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NOTE

From : The Presidency
To : Working Party on Cooperation in Criminal Matters
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.
- Proposals of Presidency

Delegations will find in the Annexes proposals from Presidency regarding Article 9 and Article 10 of the draft Directive.

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 case¹;

(...)

- 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 means².
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.

¹ The wording “would not be available in a similar domestic case” would need clarification, at least in a recital. It is understood that it is more restrictive than “would not be authorised in a similar domestic case” (i.e. it is only linked to legal conditions without discretionary/opportunity assessment by the executing authority).

² According to French oral proposal.

3. Where, in accordance with paragraph (1)(b), the investigative measure provided for in the EIO 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.

Article 10

Grounds for non-recognition or non-execution

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 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 EIO¹;
 - 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;
 - e) its execution would infringe the *ne bis in idem* principle.

¹ Depending on the solution to be found regarding the proposal of SE.

- 1a. Where the investigative measure indicated in the EIO concerns one of the following measures, Article 9(1) 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
 - 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 [similar domestic] criminal proceedings or for the purposes of the EIO¹;
 - d) the obtaining of information contained in databases held by police or judicial authorities and accessible by the executing authority in the framework of [a similar domestic] criminal proceedings²;
 - 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.

(insert list of 32 offences into the Annex X)

¹ To be further discussed.

² To be further discussed.

1b. 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 in any of the following cases:

(a) 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)

(b) 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.

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) and (e), 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.