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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 meetings of the Working Party on 7-8 February 2011, 8 March 2011 and 1 April 2011.

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**I. INTRODUCTION**

The Working Party on Cooperation in Criminal Matters met on 7 and 8 February 2011 and continued the examination of the initiative for a Directive on the European Investigation Order. The discussions referred to Articles 1-18 (excl Articles 8-10), as well as article 32 of the initiative and were carried out on the basis of the document 5591/11 COPEN 10 EUROJUST 9 EJN 5 CODEC 91 issued by the Presidency and working documents presented by the Polish delegation (document 6208/11 COPEN 17 EUROJUST 14 EJN 8 CODEC 178), and the Czech and Slovak delegations (ds 1070/11).

Articles 8 to 10 were intensively discussed at the meetings of the Working Party on 8 March and the JHA Counsellors on 18 March where different options were examined. Delegations examined these articles again on 1 April on the basis of the document 8036/11 COPEN 53 EUROJUST 34 EJM 24 CODEC 470 and working documents presented by delegations. Further details concerning the outcome of these discussions are set out under II below.

Several of the outstanding issues were also considered during the Belgian Presidency by CATS and the Coreper/Council were invited to give guidance on some questions as well. The Hungarian Presidency presented a state of play report in respect of the key issues to the Council on 12<sup>th</sup> April (doc. 8396/11 COPEN 57 EUROJUST 38 EJM 27 CODEC 525). As a final conclusion, the April Council took note of the progress report and instructed the Working Party to continue the discussions, taking into account the state of play, with a view to reaching a general approach within the Council.

In order to reach a general approach delegations should be open to compromise. Therefore they are invited to consider their reservations and focus on reaching an agreement as soon as possible.

In the Annex, delegations will find a revised text of Articles 1-18 of the initiative, reflecting the outcome of the above-mentioned meetings. Specific outstanding issues are set out under II below.

## **II. ISSUES SUBMITTED TO THE WORKING PARTY**

### **1. RECOGNITION AND EXECUTION**

The question of "grounds of non recognition and non execution" was extensively discussed at the last meeting of the Working Party on 1 April 2011. Number of delegations presented written drafting suggestions, in particular the United Kingdom's delegation (document 8411/11 COPEN 65 EUROJUST 46 EJM 35 CODEC 529), the Finnish delegation (document 8506/11 COPEN 71 EUROJUST 50 EJM 39 CODEC 560), the Netherlands delegation (document 8701/11 COPEN 79 EUROJUST 55 EJM 43 CODEC 594) and the German delegation (document 8555/11 COPEN 74 EUROJUST 52 EJM 41 CODEC 570).

On the basis of these discussions the text of the relevant provisions was further modified, and is set out in the Annex to this note .

Further to the present text, some delegations proposed an insertion of other grounds for non-recognition under Paragraph 1 of Article 10:

- FI/SE/LT suggested to add the following discretionary ground for non-recognition: "*under the law of the executing State, the suspected person cannot, because of his/her age, be held criminally responsible for the offence covered by the EIO*";

- In addition, UK/DE/IT proposed the following ground for non-recognition: "*the measure provided for in the EIO would not be authorised in a similar domestic case*". This proposal was supported by CZ/IT, but opposed by LT/PL.

- CZ suggested also that there should be a possibility to refuse recognition on the EIO in cases where there is of lack of information concerning the evidence, or at least the possibility to request supplementary information should be provided.

- SE pleaded for introduction on the ground for non-recognition addressing the specific problem it has in respect of investigations carried out in respect of persons linked with press.

- DE, suggested to introduce a general ground for refusal based on a possible infringement of the Fundamental Rights. FR/EL/CY opposed it.

- DE, supported by LU/UK, proposed the introduction of the ground of non-recognition linked with the 'territoriality principle'. FR/BE/IT/FI/BE/AT/EL/ES/CZ strongly opposed this suggestion.

- NL proposed the insertion of an intermediate category, which could be phrased as follows: "*Iba). Without prejudice to Paragraph 1, the execution or recognition of an EIO may not be refused where the investigative measure concerns search and seizure, and has been requested in relation to the following categories of offences, as indicated by the issuing authority in the EIO, if they are punishable in the issuing State by a custodial sentence or a detention order for a maximum period of at least three years: (insert list of 32 offences)*". Few delegations supported this proposal.

Referring to the introduction of a ground of non-recognition linked with the 'territoriality principle', the Presidency highlights that the adoption of this provision could result in that investigations concerning serious organized crime that affect two or more Member States could be impeded. Such a ground of non-recognition can lead to situations where the prosecution cannot be carried out in either of the Member States.

Concerning the use of the *ne bis in idem* principle as a ground for non-recognition of an EIO this question was not in depth explored neither in the COPEN WP meeting, nor at the JHA Counsellors' meeting. Some delegations opposed to the use of this principle as a ground for refusal. Other delegations proposed to modify the wording of the proposal. Eurojust in its opinion (doc 6814/11) expressed concerns as to the introduction of this ground for non-recognition as regards the wide interpretation of this notion by the ECJ, which may lead to differing application among the Member States. However, the Presidency believes that the reference to this principle as a ground for non-recognition is necessary in order to be consistent with the provisions (see Art. 2) of the Council Framework Decision 2009/948/JHA on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings.

Delegations are invited to examine the proposal and reflect on the questions raised above.

## **2. LEGAL REMEDIES**

The question of "legal remedies" was already discussed during the meeting on 27-28 July 2010, 11-12 January 2011 and 7-8 February 2011.

The discussions addressed two main issues. The first of them was the question of the relation between legal remedies provided for in Article 13 with the legal remedies already existing under national law. A majority of delegations were of the opinion that the directive should not be understood as imposing upon the Member States any obligation to provide more legal remedies than what is available in respect of the same investigative measures carried out in a similar national case. Secondly, the relationship between Article 13 and Articles 11 and 12 setting the time limits and Article 14 listing the grounds for postponement of recognition or execution was examined.

In order to address concerns voiced by delegations and the need to ensure a comprehensive mechanism on this issue, the Presidency proposes a new wording of Article 13.

