



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 12 October 2010

14641/10

**Interinstitutional File:
2010/0817 (COD)**

LIMITE

**COPEN 207
EJN 45
EUROJUST 101
CODEC 983**

NOTE

From : Presidency
To : Working Party on Cooperation in Criminal Matters
Prev. doc. 13822/10 COPEN 196 EUROJUST 93 EJN 41 CODEC 867
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 on 28 September 2010

I. INTRODUCTION

The Working Party on Cooperation in Criminal Matters met on 28 September 2010 with a view to continuing the examination of the initiative for a directive on the European Investigation Order. The discussions referred to Articles 1-10 of the initiative and were carried out on the basis of the discussion paper issued by the Presidency (document 13822/10 COPEN 196 EUROJUST 93 EJN 41 CODEC 867)), the opinion of the Council Legal Service (13514/10 JUR 371 COPEN 188 EUROJUST 90 EJN 39 CODEC 807) and working documents from UK/DE, NL and the Presidency (DS 1623/10, DS 1623/10, DS1643/10 respectively).

The present note aims at reflecting the outcome of the above-mentioned meeting. The Presidency would like to thank delegations for their constructive approach and their valuable contributions to the discussions. Specific outstanding issues are set out under II below. In the Annex, delegations will find a revised text of Articles 1-10 of the initiative, including in the footnotes the references to specific positions of delegations in respect of particular provisions. Changes are indicated in the text as against 13822/10 COPEN 196 EUROJUST 93 EJM 41 CODEC 867.

It is understood that all delegations are still in the process of internal consultations and that a number of delegations have entered a general scrutiny reservation on the initiative and some delegations entered specific scrutiny reservations on particular provisions, as reflected in Annex 1 to this note.

Delegations are invited to reflect on the specific issues outlined below in this document with a view to preparing the discussion at the CATS meeting of 25-26 October.

II. SPECIFIC OUTSTANDING ISSUES

1. Scope

As already stated during the preliminary discussions, delegations broadly support the idea of setting up a single legal regime for the obtaining of evidence within the EU. However, delegations maintained diversified opinions as regards to the extension of the scope to the other forms of mutual legal assistance (cf doc 12862/10). In particular, NL has presented a working document addressing this issue (DS 1624/10).

As regards Article 3, the issue of the exclusion of some forms of interception of telecommunication remained undecided. Following the discussions which took place during the meeting of the Working Party of 27-28 July 2010 on the basis of doc. 12201/10, the Presidency has issued a questionnaire in respect to issues related to the use of four different types of interception of telecommunications¹. At the time of drafting this document, 15 Member States² have sent their replies to this questionnaire. The outcome of the questionnaire³ contributes to give a clear view of the current practices in the Member States and could create more clarity on the necessity to include/exclude one or more specific types of interception within/from the scope of the directive. As a preliminary remark, the Presidency would like to note that although most Member States apply one or more types of interception, a significant number of Member States does not have available statistical data on the use of interception of telecommunications, since the 2000 MLA Convention calls for direct contact between the authorities concerned. Consequently, the Presidency refrains from going into details on the frequency of the use of the different types.

The first type concerns the ordinary interception of telecommunications without immediate transmission. The answers to the questionnaire have shown that most Member States make use of this specific type of mutual legal assistance.

The second type concerns the ordinary interception of telecommunications with immediate transmission. This type of interception is not technically possible in some Member States. Member States having necessary technical equipment indicated that this form of mutual legal assistance is occasionally requested.

¹ Doc. 12863/10

² AT/BE/BG/CZ/DK/EE/FI/IE/IT/LV/PT/SE/SI/SK/UK

³ Doc. 14591/10

The third type concerns interception of satellite telecommunications. This specific form of interception of telecommunication covers 3 different types of relations between the requesting State and the State hosting the terrestrial station:

- *Type 3a*: the interception of telecommunications takes place in the State hosting the terrestrial station and the result is forwarded later to the requesting State;
- *Type 3b*: telecommunications are intercepted in the State hosting the terrestrial station, but immediately transmitted to the requesting State;
- *Type 3c*: the interception of telecommunications takes place in the requesting State, which uses a remote control system to activate the transmission of telecommunications from the terrestrial station to one of its telecommunication service providers.

