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From :	Presidency
To :	delegations
Prev. doc.	17854/10 COPEN 290 EUROJUST 151 EJN 79 CODEC 1515
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 - Follow-up document of the meeting of the Council on 8-9 November 2010 and the Working Party on 11-12 January 2011

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**I. INTRODUCTION**

The Working Party on Cooperation in Criminal Matters met on 11 and 12 January 2011 and continued the examination of the initiative for a Directive on the European Investigation Order on the basis of the document issued by the Presidency (document 17854/10 COPEN 290 EUROJUST 151 EJN 79 CODEC 1515 and room documents from the UK delegation and from the Presidency).

In the Working Party the discussions focused on Articles 11-18, to which also drafting suggestions from the Presidency related. In addition a general exchange of views took place in respect of the report on the progress which was reached so far regarding the examination of this proposal.

In light of the conclusions of the Council which met in December 2010, the Presidency envisages to continue the examination of Articles 8, 9 and 10. In order to prepare the discussions at the subsequent meetings of the Working Party, the Presidency invited Eurojust to provide the Council preparatory bodies with a comprehensive opinion of practitioners on the EIO Directive based on consultations with practitioners, in particular gathered within the Consultative Forum of the Prosecutors General and the European Judicial Network.

Further to the meeting in January delegations will find in the Annex the text of Articles 1-18 (excl Articles 8, 9 and 10) with some further drafting suggestions from the Presidency. A more extensive note regarding some of these modifications is set out below. Delegations are invited to reflect on the proposed new drafting.

## **II. ISSUES SUBMITTED TO THE WORKING PARTY**

### **1. PROPORTIONALITY**

This issue has been subject to extensive discussions during the Belgian Presidency. In its conclusions, the Council meeting 2-3 December 2010<sup>1</sup>, agreed on the following guiding principles for further discussions:

- proportionality should systematically be checked by the issuing authority;
- the executing authority should be entitled to opt for a less intrusive measure than the one indicated in the EIO if it makes it possible to achieve similar results;
- proportionality should not constitute a general ground for refusal for the executing authority applicable to all kinds of measures;
- direct communication between the issuing and executing authority should play an important role.

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<sup>1</sup> c.f 16868/10 COPEN 266 EJM 68 EUROJUST 135 CODEC 1369

The Belgian Presidency proposed to delegations an approach whereby, in addition to the proportionality check made by the issuing authority on the issuing of the EIO, the executing authority would have the possibility to consult with the issuing authority on the relevance of the execution of an EIO where it had reasons to believe that, in the specific case, the investigative measure concerned a minor offence. The provision underlines the importance of communication between the competent authorities of the issuing and executing States in order to assess the possibility, in such a case, of withdrawal of the EIO.

This new Article 5a was generally supported by the delegations. In order to further address concerns expressed by some delegations that the provision could *de facto* provide for a hidden ground for refusal the following new recital could be inserted: "*The EIO should be chosen where the execution of an investigative measure seems proportionate, adequate and applicable to the case in hand. The issuing authority should therefore ascertain whether the evidence sought is necessary and proportionate for the purpose of proceedings, whether the measure chosen is necessary and proportionate for the gathering of this evidence, and whether, by means of issuing the EIO, another MS should be involved in the gathering of this evidence. The execution of an EIO should not be refused on grounds other than those stated in this Directive, however the executing authority is entitled to opt for a less intrusive measure than the one indicated in an EIO if it makes it possible to achieve similar results.*"

*Delegations are invited to further reflect on this issue, and, if appropriate, endorse this language.*

## **2. LEGAL REMEDIES**

The question of "legal remedies" was already discussed during the meeting on 27-28 July 2010 and on 11-12 January 2011.

The discussions addressed two main issues. The first of them addressed the question of relation of the legal remedies provided for in Article 13 with the legal remedies already existing under national law. Majority of delegations were of the opinion that the directive should not be understood as imposing upon the Member States any obligation to provide more legal remedies than what is available in respect of the same investigative measures carried out in a similar national case.

Secondly, the relationship between Article 13 and Articles 11 and 12 setting the time limits and Article 14 listing the grounds for postponement of recognition or execution was examined.