The principal rule reflected in paragraph (1) of Article 13, is that Member States should ensure the applicability of legal remedies which already exist in their national law. This main principle is applicable both in the issuing and executing State. It is assumed that each Member State has in its law legal remedies although those remedies may differ between Member States and may apply at different stages of proceedings and also have different impact on these proceedings. It is noted also that, in the instance no legal remedy is available in the executing State, either because according to national law the person is not informed of the investigative measure being carried out, or because the investigative measure is carried out at an early stage of the procedure, it is understood that any interested party will nonetheless have the possibility to challenge the measure at least in the course of the procedure carried out in the issuing State.

Paragraph (3) of Article 13 reiterates one basic principle of the mutual recognition instruments that the substantive reasons for issuing the EIO may be challenged only in an action brought before a court in the issuing State. It is then understood that the recognition or execution of the EIO may be challenged in both the executing and issuing State. Accordingly as the rules on legal remedies stem from national law, Article 13 does not define the time limit within which a legal remedy can be applied for.

Therefore, two fundamental issues need at least to be addressed in this debate: the question of the suspension of the execution/transfer and the effect of the remedy exercised.

First, on the question of the suspension of the execution / transfer pending the outcome of a legal remedy in the executing State, it is necessary to make a distinction between different situations. Three examples, based on the moment when the person becomes aware of the execution of the investigation measure concerned, illustrate the various situations:

- The first example concerns cases where the interested party is informed prior to the actual execution of the measure and may challenge the decision to execute the measure before it is actually carried out. This may include for example taking of blood sample or compulsory hearing of a witness. In such case, the remedy will impact on whether or not the measure is executed.

In this case, it is recalled that Article 11 (4) provides already a certain margin of flexibility for the Member States allowing the measure to be executed within 90 days after the decision on the recognition and execution has been taken. Article 11 (6) also provides the possibility to postpone the execution even further.

- The second example concerns cases where the person is informed of the measure but only while or after it has been carried out. The person may therefore challenge the measure only after the EIO and the investigative measure concerned have been executed. This may include for example the search of premises where there is seizure of evidence.

In this instance, the question arises whether the transfer of the evidence should be postponed or not pending the outcome of the legal remedy. This question is not expressly addressed in the Directive and it is therefore up to national law of the executing State to decide on how to handle the question. According to Article 12 (1), the evidence has to be transferred without undue delay. However it can be reasonably argued that a pending remedy is a legitimate reason to delay the transfer if the remedy has suspensive effect under national law.

- The third example concerns cases where the person is not informed about the measure or is informed only at a later stage. This may include for example the interception of telecommunications, where, depending on the national systems concerned, the person will not be informed or will only be informed after the investigation is completed. In this case, a possible remedy will, in most cases, be exercised only after the evidence has been transferred to the issuing State and probably the remedy will be exercised in the issuing State itself.

It may however happen that the remedy will be exercised in the executing State. In this case, the question at hand is not the suspension of execution/transfer any more but the question of the effect in the issuing State of the remedy being exercised in the executing State. This specific issue is addressed in paragraph 5a.

There are two situations:

- Either the exercise of a remedy leads to the conclusion that the EIO should not have been recognised in the first place (because a ground for refusal should have been applied);

- Or the EIO should have been executed but there was some irregularity in the way the evidence was collected according to the national law of the executing State.

In both cases, the issuing authority would have to take into account the irregularity established in the executing State in accordance with its own national law.

On the basis of earlier discussions the Presidency proposed to delegations modified text of relevant Articles. The German delegation made an alternative proposal set out in document 8410/11 COPEN 64 EUROJUST 45 EJM 34 CODEC 528.

*Delegations are invited to further reflect on this issue, and, if appropriate, endorse the language contained in the Article.*

### **3. COSTS**

The Working Party meeting on 7-8 February 2011 continued the examination of the question of costs. The following principles stemming from the discussion in the Council were confirmed by the delegations as the basis for drafting: 1. disproportionate costs or lack of resources in the executing State should not be a ground for refusal for the executing authority; 2 instead other possible alternative solutions could be applied (direct communication between the competent authorities, extension of deadlines, sharing of costs, etc).

Delegations confirmed that there should be a possibility to make, in exceptional circumstances, the execution of the investigative measure subject to the condition that the costs will be borne by (or shared with) the issuing State. In this case, the issuing authority should have the possibility to withdraw the EIO.

The discussions at the last meeting were based on two drafting versions of paragraph 3 and 4 aimed at addressing the issue of costs, as well as on a proposal made by the Polish delegation (document 6208/11 COPEN 17 EUROJUST 14 EJM 8 CODEC 178). Delegations clearly expressed their preference to the second version proposed by the Presidency which constitutes the basis for the new proposal.

It should be noted also that the Article Y below will become a general rule of the Directive and that other specific provisions relating to costs (e.g. Article 20 (9) or Article 27) will be provided for in respect of particular measures.

On the basis of earlier discussions the Presidency proposed to delegations modified text of relevant Articles. The Polish delegation made a new proposal set out in document 8495/11 COPEN 70 EUROJUST 49 EJM 38 CODEC 557.

In order to facilitate the examination of the latest draft the text of Article Y, as modified, is set out below:

#### Article Y<sup>1</sup>

##### Costs

1. *Unless otherwise provided in the Directive, all costs undertaken on the territory of the executing State which are related to the execution of an EIO shall be borne by the executing State.*
2. *Where the executing authority considers that the costs for the execution of the EIO may become exceptionally high, it shall consult with the issuing authority on whether and how the costs could be shared.*

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<sup>1</sup> Scrutiny reservation entered by CZ/DE/IT/PL/MT/SK. FR proposed modifications according to which paragraph 2 should be deleted and paragraph 3 read: "*If consultations referred to in paragraph 2 cannot lead to an agreement on the division of costs, the issuing authority may withdraw the EIO.*" FI proposed instead that paragraph 3 is deleted and additional sentence is added at the end of paragraph 2 in order to read as follows: "*Notwithstanding these consultations the EIO shall be executed without delay unless the issuing state decides to withdraw or modify the EIO.*" IE proposed that paragraph 4 is deleted and additional sentence is added at the end of paragraph 3 in order to read as follows: "*the EIO shall be executed subject to the budgetary constraints of the executing authority in a manner to be determined by the executing authority.*"



3. *If consultations referred to in paragraph 2 cannot lead to an agreement on the division of cost, (...) the competent authorities should further consult with each other in order to assess whether the request could not be modified (...), spread over time or eventually completely or partially withdrawn (...). Where the issuing authority objects to the withdrawal of the EIO it shall specify its reasons to the executing authority.*

4. deleted

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**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**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION

Having regard to the Treaty on the Functioning of the European Union, and in particular  
Article 82 (1)(a)<sup>2</sup> thereof,

Having regard to the initiative of the Kingdom of Belgium, the Republic of Bulgaria,  
the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia  
and the Kingdom of Sweden,

After transmission of the draft legislative act to the national Parliaments,

Acting in accordance with the ordinary legislative procedure,

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<sup>2</sup> Question from UK/DE about the need to extend the legal basis selected for this initiative to Article 82 (1) (d).