Regarding the question whether the Member State is hosting a terrestrial station, most Member States answered in the negative. Member States have furthermore not taken measures to make use of a remote control system possible in their territory. Detailed statistic data are not always available, but several Member States indicated that interception of satellite telecommunications did not take place on their territory, nor did they request such form of mutual legal assistance.

The fourth type concerns interception of telecommunications in cases where the requesting State does not need technical assistance of the Member State where the target is located. This type is sporadically used in some Member States, but the specific nature of this type – i.e. this type of interception does not apply the usual regime of request and reply, it is actually based on notification of the fact that the interception is going to take place or is already taking place, while providing a possibility for the Member State where the target is located to oppose this interception – makes it difficult to get a comprehensive overview of the use of this specific type of mutual legal assistance.

The outcome of the questionnaire indicates that both types of ordinary interception of telecommunications (with and without immediate transmission) are applied in a number of Member States. The results also show that the relatively low use of all the different types of interception is, amongst others, linked with practical or technical limitations. The Presidency is aware that excluding certain types merely on the ground of elements of an evolving nature could, in the long run, undermine the objective of the new framework. Taking into account the concerns expressed by the Member States during the discussions, the Presidency invites the Member States to reflect on the possible enlargement of the scope to all forms of interception of telecommunications.

However, the possible introduction of all forms of interception within the scope of the Directive does not mean that provisions in this Directive on these issues should follow the structure found in the 2000 EU MLA Convention. Practical experience in the application of these provisions should be used to simplify, where appropriate, the current legal framework. This discussion should however form a part of the negotiations on Chapter IV and will not be addressed at this stage.

2. Issuing authorities

During the discussion at the Working Party on 28 September 2010 delegations further discussed the definition of authorities competent to issue an EIO (Article 2 (a)). More particularly, delegations have expressed their opinions in respect of the five options presented by the Presidency in its note (doc 13822/10). As a result of the discussions, it seems that option 3 which, while maintaining the text of Article 2 (a) (ii) as it was, introduces a validation procedure and an additional ground for refusal in case the EIO would not be validated, gained the most extensive support among the delegations.

Reflecting upon the possible solutions, the Presidency would like to present to the delegations two options (below) by which the validation procedure could be introduced into the text. Accordingly, the Presidency would like to invite the delegations to consider the following options. Both wordings are based on the model set out in the EEW Framework decision, but its application is broader, as it is not restricted to coercive measures.

As an introductory remark, the Presidency would however like to underline that it is understood that the EIO may in fact contain requests for executing more than one investigative measure, in respect of any of which the national law of the executing Member State may set different requirements. Accordingly, for some of the measures covered by a particular EIO, the validation procedure might be necessary, but it would not be for some others. In order to ensure the practical application of such an EIO, it appears that a pragmatic solution would be if the directive allows for a partial non-execution of an EIO: the investigative measures in respect of which the required validation procedure was not completed, will not be executed. However, this possibility of a partial execution of the EIO is not limited to the validation requirement, but could be envisaged for almost all grounds for refusal, and therefore should be addressed in a more general way. If the delegations can agree with the latter, the Presidency will reflect on a drafting proposal.

OPTION 1

This option entails that the executing authority can only refuse the execution of an EIO (or only some of the investigative measures covered by the EIO) on the ground that it has not been issued and/or validated by a judge, a court, an investigating magistrate or a prosecutor if its Member State has made a notification that such validation is required. Accordingly, the validation procedure would apply to all EIOs transmitted to a Member State which has notified such a requirement. This option has the advantage that the issuing authority knows from the outset that the EIO must be subject to the validation procedure and it may therefore undertake the necessary steps before forwarding the EIO to the executing Member State. Such a solution would allow for a swift execution of an EIO, without the need to postpone it in order for the issuing authority to comply with the validation procedure.