The main issue what has been reflected in the new recital and in paragraph (2) Article 13, is that most of the delegations could not accept to create new legal remedies in their national law specific to the issuing or the executing of an EIO. Therefore Member States should ensure the applicability of legal remedies which already exist in their national law. Accordingly as the rules on legal remedies concern national law, Article 13 does not define the time limit within which a legal remedy can be applied for, and the suspension of the execution is also defined by the relevant national law. However, Member States shall take the necessary measures to facilitate the exercise of the right to a legal remedy which includes the obligation to inform.

In order to address concerns voiced by delegations, the Presidency proposes a new wording of Article 13 and the inclusion of the following recital based on similar recitals in the Directive on the right to interpretation and translation in criminal proceedings.

*“Article 13*

*Legal remedies*

- 1. Member States shall put in place the necessary arrangements to ensure that any interested party has a legal remedy against the recognition and execution of an EIO pursuant to Article 8, in order to preserve their legitimate interests.*
- 2. Member States shall ensure the applicability of legal remedies for the interested parties which are available in a comparable domestic case.*
- 3. The substantive reasons for issuing the EIO may be challenged only in an action brought before a court in the issuing State.*
- 4. Member States may limit the legal remedies provided for in paragraph (1) to cases in which EIO has been executed using coercive measures and to cases in which notification of the existence of a right of legal remedy would not undermine the need to ensure the confidentiality of an investigation, as provided for an Article 18 (1).*

5. *The executing State may suspend the transfer of objects, documents and data pending the outcome of a legal remedy.*
6. *Member States shall take the necessary measures to facilitate the exercise of the right to a legal remedy referred to in paragraph (1), in particular by providing interested parties with notification containing relevant and adequate information.*
7. *For the purpose of this Article interested party shall mean any party including any bona fide third party, whose interest in the evidence to be transferred as a result of the execution of an EIO would be clear to the executing authorities of the executing Member State.”*

New recital:

*"The persons subject to or affected by the proceedings for which the EIO has been issued should have the right to challenge the EIO in accordance with procedures in national law. This right does not entail an obligation for Member States to provide for a separate mechanism or complaint procedure in which the issue or the execution of an EIO may be challenged and should not prejudice the time limits applicable to the execution of an EIO"*

*Delegations are invited to further reflect on this issue, and, if appropriate, endorse this language.*

### **3. CONFIDENTIALITY**

The issue of confidentiality of information contained in the EIO is closely linked with the application of a data protection regime to this information. As already stated during the previous discussions the data protection regime set out by the Council Framework Decision 2008/977/JHA is applicable to the information transferred to the issuing Member State on the basis of an EIO. In the course of discussions of COPEN Working Party on 6-7 October 2010, and following the earlier discussions concerning the data protection issues, the delegations were ready to agree on an additional recital clarifying that the provisions of the Council Framework Decision 2008/977/JHA will apply to the processing of personal data transmitted in the framework of the Directive regarding the EIO.

The question of confidentiality was discussed last time during the meeting on 11-12 January 2011, where delegations expressed their doubts about the suggested new recital by the Presidency. In order to address concerns voiced by delegations, Presidency proposes a new recital, which could read as follows: *“Personal data processed, when implementing this Directive, should be protected in accordance with the provisions applicable to the protection of personal data processed in the framework of police and judicial cooperation in criminal matters and with relevant international instruments in this field.”*

The Hungarian Presidency is however inquiring with the delegations whether a relevant provision could not be included directly into Article 18 in order to clarify further this issue. For further clarification the Presidency also suggests a new paragraph 2bis in Article 18: *„Personal data shall not be further processed, in the framework of the application of EIO, in a way which is not compatible with those purposes laid down in this Directive.”*

*Delegations are invited to further reflect on this issue.*

#### **4. EVALUATION CLAUSE**

At the meeting of Working party on 11-12 January the Presidency proposed to delegations modifications to the evaluation clause regarding the implementation of the EIO Directive. These modifications took account of the suggestions made by the European Data Protection Supervisor as set out in his note.<sup>2</sup> Following the observations made by the delegations the Presidency proposes that the following modifications are brought to the text of Article 32.

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<sup>2</sup> 152122/10

## Article 32

No later than five years after the date of entry into force of this Directive, the Commission shall submit to the European Parliament and the Council a report on the application of this Directive, on the basis of both qualitative and quantitative information including in particular, the evaluation of its impact on the cooperation in criminal matters and the protection of individuals with regard to their personal data, taking into account the reports provided to the Commission by the Member States. The report shall be accompanied, if necessary, by proposals for amending this Directive.

