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From :	Presidency
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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 - Orientation debate

In the Stockholm Programme, the European Council indicated that the existing legal instruments applicable to the obtaining of evidence in another Member State in criminal matters 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.

On this basis, a group of seven Member States have presented a proposal for a Directive on the European Investigation Order in criminal matters. Discussions on this proposal have started under the Belgian Presidency in the working parties of the Council. This proposal is now submitted to the Council for a first orientation debate on some key issues.

The European Investigation Order, because of its underlying objective to end the fragmentary regime on obtaining evidence, will be an instrument which will apply the principle of mutual recognition in criminal matters to the widest range of decisions. The final text will have to achieve a general balance and to combine flexibility with legal certainty as well as protection of defence rights with efficiency of the procedure. Most of its components (issuing authority, types of procedures, grounds for refusals, time-limits, costs, form,...) are interrelated.

The guidance which the Presidency is seeking to obtain on the issues submitted to the Council will enable the Working Party to make progress keeping in mind that it is also subject to appropriate solutions to be found on other major issues. The global balance of the result will have to be considered at a later stage.

1. From mutual legal assistance to mutual recognition: non-regression as the starting point

Article 82 of the Treaty states clearly that judicial cooperation in criminal matters shall be based on the principle of mutual recognition of judgments and judicial decisions. Consequently an instrument on a European Investigation Order has to be based on that principle.

At the same time, that principle needs to be addressed taking into account the specificities and the diversity of the decisions taken at the stage of the criminal investigation.

The objective of a new instrument in that field should be to enhance and facilitate the judicial cooperation compared to the existing system. This must be achieved while protecting adequately defence rights and respecting the fundamental aspects of the criminal justice systems of the Member States. But this guiding principle to improve cooperation has to be kept in mind. Taken as a whole and in conjunction with ongoing parallel work on approximation of procedural rights, the EIO has to constitute a clear improvement, make procedures faster and give more assurance that evidence can be obtained from other Member States.

The Presidency therefore invites the delegations to agree to keep as a guiding principle for the negotiation the fact that the solutions to be found for the various aspects of the EIO can not, at the very least, result in a step backward, compared to the current system, in terms of degree of cooperation between the authorities concerned.

2. Grounds for refusal: differentiation based on the intrusiveness of investigative measures

The current regime of mutual legal assistance provides for some specific possibilities not to cooperate in a concrete case together with a wide and vague provision indicating that the assistance may be refused “*if the requested Party considers that execution of the request is likely to prejudice the sovereignty, security, ordre public or other essential interests of its country*”¹.

The evolution from mutual legal assistance to mutual recognition will not involve full automaticity in the execution of the decisions. Possibilities to refuse the execution of an EIO (“grounds for refusal”) will therefore have to be provided for. But, in defining these grounds for refusal, one should keep in mind that the insertion of a ground for refusal should be examined on the basis of its own merit and necessity with respect of the decision to be executed. In principle, cooperation between the Member States of the EU under the mutual recognition principle should be facilitated by keeping only a limited number of grounds for refusal.

After in depth discussions in the Working Party, the Presidency came to the conclusion that, given the great diversity of the measures that can be ordered in the stage of a criminal investigation, an adequate solution to this question could only be achieved through modalising the grounds for refusal depending on different categories of measures. This would ensure differentiation of the approach, according to the intrusive or coercive nature of the investigative measure. It has to be noted in that respect that the mutual legal assistance framework already provides different regimes for specific measures.

¹ Article 2(b) of the European Convention of 20 April 1959 on mutual assistance in criminal matters.

The measures would be distinguished according to the categories described below, based on the criteria of the intrusiveness or coerciveness of the measures concerned. Examples are provided as illustrations. They do not constitute an exhaustive list and will require further discussions in the Working Party.

1. A first category would cover measures which are considered as not or not very intrusive or coercive and for which the execution should be as automatic as possible. This would for example include EIO issued for the purpose of hearing witnesses on a voluntary basis or obtaining evidence that is already in the possession (e.g. in case files or in police databases) of the authorities of the executing State.
2. A second category would cover coercive/intrusive measures. This category would include some of the measures which are commonly used under current mutual legal assistance (in particular, but not only, searches and seizures). The principle of non-regression mentioned above would have to apply to these measures in particular. The fact that they exist in all Member States and in similar manner would make it possible to limit the grounds for refusal for those measures. The issue of double criminality should require further discussions in that respect.
3. For less usual measures, which could be part of the second category or could form a third category, defining grounds for refusal would need to take into account the fact that some of those measures may not always exist in all the Member States or may not apply to offences of comparable gravity, which could give rise to additional grounds for refusal.
4. A last category would concern the most intrusive measures (e.g. interceptions of telecommunications, observation, infiltration, monitoring of bank accounts, etc). All delegations agree on the fact that this Directive should have a very wide scope and cover all existing investigative measures, including those highly intrusive measures. It is generally accepted, however, that more flexibility should be left to the executing authority for these measures. That is why the current proposal gives the possibility to limit the cooperation to the situations where the measure would have been authorised in a similar domestic case.

