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Introduction

During the meeting on 5 and 6 June 2010, CATS representatives have exchanged views on the basis of questions raised in document 11406/10 COPEN 142 EUROJUST 60 EJN 20 CODEC 598, in view of giving strategic guidance to the expert working group in relation to the proposal for a Directive of the European Parliament and the Council regarding the European Investigation Order (EIO) in criminal matters.

CATS representatives supported to a very large extent the general objective of the legal instrument, *i.e.* providing a single legal basis for executing all types of investigative measures throughout the European Union and replacing the existing legal framework. In particular, delegates shared the opinion that the main driver of this negotiation should be the simplification of the work of the practitioners. They also generally agreed on the approach focusing on the investigative measure to be executed, instead of on the evidence to be gathered.

CATS representatives also exchanged views on the issue of rationalizing the grounds for refusal. They agreed that the latter should be examined on a case by case basis and in the light of the objective pursued.

Moreover, CATS representatives also supported the idea of the twofold approach, whereby the new instrument would provide on the one hand for a general regime applicable to most investigative measures and on the other hand for more detailed or derogatory rules for certain specific measures requiring special treatment.

They asked the '*Working Party on Cooperation in Criminal Matters*' to start the negotiations and, in particular, to first focus on the general regime (i.e. Articles 1 to 18) and to give priority to the following issues: the scope of the legal instrument, the issuing/executing authorities, the procedure in the executing Member State, the grounds for refusal, the time limits for recognition and execution. It was also requested to deal with the issue of legal remedies early in the negotiations.

The question of the legal form of the instrument was also raised during the discussions in CATS. The Presidency is of the opinion that the priority should be given to the discussion of the content of the initiative and indicated its intention to come back to this issue at a later stage of the negotiation process.

Following the general orientations expressed by CATS representatives and taking into account the positions expressed by the Member states, the Presidency hereby submits a discussion paper for the discussion by the expert working group. Delegations are invited to discuss these issues on the basis of the proposal for a directive itself but also taking into account the reasoning explained in the explanatory memorandum (doc. 9288/10 COPEN 117 EUROJUST 49 EJN 13 PARLNAT 13 CODEC 384 ADD 1) and in the detailed statement (doc. 9288/10 COPEN 117 EUROJUST 49 EJN 13 PARLNAT 13 CODEC 384 ADD 2).

I. Scope (Articles 3 and 4)

This topic can be subdivided in two parts: the investigative measures covered by the EIO (Article 3) on one hand and the types of procedures for which an EIO can be issued (Article 4) on the other hand.

a. The investigative measures covered by the EIO (Article 3)

The scope of the proposal is the obtaining of evidence and therefore it does not cover the full range of types of mutual legal assistance (e.g. the sending and service of procedural documents) nor does it replaces the provisions of the Framework Decision 2003/577/JHA on the execution of orders freezing property or evidence, to the extent that they concern the confiscation of property. It is Presidency belief that the exclusion of these types of judicial cooperation does not affect the objective of simplification, because cooperation in the field of gathering evidence is not requested in the same way as for the carrying out of investigative measures and it is therefore neither appropriate nor necessary to provide for a single form to be used to request (or decide) the execution of both investigative measures and the other types of judicial cooperation.

In the field of obtaining evidence, the proposal focuses, as a basic principle, on the measures to be executed, rather than on the evidence to be gathered. The scope is therefore defined in terms of investigative measures to be covered. To facilitate the discussion in the Working Party, the orientation taken in the proposal may be described as follows.

a.1. All investigative measures are in principle covered

As indicated in the Stockholm Programme, it is essential that the new instrument provides for the widest possible scope in terms of investigative measures. The idea is that the issuing authority should be able to use a single EU instrument and a single form to obtain the execution of different types of investigative measures in another Member State. This is strongly requested by the practitioners and is a condition *sine qua non* to provide for an instrument which will work in practice. The discussion in CATS also confirmed this orientation.

Such a general scope should be maintained despite the fact that some investigative measures may be regarded as very sensitive and may be subject to important differences in the legislation of the Member States. An example of such a measure is the interception of telecommunications. It is better to include these measures in the scope of the new instrument, with appropriate derogatory rules, than to exclude them from the instrument. This is the reasoning behind the "twofold approach", which was already briefly discussed and generally supported in CATS.

Article 3 paragraph 1 is thus written in a very general way in order to apply to all possible investigative measures, except those specifically mentioned in paragraph 2[1].

