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From :	Presidency
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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 submitted for partial general approach

I. INTRODUCTION

The draft Directive of the European Parliament and the Council regarding the European Investigation Order in criminal matters (hereafter “the EIO”) has been presented in April 2010 and since then has been discussed on several occasions within the Working Party on Cooperation in criminal matters. The latest discussion was held at the level of the JHA Counsellors meeting on 30 May 2011 on the basis of document 10655/11 COPEN 126 EJN 66 EUROJUST 81 CODEC 899 and suggestions presented by France and Lithuania (doc. 10884/11 COPEN 135 EUROJUST 88 EJN 72 CODEC 930 and doc. 10967/11 COPEN 138 EUROJUST 90 EJN 74 CODEC 942). Documents on proposals previously presented by other delegations are indicated in the footnotes.

Delegations will find attached the text of the draft Directive with the changes resulting from the discussions at that meeting. Changes to the text are underlined.

Member States generally showed a positive and constructive attitude to work on the text, while recognising that some difficulties still had to be overcome. Some delegations entered parliamentary scrutiny reservations on the text of the draft Directive.

As regards the outstanding issues set out in the footnotes, the Presidency is of the view that the text as it currently stands and as it has now been further adjusted provides a delicate balance between the positions of delegations. The Presidency considers that the text is a "compromise package", and would therefore call upon all Member States to accept the text as it stands and withdraw reservations as far as possible on the understanding that further discussions may reveal that it may be necessary to revert to some issues.

The Presidency is convinced that after a partial general approach on Articles 1-18 (including Article Y) containing general rules of the European Investigation Order has been reached, the discussions should be pursued on the provisions regarding special measures. It is understood that several recitals are closely linked to the operative part of the text (recitals 10, 10a, 10b, 11, 12, 12a, 12b, 13, 13a, 14a and 17a) and that a partial general approach would therefore also encompass such recitals, subject to an overall assessment of the text.

It is the intention of the Presidency to reach a partial general approach on Articles 1-18 (including Article Y) of the text at the JHA Council on 9/10 June 2011 on the basis of the attached text. In order to reach this objective, delegations are invited to agree on the text by addressing the outstanding issues referred under point II below.

II. OUTSTANDING ISSUES

1. Scope

At the meeting of the JHA Council in December 2010 the Council concluded that the EIO instrument should cover all investigative measures aimed at the obtaining of evidence, the only exception being the joint investigation teams which benefit from a specific regime in the EU. Article 3 and 4 of the draft Directive have been further examined by the Council preparatory bodies. The experts confirmed the objective of setting broad scope of the Directive, and, in particular to include all forms of interception of telecommunications and under covered agents.

Further discussions will have to clarify the relation of the EIO to the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution of orders freezing property or evidence and the issue of undercover operations.

The Council preparatory bodies also examined the question of the types of procedures for which the EIO can be issued. It has been noted that the EIO is designed for obtaining evidence in criminal proceedings, but it may also cover some administrative proceedings having a criminal dimension and fulfilling precise criteria. Accordingly, majority of delegations agreed that it would be adequate to extend the scope of the EIO to proceedings in respect of infringements of the rules of law where the decision may give rise to proceedings before a criminal court. These kind of proceedings may be brought by administrative or judicial authorities depending on the type of the proceeding and the judicial system of the given Member State.¹ In order to balance the inclusion of such proceedings a specific ground for non recognition or non execution was introduced into Article 10 (1)(d) of the draft Directive.

Coreper/Council is invited to confirm that EIO should cover all investigative measures aimed at the obtaining of evidence, with the exception of Joint Investigation Teams. It should also be available for certain administrative proceedings that have criminal dimensions on the basis of the wording of Article 4 points b) and c).

2. Grounds for non recognition or non execution

At the meeting of the JHA Council in December 2010 the Council concluded that grounds for non recognition or non execution should only be specific ones and that a wide ground for non recognition or non execution, drafted in general terms as in the existing regime of mutual legal assistance, should be avoided. As a second point, the Council concluded that a differentiation should be introduced between categories of investigative measures and grounds for non recognition or non execution linked to them. Accordingly, it should be ensured that there will be no step backwards in comparison to the existing instruments.

¹ The possibility of executing mutual legal assistance requests also in such cases is provided for in the 2000 Convention on Mutual Legal Assistance in Criminal Matters between the Member States of the European Union.

Although the text as presented may seem complex at first sight, it should be underlined that it provides a synthesis of the current regime based on different layers of mutual legal assistance conventions and existing mutual recognition instruments.

