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**NOTE**

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From :	Presidency
To :	delegations
Prev. doc.	15687/11 COPEN 276 EUROJUST 162 EJN 136 CODEC 1715
Subject :	Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters - Follow-up document of the meeting of the "Working Party on cooperation in criminal matters" on 14 November 2011

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**I. INTRODUCTION**

The initiative for a Directive of the European Parliament and the Council regarding the European Investigation Order in criminal matters (hereafter “the EIO”) has been presented to the Council in April 2010. At its meeting in June 2011 the Council reached a partial general approach on the main regime (Articles 1-18, and Article Y).<sup>1</sup> Some delegations maintain parliamentary scrutiny reservations on the draft Directive.

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<sup>1</sup> 11735/11 COPEN 158 EUROJUST 99 EJN 80 CODEC 1047.

At its meeting on 14 November 2011 the Working Party on Cooperation in criminal matters continued the examination of certain measures set out in Chapter IV and the final provisions set out in Chapter V of the initiative on the basis of document 16408/11 COPEN 303 EUROJUST 178 EJM 150 CODEC 1901. The Presidency maintained its invitation to delegations to submit further contributions, in writing, in respect of the examined provisions.

As a result of these discussions the Presidency introduced further modifications into the text of Chapter IV as it is set out in the Annex to this note. Specific observations made by delegations are set out in the footnotes to particular provisions. Similarly, specific observations made to Chapter V are indicated under the relevant provisions.

Articles 19-22 have been examined by the experts at the meeting of the "Friends of Presidency" on 26 October 2011. The results of this meetings are also reflected in the Articles set out in the Annex.

A number of delegations entered scrutiny reservations on specific Articles set out in Chapter IV.

## **II. CONCLUSIONS**

Delegations are invited to continue the examination of the modified provisions contained in Chapter IV and V of the draft Directive as set out in the Annex.

**CHAPTER IV**

**SPECIFIC PROVISIONS FOR**

**CERTAIN INVESTIGATIVE MEASURES**

*Article 19<sup>2</sup>*

*Temporary transfer to the issuing State of  
persons held in custody for purpose of conducting an investigative measure*

- 1.<sup>3</sup> An EIO may be issued for the temporary transfer of a person in custody in the executing State for the purpose of conducting an investigative measure<sup>4</sup> with a view to collecting evidence for which his presence on the territory of the issuing State is required, provided that he shall be sent back within the period stipulated by the executing State.

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<sup>2</sup> IT/PT entered scrutiny reservations on Articles 19 and 20. UK supported by HU proposed to merge this Article with Article 20. BL/SK/FR opposed it.

<sup>3</sup> The Presidency would like to propose the following recital with a view to further clarifying the objective pursued by this Article also in relation to the use of the EAW Framework Decision : "*This Directive sets rules on carrying out, at all stages of criminal proceedings, including the trial phase, of an investigative measure, if needed with the participation of the person with a view to collecting evidence. For example an EIO may be issued for the temporary transfer of the person to the issuing State or for carrying out of a hearing by videoconference. However, where the person is to be transferred to another Member State for the purposes of bringing that person before a court for the purpose of the standing trial an EAW should be issued in accordance with the Council Framework Decision 2002/584/JHA(...).*" DE reiterated its wish that the distinction between EIO and EAW is specified in the Article.

<sup>4</sup> EUROJUST questioned whether the hearing of witness at the trial is also included. This was confirmed by the Presidency which refers to the above-mentioned recital.

- 2.<sup>5</sup> In addition to the grounds for non-recognition or non-execution referred to in Article 10 the execution of the EIO may also be refused if:
- (a) the person in custody does not consent<sup>6</sup>; or
  - (b) the transfer is liable to prolong his detention.
- 3.<sup>7</sup> In a case under paragraph 1, transit of the person in custody through the territory of a third Member State shall be granted on application, accompanied by all necessary documents.
4. The practical arrangements regarding the temporary transfer of the person including the particularities of his custody conditions in the issuing State, and the dates by which he must be transferred from and returned to the territory of the executing State shall be agreed between the Member States concerned.
5. The transferred person shall remain in custody in the territory of the issuing State and, where applicable, in the territory of the Member State through which transit is required, for the acts or convictions for which he has been kept in custody in the executing State, unless the executing Member State applies for his release.

