



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 8 November 2011

16410/11

**Interinstitutional File:
2010/0817 (COD)**

LIMITE

**COPEN 305
EUROJUST 180
EJN 152
CODEC 1903**

NOTE

From :	Presidency
To :	delegations
Prev. doc.	15687/11 COPEN 276 EUROJUST 162 EJN 136 CODEC 1715
Subject :	Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters - Freezing of evidence

1. At the meeting of the JHA Council in December 2010 the Council concluded that the EIO instrument should cover all investigative measures aimed at the obtaining of evidence, the only exception being the joint investigation teams which benefit from a specific regime in the EU.
2. At the Council meeting on 9/10 June 2011, it was confirmed that the new instrument should cover all investigative measures aimed at obtaining evidence.

3. In addition, CATS at its meeting on 22 June 2011 was invited to express their opinion on the need to replace the Framework Decision 2003/577/JHA on the execution of orders freezing property or evidence in its entirety and thus enlarging the scope of the proposal to measures aimed at freezing of assets in view of their confiscation. The views of the delegations differed in this respect, and the Commission and the Council Legal Service appealed to the Member States to carefully weight pros and cons of such inclusion. Some delegations also recalled that the draft Directive only covers investigative measures aimed at gathering evidence. On the basis of this discussion, CATS concluded that the examination should be continued in order to clarify the relation of the EIO with the Council Framework Decision 2003/577/JHA.
4. During the upcoming Working Party meeting on 14 November 2011, the Presidency would like to hold a discussion on the freezing of evidence and to gather the Member States' opinion on this issue. The Presidency will consider presenting the outcome of this discussion to CATS.
5. Delegations are invited to reflect on the following advantages and disadvantages of the inclusion of the issue of freezing of evidence into the scope of the EIO Directive.

Option A – It is assumed that the issue of freezing of evidence is already covered by the current draft EIO Directive. According to Article 29.2. 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. This would mean that the freezing of evidence already falls within the scope of the EIO Directive as it stands. The modalities of the freezing procedure, such as those relating to the urgency of execution of the EIO would remain regulated by the existing provisions (e.g. Article 11.2 gives the possibility to shorten deadlines in specific cases, subject to discretionary decision of the competent authority). Thus, no additional modifications would be necessary as regards freezing of evidence.

Option B – This option would assume the inclusion of specific provisions addressing the freezing of evidence under the EIO Directive. The new provisions would ensure that the EIO Directive maintains the current procedural standards of freezing of evidence as set up in the Framework Decision 2003/577/JHA on freezing orders. In particular, it foresees strict deadlines for the execution of freezing (24 hours) and other specific modalities, which ensure the proper course of freezing procedure and which are not dependent on discretionary decisions of the authorities involved.

Should this option be given preference, the Presidency has prepared draft provisions covering freezing of evidence (see below).

The draft was based on the relevant provisions of the Framework Decision 2003/577/JHA, with necessary modifications. It provides for two possibilities of an EIO issued for the purpose of freezing of evidence, whereby the first one would be accompanied by a request for the evidence to be transferred to the issuing State and the other one would comprise an instruction that the evidence shall remain in the executing State (e.g. where the transfer of evidence would appear too cumbersome or costly). The draft includes some specific provisions relating exclusively to an EIO issued for the purpose of freezing of evidence (tighter deadlines for execution, duration of freezing) whilst the general rules on the EIO procedure set up in Chapters I-III (e.g. grounds for refusal, transfer of evidence) would remain applicable also to freezing of evidence.

Option C – Whilst options A and B do not assume the inclusion of freezing of assets with a view to confiscation, this option would cover both freezing of evidence and freezing of assets. This would, however, entail the necessity to enlarge the scope of the EIO Directive, compared to the present Article 1, which provides that this Directive aims only at obtaining evidence (and does not purport to procedures leading to confiscation of the proceeds of crime). This option could also have a bearing on the future Commission’s package on confiscation, where regulations concerning freezing of assets with a view to confiscation are planned as a part of the general framework targeted at handling the proceeds of crime. In this context, Eurojust noted in its opinion (doc. 6814/11) that it might be difficult in practice to distinguish between evidence, instruments and proceeds of crime as the same asset could be classified under all these categories. However, the Presidency is of the view that such situations would not be a daily practice of the investigative authorities since in most cases of transnational cooperation (e.g. financial crime, corruption, child pornography) the evidence can be easily distinguished from the proceeds of crime. In case the practitioners are unable to make this distinction at an early stage, the viable solution would be to request freezing of evidence on the basis of the EIO Directive, which would allow for more time to make a subsequent request, if it turns out necessary, with a view to confiscation on the basis of the relevant instrument.

6. Against this background, the Presidency would like to request the delegations to give their preference on one of the 3 options referred to above.

Option B – proposed provisions
Chapter IV(b)
FREEZING OF EVIDENCE

Article 27e
Issuing and executing of an EIO

1. An EIO may be issued for the purpose of freezing of evidence. The transmission of such an EIO may be accompanied by:
 - (a) a request for the evidence to be transferred to the issuing State, or
 - (b) an instruction that the evidence shall remain in the executing State.
2. The executing authority shall decide and communicate the decision on freezing as soon as possible and, whenever practicable, within 24 hours of receipt of the EIO issued for the purpose of freezing of evidence.
3. Any additional coercive measures rendered necessary by the EIO issued for the purpose of freezing of evidence shall be taken in accordance with the applicable procedural rules of the executing State.
4. A report on the execution of the EIO issued for the purpose of freezing of evidence shall be made forthwith to the competent authority in the issuing State by any means capable of producing a written record.

Article 27f

Duration of the freezing

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