The compromise is based on a combination of generic and specific grounds for non recognition or non execution depending on the coerciveness of the measure. While it is for the issuing authority to decide as a matter of principle which is the requested measure, the executing authority would have the possibility under certain conditions to have recourse to a different type of investigative measure. It is then understood that Article 9 and 10 form a whole package and the balance has to be found between the correlation of solutions introduced by those Articles.

Accordingly the structure of Article 10 is divided into three categories:

- Paragraph 1 lists generic grounds for non recognition or non execution which could be assessed by the executing authority in every case.
- Paragraph 1a contains a list of measures most commonly used and existing in all legal systems for which the execution of an EIO could only be refused on the basis of generic grounds for refusal as listed in Paragraph 1. Search and seizure have been included in this positive list with the condition that the offence underpinning the EIO is an offence punishable in the issuing State by a custodial sentence of at least 3 years and contained in the 32 list offences (as in the EAW Framework Decision)
- In respect of the most sensitive and coercive measures, which would fall under Paragraph 1b, the broadest possibilities to refuse are provided (with limited dual criminality check, restriction under the law of the executing state to a list or categories of offence).

In respect of the list of generic grounds for non recognition or non execution, the following elements have been put forward as elements of the overall balance :

- Territoriality (Article 10 (1) f): Although this ground for non recognition or non execution doesn't exist under the current regime, it was felt necessary by some delegations in order to address their concerns especially in relation to the limitation of the dual criminality requirement in case of a coercive measure (see Article 10 (1b) a))

- Ne bis in idem (Article 10 (1) e)): A specific ground for non recognition or non execution introduced in this respect is subject to compulsory consultation (Article 10 (2)) in order to ensure that the executing authority would have complete information to establish that the execution of the EIO would be contrary to the principle of the Ne bis in idem. Recital 12a has been drafted in order to further ensure that application of this ground for non recognition or non execution is not misused and consistent with the established case-law of the ECJ in respect of Article 54 of the Convention implementing the Schengen agreement.

Coreper/Council is invited to accept the compromise package as set out under Article 9 and 10 as it stands in Annex I.

3. Legal remedies

The question of "legal remedies" was discussed extensively by the council preparatory bodies in the past months. Delegations proved to be in an agreement on following issues:

- There should be no obligation on the member states to provide more legal remedies than what is available in respect of the same investigative measures carried out in a similar national case.
- It is clarified that legal remedies may be brought in both the issuing and the executing Member State. No specification is made however, as to the authority before which the action may be brought. However it is noted that, as far as legal remedies related to substantial reasons for issuing EIO are concerned, such an action may be brought only in the issuing state.
- Appropriate information on the remedies should be given to any interested party as identified under the national law of the issuing and executing States and within the remits of confidentiality requirement.
- Following an extensive discussion the compromise text now also provides for the suspension of the transmission of the evidence pending the legal remedy, unless such transfer will be explicitly required by for the proper conduct of the investigation or the preservation of individual rights.

The present text provides for a balanced outline of legal remedies available to the interested party to challenge the issuing or the execution of an EIO. At the same time, this draft does not set out an overwhelmingly cumbersome procedure for such cases.

Coreper/Council is invited to accept the compromise proposal for a revised wording of Article 13 as it stands in Annex I.

4. Costs

During discussions delegations have reiterated the following principles as the basis for drafting:

1. As a rule, the expenses incurred on the territory of the executing State should be borne by this State, subject to specific provisions related to costs set out in Chapter IV.;
2. Disproportionate costs or lack of resources in the executing State should not be a ground for refusal for the executing authority; instead other possible alternative solutions could be applied (direct communication between the competent authorities, extension of deadlines, sharing of costs, etc);
3. In exceptional circumstances, there should be a possibility to make 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.

Accordingly the compromise text provides that the competent authorities of the issuing and executing state will first in the process of consultations explore all possibilities of solving the problem. Should the consultations bring no solution, the EIO should be executed. However the issuing authority will be obliged to bear the part of the costs defined as exceptional. Recital 13a has been proposed in order to clarify which costs could be estimated exceptionally high.

Coreper/Council is invited to accept the compromise proposal for a revised wording of Article Y as it stands in Annex I.

**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**

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) 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,

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 evidence², 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 matters³ 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.

² OJ L 196, 2.8.2003, p. 45.

³ 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 Agreement⁴.

