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NOTE

from:	Mr Aled Williams, President of Eurojust
to:	Dr Tunde Forman, Chair of the COPEN Working Party in the Council of the European Union
date of receipt:	2 March 2011
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 - Opinion of Eurojust regarding the draft Directive

Delegations will find annexed hereto the Opinion of Eurojust regarding the draft Directive on the European Investigation Order in criminal matters.

Dear Dr Forman,

RE: Eurojust Consultation regarding the draft Directive on the European Investigation Order in criminal matters

In his letter dated 14 January 2011, Mr Peter Csonka, as JHA Coordinator at the Hungarian Permanent Representation, asked Eurojust to provide the CATS meeting of 11 February 2011 with its first observations on the draft Directive on the European Investigation Order in criminal matters. Eurojust was also requested to present its written contribution to the Council Working Party before its meeting in March 2011.

On behalf of Eurojust, I am glad to provide you with its opinion on the Proposal for a Directive on the European Investigation Order, the substance of which was agreed by the College on 22 February 2011.

Eurojust is grateful for the initiative of the Hungarian Presidency and its kind suggestion that COPEN should be provided with a written contribution. We hope that the paper is useful and of course remain willing to assist in any further discussion of the EIO, should the relevant Council bodies consider this appropriate.

(Complimentary close)

(s.) Aled Williams

ANNEX II

EUROJUST OPINION ON THE

PROPOSAL FOR A DIRECTIVE ON THE EUROPEAN INVESTIGATION ORDER (EIO)

Executive summary

EUROJUST is of the opinion that the consolidation of mutual legal assistance measures into a single mutual recognition instrument, as proposed by the draft Directive on the EIO, could simplify and facilitate judicial cooperation.

To achieve its aims, the EIO should be a "stand-alone" instrument, covering all types of investigative measures that, at present may be requested by way of mutual legal assistance. In light of this, the exclusion of freezing of assets, as provided for in the latest draft, may need further reflection.

The introduction of a standard form, that may be easily translated, would have an added value as long as it remains simple, clear and concise. Deadlines for execution and transfer of evidence would also constitute an improvement.

Moreover, the effectiveness of the EIO should not be lower than that resulting from the current legal framework. Clarity as to the relations between the new legal regime and the existing MLA instruments should be ensured.

From a practical perspective, basing grounds for refusal on a differing categorisation of investigative measures according to their degree of intrusiveness seems rather artificial and complex to implement.

As for the executing authority being able to substitute a less coercive measure to the one requested, a clear consultation process should be introduced to ensure smooth cooperation.

The facilitating role of EUROJUST in the execution of the EIO should be underlined, in particular for its transmission and in the context of consultation process between national authorities, but also in more general terms.

1. By a letter to its President dated 14th January 2011, the Hungarian Presidency requested EUROJUST to provide an opinion on the Proposal for a Directive on the European Investigation Order (EIO), presented in April 2010 by Austria, Bulgaria, Belgium, Estonia, Slovenia, Spain and Sweden. A consolidated text of the proposed instrument - following the discussions within the Council under the Belgian Presidency - was attached to the letter.

   In addition to its opinion, EUROJUST was asked to facilitate the gathering of practitioners' views, taking into account the "*close relationship of EUROJUST with (...) the Consultative Forum of the Prosecutors General and the European Judicial network*". This paper only reflects the opinion of EUROJUST.

2. EUROJUST welcomes the opportunity to contribute to the discussions on this important instrument. Representatives of the College of EUROJUST and Legal service have been attending meetings of the Working Party on cooperation in criminal matters since the beginning of discussions at the Council, and the College has been regularly informed on the state of play of discussions.

3. Taking into account the experience gathered in the framework of its mission of assistance to national authorities dealing with judicial cooperation in criminal matters, EUROJUST offers an opinion from a practitioners' perspective.

General observations:

4. At present, mutual legal assistance (MLA) between EU Member States is still regulated by the European Convention on Mutual Legal Assistance in criminal matters of 20.04.1959, supplemented by the Convention implementing the Schengen Agreement of 19.06.1990 and the Convention on Mutual Legal Assistance in criminal matters between Member States of the EU of 29.05.2000 (together with its Protocol of 16.10.2001).

5. The principle of mutual recognition has only been applied to certain types of pre-trial investigative measures (e.g freezing orders – 2003/577/JHA Framework Decision and obtaining of objects, documents and data – 2008/978/JHA Framework Decision) and these instruments apply in addition to MLA provisions.