For any of those categories, the executing authority should always have the possibility to opt for an alternative measure if it will have the same result as the one provided in the EIO by using less coercive means.

The Presidency therefore invites the delegations to agree that the differentiation between the types of investigative measures based on their coercive or intrusive nature should be further explored with a view to limiting grounds for refusal to what is strictly necessary for the measures concerned.

3. Avoiding a wide ground for refusal

Limiting the scope of grounds for refusal is a distinctive feature of mutual recognition compared to the existing regime of mutual legal assistance. Though it may be necessary to list several grounds for refusal, they should be drafted in clear terms and address specific situations.

Some delegations insisted during discussions in the Working Party on the need for a wide ground for refusal. They expressed concerns on the fact that the Directive could lead to imposing on them to execute EIOs in situations not in conformity with national law.

However, a clear majority of delegations indicated that a wide ground for refusal, drafted in general terms, would not be compatible with mutual recognition. Its effect would be that the issuing authority would never know in advance what to expect from the executing authority which would undermine legal certainty and good cooperation.

Therefore most delegations are in favour of avoiding a wide ground for refusal. Discussions in the Working Party have shown that necessary safeguards can be found via specific grounds for refusal. For example, it was argued that a general ground for refusal would be necessary to make sure that execution of an EIO to search the office of a lawyer may be refused to protect the relation between the lawyer and the suspected or accused person. This situation could be dealt with under the ground for refusal related to privileges and immunities, which could be further developed, and does not require a wide ground for refusal.

Other aspects of the instrument should also be kept in mind including, for example, the fact that a wide margin of manoeuvre is already afforded to the executing authority for the most intrusive investigative measures.

The Presidency therefore invites the delegations to agree that a wide ground for refusal should be avoided.

4. Proportionality

During the discussions, some Member States raised concerns about the fact that the issuing or execution of an EIO could not be proportionate. Based on current experience of the application of the European Arrest Warrant, these Member States underlined the importance to ensure proportionality check of any EIO. Not all Member States agreed however on the solution to be found.

Member States generally agree that proportionality should be checked by the issuing authority as it is the best placed to assess the necessity and proportionality of the issuing of an EIO. The Presidency suggested to add a new provision in this regard, which was supported by all delegations.

Some Member States underlined that proportionality should also constitute a ground for refusal for the executing authority. However, a wide majority of delegations are of the opinion that a ground for refusal based on proportionality would undermine the EU cooperation based on mutual recognition and mutual trust. They also argued that it is the issuing authority which is the best placed to make that proportionality assessment. Conferring such control to the executing authority would require it to make a substantial analysis of the case, with the additional risk of requiring extensive information from the issuing authority and delaying cooperation.

This being said, the absence of a ground for refusal based on proportionality has to be understood in the broader context of this instrument which already includes several aspects dealing indirectly with proportionality. This includes for example the fact that the executing authority will always be authorised to opt for a less intrusive measure than the one indicated in the EIO if it makes it possible to achieve similar results. It is also important to recall that, for the most intrusive measures, a wide ground for refusal will be provided which could encompass some proportionality test. Other issues, such as the issue of the costs referred to below and some of the grounds for refusal already mentioned above will also indirectly interfere with proportionality.

It also emerges from the last meetings of the Working Party that further discussion should be carried out concerning the possibility to provide additional flexibility for minor offences.

5. Costs and impact on executing State's resources

During the discussions, several delegations raised the concern of the costs of the execution of an EIO and its possible impact on the resources of the executing State, and agreed that a discussion on it was needed at the highest level.

Concerning this specific issue, some delegations consider that Member States should not be obliged to execute an EIO if such execution would require the use of disproportionate resources by the executing State. It was also suggested to link the obligation falling on the executing State to the use of resources which would be available in a similar domestic case, which is an approach followed by the proposal on the EIO with regard to time limits.

Again, the Presidency considers that the resources required to execute the EIO should not constitute a general ground for refusal as this would give excessive discretion to the executing authority and would mean that the issuing authority never knows what to expect.

As for previous issues discussed in this document, existing flexibility provided in the instrument should be kept in mind and reassure Member States on this issue. This concerns for example the possibility provided in the proposal to extend the deadlines when they are not practicable in a specific case as well as to refuse the execution of highly intrusive measures (interception of telecoms, infiltration, etc) if the measure would not be authorised in a similar domestic case.

The Presidency considers that additional solutions could also be found, for example in the sharing of costs between the issuing and executing States in circumstances which would need to be defined.

The Presidency therefore invites the delegations to agree that proportionality and costs are important issues on which it is preferable to find solutions others than a specific ground for refusal and further work is necessary in that respect to find the adequate balance.

The Council is invited to have an orientation debate and to give guidance to the Working Party on the basis of the above mentioned orientations.