Whereas:

- (1) The European Union has set itself the objective of maintaining and developing an area of freedom, security and justice.
- (2) According to Article 82(1) of the Treaty on the Functioning of the European Union, judicial cooperation in criminal matters in the Union is to be based on the principle of mutual recognition of judgments and judicial decisions, which is, since the Tampere European Council of 15 and 16 October 1999, commonly referred to as a cornerstone of judicial cooperation in criminal matters within the Union.
- (3) Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property and evidence<sup>3</sup>, addressed the need for immediate mutual recognition of orders to prevent the destruction, transformation, moving, transfer or disposal of evidence. However, since that instrument is restricted to the freezing phase, a freezing order needs to be accompanied by a separate request for the transfer of the evidence to the issuing state in accordance with the rules applicable to mutual assistance in criminal matters. This results in a two-step procedure detrimental to its efficiency. Moreover, this regime coexists with the traditional instruments of cooperation and is therefore seldom used in practice by the competent authorities.
- (4) Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters<sup>4</sup> was adopted to apply the principle of mutual recognition in such respect. However, the European evidence warrant is only applicable to evidence which already exists and covers therefore a limited spectrum of judicial cooperation in criminal matters with respect to evidence. Because of its limited scope, competent authorities are free to use the new regime or to use mutual legal assistance procedures which remain in any case applicable to evidence falling outside of the scope of the European evidence warrant.

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<sup>3</sup> OJ L 196, 2.8.2003, p. 45.

<sup>4</sup> OJ L 350, 30.12.2008, p. 72.

- (5) Since the adoption of Framework Decisions 2003/577/JHA and 2008/978/JHA, it has become clear that the existing framework for the gathering of evidence is too fragmented and complicated. A new approach is therefore necessary.
- (6) In the Stockholm programme, which was adopted on 11 December 2009, the European Council decided that the setting up of a comprehensive system for obtaining evidence in cases with a cross-border dimension, based on the principle of mutual recognition, should be further pursued. The European Council indicated that the existing instruments in this area constitute a fragmentary regime and that a new approach is needed, based on the principle of mutual recognition, but also taking into account the flexibility of the traditional system of mutual legal assistance. The European Council therefore called for a comprehensive system to replace all the existing instruments in this area, including the Framework Decision on the European evidence warrant, covering as far as possible all types of evidence and containing deadlines for enforcement and limiting as far as possible the grounds for refusal.
- (7) This new approach is based on a single instrument called the European Investigation Order (EIO). An EIO is to be issued for the purpose of having one or several specific investigative measure(s) carried out in the executing State with a view to gathering evidence. This includes the obtaining of evidence that is already in the possession of the executing authority.
- (8) The EIO has a horizontal scope and therefore applies to almost all investigative measures. However, some measures require specific rules which are better dealt with separately, such as the setting up of a joint investigation team and the gathering of evidence within such a team Existing instruments should continue to apply to these types of measures.
- (9) This Directive does not apply to cross-border observations as referred to in Article 40 of the Convention of 19 June 1990 implementing the Schengen Agreement<sup>5</sup>.

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<sup>5</sup> OJ L 239, 22.9.2000, p. 19.

- (10) The EIO should focus on the investigative measure which has to be carried out. The issuing authority is best placed to decide, on the basis of its knowledge of the details of the investigation concerned, which measure is to be used. However, the executing authority should have the possibility to use another type of measure either because the requested measure does not exist or is not available under its national law or because the other type of measure will achieve the same result as the measure provided for in the EIO by less coercive means.
- (10a) The EIO should be chosen where the execution of an investigative measure seems proportionate, adequate and applicable to the case in hand. The issuing authority should therefore ascertain whether the evidence sought is necessary and proportionate for the purpose of proceedings, whether the measure chosen is necessary and proportionate for the gathering of this evidence, and whether, by means of issuing the EIO, another MS should be involved in the gathering of this evidence. The execution of an EIO should not be refused on grounds other than those stated in this Directive, however the executing authority is entitled to opt for a less intrusive measure than the one indicated in an EIO if it makes it possible to achieve similar results.<sup>6</sup>
- (11) The execution of an EIO should, to the widest extent possible, and without prejudice to fundamental principles of the law of the executing State, be carried out in accordance with the formalities and procedures expressly indicated by the issuing State. The issuing authority may request that one or several authorities of the issuing State assist in the execution of the EIO in support of the competent authorities of the executing State. This possibility does not imply any law enforcement powers for the authorities of the issuing State in the territory of the executing State, unless the execution of such powers in the territory of the executing State is in accordance with the law of the executing state and has been agreed between issuing and executing authorities.
- (12) To ensure the effectiveness of judicial cooperation in criminal matters, the possibility of refusing to recognise or execute the EIO, as well as the grounds for postponing its execution, should be limited.

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<sup>6</sup> This recital has been inserted in relation to Article 5a in order to address concerns expressed by some delegations that the new provision could *de facto* provide for a hidden ground for refusal.

- (12a) The principle of *ne bis in idem* is a fundamental principle of law in the European Union. Therefore the executing authority should be entitled to refuse the execution of an EIO if its execution would be contrary to such principle. Given the preliminary nature of the proceedings underlying an EIO, this ground for refusal should only be used by the executing authority when it is firmly confirmed that the trial of the person concerned has been finally disposed of for the same facts and under the conditions set out in Article 54 of the Convention of 19 June 1990 implementing the Schengen Agreement. Such ground for refusal is without prejudice to the obligation of the executing authority to consult the issuing authority in accordance with Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings.<sup>7</sup>
- (13) Time restrictions are necessary to ensure quick, effective and consistent cooperation between the Member States in criminal matters. The decision on the recognition or execution, as well as the actual execution of the investigative measure, should be carried out with the same celerity and priority as for a similar national case. Deadlines should be provided to ensure a decision or execution within reasonable time or to meet procedural constraints in the issuing State.
- (14) The EIO provides a single regime for obtaining evidence. Additional rules are however necessary for some types of investigative measures which should be included in the EIO, such as the temporary transfer of persons held in custody, hearing by video or telephone conference, obtaining of information related to bank accounts or banking transactions or controlled deliveries. Investigative measures implying a gathering of evidence in real time, continuously and over a certain period of time are covered by the EIO, but flexibility should be given to the executing authority for these measures given the differences existing in the national laws of the Member States.