⁴ 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, wherever possible, use another type of measure if the requested measure does not exist under its national law or would not be available in a similar domestic case. Availability of the measure under the law of the executing State should be assessed by the executing authority only in relation to legal conditions that are essential for the execution of the measure. This does not allow the executing State to assess the underlying reasons for issuing the EIO. Availability refers to occasions where the requested measure exists under the law of the executing State but is only lawfully available in certain situations, for example when the measure can only be carried out for offences of a certain degree of seriousness; against persons for which there is already a certain level of suspicion; or with the consent of the person concerned. The executing authority may also have recourse to another type of investigative measure when it will achieve the same result as the measure provided for in the EIO by means implying less interference on the fundamental rights of the person concerned.
- (10a) 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.

- (10b) In view of ensuring the transmission of the EIO to the competent authority of the executing State, the issuing authority may make use of any possible/relevant means of transmission, including for example the secure telecommunications system of the European Judicial Network, Eurojust, Interpol or other channels used by judicial or law enforcement authorities. 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.
- (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. The executing authority should comply with such request, if necessary by setting conditions as to the scope and nature of the attendance of the authorities of the issuing State.
- (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. (...) It 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.⁵

⁵ OJ L 328, 15.12.2009, p. 42.

- (12b) It should be possible to refuse an EIO where its recognition or execution in the executing State would involve breaching an immunity or privilege in that State. There is no common definition of what constitutes an immunity or privilege in the European Union and the precise definition of these terms is therefore left to national law, which may include protections which apply to medical and legal professions, but should not be interpreted in a way which would run counter to the obligation to abolish certain grounds for refusal in Article 7 of the Council Act of 16 October 2001 establishing, in accordance with Article 34 of the Treaty on European Union, the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union. This may include as well, even though they are not necessarily considered as privilege or immunity, rules relating to freedom of the press and freedom of expression in other media.
- (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.
- (13a) The expenses incurred in the territory of the executing Member State for the execution of an EIO should be borne exclusively by that Member State. This arrangement complies with the general principle of mutual recognition. However, the execution of an EIO may incur exceptionally high costs on the executing State. Such exceptionally high costs may, for example, be large police operation or surveillance activities over a large period of time. This should not impede the execution of the EIO and the issuing and executing authority should seek to establish which expenses are to be considered as exceptionally high. The issue of costs might become a subject to consultations between the Member States concerned and they are recommended to resolve this issue during the consultations stage. As the last resort, the costs which are estimated exceptionally high by the executing State and absolutely necessary in the course of the proceedings, should be wholly or partially covered by the issuing State. The given mechanism does not constitute an additional ground for refusal, and in any case should not be abused in a way to delay or bar execution of the EIO.

- (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) 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,

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 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. 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. 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.

Article 2
Definitions

For the purposes of this Directive:

- a) "issuing authority" means:
 - i) a judge, a court, an investigating magistrate or a public prosecutor competent in the case concerned; or
 - ii) any other 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.

Article 3⁶
Scope of the EIO

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 Union⁷ (hereinafter referred to as "the Convention") and in Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams⁸, except for the purposes of applying, respectively, Article 13(8) of the Convention and Article 1(8) of the Framework Decision.

⁶ It is agreed that all forms of interception of telecommunications are covered by the Directive and specific provisions will be introduced in Chapter IV. FI, supported by NL and LV, regretted that the scope does not cover provision of the 2000 MLA Convention on service of documents. CZ entered a scrutiny reservation in this respect. This extension has been opposed by several delegations (IT/BE/AT/EL/DE). It is understood that in respect of the measures which do not fall within the scope of the present Directive the already existing rules on legal assistance will continue to apply. Further discussions will also have to clarify the relation of the EIO to the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution of orders freezing property or evidence and the issue of undercover operations. DE entered scrutiny reservation on this latter issue.

⁷ OJ C 197, 12.7.2000, p. 3.

⁸ OJ L 162, 20.6.2002, p. 1.

Article 4

Types of procedure for which the EIO can be issued⁹

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.

⁹ Delegations have agreed on the inclusion of proceedings listed under points b) and c) provided that the specific ground for refusal (as that set out under 10.1.d) is maintained. Scrutiny reservation by CZ/NL and UK.

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

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.
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, by a judge, court, public 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.
3. (...)
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.