The relevant wording of Article 8 could be as follows:

Article 8

Recognition and execution

...

'2bis. If the issuing authority is not a judge, a court, an investigating magistrate or a public prosecutor and the EIO has not been validated by one of those authorities in the issuing State, the executing authority may decide that the EIO may not be executed, subject to a declaration or notification in accordance with paragraph 2ter. Before so deciding, the executing authority shall consult the competent authority of the issuing State.

2ter. A Member State which wants to avail itself of the possibility foreseen in paragraph 2bis, shall, at the time of adoption of this Framework Decision, make a declaration or subsequent notification to the General Secretariat of the Council requiring such validation in all cases where the issuing authority is not a judge, a court, an investigating magistrate or a public prosecutor and where the measures necessary to execute the EIO would have to be ordered or supervised by a judge, a court, an investigating magistrate or a public prosecutor under the law of the executing State in a similar domestic case.'

OPTION 2

This option is based on the assumption that the Member States may declare that they would require a validation of an EIO in all cases. However, should such declaration not be made, the executing authority would still be allowed to decide on a case by case basis that it will require validation of an EIO. Such an approach was followed in the EEW Framework Decision. The disadvantages of this option, as against option 1, are the consequence of a lower certainty for the issuing authority as to the requirements which may be requested by the executing authority for a particular EIO. On the other hand, such option allows for more flexibility for the executing authority to require validation since the EIO may cover numerous different investigative measures.

The relevant wording for this option could read as follows:

Article 8

Recognition and execution

...

"2bis. If the issuing authority is not a judge, a court, an investigating magistrate or a public prosecutor and the EIO has not been validated by one of those authorities in the issuing State, the executing authority may, in the specific case, decide that the EIO may not be executed. Before so deciding, the executing authority shall consult the competent authority of the issuing State.

2ter. A Member State may, at the time of adoption of this Framework Decision, make a declaration or subsequent notification to the General Secretariat of the Council requiring such validation in all cases where the issuing authority is not a judge, a court, an investigating magistrate or a public prosecutor and where the measures necessary to execute the EIO would have to be ordered or supervised by a judge, a court, an investigating magistrate or a public prosecutor under the law of the executing State in a similar domestic case."

For both options, an additional ground for refusal will have to be introduced into Article 10 (1) when, in the described cases, the EIO has not been validated.

3. Central authorities

Delegations also maintained their concerns in respect to the definition of ‘executing authority’. Nevertheless, it needs to be noted that the text amendments proposed by Presidency to Article 2 (b) were generally welcomed by the delegations and it has been confirmed that the ‘executing authority’ should be understood as an authority having competence to recognise the EIO and to trigger, in accordance with the specific national rules to that effect, the execution of it.

Despite this common understanding on the principle, the discussion remained undecided regarding the envisaged role and competences of the central authorities. In its previous note, the Presidency invited delegations to reflect on whether Article 6(2), read in conjunction with the newly drafted Article 2 (b), may allow for a procedure whereby the central authority takes the decision on the execution of an EIO and orders it to be carried out by law enforcement authorities. Such procedure should not be a way of derogating from direct contacts between competent authorities. In addition, it would have to be strictly limited to cases where the specific situation regarding the separation of powers in the Member State concerned makes it impossible to designate a judge, a prosecutor or the police as the authority competent to recognise an EIO. In this respect some further clarification was provided by the UK delegation.

UK/IE/CY/MT insisted on a formulation which would not prevent them from designating a central authority as executing authority. COM/ES/FR/EL opposed such solution, while FR/ES and IT indicated a scrutiny reservation in case the text would be modified.