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<sup>7</sup> OJ L 328, 15.12.2009, p. 42.

- (14a) When making a declaration concerning the language regime, Member States are encouraged to include at least one language which is commonly used in the European Union other than their official language(s).
- (15) This Directive replaces Framework Decisions 2003/577/JHA and 2008/978/JHA as well as the various instruments on mutual legal assistance in criminal matters in so far as they deal with obtaining evidence for the use of proceedings in criminal matters.
- (16) Since the objective of this Directive, namely the mutual recognition of decisions taken to obtain evidence, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the action, be better achieved at the level of the Union, the Union may adopt measures in accordance with the principle of subsidiarity, as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve that objective.
- (17) This Directive respects the fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and by the Charter of Fundamental Rights of the European Union, notably Title VI thereof. Nothing in this Directive may be interpreted as prohibiting refusal to execute an EIO when there are reasons to believe, on the basis of objective elements, that the EIO has been issued for the purpose of prosecuting or punishing a person on account of his or her sex, racial or ethnic origin, religion, sexual orientation, nationality, language or political opinions, or that the person's position may be prejudiced for any of these reasons.

- (17a)<sup>8</sup> Personal data processed, when implementing this Directive, should be protected in accordance with the provisions on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters and with relevant international instruments in this field.
- (18) [In accordance with Article 3 of Protocol N° 21 on the Position of the United Kingdom and Ireland in respect of the area of Freedom, Security and Justice annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, the United Kingdom and Ireland have notified their wish to take part in the adoption of this Directive.]
- (19) In accordance with Articles 1 and 2 of Protocol N° 22 on the Position of Denmark annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application,

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<sup>8</sup> In the Opinion of the European Data Protection Supervisor (EDPS) on this initiative – which is contained in doc. 15122/10 COPEN 226 CODEC 1085 EUROJUST 113 EJM 52 – the EDPS recommends the introduction of such a recital. This new recital has been discussed at the meeting on 7-8 February 2011.



HAVE ADOPTED THIS DIRECTIVE:

**CHAPTER I**  
**THE EUROPEAN INVESTIGATION ORDER**

*Article 1*

*Definition of the European Investigation Order  
and obligation to execute it*

1. The European Investigation Order (EIO) shall be a judicial decision issued by a competent authority<sup>9</sup> of a Member State ("the issuing State") in order to have one or several specific investigative measure(s) carried out in another Member State ("the executing State") with a view to obtaining evidence in accordance with Article 8<sup>10</sup>, within the framework of the proceedings referred to in Article 4. The EIO may also be issued for obtaining evidence that is already in the possession of the competent authorities of the executing State.
2. Member States shall execute any EIO on the basis of the principle of mutual recognition and in accordance with the provisions of this Directive.

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<sup>9</sup> NL reiterates its concerns as to the use of the wording '*competent authority*' instead of '*judicial authority*', since the EIO is referred to as a judicial decision. However, the Presidency, supported by some delegations, believes that the validation procedure introduced into this Directive justifies the reference being made to "competent authorities".

<sup>10</sup> The reference to Article 8 has been inserted in order to address concerns expressed by CZ and DE. DE maintains however its proposal to insert the following text: '*on the basis of and in accordance with the relevant national law*'. Other delegations opposed to it. FR expressed some concerns about the reference to Article 8 in a provision dealing with the scope of the instrument.

3. This Directive shall not have the effect of modifying the obligation to respect the fundamental rights and legal principles as enshrined in Article 6 of the Treaty on European Union, and any obligations incumbent on judicial authorities in this respect shall remain unaffected.

## *Article 2*

### *Definitions*

For the purposes of this Directive<sup>11</sup>:

- a) "issuing authority" means:
- i)<sup>12</sup> a judge, a court, an investigating magistrate or a public prosecutor competent in the case concerned<sup>13</sup>; or
  - ii) any other competent authority as defined by the issuing State and, in the specific case, acting in its capacity as an investigating authority in criminal proceedings with competence to order the gathering of evidence in accordance with national law,
- b) "executing authority" shall mean an authority having competence to recognise an EIO and ensure its execution in accordance with this Directive.<sup>14</sup>

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<sup>11</sup> DE suggested that also a definition for 'freezing order' be included in this article.

<sup>12</sup> Reservation on substance by MT.

<sup>13</sup> FR suggested adding the words "*at a national level to order the measure described in the EIO*".

<sup>14</sup> Scrutiny reservation by DE.

*Article 3<sup>15</sup>.*

*Scope of the EIO*

1. The EIO shall cover any investigative measure with the exception of the setting up of a joint investigation team and the gathering of evidence within such a team as provided in Article 13 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union<sup>16</sup> (hereinafter referred to as "the Convention") and in Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams<sup>17</sup>, except for the purposes of applying, respectively, Article 13(8) of the Convention and Article 1(8) of the Framework Decision.

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<sup>15</sup> It is noted that the delegations have also agreed that all forms of interception of telecommunications are covered by the Directive and specific provisions will be introduced in Chapter IV. UK however indicated its preference that all forms of interception of telecommunications be kept out of the scope of the Directive as well as provision related to undercover agent. FI, supported by NL and LV, regretted that the scope does not cover all provision of the 2000 MLA convention, in particular those related to the service of document. This extension has been opposed by several delegations (IT, BE, AT, EL and DE), as the service of document is not part of getting evidence. Moreover this approach has also already been broadly endorsed at the Council meeting in December.

<sup>16</sup> OJ C 197, 12.7.2000, p. 3.

<sup>17</sup> OJ L 162, 20.6.2002, p. 1.

