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From :	Presidency
To :	delegations
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Subject :	Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters - Follow-up document of the meeting of the Working Party on 21 September 2011

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).¹ Some delegations maintain parliamentary scrutiny reservations on the draft Directive.

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

At its meeting on 21 September 2011 the Working Party on Cooperation in criminal matters carried out the second reading examination of certain measures set out in Chapter IV of the initiative on the basis of document 13224/11 COPEN 186 EUROJUST 113 EJM 92 CODEC 1277 and working documents submitted by the Netherlands, the United Kingdom and Germany and by the General Secretariat (docs: 14326/11 COPEN 224 EUROJUST 136 EJM 114 CODEC 1461, 14389/11 COPEN 226 EUROJUST 137 EJM 115 CODEC 1468 and 14445/11 COPEN 228 EUROJUST 138 EJM 116 CODEC 1479 respectively). The Presidency maintained its invitation to delegations to submit further contributions, in writing, in respect of the examined provisions.

The objective of the meeting of the experts was to carry out, on the basis of the presented written documents, the second reading of Chapter IV of the initiative. 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.

The main outstanding issues and amendments introduced into the text are set out under II below.

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

It shall be noted that experts have not, as yet, examined in detail the questions linked with interception of telecommunications. It has been agreed, as a part of partial general approach at the Council meeting on 9-10 June, that all forms of interception of telecommunications should be covered by the Directive. To this end, specific provisions should be introduced in Chapter IV. As preparatory work for the Working Party, a technical meeting between some experts of the Member States was held on 13 September 2011 with a view to assessing the current legal framework and to reflect on possible solutions. A second meeting will be held on 10 October 2011. Delegations will be fully informed of the outcome of these meetings through a separate note .

II. OUTSTANDING ISSUES

1. Chapter IV : Specific investigative measures

Chapter IV of the initiative sets out specific provisions on certain investigative measures. It is understood, that because of their specificity, or particular sensitivity, some measures, identified in Chapter IV should be subject to more detailed provisions complementary to the general rules set out under Articles 1-18 and Article Y. Furthermore, the discussions are carried out against the background that in the process of examination of the EIO the existing provisions be regarded as a benchmark and the work on the new Directive carried out in line with the principle of "droit constant". To that end the provisions of the initiative on the EIO are inspired by existing provisions² adjusted in order to correspond to the mutual recognition principle while preserving the flexibility provided for by the traditional regime of mutual legal assistance.

Moreover, the discussions regarding the grounds for non recognition or non execution were carried out against the conclusions reached on the partial general approach in respect of Articles 9 and 10.

Finally, the Presidency reaffirmed that further examination will be carried out in the future in order to clarify the relation of the EIO Directive with the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution of orders freezing property or evidence. A legislative package on this matter is expected to be presented by the Commission by the end of this year.

Below, the main outstanding issues following the meeting of the Working Party on 22 September raised in respect of specific investigative measures are set out under Articles 19 to 27 of the draft Directive.

² Various Articles of the 2000 EU MLA Convention and the 2001 EU MLA Protocol or various Articles of the 1959 Council of Europe Convention and its additional Protocols.

A. Temporary transfer to the issuing State or the executing State of persons held in custody for purpose of investigation (Articles 19 and 20)

Similar issues arose in the context of Articles 19 and 20 and to a certain extent were discussed jointly. The question of the merging the two Articles however has been put aside taking into account of the relatively different positions held by the person concerned in each provision. If at a later stage, it appears that identical solutions are deemed adequate for both Articles, the question of the merging could be brought up again.

At the Working Party the discussion focused on the question of retaining the consent of the person as a mandatory requirement. While it was felt as an essential condition for some delegations, it was perceived by the others as a possibility for the person to obstruct the proceedings held against him.

Eventually, the requirement of the consent of the person in custody was maintained in article 19. With respect to Article 20, the provision according to which the person concerned shall be consulted has been further elaborated. This latter solution should, while not providing for an additional ground for refusal allow to ensure the practical effectiveness of the EIO.

In addition, following the request of some delegations, a specific provision on costs has been reintroduced in Article 20.6. Accordingly, the general and flexible regime set out by Article Y on the costs shall be applicable except for the part of the costs resulting from the transfer of the person.

Finally, paragraph 1 of Article 19 was further amended in order to clarify the relationship between the transfer of the person for the purpose of obtaining evidence made on the basis of an EIO and the transfer based on the EAW where the person is transferred for the purpose of conducting criminal prosecution in another Member State.

B. Hearing by videoconference and telephone conference (Articles 21 and 22)

Following the meeting of the Working Party further modifications have been introduced into these Articles.

Firstly, the scope of the application of an EIO issued for the purpose of hearing a person by video-conference has been extended also to suspected persons.

Secondly, specific rules on practical arrangements have been introduced, along the lines of Article 11.4 of the 2000 MLA Convention.