The Presidency understands the preoccupations of the delegations which object the proposal to extend the role of the central authorities. At the same time the Presidency notes however that a certain flexibility needs to be maintained in order for the instrument to accommodate the specificity of legal systems such as that of the "common law" Member States.

In order to accommodate the preoccupations stated by the delegations the Presidency proposes that the following sentence is added at the end of Article 2 (b):

"A central authority may be designated as an executing authority only where there is no judge, court, investigating authority or public prosecutor competent to ensure the execution of the investigative measure mentioned in the EIO in a similar national case and where it is necessary in accordance with the fundamental aspects of the criminal justice system of the Member State regarding the division of powers between the police, prosecutors and judge.⁴ The designation of a central authority should not be a way of derogating from direct contacts between competent authorities".

Further clarification would be needed to ensure that such wording would not be prejudiced by Article 6 (2).

The Presidency invites the delegations to indicate whether they can accept the new draft proposal.

4. Procedures (Article 4)

The discussion on this point continued on the basis of the positions taken by the delegations during the previous meetings and the outcome of the questionnaire submitted by the Presidency⁵. The Presidency would however like to indicate that further discussions in the Working Party, 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).

⁴ The wording is aligned with the text of Article 82(3), 83 TFEU and as applied in Article 9e of the Eurojust decision.

⁵ Doc. 13050/1/10.

5. Proportionality

During the discussions, delegations raised some concerns as regards proportionality.

In view of addressing the concerns expressed, a new provision (Article 5a) has been inserted in the text providing:

- a proportionality check by the issuing authority which should encompass the verification of the following three elements:
 - o whether the evidence sought is necessary and proportionate for the purpose of proceedings,
 - o whether the measure chosen is necessary and proportionate for the gathering of this evidence, and
 - o whether, by means of issuing the EIO, another MS should be involved in the gathering of this evidence;
- the assurance that the issuing authority would have been able to order the investigative measure mentioned in the EIO under the same conditions in a similar national case.

This new provision has been broadly supported by the delegations. Some of them however suggested to add additional provisions allowing for a proportionality check by the executing authority. In this regard, three different situations were identified during the discussions:

1. the executing authority may need to assess whether the execution of the EIO could have a disproportionate impact in the executing Member State: UK/DE gave an extensive explanation in their working document⁶ on the possible impact on executing MS resources. While recognising the potential impact on capacity and costs for the executing State, most of the Member States were not in favour of introducing a new ground for refusal based on a proportionality check. Article 11 (5) provides some flexibility for the executing authority in terms of deadlines when it is not practicable to meet them. The Presidency also would like to recall that it will organize in the near future, at appropriate level, a specific discussion on the issues of capacity and costs.

⁶ DS 1623/10

2. the executing authority may need to assess whether the measure indicated in the EIO is proportionate : Article 9 (1) (c) already provides for the possibility for the executing authority to opt for another investigative measure when the latter will have the same result as the measure provided for in the EIO by less coercive means.
3. the executing authority may need to assess whether the issuing of the EIO could have been disproportionate : this would allow the issuing authority to examine the substantive reasons which have lead to the issuing of the EIO. This would clearly infringe the principle of mutual recognition.

The Presidency invites delegations to confirm that :

- proportionality should be checked only by the issuing authority, while allowing a certain flexibility for the executing authority through Article 9 (1)(c)
- the level of control of proportionality provided in article 5a is appropriate

6. Protection of personal data

Following the discussion 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. The suggested recital could read as follows: "*Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters (OJ L 350 , 30.12.2008, p.60) applies to the transmission of personal data on the basis of an EIO, including its Article 11 on limitation of purposes for which the personal data may be further processed, and provides for an adequate level of data protection in the context of evidence transmitted between Member States.*"

The Presidency invites the delegations to agree on this new recital.

7. Automaticity/flexibility of the execution of the EIO (Articles 9 and 10)

During the discussions, some Member States asked for more flexibility for the executing authority.