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<sup>5</sup> DE maintained its proposal to add the ground for refusal based on 1959 MLA Convention, namely the necessity of presence of the person at criminal proceedings pending in the executing State. The Presidency is of the opinion that this concern is covered by the ground for postponement foreseen by Article 14 (1) a) of the draft Directive. CZ supported by NL/UK/DE/IT proposed to add the same ground for non recognition or non execution as included in former Article 20(2b) in relation to the agreement on the arrangements for the transfer. CZ/FI suggested that an additional ground for refusal be added containing reference to exceptional circumstances such as i.e. serious illness of the person. The Presidency suggested that these situations should rather be covered by Article 14.

<sup>6</sup> While most of the delegations were in favour of maintaining this specific ground for non recognition or non execution, some of them questioned it. NL, supported by RO/ES/FR, proposed to make a distinction according to the status of the person in the issuing State, so that witnesses will have the possibility to refuse their consent while suspected or accused persons will not. UK opposed it.

<sup>7</sup> DE argued that a third Member States should be able to refuse transit of its own nationals.

6. The period of custody in the territory of the issuing Member State shall be deducted from the period of detention which the person concerned is or will be obliged to undergo in the territory of the executing Member State.
- 7.<sup>8</sup> Without prejudice to paragraph 5, a transferred person shall not be prosecuted or detained or subjected to any other restriction of his personal liberty in the issuing State for acts committed or convictions handed down before his departure from the territory of the executing State and which are not specified in the EIO
8. The immunity provided for in paragraph 7 shall cease when the transferred person, having had for a period of fifteen consecutive days from the date when his presence is no longer required by the issuing authorities an opportunity to leave, has nevertheless remained in the territory, or having left it, has returned.
9. Costs resulting from the application of this Article shall be borne in accordance with Article Y, except for the costs arising from the transfer of the person to and from the issuing State which shall be borne by this State.

*Article 20*

*Temporary transfer to the executing State of persons*

*held in custody for the purpose of conducting an investigative measure*

1. An EIO may be issued for the temporary transfer of a person held in custody in the issuing State for the purpose of conducting an investigative measure with a view to collecting evidence for which his presence on the territory of the executing State is required.

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<sup>8</sup> RO entered scrutiny reservation on paragraphs 7 and 8. SE/FI asked for the deletion of the last part of this paragraph, words: "and which are not specified in the EIO."

- 1a.<sup>9</sup> Before issuing the EIO the person concerned shall be given opportunity to state her opinion to the issuing authority on the temporary transfer. Where the issuing State considers it necessary in view of the person's age or physical or mental condition, that opportunity shall be given to his or her legal representative. The opinion of the person shall be taken into account when deciding to issue an EIO.
- 2.<sup>10</sup> (deleted)
3. (deleted)
4. (deleted; contained under para 5 below)
5. Paragraphs 3 to 8 of Article 19 are applicable *mutatis mutandis* to the temporary transfer under this Article.

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<sup>9</sup> UK entered a reservation arguing that the consent of the person is necessary. DE called for bringing back the original text of this Article, including the specific provision on costs. DE/CZ/LV/FI opposed this provision stating that the consent of the person should be required. Additionally DE argued that in the lack of the consent the executing State might refuse to take on the person to the prison. AT/ PT proposed to delete the second sentence of this paragraph. The Presidency explained that this Article deals with the persons who are in custody and thus "at the disposal" of the issuing authority. In response to the issue put forward by some MS that without a consent the person may not be willing to cooperate and thus the execution of the measure will be impossible, the Presidency explained that there may well be cases in which the cooperation of the person is not necessary: i.e. where the person is to be recognised by the witness in the executing State who is not in a position to travel to the issuing State. FI asked for a recital explaining this issue. FR suggested that information about the opinion of the person be sent to the executing State. The Presidency would like therefore to propose the following text of the recital: "Where the person held in custody is temporarily transferred for the purpose of carrying out of an investigative measure in the executing State it is important to take into account the opinion of that person on the temporary transfer in order not to prejudice the objective of the measure."

<sup>10</sup> DE/FR entered scrutiny reservations on the deletion of this paragraph. Also UK/CZ/BG favoured its reinsertion as well as paragraph 3. CZ/DE/BG proposed that the lack of practical arrangements be considered as a ground for non-recognition or non-execution.

- 6.<sup>11</sup> Costs resulting from the application of this Article shall be borne in accordance with Article Y, except for the costs arising from the transfer of the person to and from the executing State which shall be borne by the issuing State.