The legal instrument is consequently applicable both for measures to gather evidence – for example the hearing of suspects or witnesses, search or seizure, the monitoring of bank transactions, DNA-analysis and the ordinary types of interception of telecommunications – as well as for measures to obtaining of evidence which are already in the possession of the executing authority.

a.2. As an exception, some investigative measures should be excluded

As explained in the explanatory memorandum:

> *"However some measures require specific rules which are better dealt with separately. This applies to the setting up of a Joint Investigation Team (JIT) and the gathering of evidence within a JIT (Article 3(2)(a)) which are regulated both in Article 13 of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union[2] (referred to below as the "2000 EU MLA Convention") and in Framework Decision 2002/465/JAI of 13 June 2002 on joint investigation teams [3]. The creation of the team requires for example the signing of a complex agreement. As for the obtaining of evidence within the team, the added value of the JIT is precisely that evidence freely circulates within the team which means that there is no need for an EIO among its members.*

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1 It must be noted that, taking into account the judicial nature of the EIO, all forms of police cooperation – such as cross-border observations as referred to in Article 40 of the Convention of 19 June 1990 implementing the Schengen Agreement – fall outside the scope of the Directive (see Recital 9).

2 OJ C 197, 12 July 2000, p. 3. See also: Explanatory report, OJ C 379, 29 December 2000, p. 7.

3 OJ L 162, 20 June 2002, p. 1.

The exclusion also covers two types of interceptions of telecommunications for which complex rules are provided in Articles 18-22 of the 2000 EU MLA Convention. These concern interception of satellite telecommunications as well as interception of telecommunications with immediate transmission to the requesting State. Incorporating such rules in the EIO would affect the consistency of the new framework and is not necessary because these investigative measures are very separated from others and there is therefore no need to provide for the possibility for a requesting or issuing authority to insert them in the same request as other investigative measures. Cooperation for the carrying out of these measures will still be possible under the existing rules, which are replaced only in so far as they deal with measures covered in the EIO (see Article 29). It is important to note that only these types of interception of telecommunications are excluded from the scope of the EIO. Standard interception of telecommunication is covered by Article 27 of the proposal which provides for flexible rules in this respect."

b. The types of procedures for which an EIO can be issued (Article 4)

This Article is a reproduction of Article 5 of the Council Framework Decision 2008/978/JHA on the European Evidence Warrant.

The types of procedures for which the EIO can be issued are the following:

- criminal proceedings brought by, or that may be brought before, a judicial authority in respect of a criminal offence under the national law of the issuing State;
- proceedings brought by administrative authorities in respect of acts which are punishable under the national law of the issuing state by virtue of being infringements of the rules of law and where the decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters;
- proceedings brought by judicial authorities in respect of acts which are punishable under the national law of the issuing state by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters, and
- in connection with the above-mentioned proceedings which relate to offences or infringements, for which a legal person may be held liable or punished in the issuing state.

As explained in the explanatory memorandum, "*though Article 4 of the proposal and Article 5 of the FD on the EEW are identical, the rules regarding administrative proceedings are not entirely the same. Because of the significant extension of the scope in the EIO to almost all investigative measures, a new ground for refusal has been inserted which provides for the possibility to refuse the execution of the EIO if the EIO has been issued for non criminal proceedings (Article 10(1)(d))*."

II. Issuing/executing authorities (Article 2)

The concepts 'issuing authority' and 'executing authority' are defined in Article 2(1) and Article 2(2). These articles are to be read together with Article 28(1)(a) whereby Member States are required to notify the authorities designated as issuing and executing authorities and with Article 6(2) which provides for the possibility to designate central authorities. However, central authorities can only have an administrative role in the transmission of the EIO.

a. The issuing authority (*Article 2(1))*

The issuing authority is, as a matter of principle, a judge, a court, an investigating magistrate or a public prosecutor competent in the case concerned.

The issuing authority may also be any other judicial authority, as defined by the issuing State, that is, in the specific case, acting in its capacity of an investigating authority in criminal proceedings with the competence to order the gathering of evidence in accordance with national law. A Member State may, for example, designate a police authority as an issuing authority, in case that police authority has the power to order the investigative measure concerned at national level.

b. The executing authority (Article 2(2))

The executing authority is, unlike the issuing authority, not necessarily a judicial authority. The Member States are competent to decide which authority will be designated as executing authority. However, the executing authority has to be an authority competent to undertake the investigative measure mentioned in the EIO, in a similar national case. If the EIO is issued to search a house in a specific location in Member State A, the executing authority must be an authority which would be competent, in a similar national case, to decide to search a house in the location concerned.