*Delegations are invited to further reflect on this text.*

### **5. COSTS**

The Working Party meeting on 11-12 January 2011 continued the examination of the question of costs. The following principles stemming from the discussion in the Council were confirmed by the delegations as the basis for drafting: 1. disproportionate costs or lack of resources in the executing State should not be a ground for refusal for the executing authority; 2 instead other possible alternative solutions could be applied (direct communication between the competent authorities, extension of deadlines, sharing of costs, etc).

Delegations confirmed that there should be a possibility to make, in exceptional circumstances, the execution of the investigative measure subject to the condition that the costs will be borne by (or shared with) the issuing State. In this case, the issuing authority should have the possibility to withdraw the EIO.

As a result of the discussions in the Working Party, the Presidency would like to propose to the delegations two drafting versions of paragraph 3 and 4 aimed at addressing the issue of costs. It should be noted also that the following provision will be a general rule of the Directive and that other specific provisions relating to costs (e.g. Article 20 (9) or Article 27) will be provided for particular measures.

Both options underline the importance of consultations between the issuing and executing authorities in order to reach an agreement as to the execution of an EIO. The provision encourages competent authorities to explore all possibilities, including the modification of the request, in order to find solution. The difference between the proposed options comes to play where the agreement cannot be reached. In version A the executing authority may request the issuing authority to withdraw the EIO. Also, Eurojust may be seized with requests for assistance. Version B of the Article stresses the fact that in cases of impasse it is the sole decision of the issuing authority to withdraw an EIO entirely or partially. If the issuing authority does not withdraw the EIO, the final solution can be reached in two possible ways: one solution can be that the EIO shall be executed without delay or another possible solution is that the EIO shall be executed in a manner determined by the executing authority.

*Delegations are invited to reflect on these options in order to state their preference.*

## Article Y<sup>3</sup>

### Costs

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 shall consult with the issuing authority on whether and how the costs could be shared.*

### Version A.

3. *If consultations referred to in paragraph 2 cannot lead to an agreement on the division of cost, or the request of the executing authority that all the costs be covered by the issuing authority is not accepted, the competent authorities should further consult with each other in order to assess whether the request could not be modified in accordance with Article 9. Eventually the executing authority may request the issuing authority to withdraw the EIO completely or, where possible, in respect of some of the measures requested therein. Where the issuing authority objects to the withdrawal of the EIO it shall specify its reasons to the executing authority.*
4. *[Where it has not been possible to reach consensus in accordance with this Article, the matter (...) may, where appropriate, be referred by the competent authority of the Member States involved to Eurojust for its assistance(...), if Eurojust is competent to act under Article 4(1) of the Eurojust Decision.]*

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<sup>3</sup> Scrutiny reservation entered by CZ/DE/IT/PL/MT/SK. FR proposed modifications according to which paragraph 2 should be deleted and paragraph 3 read: "If consultations referred to in paragraph 2 cannot lead to an agreement on the division of costs, the issuing authority may withdraw the EIO." FI proposed instead that paragraph 3 is deleted and additional sentence is added at the end of paragraph 2 in order to read as follows: "Notwithstanding these consultations the EIO shall be executed without delay unless the issuing state decides to withdraw or modify the EIO." IE proposed that paragraph 4 is deleted and additional sentence is added at the end of paragraph 3 in order to read as follows: "the EIO shall be executed subject to the budgetary constraints of the executing authority in a manner to be determined by the executing authority."

*The competent authorities of the issuing and executing state may agree on a case-by-case basis to the partial recognition and execution of the EIO in accordance with the conditions set by them and an agreement reach in respect of the division of costs.*

Version B

3. If consultations referred to in paragraph 2 cannot lead to an agreement on the division of cost, or the request of the executing authority that all the costs be covered by the issuing authority is not accepted the competent authorities should further consult with each other in order to asses whether the request could not be modified in accordance with Article 9. Eventually the issuing authority may withdraw the EIO completely or, where possible, in respect of some of the measures requested therein. Where the issuing authority objects to the withdrawal of the EIO it shall specify its reasons to the executing authority.

4. deleted

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**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**

**of**

**regarding the European Investigation Order in criminal matters**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 82 (1)(a)<sup>4</sup> thereof,

Having regard to the initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden,

After transmission of the draft legislative act to the national Parliaments,

Acting in accordance with the ordinary legislative procedure,

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<sup>4</sup> Question from UK/DE about the need to extend the legal basis selected for this initiative to Article 82 (1) (d).