*Article 21<sup>12</sup>*

*Hearing by videoconference or other audio – visual transmission*

1. If a person is in the territory of the executing State and has to be heard as a witness or expert by the competent<sup>13</sup> authorities of the issuing State, the issuing authority may issue an EIO in order to hear the witness or expert by videoconference or other audio – visual transmission, as provided for in paragraphs 6 to 9.
- 1a.<sup>14</sup> An EIO may also be issued for the purpose of the hearing of a suspected<sup>15</sup> or accused person by videoconference or other audio - visual transmission. In addition to the grounds for non-recognition or non-execution referred to in Article 10, the execution of the EIO may also be refused if:
- a) the suspected or accused person does not consent;<sup>16</sup> or
  - b) the execution of such a measure in a particular case would be contrary to the fundamental principles of the law of the executing State.

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<sup>11</sup> FR opposed the inclusion of a provision on costs in this Article.

<sup>12</sup> Scrutiny reservation by DE. Scrutiny reservation by PT on articles 21 and 22. DE/FR/EE/PT questioned the extension of the provision to "other audio-visual transmission means".

<sup>13</sup> FR/NL/DE questioned the change of the reference to "competent authorities" in paragraph 6 of this Article.

<sup>14</sup> Scrutiny reservation by IT on this paragraph.

<sup>15</sup> FR expressed concerns about an inclusion of a reference to „suspect“.

<sup>16</sup> SE/PT questioned whether the ground for non recognition and non-execution set out under point a) is not already included under point b). ( UK/DE stated that the consent should be required also in relation to experts and witnesses.

- 1b. The practical arrangements regarding the hearing shall be agreed between the issuing and the executing authority. When agreeing such arrangements, the executing authority shall undertake to:
- (a) summon the witness or expert concerned of the time and the venue of the hearing or;
  - (b) summon the suspected or accused person to appear for the hearing in accordance with the forms laid down by its law, in such a time as to allow him to exercise his rights of defence effectively;
  - (c) ensure the identification of the person to be heard.
2. (deleted)
3. (deleted)
4. (deleted)
5. (deleted)
6. In case of a hearing by videoconference or other audio – visual transmission, the following rules shall apply:
- (a) a competent authority of the executing State shall be present during the hearing, where necessary assisted by an interpreter, and shall also be responsible for ensuring both the identification of the person to be heard and respect for the fundamental principles of the law of the executing State. If the executing authority is of the view that during the hearing the fundamental principles of the law of the executing State are being infringed, it shall immediately take the necessary measures to ensure that the hearing continues in accordance with the said principles;
  - (b) measures for the protection of the person to be heard shall be agreed, where necessary, between the competent authorities of the issuing and the executing State;



- (c) the hearing shall be conducted directly by, or under the direction of, the competent authority of the issuing State in accordance with its own laws;
- (d) at the request of the issuing State or the person to be heard, the executing State shall ensure that the person to be heard is assisted by an interpreter, if necessary;
- (e)<sup>17</sup> the person to be heard may claim the right not to testify which would accrue to him under the law of either the executing or the issuing State; the person concerned shall be informed about this right in advance of the hearing.
7. Without prejudice to any measures agreed for the protection of the persons, the executing authority shall on the conclusion of the hearing draw up minutes indicating the date and place of the hearing, the identity of the person heard, the identities and functions of all other persons in the executing State participating in the hearing, any oaths taken and the technical conditions under which the hearing took place. The document shall be forwarded by the executing authority to the issuing authority.
- 8.<sup>18</sup> (deleted)
9. Each Member State shall take the necessary measures to ensure that, where (...) the person is being heard within its territory in accordance with this Article and refuse to testify when under an obligation to testify or do not testify the truth, its national law applies in the same way as if the hearing took place in a national procedure.<sup>19</sup>

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<sup>17</sup> DE proposed to include also the right of the person to be assisted by the legal counsel. CZ also argued that the rights of the person should be further specified. NL proposed that a clear distinction is made between the cases of hearing of witness and/or expert and of suspected/accused person, as specific procedural guarantees are needed for this latter category. NL argued that the person should be notified of its rights in accordance with the law of the issuing State. In this respect, the Presidency drew the attention of delegations on the risk of pre-empting discussions on the roadmap.