In this regard, two major issues may be identified:

- double criminality and availability of the measure according to the law of the executing State
- other conditions of the law of the executing State to be fulfilled

(a) Double criminality and availability of the measure

Questions may be raised as regards the obligation to execute an EIO that relates to an offence which is not punishable under the law of the executing MS or that relates to an offence for which the measure is not available according to the law of the executing MS.

In the framework of mutual legal assistance between Member States, the 1959 Council of Europe Convention poses as a general rule that double criminality does not apply. Through declarations to the Convention, double criminality can, in principle, only be checked for the execution of search and seizure. In the Framework Decision on the European Evidence Warrant, double criminality may be checked:

- if it is necessary to carry out a search or a seizure
- unless if the EEW relates to one of the 32 listed offences, at least if these are punishable in the issuing State by a custodial sentence or a detention order for a maximum period of at least 3 years

Moreover, the MS shall ensure that measures, including search and seizure, are available for the purpose of the execution of the EEW where it is related to one of the 32 listed offences.

The original proposal on the EIO does not provide for double criminality as a general ground for refusal in Article 10. Article 9(1)(b) brings some flexibility and makes it possible for the executing authority to opt for a different type of measure than the one specified in the EIO *'when the investigative measure indicated in the EIO exists under the law of the executing State but its use is restricted to a list or a category of offences which does not include the offence covered by the EIO'*.

In the explanatory memorandum, it is stated that this case covers for example the situation where the EIO is issued in order to intercept the telecommunications of a suspect and where, in the executing State, the interception of telecommunications is available only for a list of offences which does not include the offence mentioned in the EIO. During the discussions, NL raised the attention that such a provision, in conjunction with Article 10(c), could constitute a step backwards allowing for a wide ground for refusal linked to dual criminality. Indeed, as soon as a measure is limited to a category of offences, the executing MS will firstly have to assess whether the offence concerned exists in its national law before checking whether the measure concerned may be ordered in relation to that offence. In Member States where most measures are limited to a category of offences (for examples offences punishable by a minimum penalty), Article 9(1)(b) coupled with Article 10(c) would reintroduce *de facto* a wider double criminality check than allowed under MLA.

Other Member States have asked for providing an explicit possibility for a dual criminality check.

During the meeting of 28 September, the Presidency has tabled a compromise proposal along the lines of the Framework Decision on the European Evidence Warrant, replacing Article 9(1)(b) with a new paragraph providing for the possibility for the executing authority to opt for another investigative measure than the one indicated in the EIO when:

- (i) the investigative measure indicated in the EIO is a search or a seizure;
- (ii) the offence for which the EIO is issued is not included in on of the 32 listed offences;
and
- (iii) this search or seizure is not available under the law of the executing State for the offence concerned.

This compromise proposal was supported by few delegations. Several noted that the new Article 9(1)(b) would apply only to search and seizure, while the previous version had a potentially much wider scope.

In view of finding a compromise solution to this crucial issue, the Presidency would like to ask the delegations if they can agree with the following principles:

- there should be no step backwards as regards to the existing acquis and therefore there is a need to limit the application of Art. 9(1)(a) and (b) in conjunction with Art. 10(1)(c)
- some flexibility should be given to the executing State, without allowing for a general ground for refusal. A possibility would be to distinguish three categories of measures:
 - o first category = less coercive/intrusive measures (evidence already in the possession of the executing authority, obtaining of documents, etc)⁷, for which Article 9(1)(a) and (b) in conjunction with Article 10(1)(c) would not be applicable;
 - o second category = coercive/intrusive measures (search and seizure, hearing of witnesses/suspects without consent, etc)⁸ for which Article 9(1)(a) and (b) in conjunction with Article 10(1)(c) would not be applicable, but there would be a possibility for the executing authority to check double criminality, except for the 32 listed offences⁹;
 - o third category = residual category for which Article 9(1)(a) and (b) in conjunction with Article 10(1)(c) would be applicable.