Finally, it is noted that the consent of the person concerned (suspected or accused) has been retained in Article 21.

C. Information on banking and other financial institutions accounts and transactions. (Articles 23 and 24)

The revised text of Articles 23 and 24 has been generally accepted by delegations. However, a certain number of Member States had concerns in respect of the extension of the scope of these articles to the information held by financial institutions other than banks (Article 23(7) and 24(5) respectively).

The objective of these paragraphs would be to address the surveillance of money flows carried out by the financial institutions that do not have a full banking license or are not supervised by a national or international banking regulatory agency. Such financial institutions facilitate bank-related financial services, such as investment, risk pooling, contractual savings, and market brokering and may also offer all sorts of banking services, such as loans and credit facilities, private education funding, retirement planning, trading in money markets, underwriting stocks, shares and other obligations.

A number of delegations were hesitant to the inclusion of these new provisions in light of the significant administrative burden implied by the application in particular of Article 23. Among other issues they questioned the existence of the definition of financial institutions other than banks'. In this respect the Presidency would like to draw the attention of delegations to the definition contained in Article 3 of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorism financing³.

In order to address the concerns raised by some delegations in respect of the thus enlarged scope of the request, an additional ground for non-recognition or non-execution referring to the execution of the measure that would not be authorised in a similar national case has been introduced in both Article 23(7) and 24(5). This would leave sufficient discretion to the executing authority to decide on the execution of the measure.

Delegations are invited to consider again this issue.

D. Investigative measures implying gathering of evidence in real time, continuously and over a certain period of time and sensitive measures (Articles 27 and 27a)

A number of modifications were introduced into Article 27.

The reference to “covert investigations” has been removed from Article 27 and reinserted into a separate new Article 27a. Two delegations opposed the inclusion of such measure into the scope of the Directive arguing that the current legal framework provides sufficient basis for cooperation. These delegations also argued that this measure falls rather within the context of police cooperation. The majority of the delegations however supported its inclusion stating that this measure is already governed by instruments related to judicial cooperation that will be replaced by the present Directive and that there was no decisive argument to keep this measure apart.

³ *OJL 309, 25.11.2005, p. 15–36*

In order to address concerns expressed by all delegations the drafting of this new Article sets out clearly more elaborated conditions for issuing and executing an EIO requesting a covert investigation to be carried out. Its text is largely based on the existing legal framework of the 2000 MLA Convention, however, it is adapted to the context of mutual recognition. Additional rules on the execution and agreeing on the practical arrangements have been introduced. Also, the grounds for non recognition and non execution have been extended in respect of this investigative measure.

As a consequence of the above modification Article 27 has also been redrafted. The list of measures falling within the scope of this Article has been maintained as an open catalogue. Consequently the additional ground for non recognition and non execution has been. An additional provision on practical arrangements for the execution of the highly sensitive measures covered by this Article has been inserted.

2. Chapter V : Final provisions

The Presidency would also like to invite delegations to engage into examination of chapter V of the initiative, containing final provisions (Articles 28-33). These provisions provide for standard rules concerning the nomination and notification of the competent authorities, languages accepted for the purpose of an EIO, issues of consent and other obligations stemming specific provisions, as well as rules on transitional provisions, entry into force and report on implementation.

The Presidency would like to draw particular attention of the delegations to Article 29 which sets rules concerning the relationship between the EIO and other agreements and arrangements.

It has already been noted that one of the main objectives of the EIO Directive is the establishment of a single regime applicable to gathering evidence in another Member State. As a consequence, once entered into force, this Directive will replace the currently existing regimes. The drafters of the initiative have chosen to indicate that this Directive replaces “the corresponding provisions” of the instruments which are listed rather than trying to list the articles which are maintained and those which are replaced. In the context of a first exchange of views on this issue at the CATS meeting in July a number of delegations expressed some concerns as to this approach, and thus requested that a more detailed list of relevant provisions be set up. Subsequently, a note has been issued from the GSC⁴ containing in the Annex a list of provisions of currently existing legal instruments that may be affected by the setting up of cooperation mechanisms proposed by the EIO Directive.

III. CONCLUSIONS

Delegations are invited to continue the examination of the modified provisions of Articles 19-27 contained in Chapter IV of the draft Directive as set out in the Annex.

Delegations are also invited to reflect on the approach to be undertaken in respect of Article 29 as well as to bring forward their observations in respect of remaining provisions in Chapter V of the initiative.