<sup>18</sup> CZ/SK argued for the reintroduction of the paragraph on costs. DE entered a scrutiny reservation on the deletion of this paragraph.

<sup>19</sup> DE proposed to add the following text: "*Member States are not obliged to use coercive measures in order to carry out hearing of witness and or experts.*"

10. (moved to paragraph 1a)

Article 22<sup>20</sup>

Hearing by telephone conference

1. If a person is in the territory of one Member State and has to be heard as a witness or expert by competent authorities of another Member State, the issuing authority of the latter Member State may issue an EIO in order to hear a witness or expert by telephone conference as provided for in paragraph 4.
- 2.<sup>21</sup> (deleted)
3. (deleted)
4. Unless otherwise agreed, the provisions of Article 21(1b.), (6), (7) and (9)<sup>22</sup> shall apply *mutatis mutandis*.

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<sup>20</sup> SE reiterated its suggestion that an indication be made that the current practice or arrangements existing between Member States would not be interfered by this provision. This delegation also asked that a reference be made in this Article to "other audio transmission".

<sup>21</sup> DE opposed the deletion of this paragraph. FR/NL argued for the reinsertion of the consent of the witness or expert to be heard by that method.

<sup>22</sup> DE proposed the deletion of the reference to this paragraph.

Article 23<sup>23</sup>

*Information on bank and other financial accounts*

- 1<sup>24</sup>. An EIO may be issued in order to determine whether any natural or legal person that is the subject of the criminal proceedings<sup>25</sup> holds or controls one or more accounts, of whatever nature, in any bank located in the territory of the executing State.<sup>26</sup>
2. Each Member State shall, under the conditions set out in this Article, take the measures necessary to enable it to provide the information referred to in paragraph 1.
3. The information referred to in paragraph 1 shall also, if requested in the EIO and to the extent that it can be provided within a reasonable time,<sup>27</sup> include accounts for which the person that is the subject of the proceedings has powers of attorney.
4. The obligation set out in this Article shall apply only to the extent that the information is in the possession of the bank keeping the account.

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<sup>23</sup> FR/PT/DE/IT/LU entered scrutiny reservation on Articles 23 and 24. ES/SK entered scrutiny reservation on Article 23.

<sup>24</sup> In order to address suggestions made by some delegations to extend the scope of this provision also to persons other than suspects, the Presidency would like to propose the following text of the recital: *"An EIO may be issued in order to get evidential information concerning the accounts, of whatever nature, held in any bank or any non-banking financial institution by the person subject to criminal proceedings. This possibility is to be understood broadly as comprising not only suspected or accused persons but also any other person in respect of which such information is found necessary by the competent authorities in the course of criminal proceedings."* LU entered scrutiny reservation on this recital. UK delegation proposed to replace the text "subject to" by "linked with" in this paragraph.

<sup>25</sup> UK proposed to extend the scope of this provision to all proceedings covered by the Directive according to Article 4.

<sup>26</sup> PT/UK/FR/SK proposed to align the text with Article 1 of the 2001 Protocol by adding the following terms: *"and if so, provide all the details of the identified accounts"*.

<sup>27</sup> UK considered this indication redundant with Article 11 on time limits.

5.<sup>28</sup> (deleted)

6. The issuing authority shall state in the EIO why it considers that the requested information is likely to be of substantial value for the purpose of the criminal proceedings and on what grounds it presumes that banks in the executing State hold the account and, to the extent available, which banks may be involved. It shall also include in the EIO any information available which may facilitate its execution<sup>29</sup>.

7.<sup>30</sup> An EIO may also be issued with regard to the information provided for in paragraph 1 with reference to any non-bank financial institution located on the territory of the executing State (...). Paragraphs 3 to 6 shall apply *mutatis mutandis*. In such case and in addition to the grounds for non-recognition and non-execution referred to in Article 10, the execution of the EIO may also be refused if the execution of the measure would not be authorised in a similar national case.

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<sup>28</sup> HU/LU entered scrutiny reservations on the deletion of this paragraph.

<sup>29</sup> Some delegations considered this paragraph to be redundant and instead that this information should be contained in the EIO form.

<sup>30</sup> Scrutiny reservation by BE/ES/IT/PT/CZ. AT/ LU opposed the inclusion of this paragraph. Following discussions, the Presidency proposes to add a new recital clarifying that for the purpose of the EIO the definition of the financial institution should be understood according to the Art. 3 of the Directive 2005/60/EC. LU considered this definition too broad in the context of the present instrument. CZ/NL/FI/SK/HU/LV/UK/IT/SE favoured however this extension of the scope. CZ/SE/FI/NL/HU asked for the limitation of the additional ground for refusal.