Whereas:

- (1) The European Union has set itself the objective of maintaining and developing an area of freedom, security and justice.
- (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.
- (3) Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property and evidence<sup>5</sup>, addressed the need for immediate mutual recognition of orders to prevent the destruction, transformation, moving, transfer or disposal of evidence. However, since that instrument is restricted to the freezing phase, a freezing order needs to be accompanied by a separate request for the transfer of the evidence to the issuing state in accordance with the rules applicable to mutual assistance in criminal matters. This results in a two-step procedure detrimental to its efficiency. Moreover, this regime coexists with the traditional instruments of cooperation and is therefore seldom used in practice by the competent authorities.
- (4) Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters<sup>6</sup> was adopted to apply the principle of mutual recognition in such respect. However, the European evidence warrant is only applicable to evidence which already exists and covers therefore a limited spectrum of judicial cooperation in criminal matters with respect to evidence. Because of its limited scope, competent authorities are free to use the new regime or to use mutual legal assistance procedures which remain in any case applicable to evidence falling outside of the scope of the European evidence warrant.

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<sup>5</sup> OJ L 196, 2.8.2003, p. 45.

<sup>6</sup> OJ L 350, 30.12.2008, p. 72.

- (5) Since the adoption of Framework Decisions 2003/577/JHA and 2008/978/JHA, it has become clear that the existing framework for the gathering of evidence is too fragmented and complicated. A new approach is therefore necessary.
- (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 possible all types of evidence and containing deadlines for enforcement and limiting as far as possible the grounds for refusal.
- (7) This new approach is based on a single instrument called the European Investigation Order (EIO). An EIO is to be issued for the purpose of having one or several specific investigative measure(s) carried out in the executing State with a view to gathering evidence. This includes the obtaining of evidence that is already in the possession of the executing authority.
- (8) The EIO has a horizontal scope and therefore applies to almost all investigative measures. However, some measures require specific rules which are better dealt with separately, such as the setting up of a joint investigation team and the gathering of evidence within such a team. Existing instruments should continue to apply to these types of measures.
- (9) This Directive does not apply to cross-border observations as referred to in Article 40 of the Convention of 19 June 1990 implementing the Schengen Agreement<sup>7</sup>.

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<sup>7</sup> OJ L 239, 22.9.2000, p. 19.

- (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.
- (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 of 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, unless the execution of such powers in the territory of the executing State is in accordance with the law of the executing state and has been agreed between issuing and executing authorities.
- (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.
- (12a) The principle of *ne bis in idem* is a fundamental principle of law in the European Union. Therefore the executing authority should be entitled to refuse the execution of an EIO if its execution would be contrary to such principle. Given the preliminary nature of the proceedings underlying an EIO, this ground for refusal should only be used by the executing authority when it is firmly confirmed that the trial of the person concerned has been finally disposed of for the same facts and under the conditions set out in Article 54 of the Convention of 19 June 1990 implementing the Schengen Agreement. Such ground for refusal is 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.<sup>8</sup>

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<sup>8</sup> OJ L 328, 15.12.2009, p. 42.

- (13) Time restrictions are necessary to ensure quick, effective and consistent cooperation between the Member States in criminal matters. The decision on the recognition or execution, as well as the actual execution of the investigative measure, should be carried out with the same celerity and priority as for a similar national case. Deadlines should be provided to ensure a decision or execution within reasonable time or to meet procedural constraints in the issuing State.
- (14) The EIO provides a single regime for obtaining evidence. Additional rules are however necessary for some types of investigative measures which should be included in the EIO, such as the temporary transfer of persons held in custody, hearing by video or telephone conference, obtaining of information related to bank accounts or banking transactions or controlled deliveries. Investigative measures implying a gathering of evidence in real time, continuously and over a certain period of time are covered by the EIO, but flexibility should be given to the executing authority for these measures given the differences existing in the national laws of the Member States.
- (14a) When making a declaration concerning the language regime, Member States are encouraged to include at least one language which is commonly used in the European Union other than their official language(s).
- (15) This Directive replaces Framework Decisions 2003/577/JHA and 2008/978/JHA as well as the various instruments on mutual legal assistance in criminal matters in so far as they deal with obtaining evidence for the use of proceedings in criminal matters.
- (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.