III. Procedure in the executing Member State (Articles 8 and 9)

The general course of the procedure as provided for in the proposal for a Directive is the following:

- The issuing authority decides on the type of measure to be executed (Article 8(1)). It is, in principle, this measure that will be executed.
- The executing authority will recognize the EIO and will decide to execute the latter, unless it invokes one of the grounds for non-recognition or non-execution (Article 8(1)).
- Although it is in principle the issuing authority that decides on the type of investigative measure to be executed, the executing authority has the option to have recourse to a different investigative measure than the one provided for in the EIO, in case (Article 9):
  - the measure does not exist under the law of the executing state;
  - the use of the measure is restricted to a list or category of offences;
  - the same result can be obtained by the use of less coercive means.

  Article 9 is to be read together with Article 10(1)(c) which makes it possible to refuse the execution of the EIO if, in cases covered in Article 9(1), there is no alternative measure.
- The investigative measure (which is in principle the one indicated in the EIO, but, in case Article 9 is applicable, possibly another measure) will be carried out in accordance with the law of the executing State (Article 8(1)). For example, in the case of an EIO issued for the purpose of searching a house, the issuing authority will be competent to decide whether or not the search of a house is a necessary measure in the case concerned. However, the modalities of the search will be governed by the law of the executing State. If the search of a house is possible at night in the issuing State, but not in the executing State, Article 8(1) makes it possible for the executing authority to carry out the measure during daytime in accordance with its own legislation.

- To ensure the admissibility of evidence, the executing authority will comply with the formalities and procedures indicated by the issuing authority (for example, the presence of a lawyer), unless such formalities or procedures are contrary to the fundamental principles of law of the executing State (Article 8(2)).
- The issuing authority has the possibility to request that one or several of its authorities assist in the execution of the EIO (Article 8(3)). This provision does not only apply to the presence of the issuing authority, but to all 'competent authorities' (for example a police investigator in charge of the investigation in the issuing state). The objective of this presence is to provide assistance to the executing authorities. This presence may, for example, be crucial to ensure the admissibility of evidence or to issue supplement EIOs in the course of the execution of a specific EIO (see Article 7(2)). This provision does not imply any law enforcement powers for the authorities of the issuing State in the territory of the executing State. Furthermore, the criminal and civil liability for acts committed by the persons concerned in the executing State is covered by Article 16 and 17.

IV. Grounds for refusal (Article 10)

As already discussed and supported in CATS, during the elaboration of this instrument it is important to analyze carefully which grounds for refusal are necessary for the specific sector concerned. The field of obtaining evidence does not necessarily require the same rules as the execution of penalties or decisions to arrest people. It is therefore not an appropriate method to take the grounds for refusal already contained in other mutual recognition instruments as a starting point for the negotiations..

Article 10 lists four grounds for refusal: immunity or privilege under the law of the executing State, harm to essential national security interests, the lack of available alternative measure and, in case of non-criminal proceedings, when the measure provided in the EIO would not be authorized in a similar national case. These grounds for refusal have been assessed as necessary in the light of the objective pursued by this proposal.

V. Time limits for recognition and execution (Article 11)

The first paragraph of Article 11 introduces the legal obligation to apply the principle of equivalence to the time limits for the recognition of the EIO and the execution of the investigative measure. The other paragraphs of Article 11 contain specific time limits that supplement this principle.

The second paragraph of Article 11 foresees that the executing authority should endeavour to execute the EIO in even shorter deadlines, in case that is requested in the EIO. It also creates an explicit possibility for the issuing authority to state that the measure must be carried out on a specific date. This may for example be useful when searches of premises have to be carried out simultaneously in several locations.

Article 11(3) maintains the 30 days time limit already found in the FD on the EEW (Article 15(2)) for the decision on the execution or recognition of the EIO. Article 11(5) creates an elevated degree of flexibility by creating the possibility for the executing authority to postpone the decision. This option is however more strict than in the FD on the EEW, because the decision concerning the EIO must be taken in any case within a total of 60 days.

Article 11(4) contains a time limit for the carrying out of the investigative measure. Since the scope of the EIO is much broader, the 60 days period provided in the FD on the EEW is extended to 90 days. There is also a possibility to prolong this period, without any limitation. While it must be possible to take a decision on whether or not the EIO may be executed within 30 to 60 days and although it should be possible to carry out the measure within 3 months, the wide scope of the EIO in terms of investigative measures covered makes it necessary to foresee a higher degree of flexibility.

VI. Legal remedies (Article 13)

Article 13 provides that legal remedies will be available for the interested parties in accordance with national law. As this legal instrument contains a general regime and does not distinguish between the types of investigative measures, it is not appropriate to provide in this proposal a single regime for legal remedies. It is however necessary, under the principle mutual recognition, to prevent that substantive reasons for issuing the EIO are challenged in an action brought before a court of the executing State.

VII. Conclusions

The delegates are invited to express their point of view on the different topics. The outcome of this discussion will serve as a basis for future debates on the relevant provisions.