⁴ 14445/11 COPEN 228 EUROJUST 138 CODEC 1479 EJM 116

CHAPTER IV⁵
SPECIFIC PROVISIONS FOR
CERTAIN INVESTIGATIVE MEASURES

Article 19⁶

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

- 1.⁷ 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 with a view to collecting

⁵ FI entered scrutiny reservation on entire Chapter IV.
IT/PT entered scrutiny reservation on Articles 19 and 20. UK supported by HU proposed to merge this Article with Article 20. BL/SK/FR opposed it. Presidency would like to propose a following recital with a view to further clarify the objective pursued by this Article also in relation to the use of the EAW Framework Decision. : "This Directive sets, among others, rules on the temporary transfer of the person to the issuing State for the purposes of carrying out , with the participation of the person, of an investigative measure with a view to collecting evidence. Where the person is to be transferred to another Member State for the purposes of conducting a criminal prosecution an EAW issued in accordance with the Council Framework Decision 2002/584/JHA should be applied."⁸ DE/FI/SK proposed 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.

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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.

- 2.⁸ 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 consent⁹; or
 - (b) the transfer is liable to prolong his detention.
- 3.¹⁰ 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 and the date by which he must be 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, unless the executing Member State applies for his release.
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.

⁹ 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 BE/RO, 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.

¹⁰ DE argued that a third member States should be able to refuse transfer of his own national. .

- 7.¹¹ A transferred person shall not be prosecuted or detained or subjected to any other restriction of his personal liberty for acts or convictions in the executing State which precede 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 judicial authorities an opportunity to leave, has nevertheless remained in the territory, or having left it, has returned.
- 9.¹² (deleted)

¹¹ RO entered scrutiny reservation on paragraphs 7 and 8.

¹² Few delegations (LT/BE/BL) considered that a specific provision on costs should be maintained in respect of this measure.

Article 20¹³

*Temporary transfer to the executing State of persons
held in custody for the purpose of criminal proceedings*

1. An EIO may be issued for the temporary transfer of a person held in custody in the issuing State for the purpose of criminal proceedings for which his presence on the territory of the executing State is required.
- 1a.¹⁴ 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.
- 2.¹⁵ (deleted)
3. (deleted)
4. The practical arrangements regarding the temporary transfer of the person and the date by which he must be returned to the territory of the issuing State shall be agreed between the Member States concerned.
- 5.¹⁶ Paragraphs 3 to 8 of Article 19 are applicable *mutatis mutandis* to the temporary transfer under this Article.

¹³ DE called for bringing back the original text of this Article, including the requirement of the consent of the person concerned and specific provision on costs.

¹⁴ UK/DE/CZ opposed this provision stating that the consent of the person should be required. The provision has been further elaborated with a view to clarify its aim.

¹⁵ AT/FR entered scrutiny reservation on the deletion of this paragraph. Also UK favoured its reinsertion as well as paragraph 3.

¹⁶ FI questioned the insertion of paragraph 6 in this list.

- 6.¹⁷ Costs resulting from the application of this Article shall be borne by the issuing and or executing states 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 21¹⁸

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 judicial 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.¹⁹ An EIO may also be issued for the purpose of the hearing of a suspected²⁰ 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; 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.

¹⁷ AT/BL/CZ/DE/ES/SK/SE argued for the inclusion of provision on costs.

¹⁸ PT entered scrutiny reservation on articles 21 and 22. DE/FR/EE questioned the extension of the provision to "other audio-visual transmission means". FR reiterated its wish to see the possibility of multiple video-conference be taken into account.

¹⁹ CZ opposed the inclusion of the additional grounds for non execution or non recognition contained in the paragraph. UK stated that the consent should be required also in relation to experts and witnesses.

²⁰ FR expressed concerns about an inclusion of a reference to „suspect”.

1b.²¹ 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) notify the witness or expert concerned of the time and the venue of the hearing or to 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.;
- (b) ensure the identification of the person to be heard.

2. (deleted)

3. (deleted)

4. (deleted)

5. (deleted)²²

6. In case of a hearing by videoconference or other audio – visual transmission, the following rules shall apply:

- (a) a judicial 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;

²¹ DE/UK suggested to include a requirement of the consent of the person also under this paragraph.

²² This paragraph was deleted as it was considered redundant by most delegations. However, it is noted that the EIO form should contain information on the competent authority carrying out the hearing and identification of the persons conducting the hearing.²³ CZ/SK argued for the reintroduction of this paragraph on costs. DE entered scrutiny reservation on the deletion of this paragraph.

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- (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 issuing authority 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) 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.
- 8.²³ (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.
10. (moved to paragraph 1a)

Article 22²⁴

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 judicial 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 or other audio transmission, as provided for in paragraphs 3 to 4.
- 2.²⁵ (deleted)
- 3.²⁶ (deleted)
4. Unless otherwise agreed, the provisions of Article 21(1b.), (6), (7) and (9) shall apply *mutatis mutandis*.

²⁴ Number of delegations questioned whether a separate provision on hearing by telephone is necessary. However, the Presidency is of the opinion that regarding the specificity of this measure compared to the one covered by Article 21 it is not advisable to apply the same regime towards them. NL generally opposed this provision. SE suggested that an indication be made that the current practice or arrangements existing between Member States would not be interfered by this provision.