Article 24<sup>31</sup>

*Information on banking and other financial operations*

1. An EIO may be issued in order to obtain the particulars<sup>32</sup> of specified bank accounts and of banking operations which have been carried out during a specified period through one or more accounts specified within, including the particulars of any sending or recipient account.
2. Each Member State shall, under the conditions set out in this Article, take the measures necessary to be able to provide the information referred to in paragraph 1.
3. The obligation set out in this Article shall apply only to the extent that the information is in the possession of the bank holding the account.
4. The issuing State shall indicate in the EIO why it considers the requested information relevant for the purpose of the criminal proceedings.
- 5.<sup>33</sup> An EIO may also be issued with regard to the information provided for in paragraph 1 with reference to the financial operations other than banking one. Paragraphs 3 to 4 shall apply *mutatis mutandis*. In such case and in addition to the grounds for non-recognition and non-execution referred to in Article 10, the execution of the EIO may also be refused if the execution of the measure would not be authorised in a similar national case.

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<sup>31</sup> DE/UK entered scrutiny reservation on the relationship of these provisions and Article 10.1b.

<sup>32</sup> UK proposed to supplement this provision by a following recital: 'When an EIO is issued to obtain the 'particulars' of a specified account, 'particulars' is understood to include at least the name and address of the account holder, details of any powers of attorney held over the account, and any other details or documents provided by the account holder when the account was opened and that are still held by the bank.'

<sup>33</sup> SE/FI/CZ asked for a limitation of the additional ground for refusal.

*Article 25*

*The monitoring of banking transactions*

(Moved to Article 27)

*Article 26*

*Controlled deliveries*

(Moved to Article 27)

*Article 27<sup>34</sup>*

*Investigative measures implying the gathering of evidence in real time,  
continuously and over a certain period of time*

1.<sup>35</sup> When the EIO is issued for the purpose of executing a measure implying the gathering of evidence in real time, continuously and over a certain period of time, such as:

- (a) monitoring banking or other financial operations that are being carried out through one or more specified accounts;
- (b) controlled delivery on the territory of the executing State;<sup>36</sup>
- (...)

its execution may be refused, in addition to the grounds for non-recognition and non-execution referred to in Article 10, if the execution of the measure concerned would not be authorised in a similar national case.

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<sup>34</sup> Scrutiny reservation by HU/UK on this Article.

<sup>35</sup> FI proposed to add the following specific measures to this list: "*c) technical or other surveillance; d) use of informants*". Some delegation opposed these suggestions arguing that paragraph 1 provides for an open list which is sufficiently general.

<sup>36</sup> UK suggested that the provision on controlled deliveries be further detailed.

2. The practical arrangements regarding the measure referred under paragraph 1 (b) and wherever else necessary, shall be agreed between the Member States concerned.<sup>37</sup>
3. The issuing State shall indicate in the EIO why it considers the requested information relevant for the purpose of the criminal proceedings.
4. The right to act and to direct and control operations related to the execution of an EIO referred to in paragraph 1 shall lie with the competent authorities of the executing State.

*Article 27a*<sup>38</sup>

*Covert investigations*

1. An EIO may be issued for the purpose of requesting the executing State to assist issuing State in the conduct of investigations into crime by officers acting under covert or false identity (covert investigations).
2. The issuing authority shall state in the EIO why it considers that this particular measure is likely to be relevant for the purpose of the criminal proceedings. The decision on the recognition and execution of an EIO issued under the conditions set out in this Article shall be taken in each individual case by the competent authorities of the executing State with due regard to its national law and procedures.<sup>39</sup>
3. Execution of an EIO referred to in paragraph 1 may be refused, in addition to the grounds for non-recognition and non-execution referred to in Article 10, if the execution of the measure concerned would not be authorised in a similar national case (...) or where it was not possible to reach an agreement, as set out in paragraphs 4 and 5.

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<sup>37</sup> CZ proposed that the lack of an agreement be considered as a ground for non-recognition or non-execution.

<sup>38</sup> Scrutiny reservation by UK/NL/DE/IT/FR/SE.

