result of operations by officials or agents of a Member State in the territory of another Member State. However, the Member State in whose territory the damage has been caused is required, first, to reimburse the damage in the same way as if it would have been caused by its own officials or agents. In this case, the other Member State shall fully reimburse any compensation paid.

Amendment 50

Draft directive

Article 18 – title

Text proposed by the group of Member States

Amendment

Confidentiality

Confidentiality and processing of personal data

Or. pt

Amendment 51

Draft directive

Article 18 – paragraph 2 a (new)

Text proposed by the group of Member States

Amendment

2a. The issuing authority shall, in accordance with its national law and unless otherwise indicated by the executing authority, keep confidential any evidence or information provided by the executing authority, except to the extent that its disclosure is necessary for the investigations or proceedings described in the EIO.

Or. pt

Amendment 52

Draft directive

Article 19 – paragraph 1

Text proposed by the group of Member States

Amendment

1. An EIO may be issued for the temporary transfer of a person in custody in the executing State in order to have an investigative measure carried out 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.

1. An EIO may be issued for the temporary transfer of a person, in custody in the executing State ***in respect of an ongoing case***, in order to have an investigative measure carried out 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.

Or. pt

Justification

This Article relates to the situation where the issuing authority requests the presence in the issuing State of a person held in custody in the executing State. This method of transfer has been included in this Directive in order for example to ensure that the person will be

available for a hearing in the issuing State and that subsequent execution of an investigative measure will be possible.

Amendment 53

Draft directive

Article 22 – paragraph 2 – point a

Text proposed by the group of Member States

Amendment

(a) the use of teleconference is contrary to fundamental principles of the law of the executing State; or

(a) the use of teleconference is contrary to ***fundamental rights and*** fundamental ***legal*** principles of the law of the executing State;
or

Or. pt

Justification

Hearings by teleconference are another method that can be particularly useful when evidence needs to be taken from witnesses or experts. This Article therefore provides that the EIO may be issued to obtain a telephone conference hearing where a person who is to be heard as a witness or expert by the judicial authorities of a Member State is present in another Member State. It sets out the arrangements to apply in respect of requests relating to hearings by telephone conference. Paragraph 2 provides for two further grounds for refusal in addition to those set out in Article 10(1).

Amendment 54

Draft directive

Article 25

Text proposed by the group of Member States

Amendment

1. An EIO may be issued in order to monitor, during a specified period, the banking operations that are being carried out through one or more accounts specified within.

2. Each Member State shall, under the conditions set out in the Article, take the measures necessary to enable it to provide

1. An EIO may be issued in order to monitor, during a specified period, the banking operations that are being carried out through one or more accounts specified within.

2. Each Member State shall, under the conditions set out in the Article, take the measures necessary to enable it to provide

the information referred to in paragraph 1.

3. The issuing State shall indicate in the EIO why it considers the requested information relevant for the purpose of the investigation into the offence.

4. The practical details regarding the monitoring shall be agreed between the competent authorities of the issuing and the executing States.

the information referred to in paragraph 1 ***in the context of monitoring a banking operation.***

3. The issuing State shall indicate in the EIO why it considers the requested information relevant for the purpose of the investigation into the offence.

4. The practical details regarding the monitoring shall be agreed between the competent authorities of the issuing and the executing States.

4a. The issuing and executing authorities should ensure privacy and confidentiality of bank details obtained in contexts that are not related to the investigation, namely not releasing this information to third parties nor using it for other purposes than the ones that justified the request.

Or. pt

EXPLANATORY STATEMENT

Given the unsuitability of traditional judicial cooperation in the current European context, the step forward that the adoption of this Directive represents is undoubtedly a positive factor, which will clearly help to consolidate the construction of the European criminal area. It crystallises the tension in terms of progress with the transfer of sovereignty, in the name of security and protection of fundamental rights.

The challenge in terms of European criminal integration is therefore to ensure respect for and guarantee fundamental rights. It is significant that the preamble to the Charter of Fundamental Rights expressly refers to the area of 'freedom, security and justice', given its particularly sensitive nature in terms of fundamental rights and freedoms. There is no need to point out that this guarantee must be 'real' and not 'formal'. The carefully thought out and considered development of the European criminal area therefore requires judicial control of respect for fundamental rights in the Union.

The importance of the European criminal area is now evident as a priority within European integration, given the gradual liberation of traditional cooperation mechanisms. Having promoted police and judicial cooperation as a measure compensating for the disappearance of internal borders, the European Union is now moving beyond this inter-state cooperation in order to gradually construct a homogenous criminal area.

This progress must be made based on the following principles: mutual recognition, coordination of investigations, and protection of fundamental rights in criminal cases, thereby complying with the measures defined by Article 82 of the Treaty on the Functioning of the European Union. The complementary link between mutual recognition and harmonisation is thus reaffirmed, highlighting the fact that mutual recognition cannot be achieved without harmonisation.

There is no need to point out that one of the objectives of the European integration process is precisely to promote the free movement of persons, without failing to guarantee their safety, by creating an area of freedom, security and justice.