(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. 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.

(17a)<sup>9</sup> Personal data processed, when implementing this Directive, should be protected in accordance with the provisions on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters and with relevant international instruments in this field.

(18) [In accordance with Article 3 of Protocol N° 21 on the Position of the United Kingdom and Ireland in respect of the area of Freedom, Security and Justice annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, the United Kingdom and Ireland have notified their wish to take part in the adoption of this Directive.]

(19) In accordance with Articles 1 and 2 of Protocol N° 22 on the Position of Denmark annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application,

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<sup>9</sup> Following the discussion on 28 September 2010 concerning the data protection issues, the delegations were inclined to agree on an additional recital specifying that the provisions of the Council Framework Decision 2008/977/JHA will apply to the processing of personal data transmitted in the framework of the Directive regarding the EIO. In the Opinion of the European Data Protection Supervisor (EDPS) on this initiative – which is contained in doc. 15122/10 COPEN 226 CODEC 1085 EUROJUST 113 EJM 52 – the EDPS recommends the introduction of a similar recital. During the last meeting on 11-12 January 2011 delegations expressed their doubts about the recital proposed by the Presidency. In order to address concerns voiced by delegations, Presidency proposes a new recital.

HAVE ADOPTED THIS DIRECTIVE:

**CHAPTER I**  
**THE EUROPEAN INVESTIGATION ORDER**

*Article 1*

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

1. The European Investigation Order (EIO) shall be a judicial decision issued by a competent authority<sup>10</sup> of a Member State ("the issuing State") in order to have one or several specific investigative measure(s)<sup>11</sup> carried out in another Member State ("the executing State") with a view to obtaining evidence in accordance with Article 8<sup>12</sup>, 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.

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<sup>10</sup> NL expressed some concerns as to the use of the wording '*competent authority*' instead of '*judicial authority*', since the EIO is referred to as a judicial decision. However, the Presidency believes that the validation procedure introduced into this Directive justifies the reference being made to "competent authorities".

<sup>11</sup> DE proposed the following wording: '*... one or several specifically mentioned investigative measure(s) ...*'. The Presidency is of the opinion that the text already clearly indicates that the requested investigative measure should be specified.

<sup>12</sup> Addition proposed by the Presidency in order to address the following concerns by DE and CZ delegations: DE suggested to insert the following text: '*on the basis of and in accordance with the relevant national law*', while CZ suggested that reference should be made to the "law of the executing State".

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.(...) <sup>13</sup>

## Article 2

### Definitions

For the purposes of this Directive<sup>14</sup>:

- a) "issuing authority" means:
- i) <sup>15</sup> a judge, a court, an investigating magistrate or a public prosecutor competent in the case concerned; or
  - 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,
- b) "executing authority" shall mean an authority having competence to recognise an EIO and ensure its execution in accordance with this Directive.

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<sup>13</sup> Following the extensive discussions at various levels of council preparatory bodies the Presidency would like to suggest that the recital be introduced in order to address the position of SE (c.f. doc. 14984/10)It has to be noted also that, the Council Legal Service emphasised that directives prevail over constitutional rules in the hierarchy of legal norms. The suggested recital could read as follows:: *"This directive shall not have the effect of requiring Member States to take any measures which conflict with their constitutional rules relating, amongst others, to freedom of association, freedom of the press and freedom of expression in other media"*.

<sup>14</sup> COM proposed to insert also the definition of 'investigative measure'. DE suggested that also a definition for 'freezing order' be included in this article.

<sup>15</sup> Reservation on substance by MT.

*Article 3<sup>16</sup>.*

*Scope of the EIO*

1. The EIO shall cover any investigative measure with the exception of the setting up of a joint investigation team and the gathering of evidence within such a team as provided in Article 13 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union<sup>17</sup> (hereinafter referred to as "the Convention") and in Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams<sup>18</sup>, except for the purposes of applying, respectively, Article 13(8) of the Convention and Article 1(8) of the Framework Decision. ;

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<sup>16</sup> Modification introduced following the discussions carried out so far. It is noted that the delegations have also agreed that all forms of interception of telecommunications are covered by the Directive and specific provisions will be introduced in Chapter IV. However, AT/FR expressed some concern that the insertion of these specific types of interception would needlessly complicate the debates and DE entered a scrutiny reservation..