<sup>39</sup> AT suggested that the second sentence of this paragraph could be deleted.

4. Covert investigations shall take place in accordance with the national law and procedures of the Member State on the territory of which the covert investigation takes place. The duration of the covert investigation, the detailed conditions, and the legal status of the officers concerned during covert investigations shall be agreed between the Member States with due regard to their national law and procedures.
5. Each Member States shall cooperate to ensure that while acting as an executing State the covert investigation is prepared and supervised in the cooperation with the issuing State and that arrangements are made for the security, anonymity and integrity of the officers acting under covert or false identity.

*(New Articles 27b to 27d are not reproduced in the present document)*

**CHAPTER IV(B)**<sup>40</sup>  
**FREEZING OF EVIDENCE**

*Article 27e*

*Issuing and executing of an EIO for the purpose of freezing of evidence*

1. An EIO may be issued for the purpose of freezing of evidence. The transmission of such an EIO may be accompanied by:
  - (a) a request for the evidence to be transferred to the issuing State, or
  - (b) an instruction that the evidence shall remain in the executing State.
2. The executing authority shall decide and communicate the decision on freezing as soon as possible and, whenever practicable, within 24 hours of receipt of the EIO issued for the purpose of freezing of evidence.

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<sup>40</sup> At the meeting of the Working Party on 14 November 2011, a majority of the Member States gave preference for option B (see document 16410/11), which implied including specific provisions on freezing of evidence in the text of the draft Directive. Thus the Presidency inserted into the current text the provisions proposed preliminarily in that document and will invite the delegation to discuss Articles 27e and 27f concerning this issue.



3. Any additional coercive measures rendered necessary by the EIO issued for the purpose of freezing of evidence shall be taken in accordance with the applicable procedural rules of the executing State.
  
4. A report on the execution of the EIO issued for the purpose of freezing of evidence shall be made forthwith to the competent authority in the issuing State by any means capable of producing a written record.

*Article 27f*

*Duration of the freezing of evidence*

1. When an EIO issued for the purpose of freezing of evidence is accompanied by an instruction that the evidence shall remain in the executing State, the issuing authority shall indicate the date of lifting the freezing.
  
2. After consulting the issuing authority, the executing authority may in accordance with its national law and practices lay down appropriate conditions in the light of the circumstances of the case in order to limit the period for which the property will be frozen. If, in accordance with those conditions, it envisages lifting the freezing, it shall inform the issuing authority, which shall be given the opportunity to submit its comments.
  
3. The issuing authority shall forthwith notify the executing authority that the freezing has been lifted.

**CHAPTER V**  
**FINAL PROVISIONS**

*Article 28*

*Notifications*

1. By ...\* each Member State shall notify the Commission of the following:
  - (a) the authority or authorities which, in accordance with its internal legal order, are competent according to Article 2 (a) and (b) when this Member State is the issuing State or the executing State;
  - (b) the languages accepted for the EIO, as referred to in Article 5(2);
  - (c) the information regarding the designated central authority or authorities if the Member State wishes to make use of the possibility under Article 6(2). This information shall be binding upon the authorities of the issuing State;

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\* OJ: Please insert the date: Two years from the entry into force of this Directive.

(d) Member State may also provide the list of necessary documents it would require under Article 19(3).

2. Member States shall inform the Commission of any subsequent changes to the information referred to in paragraph 1.
3. The Commission shall make the information received in application of this Article available to all the Member States and to the European Judicial Network (EJN). The EJN shall make the information available on the website referred to in Article 9 of the Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network<sup>41</sup>.

### *Article 29*

#### *Relations to other agreements and arrangements*

- 1<sup>42</sup>. Without prejudice to their application between Member States and third States and their temporary application by virtue of Article 30, this Directive replaces, as from ..., \* the corresponding provisions of the following conventions applicable in the relationships between the Member States bound by this Directive:

European Convention on mutual legal assistance in criminal matters of 20 April 1959 as well as its two additional protocols of 17 March 1978 and 8 November 2001 and the bilateral agreements concluded pursuant to Article 26 of that Convention;

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<sup>41</sup> OJ L 348, 24.12.2008, p. 130.