*Article 4*

*Types of procedure for which the EIO can be issued*<sup>18</sup>

The EIO may be issued:

- a) with respect to criminal proceedings brought by, or that may be brought before, a judicial authority in respect of a criminal offence under the national law of the issuing State;
- [b) in proceedings brought by administrative authorities in respect of acts which are punishable under the national law of the issuing state by virtue of being infringements of the rules of law and where the decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters;
- c) in proceedings brought by judicial authorities in respect of acts which are punishable under the national law of the issuing state by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters,] and
- d) in connection with proceedings referred to in points (a), [(b), and (c)] which relate to offences or infringements for which a legal person may be held liable or punished in the issuing state.

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<sup>18</sup> The discussion on this provision is not yet finalised. The Presidency would therefore like to indicate that further discussions, including with regard to Articles 9 and 10, should focus on cases referred to in Article 4(a) (criminal proceedings). Once agreement is reached on the main Articles of the Directive for cases referred to in Article 4(a), further evaluation will be necessary in order to see if the agreed solution has to be adapted with regards to cases referred to in Article 4(b), (c) and (d). Scrutiny reservation by CZ, which suggested that points b) and c) be deleted. DE, while agreeing on inclusion of administrative procedures in the scope of EIO instrument, stated that this should not imply that EIO in connection with such proceedings is issued by an administrative authority

*Article 5*  
*Content and form of the EIO*

1. The EIO set out in the form provided for in Annex A shall be completed, signed, and its content certified as accurate by the issuing authority.
2. Each Member State shall indicate the language(s) which, among the official languages of the institutions of the Union and in addition to the official language(s) of the Member State concerned, may be used for completing or translating the EIO when the State in question is the executing State.

*Article 5a*  
*Conditions for issuing and transmitting an EIO<sup>19</sup>*

1. An EIO may be issued only when the issuing authority is satisfied that the following conditions have been met:
  - (a) the issuing of the EIO is necessary and proportionate for the purpose of the proceedings referred to in Article 4; and
  - (b) the investigative measure(s) mentioned in EIO could have been ordered under the same conditions in a similar national case.<sup>20</sup>
2. These conditions shall be assessed by the issuing authority in each case.

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<sup>19</sup> C.f. new recital 10a.

<sup>20</sup> DE proposed a new condition of issuing an EIO in an additional point c) with the wording “the EIO relates to offences which have a relevant connection with the issuing state”. This new provision would be inserted in view of addressing some concerns, providing a proportionality check by the issuing authority which should encompass the verification of the following three elements:

- whether the evidence sought is necessary and proportionate for the purpose of proceedings,
- whether the measure chosen is necessary and proportionate for the gathering of this evidence, and
- whether, by means of issuing the EIO, another MS should be involved in the gathering of this evidence.

These three elements of the proportionality check could need to be mentioned in a recital.

3. Where an EIO is issued by an authority referred to in Article 2(a)(ii), the EIO shall be validated, after examination of its conformity with the conditions for issuing an EIO under this Directive<sup>21</sup>, by a judge, court, public prosecutor or investigating magistrate before it is transmitted to the executing authority.

## CHAPTER II

### PROCEDURES AND SAFEGUARDS FOR THE ISSUING STATE

#### *Article 6*

#### *Transmission of the EIO*

1. The EIO completed in accordance with Article 5 shall be transmitted from the issuing authority<sup>22</sup> to the executing authority by any means capable of producing a written record under conditions allowing the executing State to establish authenticity. All further official communication shall be made directly between the issuing authority and the executing authority.
2. Without prejudice to Article 2(b), each Member State may designate a central authority or, when its legal system so provides, more than one central authority, to assist the competent<sup>23</sup> authorities. A Member State may, if necessary as a result of the organisation of its internal judicial system, make its central authority(ies) responsible for the administrative transmission and receipt of the EIO, as well as for other official correspondence relating thereto.

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<sup>21</sup> NL and DE stated that the validating authority should also examine whether the EIO is in conformity with the national law of the issuing state. The CLS advised against such an insertion.

<sup>22</sup> FI suggested to add "or validating authority".

<sup>23</sup> SE suggested to delete the word "competent".

- 3.<sup>24</sup> If the issuing authority so wishes, transmission may be effected via the secure telecommunications system of the European Judicial Network.
4. If the executing authority is unknown, the issuing authority shall make all necessary inquiries, including via the European Judicial Network contact points, in order to obtain the information from the executing State.
5. When the authority in the executing State which receives the EIO has no competence to recognise it and to take the necessary measures for its execution, it shall, *ex officio*, transmit the EIO to the executing authority and so inform the issuing authority.
6. All difficulties concerning the transmission or authenticity of any document needed for the execution of the EIO shall be dealt with by direct contacts between the issuing and executing authorities involved or, where appropriate, with the involvement of the central authorities of the Member States.

#### *Article 7*

#### *EIO related to an earlier EIO*

1. Where the issuing authority issues an EIO which supplements an earlier EIO, it shall indicate this fact in the EIO in accordance with the form provided for in Annex A.
2. Where, in accordance with Article 8(3), the issuing authority assists in the execution of the EIO in the executing State, it may, without prejudice to notifications made under Article 28(1)(c), address an EIO which supplements the earlier EIO directly to the executing authority, while present in that State.

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<sup>24</sup> CZ suggested to add a following paragraph: *'In case of an emergency, the issuing authority may ensure the transmission of an EIO via Interpol or any other relevant mean of transmission'*. FR and ES opposed to it. In any case, the relatively broad terms used in Paragraph 1 *"by any means capable of..."* authorise already a room for flexibility in the use of the transmission channel.

**CHAPTER III**  
**PROCEDURES AND SAFEGUARDS**  
**FOR THE EXECUTING STATE**

*Article 8*

*Recognition and execution*

1. The executing authority shall recognise an EIO, transmitted in accordance with Article 6,<sup>25</sup> without any further formality being required, and ensure its execution in the same way and under the same modalities as if the investigative measure in question had been ordered by an authority of the executing State, unless that authority decides to invoke one of the grounds for non-recognition or non-execution provided for in this Directive or one of the grounds for postponement provided for in Article 14.<sup>26</sup>
2. The executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority unless otherwise provided in this Directive and provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State<sup>27</sup>.

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<sup>25</sup> SE proposed adding a reference to Article 7 (2).

<sup>26</sup> UK proposed inserting a new Paragraph 1bis setting out a principle of availability of the investigative measures. A number of delegations opposed it.

<sup>27</sup> Scrutiny reservation of DE, UK, CY and CZ pending the overall compromise on the grounds for non recognition or non execution.



