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NOTE

From : Presidency
To : delegations

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
-Text suggestions in view of the trilogue on 11 June 2013

In view of the Friends of the Presidency meeting on 31 May and on the basis of the trilogue on 15 May 2013 delegations will find attached suggestions from the Presidency on some of the issues that will be discussed at the next trilogue.

Article 1**" Article 1**

~~Definition of the~~ **The European Investigation Order and obligation to execute it**

1. The European Investigation Order (EIO) shall be a judicial decision issued or validated by a judicial (...) 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 obtaining evidence (...) in accordance with the provisions of this Directive, ~~and specifically within the framework of the proceedings referred to in Article 4.~~ The EIO may also be issued for obtaining evidence that is already in the possession of the competent authorities of the executing State.
2. Member States shall execute any EIO on the basis of the principle of mutual recognition and in accordance with the provisions of this Directive.
3. The issuing of an EIO may be requested by a suspect or accused person (or by a lawyer on his behalf), within the framework of applicable defence rights in **conformity with** national criminal procedure.
4. 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 on judicial authorities in this respect shall remain unaffected.

The European Parliament suggested to change the title of the Article and delete "definition of". The Presidency considers that this is acceptable. The EP insists on the addition to paragraph 4

recital 17

"(17) This Directive respects the fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and by the Charter of Fundamental Rights of the European Union, notably Title VI thereof, by international law and international agreements to which the Union or Member States are party, including the European Convention for the protection of human Rights and Fundamental Freedoms, [and by Member States' **constitutional structures**] in their respective field of application. Nothing in this Directive may be interpreted as prohibiting refusal to execute an EIO when there are reasons to believe, on the basis of objective elements, that the EIO has been issued for the purpose of prosecuting or punishing a person on account of his or her sex, racial or ethnic origin, religion, sexual orientation, nationality, language or political opinions, or that the person's position may be prejudiced for any of these reasons."

The EP insists on having a reference to Member States' constitutions and since the Presidency had indicated that Member States had not been favourable to the drafting suggested the EP suggested to refer to "constitutional structures" instead. It was decided to leave Article 1 and recital 17 for the time being.

Article 2

Definitions

"(-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 investigative measure is to be carried out or the person covered by the investigative measure is to be found;

a) 'issuing authority' shall mean a judge, a court, an investigative magistrate or a public prosecutor competent in the case concerned;

ii) any other (...) competent 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. In addition, before it is transmitted to the executing authority the EIO shall be validated, after examination of its conformity with the conditions for issuing an EIO, in particular the conditions set out in Article 5a.1, under this Directive, by a judge, court, investigating judge or a public prosecutor in the issuing State. Where the EIO has been validated by a judicial authority, that authority may also be regarded as an issuing authority for the purposes of transmission of the EIO.

b) "executing authority" shall mean an authority having competence to recognise an EIO and ensure its execution in accordance with this Directive and the procedures applicable in a similar domestic case. ~~Where the executing authority is not a judicial authority, such~~ **Such** procedures may require a court authorisation in the executing State where provided by its national law. "

The only outstanding issue in this Article is the small change in paragraph 1 (b). The EP wanted to delete the beginning of the second sentence. The Presidency does not see any problem to accommodate the EP on this point. However it may be that the EP will condition its acceptance of the definition of "executing authority" on the inclusion of absence of validation as a ground for refusal.

Article 5a

Conditions for the issuing and transmitting of an EIO

1. An EIO may be issued only when the issuing authority is satisfied that the following conditions have been met:

(a) the issuing of the EIO is necessary ~~in a democratic society~~ and proportionate for the purpose of the proceedings referred to in Article 4 ~~taking into account the rights of the suspect~~ **[in accordance in particular with Article 48 and 52 of the Charter of Fundamental Rights of the EU];**

b) the investigative measure(s) mentioned in EIO could have been ordered under the same conditions in a similar national case.

2. These conditions shall be assessed by the issuing authority in each case.

3. Where an executing authority has reason to believe that the conditions in Article 5a(1) have not been met, it may consult the issuing authority if an explanation has not been given in the EIO. Following the consultation, the issuing authority may decide to withdraw the EIO or to maintain the EIO which will then be executed according to this Directive.

The EP accepted to withdraw the references to democratic society and the rights of the suspect. On the consultation process in paragraph 3, the EP could not yet give a definite position. This will be discussed at the next trilogue.