<sup>42</sup> Delegations had a first exchange of views concerning the relationship between the draft Directive on EIO and the existing measures. In particular, a question was raised whether delegations would prefer to include in this Article a detailed list of specific provisions. (c.f.14445/11 COPEN 228 EUROJUST 138 CODEC 1479 EJN 116) In addition a question has been asked to the CLS regarding the possibility of applying along the EIO, after its date of implementation, other instruments in force at that date. In its answer the CLS underlined that once the date of implementation passed the EIO Directive sets a new regime between the Member States and thus the instruments which it replaces may not be applicable between the Member States anymore.

\* OJ: Please insert the date: XXXX years from the entry into force of this Directive. The date shall be further discussed.

Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985;

Convention of 29 May 2000 regarding mutual legal assistance in criminal matters between the Member States of the EU and its protocol of 16 October 2001.

2. Framework Decision 2008/978/JHA is repealed. This Directive applies between the Member States to the freezing of items of evidence in substitution for the corresponding provisions of Framework Decision 2003/577/JHA.
- 3<sup>43</sup>. Member States may continue to apply the bilateral or multilateral agreements or arrangements in force after ...\* insofar as these make it possible to go beyond the aims of this Directive and contribute to simplifying or further facilitating the evidence gathering procedures.
4. Member States may conclude bilateral or multilateral agreements and arrangements after ...\*\* insofar as these make it possible to go further into or extend the provisions of this Directive and contribute to simplifying or further facilitating the evidence gathering procedures.
5. Member States shall notify to the Commission by ...\* the existing agreements and arrangements referred to in paragraph 3 which they wish to continue to apply. The Member States shall also notify the Commission within three months of the signing of any new agreement or arrangement referred to paragraph 4.
6. If the Commission is of the view that a bilateral or multilateral agreement or arrangement notified to it does not comply with the conditions set out in paragraphs 3 and 4, it shall invite the Member States concerned to terminate, modify or refrain from concluding the agreement or arrangement in question.

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<sup>43</sup> COM has raised objections concerning the formulation of paragraphs 3 and 4 of this Article. COM argued that it may be contrary to the treaty provisions (Article 3 TFEU). CLS disagreed with this opinion indicating however that further clarification of the text may be needed in order to ascertain that the applicable regime will be set out by the EIO and the bilateral or multilateral agreements be only complementary, and that the resulting applicable regime would not forebleow standards for rights of defence as set out by this Directive.

\* OJ: Please insert the date: xxxx years from the entry into force of this Directive. The date shall be further discussed.

\*\* OJ: Please insert the date of entry into force of this Directive.

\* OJ: Please insert the date: Three months after the entry into force of this Directive.

*Article 30*

*Transitional arrangements*

1. Mutual assistance requests received before\* (...) shall continue to be governed by existing instruments relating to mutual assistance in criminal matters. Decisions to freeze evidence by virtue of Framework Decision 2003/577/JHA and received before \*\*\* (...) shall also be governed by the latter.
2. Article 7(1) is applicable *mutatis mutandis* to the EIO following a decision of freezing taken by virtue of Framework Decision 2003/577/JHA.

*Article 31*

*Transposition*

1. Member States shall take the necessary measures to comply with this Directive by ...\*.
2. When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.
- 3.<sup>44</sup> By ...\*\*, Member States shall transmit to (...) the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Directive.

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\* OJ: Please insert the date: XXX months after the entry into force of this Directive. The date shall be further discussed

\*\*\* OJ: Please insert the date: xxxx years after the entry into force of this Directive. The date shall be further discussed

\* OJ: Please insert the date: XXX years after the entry into force of this Directive. The date shall be further discussed

<sup>44</sup> This paragraph will need to be modified subject to the agreement on the explanatory documents on the transposition of directives. C.f. doc 14603/11 INST 429

\*\* OJ: Please insert the date: XXX years after the entry into force of this Directive. The date shall be further discussed

4. The Commission shall, by ...<sup>\*\*\*</sup>, submit a report to the European Parliament and to the Council, assessing the extent to which the Member States have taken the necessary measures in order to comply with this Directive, accompanied, if necessary, by legislative proposals.

*Article 32*

*Report on the application*

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

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<sup>\*\*\*</sup> OJ: Please insert the date: XXX years after the entry into force of this Directive. The date shall be further discussed

*Article 33*

*Entry into force*

This Directive shall enter into force on the twentieth day following its publication in the *Official Journal of the European Union*.

*Article 34*

*Addressees*

This Directive is addressed to the Member States in accordance with the Treaties.

Done at ...,

*For the European Parliament*

*The President*

*For the Council*

*The President*

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