<sup>17</sup> OJ C 197, 12.7.2000, p. 3.

<sup>18</sup> OJ L 162, 20.6.2002, p. 1.

*Article 4*

*Types of procedure for which the EIO can be issued<sup>19</sup>*

The EIO may be issued:

- a) with respect to 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;
- [b) in 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;
- c) in 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
- d) in connection with proceedings referred to in points (a), [(b), and (c)] which relate to offences or infringements for which a legal person may be held liable or punished in the issuing state.

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<sup>19</sup> The discussion on this provision is not yet finalised. The Presidency would therefore like to indicate that further discussions, including with regard to Articles 9 and 10, should focus on cases referred to in Article 4(a) (criminal proceedings). Once agreement is reached on the main Articles of the Directive for cases referred to in Article 4(a), further evaluation will be necessary in order to see if the agreed solution has to be adapted with regards to cases referred to in Article 4(b), (c) and (d). Scrutiny reservation by CZ, which suggested that points b) and c) be deleted. DE, while agreeing on inclusion of administrative procedures in the scope of EIO instrument, stated that this should not imply that EIO in connection with such proceedings is issued by an administrative authority

*Article 5*  
*Content and form of the EIO*

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.
2. Each Member State shall indicate the language(s) which, among the official languages of the institutions of the Union and in addition to the official language(s) of the Member State concerned, may be used for completing or translating the EIO when the State in question is the executing State.

*Article 5a*  
*Conditions for issuing and transmitting an EIO<sup>20</sup>*

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 and proportionate for the purpose of the proceedings referred to in Article 4; and
  - (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.

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<sup>20</sup> Scrutiny by PL on this Article

3. Where an EIO is issued by an authority referred to in Article 2(a)(ii), the EIO shall be validated, after examination of its conformity with the conditions for issuing an EIO under this Directive<sup>21</sup>, by a judge, prosecutor or investigating magistrate before it is transmitted to the executing authority.

## CHAPTER II

### PROCEDURES AND SAFEGUARDS FOR THE ISSUING STATE

#### *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.
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.<sup>22</sup>

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<sup>21</sup> EL/ES/IT/NL/PT/SI/SK supported the idea of establishing minimum standards for the validation procedure. NL stated that the validating authority should examine whether the EIO is in conformity with the provisions of the Directive as well as with the national law of the issuing state. Underlined text has been already first presented to CATS in November. Delegations are invited to further reflect on this proposal in light of the earlier discussions and in the context of the obligations established by the entire provision.

<sup>22</sup> Presidency proposes a new recital what can be read as follows: „Direct communication between the issuing authority and the executing authority is the principle of cooperation in criminal co-operation. However, for some of the investigative measures covered by EIO, Member States may designate different competent central authorities according to their national law.”

- 3.<sup>23</sup> If the issuing authority so wishes, transmission may be effected via the secure 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.

#### *Article 7*

#### *EIO related to an earlier EIO*

1. Where the issuing authority issues an EIO which supplements an earlier EIO, it shall indicate this fact in the EIO in accordance with the form provided for in Annex A.
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 earlier EIO directly to the executing authority, while present in that State.

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<sup>23</sup> CZ suggested to add a following paragraph: *'In case of an emergency, the issuing authority may ensure the transmission of an EIO via Interpol or any other relevant mean of transmission'*.

**CHAPTER III**  
**PROCEDURES AND SAFEGUARDS**  
**FOR THE EXECUTING STATE**

*Article 8*

*Recognition and execution*

(omiss)

*Article 9*

*Recourse to a different type of investigative measure*

(omiss)

*Article 9a*

*Specific grounds for non-recognition or non-execution*

(omiss)

*Article 10*

*General grounds for non-recognition or non-execution*

(omiss)

**Article 11**

**Deadlines for recognition or execution**

1. The decision on the recognition or execution shall be taken and the investigative measure shall be carried out with the same celerity and priority as for a similar national case and, in any case, within the deadlines provided in this Article.

2. Where the issuing authority has indicated in the EIO that, due to procedural deadlines, the seriousness of the offence or other particularly urgent circumstances, a shorter deadline than those provided in this Article is necessary, or if the issuing authority has stated in the EIO that the investigative measure must be carried out on a specific date, the executing authority shall take as full account as possible of this requirement.