6. Therefore it may be difficult for national authorities, when issuing or executing a MLA request, to determine the applicable legal framework (depending in particular on the type of measures requested, on the effective ratification or implementation of instruments by the requested Member State, or on the scope of declarations that may have been made).

7. Taking into account this fragmented picture, consolidation of MLA legal framework is likely to simplify the handling of judicial cooperation in criminal matters. In view of this, the replacement of existing instruments by a single mutual recognition instrument covering all practitioners' needs in terms of gathering of evidence - as proposed in the EIO draft Directive – would introduce a more unified, general and transparent legal regime.

8. In addition, the use of a standardized form could contribute to the harmonization of the drafting of requests, thus reducing the impact of differences between national legal systems that often impede the smooth execution of requests. Such a form would also simplify the translation of the request, which at present can lead to misunderstandings between national competent authorities.

9. The introduction of time limits for execution would also contribute to the efficiency and effectiveness of judicial cooperation.

10. Against this background, one should also bear in mind that despite its fragmentation, the current MLA framework, when combined with appropriate support, can also offer a high degree of flexibility and efficiency. Article 1 of 1959 Convention provides for a "non-limitative" scope of application, which is suitable to practitioners' needs : in organized crime cases, rogatory letters often cover a wide range of investigative measures in a single request (bank information, phone identification, wire tapping, hearings, house searches...). With relevant assistance (liaison magistrates, European Judicial Network (EJN) contact points, EUROJUST...), national authorities can expect swift and accurate execution of the request (identification of the competent executing authority, assistance to overcome legal obstacles, execution in emergency, even in real-time or simultaneously in different Member States...). To convince practitioners, the EIO has to offer at least the same level of efficiency.

11. It appears therefore that the EIO could have an added value in practice if certain requirements are met :
    - The EIO should be a "stand-alone" instrument and as a consequence, its scope of application should be as comprehensive as possible, thus covering the investigative measures most often requested in the context of MLA, if not all ;
    - The effectiveness of the EIO should not be lower than that resulting from the current legal framework.

12. The impact of the (possible) adoption of a comprehensive mutual recognition instrument dealing with gathering of evidence in criminal proceedings on the implementation of existing instruments should also be carefully considered. According to Article 29.2 of the current draft, the EIO would replace in particular the European evidence warrant (EEW), that Member States were asked to implement before 19th January 2011. From a practical point of view, such an implementation of the FD EEW would have the undesirable consequence of practitioners having to get used to a new instrument – the EEW – which would soon thereafter be repealed and replaced by the EIO.

13. On a related point, wording of Article 29.1 could also be clarified so as to identify precisely which provisions of the mentioned instruments are replaced by the new Directive, the reference to "corresponding provisions" being vague.

Specific comments:

Article 3 – Scope of the EIO

14. This Article provides for a large scope of application, covering any type of investigative measure, the execution of which may be requested from a competent authority of another Member State.

15. However, the freezing of instruments and proceeds of crime seems to be excluded as, in accordance with Article 29.2, the Directive *"(only) applies between the Member States to the freezing of items of evidence in substitution to the corresponding provisions of Framework Decision 2003/577/JHA"*.

16. Whereas there may be justification for excluding confiscation of assets from the purport of the Directive, the exclusion of the freezing of assets could entail the following consequences:
    - Bank information (e.g information on the amount of money on a bank account) would be covered by the Directive ;
    - Freezing of the amount of money on that bank account would be exclusively covered by Framework Decision 2003/577/JHA.

17. Hence, it would be necessary to issue two different forms (under two different legal regimes) to get the desired result. One could argue that this approach – in two steps – has the advantage of allowing the issuing authority to assess the material gathered before issuing a freezing order. On the other hand, this method may not be appropriate in organized crime cases, where there is a high risk of dispersion of assets derived from crime. Furthermore, the issuing of a separate form – in addition to MLA request – to obtain the freezing of assets appears to be one of the reasons why practitioners show little interest in applying Framework Decision 2003/577/JHA.

Moreover, it might be difficult in practice, at least at the beginning of an investigation, to distinguish between evidence, instruments and proceeds of crime, as the same asset could be classed under all these heads[1]. Thus, as far as freezing orders are concerned, the new instrument offers an opportunity to replace Framework Decision 2003/577/JHA and to set up a unique, coherent and comprehensive legal regime in this field which would apply to both evidence and assets.

Article 4 – Types of procedure for which the EIO can be issued

18. The reference to administrative proceedings, where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters, has been put between brackets in the text communicated by the Presidency. However, the inclusion of such proceedings – which are currently covered by MLA instruments (see Article 3.1 of the 2000 Convention) – would ensure that the new instrument is in line with the scope of MLA current legal framework.