The Presidency invites the delegations to reflect on this alternative proposal.

(b) Application of other conditions of the law of the executing MS

During the discussions, some Member States have asked to insert an additional ground for refusal if the measure would not have been authorised under the law of the executing Member State.

The Presidency understands some of the concerns expressed by delegations about the necessity to comply with specific conditions imposed by their domestic legislation when executing an EIO. Italy gave the example of the prohibition, according to the Italian law, to search a lawyer's house.

⁷ To be listed.

⁸ To be listed.

⁹ It has to be noted that the most intrusive measures (such as interception of telecommunications or infiltration) would actually constitute a fourth category, as Article 27 provides for wider possibilities of refusal for those measures.

The Presidency would firstly like to refer to Article 8(1) that makes it clear that the national law of the executing Member State applies to the procedural rules for the execution. In the explanatory memorandum of the proposal, it is explicitly stated that, for example, in the case of an EIO issued for the purpose of searching a house, the modalities of the search will be governed by the law of the executing State. If the search of a house is possible at night in the issuing State, but not in the executing State, Article 8(1) makes it possible for the executing authority to carry out the measure during daytime in accordance with its own legislation.

The Presidency would also like to raise the attention on the possible consequences of inserting a wide ground for refusal when the measure would not have been authorised under the law of the executing Member State. Such a ground for refusal would not only allow the executing Member State to look at the substantive reasons for issuing the EIO, but would also give predominance to the law of the executing State, which would clearly contradict the principle of mutual recognition.

In order to obtain a clear view of the concerns of certain Member states, the Presidency reiterates its request to provide more detailed information on possible legal conditions provided by their national law that would not be safeguarded by the current text of the proposal.

**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)¹⁰ 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,

¹⁰ 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 evidence¹¹, 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 matters¹² 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.

¹¹ OJ L 196, 2.8.2003, p. 45.

¹² 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 as well as some specific forms of interception of telecommunications, for example, interception with immediate transmission and interception of satellite telecommunications. 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 Agreement¹³.
- (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.

¹³ OJ L 239, 22.9.2000, p. 19.

- (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.¹⁴
- (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).

¹⁴ OJ L 328, 15.12.2009, p. 42.

- (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.
- (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 by a competent authority¹⁵ of a Member State ("the issuing State") in order to have one or several specific investigative measure(s)¹⁶ carried out in another Member State ("the executing State") with a view to obtaining evidence within the framework of the proceedings referred to in Article 4¹⁷. 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.

¹⁵ 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, this point should be further considered once the definitions in Article 2 are decided.

¹⁶ 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.

¹⁷ DE suggested to insert the following text: "on the basis of and in accordance with the relevant national law". CZ supported this proposal and 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. [This Directive shall likewise not have the effect of requiring Member States to take any measures which conflict with their constitutional rules relating to freedom of association, freedom of the press and freedom of expression in other media.]¹⁸

Article 2

Definitions

For the purposes of this Directive¹⁹:

- a) "issuing authority" means²⁰:
- i) a judge, a court, an investigating magistrate or a public prosecutor competent in the case concerned; or
 - ii) any other judicial²¹ 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 law²²,

¹⁸ LU expressed doubts on the entire Article. BG/COM/ES/LV/NL suggested to delete the reference to constitutional rules in this Article. Some delegations (EL/DE/IT/SE) suggested that this reference could be maintained. Moreover, DE/EL/IT/FI were of the opinion that additional reference to other principles and freedoms should be added. Following the discussions, a significant number of delegations considered that a compromise solution might be the introduction of a new recital while deleting the last sentence of this paragraph. The suggested recital could follow the text incorporated in EEW Framework decision, albeit slightly amended: '*This Directive does not prevent any Member State from applying its constitutional rules, including those relating to due process, freedom of association, freedom of the press and freedom of expression in other media*'. In a written comment, DE proposed the following alternative wording for Article 1(3): '*This Directive shall likewise not have the effect of requiring Member States to take any measures which conflict with their constitutional rules relating to due (conduct of) investigation proceedings and to due process, or with their constitutional rules relating to freedom of association, freedom of the press and freedom of expression in other media.*'

¹⁹ COM proposed to insert also the definition of "investigative measure". DE suggested that also a definition for "freezing order" be included in this article.