3. The issuing authority may request that one or several authorities of the issuing State assist in the execution of the EIO in support to the competent authorities of the executing State to the extent that the designated authorities of the issuing State would be able to assist in the execution of the investigative measure(s) mentioned in the EIO in a similar national case. The executing authority shall comply with this request provided that such assistance is not contrary to the fundamental principles of law of the executing State or does not harm its essential national security interests.
- 3a. The authorities of the issuing State present in the executing State shall be bound by the law of the executing State during the execution of the EIO. They shall not have any law enforcement powers in the territory of the executing State, unless the execution of such powers in the territory of the executing State is in accordance with the law of the executing State and has been agreed between issuing and executing authorities. [The executing authority may set conditions as to the scope and nature of the attendance of the authorities of the issuing State.<sup>28</sup>]
4. The issuing and executing authorities may consult each other, by any appropriate means, with a view to facilitating the efficient application of this Article.

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<sup>28</sup> Modification introduced following the suggestion made by LU. SK/NL/IT/FR opposed this addition. Secondly, LU proposed to insert a new paragraph 3b: "*The presence of the authorities of the issuing State shall not result in facts being divulged to persons other than those authorised by virtue of the preceding paragraphs in breach of judicial confidentiality or the rights of the person concerned. The information brought to the knowledge of the issuing State may not be used as evidence until the transfer of evidence has taken place in accordance with Article 12.*" Majority of delegations opposed the insertion of such a recital. Eurojust advises against the insertion of Paragraph 3b which may impede the cooperation in practice. Some delegations were however favourable to insertion of such wording in the Preamble.

## Article 9

### Recourse to a different type of investigative measure

1. The executing authority may<sup>29</sup> decide to have recourse to an investigative measure other than that provided for in the EIO when:
  - a) [the investigative measure indicated in the EIO does not exist under the law of the executing State, or;]
  - b) (...)
  - c) the investigative measure selected by the executing authority will have the same result as the measure provided for in the EIO by less intrusive means .
2. When the executing authority decides to avail itself of the possibility referred to in paragraph 1, it shall first inform the issuing authority, which may decide to withdraw the EIO.

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<sup>29</sup> UK, supported by CY, proposed replacing "may decide to" by the following words "*must, wherever possible,*", adding a new point b) worded as follows: "*b) the investigative measure indicated in the EIO would not be available in a similar domestic case, or*", as well as a new Paragraph 3 as follows: "*3. Where, in accordance with paragraph (1)(a) or (b), the investigative measure provided for in the EIO does not exist in the law of the executing State or would not be available in a similar domestic case, and where there is no other investigative measure which would have the same result as the measure requested, the executing authority must notify the issuing authority that it has not been possible to [provide the assistance requested]*". Consequently, UK proposed to delete Paragraph 1a (b) and (c). IT, SE, BL, DE, EL, RO entered a scrutiny reservation. LT expressed concerns about the interpretation of the word "*available*".

Article 10<sup>30</sup>

*Grounds for non-recognition or non-execution*

1. Recognition or execution of an EIO may be refused in the executing State where<sup>31</sup>:
  - a) there is an immunity or a privilege under the law of the executing State which makes it impossible to execute the EIO<sup>32</sup>;

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<sup>30</sup> Scrutiny reservation by a number of delegations on this new draft. Some delegations suggested that additional grounds for non-recognition are inserted into this provision. C.f. under II on the cover note. In respect of the structure of this Article, SK, supported by BE, FR/SE/EL/EE and SV proposed to switch Paragraph 1a and 1b, so to make the order of the paragraphs more logic. However, Presidency believes that the working method should be to focus on the provisions first, and the possible change of the order of paragraphs afterwards. Some delegations also suggested that when the list of ground for non recognition is considered attention should be given to the opinion of the Fundamental Rights Agency

<sup>31</sup> DE suggested that a new point f) is added making a ground for non-recognition related to territoriality: NL and IE could accept it if was limited to the situations where there was a lack of dual criminality. UK suggested as a compromise to limit the scope of the ground for refusal to situations when the issuing State is exercising extraterritorial jurisdiction, the use of a coercive measure is required and there is a lack of dual criminality. However, FR/BE/IT/FI/BE/AT/EL/ES/CZ strongly opposed the inclusion of the ground for non recognition based on "territoriality".

<sup>32</sup> SE maintained its proposal that this point be modified in order to address its specific institutional concerns. The proposed text could read as follows: "*under the law of the executing State, there is an immunity or a privilege or there are rules on determination and limitation of criminal liability relating to freedom of the press and freedom of expression in other media, which would make it impossible to execute the EIO.*" SE requested that this text be accompanied by the following recital: "*This directive shall not have the effect of requiring Member States to take any measures which conflict with their [constitutional] rules relating, amongst others, to freedom of association, freedom of the press and freedom of expression in other media*". BE/AT/LT supported the SE plea for a specific ground for refusal related to the specific rules existing in SE in relation to freedom of the press. IT/FR/CZ/SK/EL/DE/NL/BL opposed it however, indicating that an inclusion of such provision may bring the risk of setting up a hierarchy of fundamental rights and constitutional freedoms. Therefore, some of these delegations(AT/FR/SK/DE/EL) suggested that instead a recital on the model of recital 17 of the EEW is inserted into the preamble of this instrument. It needs to be noted that almost all delegations opposed the inclusion of the recital proposed by SE. Also CLS advised against the recital in suggested wording.

- b) in a specific case, its execution would harm essential national security interests, jeopardise the source of the information or involve the use of classified information relating to specific intelligence activities;
- c) (...)
- d)<sup>33</sup>; [the EIO has been issued in proceedings referred to in Article 4(b) and (c) and the measure would not be authorised in a similar domestic case]
- e)<sup>34</sup> its execution would infringe the *ne bis in idem* principle.

1a. Without prejudice to paragraph (1) where the investigative measure indicated by the issuing authority in the EIO concerns a coercive measure<sup>35</sup> the recognition or execution of the measure may also be refused in any of the following cases:

- a) if the conduct for which the EIO has been issued does not constitute an offence under the law of the executing State, or;
- b) if the measure concerned could not have been authorised in the executing State in a similar domestic case, or;
- c) if the measure does not exist under the law of the executing State and there is no other measure that will have the same result in accordance with Article 9, or;
- d) if the measure exists under the law of the executing State, but its use is restricted to a list or category of offences or to offences punishable by a certain threshold, which does not include the offence covered by the EIO.