Article 5 – Content and form of the EIO

19. The introduction of a standardized form - as long as it remains concise - could simplify the issuing and translation of MLA requests. The proposed form, as it stands, seems well focussed and likely to be of practical use.

Article 5a – Conditions for issuing and transmitting an EIO

20. Paragraphs 1 and 2 address the issue of "proportionality", which has already given rise to practical problems in the context of European arrest warrants, due to a substantial increase of minor cases. This increase may be due to the strict application of the legality principle in several Member States and/or different views on the seriousness of certain crimes. There is a danger that a simplified procedure for requesting investigative measures will lead to an increase of cases where the proportionality of the requested measure may be questionable. In the context of gathering of evidence, one should also bear in mind that proportionality shall be assessed *in concreto*, taking into account all the circumstances of the case, i.e in particular the intrusiveness of the investigative measure(s) requested and the resources required to carry out such measure(s), in relation to the seriousness of the case.

21. As currently drafted, the Article strikes the desired balance between the application of the principle of mutual recognition and proportionality requirements.

[1] [1] For instance, a suitcase full of cash, carried by the suspect at the time of arrest may constitute both the evidence of money laundering and the proceeds or instrument of such crime.

22. The introduction of a validation process by a judge, prosecutor or investigating magistrate – provided for under paragraph 3 – should be accompanied by practical arrangements, so as to avoid exchanges between the issuing and the executing authorities. These could include the introduction of a specific box in the form to confirm that there has been judicial consideration in all cases, and provision for rapid exchange of information when validation is missing.

Article 6 – Transmission of the EIO

23. Paragraphs 1 and 2 reproduce solutions from existing instruments. In practice, direct transmission of MLA requests between competent judicial authorities (with consequential limitation of the role of central authorities), in conjunction where necessary with the support of EJN contact points or EUROJUST, has proved effective.

24. Paragraphs 3 and 4 mention expressly the facilitating role of EJN in the transmission of requests (via secure telecommunications system, when it is in place) and the identification of competent authorities. In line with Article 9c of 2009/426/JHA Council Decision (the "new EUROJUST Decision") and current practice, it should also be stated that the EIO may be transmitted via EUROJUST as well.

25. EUROJUST would also welcome the introduction of a recital stating that EUROJUST assistance may be requested, within the limits of its mandate, in any issue related to the EIO, in order to facilitate its issuing, transmission or execution.

Article 7 – EIO related to an earlier EIO

26. Paragraph 2 facilitates the direct transmission of additional requests "on the spot", where the issuing authority is present during the execution of the EIO. Such provision would indeed facilitate practitioners' daily work.

Article 8 – Recognition and execution

27. The principle of execution of the EIO "in the same way and under the same modalities" as if the measures have been ordered in the executing State (para 1) seems in fact not far from the solution currently provided for under Article 3.1 of 1959 Convention.

28. The possibility that specific formalities and procedures may be required by the issuing State follows the 2000 Convention. Despite the difficulty for the executing authority to comply with rules with which it may not be familiar, this solution already gives good results in practice, and is likely to facilitate the admissibility of evidence collected.

29. Paragraphs 3 and 3a provide for the possibility for the issuing authority to be present during the execution of the investigative measures requested. The issuing authority is undoubtedly best placed to assist the requested authorities in the execution of its own request. Being physically present often contributes significantly to expediting execution. Presence can also assist in speedily identifying material which is of relevance from that which need not be gathered, although initially requested in the EIO. As a consequence, within the European judicial area, the presence of the issuing authority during the operations should be enabled to the widest extent possible and the ground for refusal could be limited accordingly (ie only to situations of national security interests).

Article 9 – Recourse to a different type of investigative measure

30. This provision offers a certain degree of flexibility to the executing authority in the choice of the investigative measure(s) to be executed.
In order to facilitate practical application of this provision, the text may, however, require some addition. Take the following example:
    - The issuing authority issues an EIO for a house search with a view to finding certain documents.
    - The executing authority has recourse to a less coercive measure, namely that the person concerned is asked to hand over the documents.
    - Should the person concerned, however, refuse to hand over the documents, the authorities of the executing State should be ready to immediately execute the EIO by coercive means. Otherwise there is a serious risk that the suspect is tipped off and the documents / evidence is destroyed or disappears.

    In other words, the executing authority should recognize the EIO and be ready to execute the measure in the EIO immediately where the less coercive measure is not effective.