CHAPTER III
PROCEDURES AND SAFEGUARDS
FOR THE EXECUTING STATE

Article 8

Recognition and execution

1. The executing authority shall recognise an EIO, transmitted in accordance with the provisions of this Directive, without any further formality being required, and ensure its execution in the same way and under the same modalities as if the investigative measure in question had been ordered by an authority of the executing State, unless that authority decides to invoke one of the grounds for non-recognition or non-execution or one of the grounds for postponement provided for in this Directive.
2. The executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority unless otherwise provided in this Directive and provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State¹⁰.
3. The issuing authority may request that one or several authorities of the issuing State assist in the execution of the EIO in support to the competent authorities of the executing State to the extent that the designated authorities of the issuing State would be able to assist in the execution of the investigative measure(s) mentioned in the EIO in a similar national case. The executing authority shall comply with this request provided that such assistance is not contrary to the fundamental principles of law of the executing State or does not harm its essential national security interests.

¹⁰ Scrutiny reservation of DE and CY pending the overall compromise package.

- 3a. The authorities of the issuing State present in the executing State shall be bound by the law of the executing State during the execution of the EIO. They shall not have any law enforcement powers 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 to the extent agreed between issuing and executing authorities¹¹.
4. The issuing and executing authorities may consult each other, by any appropriate means, with a view to facilitating the efficient application of this Article¹².

Article 9

Recourse to a different type of investigative measure

1. The executing authority must, wherever possible, have 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 ;

¹¹ Recital 11 was modified in relation to this Article. LU maintained its proposal to insert a new paragraph 3b: "*The presence of the authorities of the issuing State shall not result in facts being divulged to persons other than those authorised by virtue of the preceding paragraphs in breach of judicial confidentiality or the rights of the person concerned. The information brought to the knowledge of the issuing State may not be used as evidence until the transfer of evidence has taken place in accordance with Article 12*". A majority of delegations opposed the insertion of this text even as a recital.

¹² CZ proposed to insert the following sentence at the end of this point: "This may include requesting of further information necessary for efficient execution of the EIO within a reasonable deadline set by the competent authority of the executing State." A number of delegations questioned the necessity of such wording.

- 1bis. 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.
3. Where, in accordance with paragraph (1), the investigative measure provided for in the EIO does not exist under the law of the executing State or it would not be available in a similar domestic case and where there is no other investigative measure which would have the same result as the measure requested, the executing authority must notify the issuing authority that it has not been possible to provide the assistance requested.¹³

¹³ Scrutiny reservation by LV.

Article 10

Grounds for non-recognition or non-execution

1. Without prejudice to Article 1.3¹⁴, 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;¹⁵
 - 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;¹⁶

¹⁴ Scrutiny reservation by FR/ES.

¹⁵ CZ/LV/MT/IT entered a reservation on the last part of point a). CZ proposed to delete it and take over recital 28 of the EEW Framework Decision. DE, supported by BG/SK/FR, proposed to add "*for example*" after "*liability*". This proposal would broaden the scope of the ground for refusal instead of keeping it as limited as possible. See also new recital 12b. UK proposed to insert the words "*or principles*" after "*rules*". Delegations questioned the need for such an insertion.

¹⁶ The wording "in a similar domestic case" have been inserted following a suggestion by UK/LT, supported by CZ/SK/IE/IT/PL. ES/FR/AT/BG/LV/SI/NL opposed it.

- e) it is established that the execution of the EIO would be contrary to the principle of *ne bis in idem*.¹⁷
- 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.¹⁸

1a.¹⁹ Where the investigative measure indicated in the EIO concerns one of the following measures, Article 9(1)²⁰ is not applicable and the recognition or execution of the EIO can only be refused in cases referred to in paragraph 1:

- 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;²¹
- c) the obtaining of information or evidence which is already in the possession of the executing authority and in accordance with the law of the executing State, that evidence could have been obtained in the framework of criminal proceedings or for the purposes of the EIO;

¹⁷ Reservation by FR/CZ/AT/BG/LV/IT.

¹⁸ MT/ES/IT/BG/FR entered a scrutiny reservation on it.

¹⁹ IT/BG entered a scrutiny reservation on paragraph 1a and 1b.

²⁰ AT/SE/CZ/DE proposed to limit the reference to Article 9 (1) b). BE opposed it.

²¹ PT/BG entered a scrutiny reservation.

- d) the obtaining of information contained in databases held by police or judicial authorities and accessible by the executing authority in the framework of criminal proceedings;²²
- 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.²³

(insert list of 32 offences into the Annex X)

1b.²⁴ Without prejudice to paragraph (1), where the investigative measure indicated by the issuing authority in the EIO concerns a measure other than those referred to in paragraph (1a), the recognition or execution of the measure may also be refused:

- (a)²⁵ if 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.