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<sup>33</sup> This point will be examined latter on.

<sup>34</sup> FR/CZ/IT/AT/BL/SK opposed the use of the *ne bis in idem* principle as a ground for refusal of an EIO. LT/NL/ FI/RO/EL/ supported it. C.f. under point II of the cover note. ..

<sup>35</sup> According to COM, the terms "coercive measure" should be defined. However, the Presidency would like to indicate that a form of "negative definition" for the purposes of this instrument, is set out in paragraph 1b of this article.

- 1b.<sup>36</sup> Where the investigative measure indicated in the EIO concerns one of the following measures, the recognition or execution of the EIO can only be refused in cases referred to in paragraph 1:
- a)<sup>37</sup> the hearing of a witness, victim, suspect or third party in the territory of the executing State or
  - b) a non-coercive investigative measure, including at least:
    - i) the obtaining of information or evidence which is already in the possession of the executing authority and in accordance with the law of the executing State, that evidence could have been obtained in the framework of [similar domestic] criminal proceedings or for the purposes of the EIO;<sup>38</sup>;
    - ii)<sup>39</sup> the obtaining of information contained in databases held by police or judicial authorities and accessible by the executing authority in the framework of [a similar domestic]<sup>40</sup> criminal proceedings;
    - iii) the identification of persons holding a subscription of a specified phone number or IP address.

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<sup>36</sup> C.f. also proposal made by UK as set out in 8411/11 COPEN 65 EUROJUST 46 EJM 35 CODEC 529

<sup>37</sup> LT asked whether all kind of hearings are to be covered by this indent (with and without coercion). According to UK, hearing conducted through videoconference should also be covered.

<sup>38</sup> New text based on the proposal made by UK (in the document no. in 8411/11 COPEN 65 EUROJUST 46 EJM 35 CODEC 529)

<sup>39</sup> Scrutiny reservation by AT and SE.

<sup>40</sup> Modifications made on the basis of the proposal of UK (in the document no. in 8411/11 COPEN 65 EUROJUST 46 EJM 35 CODEC 529)

1c.<sup>41</sup> Without prejudice to paragraph (1), the execution or recognition of an EIO may not be refused in the cases provided for in paragraph 1a (a) and (b), where the investigative measure has been requested in relation to the following categories of offences, as indicated by the issuing authority in the EIO, if they are punishable in the issuing State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of that State, and they shall not be subject to verification of double criminality under any circumstances:

*[insert list of 32 offences in accordance with Article 2(2) of the Framework Decision on the European Arrest Warrant]*

2. In the cases referred to in paragraph 1(a), (b) and (e), before deciding not to recognise or not to execute an EIO, either totally or in part, the executing authority shall consult the issuing authority, by any appropriate means, and shall, where appropriate, ask it to supply any necessary information without delay.

3<sup>42</sup>. [In the case referred to in paragraph 1(a) and where power to waive the privilege or immunity lies with an authority of the executing Member State, the executing authority shall request it to exercise that power forthwith. Where power to waive the privilege or immunity lies with an authority of another State or international organisation, it shall be for the issuing authority to request it to exercise that power. ]

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<sup>41</sup> LT, supported by DE, proposed the deletion of Paragraph 1c. FI proposed to remove Paragraph 1c dealing with the dual criminality issue in a separate Article. BE opposed this proposal as it would have the effect to unbalance the proposed compromise also in relation to Paragraph 1a (b) (similar domestic case).

<sup>42</sup> Scrutiny reservation by DE .

## Article 11

### Deadlines for recognition or execution

1. The decision on the recognition or execution shall be taken and the investigative measure shall be carried out with the same celerity and priority as for a similar national case<sup>43</sup> and, in any case, within the deadlines provided in this Article.
2. Where the issuing authority has indicated in the EIO that, due to procedural deadlines, the seriousness of the offence or other particularly urgent circumstances, a shorter deadline than those provided in this Article is necessary, or if the issuing authority has stated in the EIO that the investigative measure must be carried out on a specific date, the executing authority shall take as full account as possible of this requirement.
3. The decision on the recognition or execution shall be taken as soon as possible and, without prejudice to paragraph 5, no later than 30<sup>44</sup> days after the receipt of the EIO by the competent executing authority.
4. Unless either grounds for postponement under Article 14 exist or evidence mentioned in the investigative measure covered by the EIO is already in the possession of the executing State<sup>45</sup>, the executing authority shall carry out the investigative measure without delay and without prejudice to paragraph 5, no later than 90 days after the decision referred to in paragraph 3.

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<sup>43</sup> UK expressed some concerns about the use of the terms "as for a similar national case" (e.g. in the absence of dual criminality) and suggested to limit the application of deadlines in instances where the dual criminality has been established. This proposal was opposed by several delegations.

<sup>44</sup> All delegations supported the inclusion of deadlines for the decision on recognition or execution of an EIO. No delegation considered the deadlines to be too short, to the contrary some delegations pleaded for even shorter time limits. Some delegations proposed the introduction of the terminology "urgent cases", where the deadlines would be shorter, however the Presidency believes that the expression "no longer than" allows a shorter deadline for executing. FI suggested to differentiate the deadlines according to different categories of investigative measures.

<sup>45</sup> FI suggested to specify that in the case the evidence is already in the possession of the executing State, it should be immediately transferred. This concern is however already addressed by Article 12 (1).

5. When it is not practicable in a specific case for the competent executing authority to meet the deadline set out in paragraph 3 or on a specific date set out in paragraph 2, it shall without delay inform the competent authority of the issuing State by any means, giving the reasons for the delay and the estimated time needed for the decision to be taken. In this case, the time limit laid down in paragraph 3 may be extended by a maximum of 30 days.
6. When it is not practicable in a specific case for the competent executing authority to meet the deadline set out in paragraph 4, it shall without delay inform the competent authority of the issuing State by any means, giving the reasons for the delay and it shall consult with the executing authority on the appropriate timing to carry out the measure.

## Article 12

### Transfer of evidence

1. The executing authority shall without undue delay transfer the evidence obtained or already in the possession of the competent authorities of the executing State as a result of the execution of the EIO to the issuing State. Where requested in the EIO and if possible under national law of the executing State, the evidence shall be immediately transferred to the competent authorities of the issuing State assisting in the execution of the EIO in accordance with Article 8(3).
2. When transferring the evidence obtained, the executing authority shall indicate whether it requires it to be returned to the executing State as soon as it is no longer required in the issuing State.<sup>46</sup>

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<sup>46</sup> Paragraph 2 of the initiative has been reintroduced following a suggestion made by DE.