Article 9

Recourse to a different type of investigation measure

1. The executing authority **shall have, wherever possible**, recourse to an investigative measure other than that provided for in the EIO when:
 - a) the investigative measure indicated in the EIO does not exist under the law of the executing State, or;
 - b) the investigative measure indicated in the EIO would not be available in a similar domestic case ;

1a. Paragraph (1) does not apply to investigative measures mentioned in Article 10 (4)

1b. The executing authority may also have recourse to an investigative measure other than that provided for in the EIO when the investigative measure selected by the executing authority will have the same result as the measure provided for in the EIO by less intrusive means.

2. When the executing authority decides to avail itself of the possibility referred to in paragraph (1) and (1bis), it shall first inform the issuing authority, which may decide to withdraw the EIO.

In paragraph 1 the EP suggested to use the verb "shall" instead of "must". In substance only paragraph 1a remains unsolved.

Article 10

Grounds for non-recognition or non-execution

1. Without prejudice to Article 1.3, recognition or execution of an EIO may be refused in the executing State where:
 - a) there is an immunity or a privilege under the law of the executing State which makes it impossible to execute the EIO or there are rules on determination and limitation of criminal liability relating to freedom of the press and freedom of expression in other media, which make it impossible to execute the EIO;
 - b) in a specific case, its execution would harm essential national security interests, jeopardise the source of the information or involve the use of classified information relating to specific intelligence activities;
 - c) (...)
 - d) the EIO has been issued in proceedings referred to in Article 4(b) and (c) and the measure would not be authorised under the law of the executing State in a similar domestic case;
 - e) the execution of the EIO would be contrary to the principle of ne bis in idem,[unless the issuing authority provides an assurance that the evidence transferred as a result of an execution of an EIO shall not be used to prosecute a person whose case has been finally disposed of in another Member State for the same facts, in accordance with the conditions set out under Article 54 of the Convention of 19 June 1990 implementing the Schengen Agreement]; **or**

Council text:

- f) **the EIO relates to a criminal offence which is alleged to have been committed exclusively outside the territory of the issuing State and wholly or partially on the territory of the executing State, the EIO seeks the use of a coercive measure and the conduct in connection with which the EIO is issued is not an offence in the executing State.**

EP text

f) 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 State's territory;

10(g) - there is clear evidence that the execution of the investigative measure would result in the real risk of an infringement of a fundamental right as set out in the CFR or in the ECHR in the executing state

2. Without prejudice to Article 1.4, recognition or execution of an EIO may also be refused in the executing State where:

(a) In the cases referred to in Article 9(1)(a) and (b), there is no other investigative measure which would make it possible to achieve the same result;

(b) the conduct for which the EIO has been issued does not constitute an offence under the law of the executing State, unless it concerns an offence listed within the categories of offences set out in the Annex X, as indicated by the issuing authority in the EIO, if it is punishable in the issuing State by a custodial sentence or a detention order for a maximum period of at least three years; or

(c) if the use of the measure is restricted under the law of the executing State to a list or category of offences or to offences punishable by a certain threshold, which does not include the offence covered by the EIO.

3. In relation to offences in connection with taxes or duties, customs and exchange, recognition or execution may not be opposed on the ground that the law of the executing State does not impose the same kind of tax or duty or does not contain a tax, duty, customs and exchange regulation of the same kind as the law of the issuing State.

4. Paragraph (2) does not apply to the following investigative measures:

- a) the hearing of a witness, victim, suspect or third party in the territory of the executing State or
- b) any non-coercive investigative measure;
- c) the obtaining of information or evidence which is already in the possession of the executing authority and , this information or evidence could have been obtained, in accordance with the law of the executing State, in the framework of criminal proceedings or for the purposes of the EIO;
- d) the obtaining of information contained in databases held by police or judicial authorities and directly accessible by the executing authority in the framework of criminal proceedings;
- e) the identification of persons holding a subscription of a specified phone number or IP address;
- f) search and seizure where it has been requested in relation to the categories of offences set out in the Annex X, as indicated by the issuing authority in the EIO, if they are punishable in the issuing State by a custodial sentence or a detention order for a maximum period of at least three years.

5. In the cases referred to in paragraph 1(a), (b), (e) and (f) 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.

6. In the case referred to in paragraph 1(a) and where power to waive the privilege or immunity lies with an authority of the executing Member State, the executing authority shall request it to exercise that power forthwith. Where power to waive the privilege or immunity lies with an authority of another State or international organisation, it shall be for the issuing authority to request it to exercise that power.

The EP want to include a ground for refusal linked to fundamental rights and the Presidency is now putting forward text for consideration. .The EP also want a ground for refusal where a non-validated EIO is received - the Presidency suggests to amend article 8(2)(a) to address the EP concern:

"8(2a) - Where an EIO is received by an executing authority and it has not been issued by an issuing authority as specified in article 2(a), the executing authority should return the EIO to the issuing state."