(insert list of 32 offences into the Annex X)

- (b) (...) 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.

²² Two options were presented to delegations with respect to the question whether points c) and d) should be included or not in the positive list of paragraph 1a. Delegations were divided on this issue. SE/LT/SK/CZ/EL opted for maintaining the reference to similar domestic cases in point c) and d) and UK/CY in at least point d).

²³ CZ/DE/LU asked for the deletion of point f). PL/NL/BE/SE/LV/LT/FR/PT/AT expressed a positive opinion on maintaining the text. UK entered a scrutiny reservation.

²⁴ Scrutiny reservation by AT/FR/LT/ES.

²⁵ LU/UK/LT/CZ proposed to delete the last part of point a).

- 1c. 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.

2. 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.(...)

3. 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.

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 case²⁶, 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 days after the receipt of the EIO by the competent executing authority.

²⁶ CZ, supported by SK/UK/IE, proposed that an exception is made in respect of the proceedings referred under Article 4, points b) and c). Number of delegations strongly opposed it.

4. 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.
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 issuing authority on the appropriate timing to carry out the measure.

Article 12
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. When transferring the evidence obtained, the executing authority shall indicate whether it requires it to be returned to the executing State as soon as it is no longer required in the issuing State.

3. 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.

Article 13²⁷²⁸

Legal remedies

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.
2. (...)
3. The substantive reasons for issuing the EIO may be challenged only in an action brought in the issuing State.
4. Where it would not undermine the need to ensure confidentiality of an investigation, as provided for in Article 18(1), the issuing and the executing authorities shall, in accordance with their national law, take the appropriate measures (...) to ensure that information is provided about the possibilities for seeking the legal remedies referred to in paragraph 1 and 3 when these become applicable and in due time to allow their effective exercise.²⁹

²⁷ A large majority of delegations agreed on the approach taken in this article, BG expressed some concerns. DE/NL/PT/IE/AT maintain a scrutiny reservation. DE suggested a revision of Article 13 contained in doc. 9927/11 COPEN 103 EUROJUST 70 EJM 56 CODEC 781.

²⁸ Following recital is proposed to the Article: „*Legal remedies available against an EIO should be at least equal to those available in the domestic case against the investigative measure concerned In accordance with their national law Member States should ensure the applicability of these legal remedies including by informing in due time any interested party about the possibilities for seeking the legal remedies.* ”

²⁹ Scrutiny reservation by DE/AT on this paragraph. Positive scrutiny reservation by CZ.

5. The issuing and executing authorities shall inform each other about the legal remedies sought against the issuing or the recognition or execution of an EIO.
- 5a. The executing authority may suspend the transfer of the evidence, pending the decision regarding a legal remedy, unless sufficient reasons are indicated in the EIO that an immediate transfer is essential for the proper conduct of its investigations or the preservation of individual rights.³⁰
- 5b. In case the evidence has already been transferred and the recognition or execution of an EIO has been successfully challenged in the executing State, this decision will be taken into account in the issuing State in accordance with its own national law.
6. (...).

Article 14

Grounds for postponement of recognition or execution

1. 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;
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.

³⁰ Modifications made following proposal made by ES. Scrutiny reservation by BG. SE proposed the deletion of the last part of the sentence.

Article 15
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.

2. Without prejudice to Article 9(2) and (3) 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 Articles 9 or 10;
 - (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 16³¹

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.

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.

³¹ Scrutiny reservation entered by DE on Articles 16 and 17.

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.³²
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.
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.

Article Y³³
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.

³² DE proposed to add the following words : "*without prejudice to article 13.4*". There was no support for this proposal.

³³ Scrutiny reservation entered by IT/SI/FR/LT/PT.
FR, supported by SE/NL/EE/LV/LT, maintained its proposal according to which paragraph 3 should 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.*"

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, its execution spread over time or eventually whether the EIO could be completely or partially withdrawn.

3. In exceptional situations where the consultations can not lead to an agreement, the EIO shall be executed without delay and the part of the costs which the executing authority considers exceptionally high³⁴ shall be borne by the issuing authority, who shall be previously informed by the executing authority of the detailed specifications of the part of the costs deemed exceptionally high.

(The remaining Articles of the draft Directive are not reproduced in the present document)

³⁴ Recital 13a is proposed to accompany this text.