3. Where the objects, documents, or data concerned are already relevant for other proceedings the executing authority may, at the explicit request and after consultations with the issuing authority temporarily transfer the evidence under the condition that it be returned to the executing State as soon as they are no longer required in the issuing State or at any other time/occasion agreed between the competent authorities.

### Article 13

#### Legal remedies

1. Member States shall (...) ensure that any interested party may avail himself of the same legal remedies as those available in a domestic case against the investigative measure concerned, in order to preserve their legitimate interests.
2. (...)
3. The substantive reasons for issuing the EIO may be challenged only in an action brought before a court in the issuing State.
4. (...)
5. (...)
- 5a. In case the evidence has already been transferred and the recognition or execution of an EIO has been successfully challenged in the executing State, this decision will be taken into account in the issuing State in accordance with its own national law.
6. (...).
7. (...)

## Article 14

### Grounds for postponement of recognition or execution

1. (...) The recognition or execution of the EIO may be postponed in the executing State where:
  - a) its execution might prejudice an ongoing criminal investigation or prosecution until such time as the executing State deems reasonable;
  - b) the objects, documents, or data concerned are already being used in other proceedings until such time as they are no longer required for this purpose; or
  - c) (...).
2. As soon as the ground for postponement has ceased to exist, the executing authority shall forthwith take the necessary measures for the execution of the EIO and inform the issuing authority thereof by any means capable of producing a written record.

## Article 15<sup>47</sup>

### Obligation to inform

1. The competent authority in the executing State which receives the EIO shall, without delay and in any case within a week of the reception of an EIO, acknowledge this reception by filling in and sending the form provided in Annex B. Where a central authority has been designated in accordance with Article 6(2), this obligation is applicable [both to the central authority and]<sup>48</sup> to the executing authority which receives the EIO via the central authority. In cases referred to in Article 6(5), this obligation applies both to the competent authority which initially received the EIO and to the executing authority to which the EIO is finally transmitted.

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<sup>47</sup> DE, supported by RO, proposed that deadline set in paragraph 1 is prolonged to 2 weeks.

<sup>48</sup> FR wants to maintain the reference to the central authority. RO opposed it.

2.<sup>49</sup> Without prejudice to Article 9(2) (...), the executing authority shall inform the issuing authority:

(a) immediately by any means:

(i) if it is impossible for the executing authority to take a decision on the recognition or execution due to the fact that the form provided for in the Annex is incomplete or manifestly incorrect;

(ii) if the executing authority, in the course of the execution of the EIO, considers without further enquiries that it may be appropriate to undertake investigative measures not initially foreseen, or which could not be specified when the EIO was issued, in order to enable the issuing authority to take further action in the specific case;

(iii) if the executing authority establishes that, in the specific case, it cannot comply with formalities and procedures expressly indicated by the issuing authority in accordance with Article 8.

Upon request by the issuing authority, the information shall be confirmed without delay by any means capable of producing a written record;

(b) without delay by any means capable of producing a written record:

(i) of any decision taken in accordance with Article 10(1);

(ii) of the postponement of the execution or recognition of the EIO, the underlying reasons and, if possible, the expected duration of the postponement.

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<sup>49</sup> Number of delegations were of the opinion that the provision of information under this article may make the procedure too cumbersome and cause too much of red tape for the executing authorities. these delegations suggested that the scope of information to be provided be reduced. However, in the opinion of the Presidency all information which is listed under this paragraph would logically be provided by the executing authority in order to effectively execute the EIO. CZ suggested to merge a) and b).

## Article 16<sup>50</sup>

### Criminal liability regarding officials

When present in the territory of the executing State in the framework of the application of this Directive, officials from the issuing State shall be regarded as officials of the executing State with respect of offences committed against them or by them.

## Article 17

### Civil liability regarding officials

1. Where, in the framework of the application of this Directive, officials of the issuing State are present in the territory of the executing State, the issuing State shall be liable for any damage caused by them during their operations, in accordance with the law of the executing State.
2. The Member State in whose territory the damage referred to in paragraph 1 was caused shall make good such damage under the conditions applicable to damage caused by its own officials.
3. The Member State whose officials have caused damage to any person in the territory of another Member State shall reimburse the latter in full any sums it has paid to the victims or persons entitled on their behalf.
4. Without prejudice to the exercise of its rights vis-à-vis third parties and with the exception of paragraph 3, each Member State shall refrain in the case provided for in paragraph 1 from requesting reimbursement of damages it has sustained from another Member State.

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<sup>50</sup> Scrutiny reservation entered by DE on Articles 16 and 17.

Article 18  
Confidentiality

1. Each Member State shall take the necessary measures to ensure that the issuing and executing authorities take due account, in the execution of an EIO, of the confidentiality of the investigation.
2. The executing authority shall, in accordance with its national law, guarantee the confidentiality of the facts and substance of the EIO, except to the extent necessary to execute the investigative measure. If the executing authority cannot comply with the requirement of confidentiality, it shall without delay notify the issuing authority.

(...)<sup>51</sup>

3. The issuing authority shall, in accordance with its national law and unless otherwise indicated by the executing authority, keep confidential any evidence and information provided by the executing authority, except to the extent that its disclosure is necessary for the investigations or proceedings described in the EIO.

4. Each Member State shall take the necessary measure to ensure that banks do not disclose to the bank customer concerned or to other third persons that information has been transmitted to the issuing State in accordance with Articles 23, 24 and 25 or that an investigation is being carried out.

*(Articles 19 to 31 are not reproduced in the present document)*

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<sup>51</sup> The proposal for a new paragraph 2bis has been rejected by delegations. See new recital 17a.

## Article 32

No later than five years after the date of entry into force of this Directive, the Commission shall submit 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 (...).<sup>52</sup> The report shall be accompanied, if necessary, by proposals for amending this Directive.

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<sup>52</sup> Following suggestions made by the European Data Protection Supervisor (EDPS), the Presidency proposed to delegations modifications to the evaluation clause in particular with regard to the impact of the Directive on protection of personal data. This proposal could not be accepted by delegations arguing that all fundamental rights should be part of the evaluation and there was no need to mention specifically data protection. The text has been modified accordingly.