²⁰ Reservation on substance by MT.

²¹ FI proposes the following wording in ii): '*any other competent judicial authority...*'.

²² See further point II.2 of the cover note.

b) "executing authority" shall mean an authority having competence to recognise an EIO and ensure its execution in accordance with this Directive.

Article 3

Scope of the EIO

1. The EIO shall cover any investigative measure with the exception of the measures referred to in paragraph 2.
2. The following measures shall not be covered by the EIO:
 - a) 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 Union²³ (hereinafter referred to as "the Convention") and in Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams²⁴, (...) except for the purposes of applying, respectively, Article 13(8) of the Convention and Article 1(8) of the Framework Decision;
 - [b) the interception and immediate transmission of telecommunications referred to in Articles 18(1)(a) of the Convention; and
 - c) the interception of telecommunications referred to in Article 18(1)(b) of the Convention insofar as they relate to situations referred to in Article 18(2)(a) and (c) and Article 20 of that Convention.]²⁵

²³ OJ C 197, 12.7.2000, p. 3.

²⁴ OJ L 162, 20.6.2002, p. 1.

²⁵ See point II.1 of the cover note.

Article 4

Types of procedure for which the EIO can be issued²⁶

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)²⁷ 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.

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.

²⁶ Scrutiny reservation by CZ, which suggested that points b) and c) be deleted. See point II.4 of the cover note.

²⁷ 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.

- 2.²⁸ 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 an EIO²⁹

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.

²⁸ See new Recital (14a).

²⁹ This new provision has been inserted in view of addressing some concerns, providing a proportionality check by the issuing authority which should encompass the verification of the following three elements:

- 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.

These three elements of the proportionality check could need to be mentioned in a recital. Scrutiny by PL on this Article. This reservation is linked to the general discussion on the issue of proportionality check.

CHAPTER II
PROCEDURES AND SAFEGUARDS FOR THE ISSUING STATE

Article 6

Transmission of the EIO

1. The EIO shall be transmitted in accordance with Article 5 from the issuing authority to the executing authority³⁰ 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.
- 2³¹. 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.
- 3.³² 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.

³⁰ Reference to ‘executing authority’ in this Article will need to be further examined once the definition in Article 2 (b) is agreed upon.

³¹ See further explanation provided by the Presidency under point II.3 of the cover note.

³² CZ suggested to add a following paragraph: ‘*In case of an emergency, the issuing authority may effectuate the transmission of an EIO via Interpol or any other relevant mean of transmission*’.

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 authority³³, while present in that State.

³³ Reference to ‘executing authority’ will need to be further examined once the definition in Article 2 (b) is agreed upon.

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 Article 6, 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 provided for in Article 10 or one of the grounds for postponement provided for in Article 14.
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 State³⁴.
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 participation is not contrary to the fundamental principles of law of the executing State or does not harm its essential national security interests.³⁵

³⁴ IE/DE/UK suggested to modify the last part of the sentence so that it reads as follows: "provided that they are allowed for under the domestic law of the executing state". SE/EL/NL/ES/FR/COM opposed such modification.

³⁵ Some delegations were of the opinion that the decision of the executing State to comply with the request under this paragraph should not be automatic, but rather subject to certain conditions. DE/UK suggested to refer to the domestic law, instead of the fundamental principles of law, of the executing State. Taking into account the administrative burdens, LU urges to introduce a stricter regime which would allow the executing Member State to limit or manage the number of foreign authorities present on its territory.