31. Further, consultation between the competent authorities may be appropriate before the executing authority has recourse to a different type of investigative measure, in order to find out the "best alternative". Such consultation may also be useful to ensure that a measure is chosen or carried out in a way which ensures admissibility of the evidence in the issuing State. On request of competent authorities, EUROJUST could assist and facilitate this consultation process.

Article 9a and 10 – Grounds for refusal

32. The current version of Articles 9a and 10, as drafted in the consolidated text of the draft Directive transmitted by the Presidency on 14 January 2011, allocates the investigative measures in four categories - depending on the intrusiveness of the measure - to which different grounds for refusal shall apply.

33. From a practitioner viewpoint, this differentiated regime may be complex to apply:
    - A single request could cover several investigative measures, that could be classified in different categories (This will often be the case in organized crime cases).
    - Some investigative measures are classified in different categories on the basis of elements that either would be difficult to distinguish or unlikely to be known at the time of recognition of the EIO: it could for instance be difficult to distinguish between a search "on the site of an offence" (covered by Article 9a.1 (d) and a search of "homes, premises, vehicles or information systems" (covered by Article 9a.2 (f). Moreover, the executing authority usually does not know, when recognizing the order, whether a hearing may be arranged "on a voluntary basis" (article 9a.1 (e) or "on a compulsory basis" (Article 9a.2 (g).

34. Regarding the scope of grounds for refusal, the text should not allow for broader possibilities to refuse cooperation than existing instruments. Considering that the EIO is based on the principle of mutual recognition, the grounds for refusal should be as limited and specific as possible.

    The *ne bis in idem* principle has been widely interpreted by courts and in particular by the ECJ. Regarding Article 10(1)(e), EUROJUST is concerned that practical difficulties could arise due to differing interpretations among Member States and associated factual complexity.

Article 11 – Deadlines for recognition and execution

35. As previously mentioned, EUROJUST welcomes the introduction of deadlines for execution, that constitute an improvement compared to the current situation.

36. Time limits have to take into account the diversity and the number of investigative measures that may be requested in an EIO. In that respect, the proposed Article 11 seems a well balanced solution.

Article 12 – Transfer of evidence

37. The second sentence of paragraph 1 – which allows the issuing authority assisting in the execution of the request to have immediate transfer of the evidence collected – corresponds to a practice already in place. It allows the issuing authority to begin examination of the material straightaway, which could save weeks or months, compared to other forms of transmission.

38. In view of these practical implications, it would be preferable not to limit such immediate transfer to situations where it is "possible under national law of the executing State". In addition, in all cases where documents or transcripts are concerned, at least a copy of them should be handed over immediately to the issuing authority.

Article 15 – Obligation to inform

39. Reasonable obligations to inform the issuing authority may help to remedy frequent lack of communication between the competent authorities involved. In particular, the sending of an acknowledgement of receipt would in itself solve many practical problems arising in the execution of MLA requests.

Articles 16 to 27

40. Most of these provisions are derived from existing MLA instruments. As a consequence, specific comments are not always required.

41. As far as the videoconference is concerned (Article 21), this form of cooperation has grown significantly since 2000 and certain limitations no longer correspond to current practice and needs. For instance, for the hearing of witnesses and experts, the use of videoconference should no longer be subject to "the fundamental principles of the law of the executing State" (Article 21(2)(a)). Consequently, Eurojust would welcome the deletion of Article 21(2)(a) so far as witnesses and experts (but not suspected or accused persons) are concerned.

42. It seems that a specific provision on interception of telecommunications – as provided by Articles 19 and 20 of the 2000 Convention – will be needed, taking into account the importance of such measures in practice. Such a provision should allow for at least the same standards of judicial cooperation as resulting from the 2000 Convention, in particular for interception without an EIO in the cases covered by Article 20 of the 2000 Convention.

The issue of costs

43. During the Working Party meeting on 11-12 January 2011, the Presidency submitted to delegations a new draft provision on the issue of costs of execution of an EIO, allowing in particular a sharing of these costs between the issuing and the executing State. The text mentioned EUROJUST, to which the case could be referred in case of disagreement between competent authorities.

44. The transfer to the issuing State of part or all the costs arising from the execution of the EIO should be limited to "extraordinary" costs, ie not those resulting from the execution of investigative measures that are usually requested (hearings, house searches, bank information, etc…).

45. In any case, execution of the EIO should not be subject to the resolution of the question of costs. This issue should not have the effect of opening an “indirect” ground for refusal.

46. EUROJUST does not consider that it should resolve cost issues, which relate to the management of Member States’ own resources. However, if it is deemed appropriate by Member States, EUROJUST may offer assistance in this matter and facilitate an agreement in particular cases.