3. The decision on the recognition or execution shall be taken as soon as possible and, without prejudice to paragraph 5, no later than 30<sup>24</sup> days after the receipt of the EIO by the competent executing authority.

4.<sup>25</sup> Unless either grounds for postponement under Article 14 exist or evidence mentioned in the investigative measure covered by the EIO is already in the possession of the executing State, the executing authority shall carry out the investigative measure without delay and without prejudice to paragraph 5, no later than 90 days after the decision referred to in paragraph 3.

5. When it is not practicable in a specific case for the competent executing authority to meet the deadline set out in paragraph 3 or on a specific date set out in paragraph 2, it shall without delay inform the competent authority of the issuing State by any means, giving the reasons for the delay and the estimated time needed for the decision to be taken. In this case, the time limit laid down in paragraph 3 may be extended by a maximum of 30 days.

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<sup>24</sup> All delegations supported the inclusion of deadlines for the decision on recognition or execution of an EIO. No delegation considered the deadlines to be too short, to the contrary some delegations pleaded for even shorter time limits. Even more some delegations proposed the introduction of the terminology “urgent cases”, where the deadlines would be shorter, however Presidency believes that the expression “no longer than” allows a shorter deadline for executing.

<sup>25</sup> RO and NL suggested that an additional text is inserted in order to allow for the prolongation of the deadlines also in cases where a legal remedy is pending in accordance with Articles 13. However, it was also understood that this Directive should not result in an obligation on the Member States to introduce into their national systems remedies which would be applicable in a similar national case (c.f. discussion on article 13). Therefore, the effects of the application of the legal remedies on the time limits of the proceedings should also be regulated in accordance with the national rules. RO also proposed that during the period of legal remedies the recognition or execution would be suspended. Number of delegations opposed this suggestion and the Presidency is of the opinion that the suspending effect of legal remedies will depend on the relevant solutions existing under national law.

6. When it is not practicable in a specific case for the competent executing authority to meet the deadline set out in paragraph 4, it shall without delay inform the competent authority of the issuing State by any means, giving the reasons for the delay and it shall consult with the executing authority on the appropriate timing to carry out the measure.

## Article 12<sup>26</sup>

### Transfer of evidence

1. The executing authority shall without undue delay transfer the evidence obtained or already in the possession of the competent authorities of the executing State as a result of the execution of the EIO to the issuing State. Where requested in the EIO and if possible under national law of the executing State, the evidence shall be immediately transferred to the competent authorities of the issuing State assisting in the execution of the EIO in accordance with Article 8(3).

2. 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 they are no longer required in the issuing State or at any other time/occasion agreed between the competent authorities<sup>27</sup>.

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<sup>26</sup> Scrutiny reservation by SK. FI proposed that a deadline for transmission of evidence is set out in this provision.

<sup>27</sup> New text of this paragraph is suggested in order to address suggestions made during the previous meeting that in cases where the requested evidence is actually relevant for the proceedings ongoing in the executing state, the competent authority could actually nonetheless decide to temporarily transferred it to the issuing authority instead of postponing the execution of the EIO. This provision should therefore be read together with Article 14.

## Article 13<sup>28</sup>

### Legal remedies

1. Member States shall put in place the necessary arrangements to ensure that any interested party has a legal remedy against the recognition and execution of an EIO pursuant to Article 8, in order to preserve their legitimate interests.
2. Member States shall ensure the applicability of legal remedies for the interested parties which are available in a comparable domestic case.
3. The substantive reasons for issuing the EIO may be challenged only in an action brought before a court in the issuing State.
4. Member States may limit the legal remedies provided for in paragraph (1) to cases in which EIO has been executed using coercive measures and to cases in which notification of the existence of a right of legal remedy would not undermine the need to ensure the confidentiality of an investigation, as provided for in Article 18 (1).
5. The executing State may suspend the transfer of objects, documents and data pending the outcome of a legal remedy.
6. Member States shall take the necessary measures to facilitate the exercise of the right to a legal remedy referred to in paragraph (1), in particular by providing interested parties with notification containing relevant and adequate information.
7. For the purpose of this Article interested party shall mean any party including any bona fide third party, whose interest in the evidence to be transferred as a result of the execution of an EIO would be clear to the executing authorities of the executing Member State.