The EP has also sought to confine the list at 10(4) to (c) and (d) and delete the other references. In particular, the EP cannot accept that Member States could be obliged to carry out a search and seizure measure where this is not possible in a comparable domestic case. On the *ne bis in idem* ground, the EP does not want the principle qualified in any way. In relation to 10(f), EP is insistent that text used in previous instruments should be used rather than that contained in the EIO.

Article 13

Legal remedies

EP text

1. In order to protect legitimate interest, Member States shall ensure that any interested party shall be entitled to legal remedies, which are equivalent to those, which would be available in a similar domestic case to challenge the investigative measure in question.

1a. The substantive reasons for issuing the EIO can be challenged only in an action brought before a court of the issuing State, without prejudice to guarantee in the executing State fundamental rights and fundamental national constitutional principles.

1b. 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.

1c. 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.

1d. A lodged remedy has merely a devolutive effect and does not suspend the execution of the investigative measure requested by the issuing State.

1e. Despite this, evidence obtained will only be transmitted to the issuing State, in the case of a pending remedy, after a final decision as regards the remedy.

1f. The interested party may ask for the attribution of a suspensive effect, by lodging a remedy that proves that the execution of the request of the issuing State would cause serious or irreversible damages to her or him.

1g. For the purposes of the preceding paragraph, the court may suspend the measure in order to guarantee the rights of the interested party, whilst taking into account the preservation of evidence and effectiveness of a request made by the issuing State.

1h. Despite the application of paragraph 1e of this Article, the issuing State may request that the evidence gathered be transferred until a final decision on the remedy is taken if it proves that the retention of the evidence, by the executing State, would cause irreversible damages and jeopardise the investigation that justified the request.

1i. For the purposes of the preceding paragraph and in the case of a successful remedy by the interested party, the evidence transferred to the issuing State during the remedy procedure, shall not be used, or shall be destroyed, depending on each case and as regards the nature of evidence.

1j. Member States shall ensure that any time limits for seeking a legal remedy are applied in a way that guarantees the possibility of effective assertion of these legal remedies for interested parties.

The text above is the text as voted by the EP in May 2012. The EP has promised to forward suggestions for changes to its text.

Article Y/18a

Both the EP and the Council maintained their positions. The Council Chair explained that it was a basic feature of the mutual legal assistance that the executing state bears the costs. The Council also made the point that it would be a very heavy administrative burden to assess the costs of the different measures that had been carried out. In the Council text there was an exception for exceptionally high costs. It was made quite clear to the EP that its suggestion to share costs would be strongly objected by the Member States.

Article Y/Article 18a

Costs

Council text

"1. Unless otherwise provided in the Directive, all costs undertaken on the territory of the executing State which are related to the execution of an EIO shall be borne by the executing State.

2. Where the executing authority considers that the costs for the execution of the EIO may become exceptionally high, it may consult with the issuing authority on whether and how the costs could be shared or the EIO modified. The issuing authority shall be previously informed by the executing authority of the detailed specifications of the part of the costs deemed exceptionally high.

3. In exceptional situations where the consultations can not lead to an agreement, the issuing authority may decide to withdraw partially or completely the EIO or, should it decide to maintain the EIO, it will bear the part of the costs deemed exceptionally high."

EP text

"All expenses arising from an investigation request, with a view of obtaining evidence, will be shared in equal parts between the issuing and the executing States unless both concerned States, in concrete cases, have previously agreed on a different distribution of costs."

Article agreed at the trilogue on 15 May 2013.

Article 6

Transmission of the EIO

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

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

2. Without prejudice to Article 2(b), each Member State may designate a central authority or, when its legal system so provides, more than one central authority, to assist the (...) competent authorities. A Member State may, if necessary as a result of the organisation of its internal judicial system, make its central authority(ies) responsible for the administrative transmission and receipt of the EIO, as well as for other official correspondence relating thereto.

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

4. If the executing authority is unknown, the issuing authority shall make all necessary inquiries, including via the European Judicial Network contact points, in order to obtain the information from the executing State.

5. When the authority in the executing State which receives the EIO has no competence to recognise it and to take the necessary measures for its execution, it shall, *ex officio*, transmit the EIO to the executing authority and so inform the issuing authority.

6. All difficulties concerning the transmission or authenticity of any document needed for the execution of the EIO shall be dealt with by direct contacts between the issuing and executing authorities involved or, where appropriate, with the involvement of the central authorities of the Member States.