- 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 has been agreed between issuing and executing authorities.³⁶
4. The issuing and executing authorities may consult each other, by any appropriate means, with a view to facilitating the efficient application of this Article.

Article 9

*Recourse to a different type of investigative measure*³⁷

1. The executing authority may decide to 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;

³⁶ New wording following a suggestion made by UK. This modification aims at addressing the concerns of the Member States which opposed the previous provision that left it to the competent authorities to decide on the applicable provisions. Scrutiny reservation by LU/DE/HU on this new paragraph.

³⁷ UK/DE suggested introducing an additional point d), which could read as follows: *'the investigative measure indicated in the EIO would require the use of disproportionate resources by the executing Member State'*. This proposal was not supported by the delegations. In the opinion of the Presidency and of most of the delegations, the issues of capacity and costs should not be seen as a reason to refuse the execution of an EIO. However, a specific discussion on the issues of capacity and costs shall take place in the future. See also points II.5 and II.7(a) of the cover note.

- [b) the investigative measure indicated in the EIO exists in the law of the executing State, but its use is restricted to a list or category of offences which does not include the offence covered by the EIO,]³⁸ or
 - c) the investigative measure selected by the executing authority will have the same result as the measure provided for in the EIO by less coercive means.
2. When the executing authority decides to avail itself of the possibility referred to in paragraph 1, it shall first inform the issuing authority, which may decide to withdraw the EIO.

Article 10

*Grounds for non-recognition or non-execution*³⁹

1. 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;

³⁸ In the course of discussions, NL expressed concerns that this provision read together with the ground for refusal in Article 10 (1)(c) may give rise to double criminality check. The Presidency proposed the following text to replace this point: "*(b) In the following situation: (i) the investigative measure indicated in the EIO is a search or a seizure and, (ii) the offence for which the EIO is issued is not included in the following list [32 offences of the EAW] and; this search or seizure is not available under the law of the executing State for the offence concerned*". LT/LU/CZ/UK/EL/IT opposed this proposal. ES supported it. See also point II.7(a) of the cover note.

³⁹ Some delegations proposed insertion of other grounds for refusal in addition to doc 13822/10. FI suggested to add the following discretionary ground for refusal: "*under the law of the executing State, the suspected person cannot, because of his/her age, be held criminally responsible for the offence covered by the EIO*". In addition, DE proposed the introduction of the ground of refusal linked with 'territoriality principle' and UK/DE proposed the following ground for refusal: "*the measure provided for in the EIO would not be authorised in a similar domestic case*". The latter was supported by CZ/IT, but opposed by LT/PL. RO entered moreover a scrutiny reservation on it. CZ suggested also that there should be a possibility to refuse EIO in cases where there is of lack of information concerning the evidence.

- 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)⁴⁰ in the cases referred to in Article 9(1)(a) and (b), there is no other investigative measure available which will make it possible to achieve a similar result, or
- d) the EIO has been issued in proceedings referred to in Article 4(b) and (c) and the measure would not be authorised in a similar domestic case⁴¹.
- e)⁴² its execution would infringe (...) the *ne bis in idem* principle.

2. In the cases referred to in paragraph 1(b) and (c), 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.

⁴⁰ This point shall be further examined once issues linked to Article 9.1.b) are solved.

⁴¹ LT was in favour of being more restrictive by referring explicitly to the law of the executing State.

⁴² FR/CZ opposed to the use of the *ne bis in idem* principle as a ground for refusal of an EIO. PT proposed that this point is replaced by the following text: '*there are strong reasons to believe that its execution would infringe the ne bis in idem principle*'. UK argued that it is the proceedings – and not the execution of an EIO – which would infringe the *ne bis in idem* principle and therefore suggested the following wording: '*the proceedings to which the EIO relates would infringe the ne bis in idem principle*'.