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<sup>28</sup> Scrutiny reservation by CZ/SK. C.f. cover note point II .4

## Article 14

### Grounds for postponement of recognition or execution

1. Without prejudice to Article 12.2 the recognition or execution of the EIO may be postponed in the executing State where:
  - a) its execution might prejudice an ongoing criminal investigation or prosecution until such time as the executing State deems reasonable;
  - b) the objects, documents, or data concerned are already being used in other proceedings until such time as they are no longer required for this purpose; or
  - c) referred to paragraph (5) Article 13, the executing State suspends the transfer of objects, documents and data pending the outcome of a legal remedy in a comparable domestic case.
  
2. As soon as the ground for postponement has ceased to exist, the executing authority shall forthwith take the necessary measures for the execution of the EIO and inform the issuing authority thereof by any means capable of producing a written record.

## Article 15<sup>29</sup>

### Obligation to inform

1. The competent authority in the executing State which receives the EIO shall, without delay and in any case within a week of the reception of an EIO, acknowledge this reception by filling in and sending the form provided in Annex B. Where a central authority has been designated in accordance with Article 6(2), this obligation is applicable [both to the central authority and] to the executing authority which receives the EIO via the central authority. In cases referred to in Article 6(5), this obligation applies both to the competent authority which initially received the EIO and to the executing authority to which the EIO is finally transmitted.

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<sup>29</sup> Scrutiny reservation by MT/PT. DE proposed that deadline set in paragraph 1 is prolonged to 2 weeks.

2.<sup>30</sup> Without prejudice to Article 9(2) and Article Y, the executing authority shall inform the issuing authority:

(a) immediately by any means:

- (i) if it is impossible for the executing authority to take a decision on the recognition or execution due to the fact that the form provided for in the Annex is incomplete or manifestly incorrect;
- (ii) if the executing authority, in the course of the execution of the EIO, considers without further enquiries that it may be appropriate to undertake investigative measures not initially foreseen, or which could not be specified when the EIO was issued, in order to enable the issuing authority to take further action in the specific case;
- (iii) if the executing authority establishes that, in the specific case, it cannot comply with formalities and procedures expressly indicated by the issuing authority in accordance with Article 8.

Upon request by the issuing authority, the information shall be confirmed without delay by any means capable of producing a written record;

(b) without delay by any means capable of producing a written record:

- (i) of any decision taken in accordance with Article 10(1);
- (ii) of the postponement of the execution or recognition of the EIO, the underlying reasons and, if possible, the expected duration of the postponement.

## Article 16

### Criminal liability regarding officials

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 of offences committed against them or by them.

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<sup>30</sup> Number of delegations were of the opinion that the provision of information under this article may make the procedure too cumbersome and cause too much of red tape for the executing authorities. these delegations suggested that the scope of information to be provided be reduced. However, in the opinion of the Presidency all information which is listed under this paragraph would logically be provided by the executing authority in order to effectively execute the EIO. The Presidency however invited the delegations to submit further suggestions they deem appropriate in respect of this provision.

Article 17  
Civil liability regarding officials

1. Where, in the framework of the application of this Directive, officials of the issuing State are present in the territory of the executing State, the issuing State shall be liable for any damage caused by them during their operations, in accordance with the law of the executing State.
2. The Member State in whose territory the damage referred to in paragraph 1 was caused shall make good such damage under the conditions applicable to damage caused by its own officials.
3. The Member State whose officials have caused damage to any person in the territory of another Member State shall reimburse the latter in full any sums it has paid to the victims or persons entitled on their behalf.
4. Without prejudice to the exercise of its rights vis-à-vis third parties and with the exception of paragraph 3, each Member State shall refrain in the case provided for in paragraph 1 from requesting reimbursement of damages it has sustained from another Member State.

Article 18  
Confidentiality

1. Each Member State shall take the necessary measures to ensure that the issuing and executing authorities take due account, in the execution of an EIO, of the confidentiality of the investigation.
2. The executing authority shall, in accordance with its national law, guarantee the confidentiality of the facts and substance of the EIO, except to the extent necessary to execute the investigative measure. If the executing authority cannot comply with the requirement of confidentiality, it shall without delay notify the issuing authority.

2bis Personal data shall not be further processed, in the framework of the application of EIO, in a way incompatible with those purposes laid down in this Directive.

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

4. Each Member State shall take the necessary measure to ensure that banks do not disclose to the bank customer concerned or to other third persons that information has been transmitted to the issuing State in accordance with Articles 23, 24 and 25 or that an investigation is being carried out.