²⁵ DE opposed the deletion of this paragraph. FR/SE argued for the reinsertion of the consent of the witness or expert to be heard by that method.

²⁶ C.F. comment to paragraph 5 of Article 21.

Article 23²⁷

Information on bank and other financial accounts

- 1²⁸. An EIO may be issued in order to determine whether any natural or legal person that is the subject of the criminal proceedings holds or controls one or more accounts, of whatever nature, in any bank located in the territory of the executing State.
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, include accounts for which the person that is the subject of the proceedings has powers of attorney.²⁹
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.
- 5.³⁰ (deleted)

²⁷ DE/IT/LU entered scrutiny reservation on Articles 23 and 24. ES entered scrutiny reservation on Article 23.

²⁸ Some delegations suggested to extend the scope of this provision also to persons other than suspects, the Presidency is however of the opinion that the text at present is general enough to cover requests concerning any person that is relevant for the criminal proceedings in as much as it would be possible under the law of the issuing state. The text has however been slightly modified to further clarify it.

²⁹ CZ questioned the meaning of this paragraph in relation to the current wording of paragraph 1 that seems already to cover persons "controlling" the account.

³⁰ HU/LU entered scrutiny reservation on deletion of this paragraph.

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]³¹.

7.³² An EIO may also be issued (...) to determine whether any non-bank financial institution located on the territory of the executing State is in possession of information on any natural or legal person that is the subject of the criminal proceedings. Paragraphs 2 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.

Article 24³³

Information on banking and other financial operations

1. An EIO may be issued in order to obtain the particulars 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.

³¹ Some delegations considered this paragraph to be redundant and instead that this information should be contained in the EIO form.

³² Scrutiny reservation by BE/ES/IT. AT/LU opposed the inclusion of this paragraph, arguing that there is no common definition of “ financial institutions other than banks”. To this end the Presidency would like to draw the attention of the delegations to the definition contained in Directive 2005/60/EC. C.f. under C in the cover note. CZ/NL/FI/SK/HU/LV/UK/IT/SE favoured however this extension of the scope. CZ/SK/SE asked for the limitation of the ground for refusal to legal conditions.

³³ UK entered scrutiny reservation on the relationship of these provisions and Article 10.1b.

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.
- 4.³⁴ The issuing State shall indicate in the EIO why it considers the requested information relevant for the purpose of the criminal proceedings.
- 5.³⁵ An EIO may also be issued with reference to the financial operations other than banking one. Paragraphs 1 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.

Article 25

The monitoring of banking transactions

(Moved to Article 27)

Article 26

Controlled deliveries

(Moved to Article 27)

³⁴ UK questioned keeping this paragraph in the text.

³⁵ C.f. footnote 31 above.

Article 27³⁶

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

- 1.³⁷ 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;³⁸
 - (b) controlled delivery on the territory of the executing State;
 - (c) (moved to Article 27a);
 - [(d) interceptions of the telecommunications on the territory of the executing State;]³⁹

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.

2. (...) Where necessary, the practical arrangements regarding the measure referred under paragraph 1 (b) shall be agreed between the Member States concerned.
- 3.⁴⁰ [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.

³⁶ Scrutiny reservation by HU/IT/DE/UK on this Article.

³⁷ Some delegations argued that the text should be further specified in order to clarify with sufficient legal certainty which measures fall within its scope. The question arose whether the list of the measures concerned should be open or closed. CZ/SK/SE supported a closed list while a majority of delegations considered that an open list of measures would be more relevant for this Article.

³⁸ Scrutiny reservation by DE/UK.

³⁹ Subject to further discussion; cf. cover note under II.D.

⁴⁰ RO/HU proposed the deletion of this paragraph.

Article 27a⁴¹

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. 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 and where it was not possible to reach an agreement, as set out in paragraphs 4 and 5.
3. 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.
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 take the necessary measures 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 of the officers acting under covert or false identity.

⁴¹ Specific provisions on this measure have been inserted following the discussions at the Working Party. UK/DE opposed the inclusion of this measure in the scope of this Directive.

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;
 - (d) the requirement of consent to the transfer from the person concerned in the case the Member State wishes to make use of the possibility provided for in Article 20(4).

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 Network⁴².

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

⁴² OJ L 348, 24.12.2008, p. 130.

Article 29

Relations to other agreements and arrangements

1. 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;

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. 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.

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

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

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

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.

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.

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

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

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

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. By ...**, Member States shall transmit to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Directive.
4. The Commission shall, by ...***, 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. The report shall be accompanied, if necessary, by proposals for amending this Directive.

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

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 ...,

<i>For the European Parliament</i>	<i>For the Council</i>
<i>The President</i>	<i>The President</i>