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NOTE

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 - Explanatory Memorandum

Delegations will find attached an Explanatory Memorandum relating to the initiative by a group of Member States for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters

Proposal for a

Directive of the European Parliament and the Council

regarding the European Investigation Order in criminal matters

EXPLANATORY MEMORANDUM

The objective of the proposed Directive is to create a single, efficient and flexible instrument for obtaining evidence located in another Member State in the framework of criminal proceedings.

In the current situation, judicial authorities have to use two different regimes: mutual legal assistance, on the one hand, and mutual recognition, on the other hand. The first regime gave rise to numerous conventions and protocols [1]. It may be used for all cases, irrespective of the type of investigative measure or the type of evidence concerned. Mutual recognition, on the other hand, may be used only for the parts which are covered by one of the instruments currently adopted. Two mutual recognition instruments applicable to obtaining evidence exist today: Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (referred to below as "FD on freezing orders") [2] and 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 (referred to below as "FD on the EEW") which applies only to pre-existing evidence.

The numerous instruments applicable to mutual legal assistance and the coexistence of mutual legal assistance with mutual recognition create a fragmented approach making the task of the judicial authorities more difficult which is the opposite of what mutual recognition is supposed to achieve. 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

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1 See the detailed statement attached to this proposal for more details (9288/10 COPEN 117 EUROJUST 49 EJN 13 PARLNAT 13 CODEC 384 ADD 1).

2 OJ L 196, 2/11/2003, p. 45.

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.

The detailed statement attached to this proposal (…/10 COPEN …) contains a detailed description of the problems arising from the current situation. It also explains the reasoning which led to the current proposal.

The main changes brought by the new instrument are :

- simplification of the procedure through the creation of a single instrument (the new Directive) and therefore replacement of all existing instruments as far as obtaining evidence is concerned, including mutual legal assistance conventions, the FD on freezing orders and the FD on the EEW;
- focus on the investigative measure (as in mutual legal assistance) to be executed rather than on the type of evidence to be collected (as in the FD on the EEW);
- limitation of the possibilities to refuse to execute or recognise the EIO;
- acceleration of the procedure;
- practical improvements such as the possibility for agents of the issuing State to assist in the execution of the EIO in the executing State.

CHAPTER I: THE EUROPEAN INVESTIGATION ORDER (EIO)

Article 1: Definition of the European Investigation Order and obligation to execute it

This Article provides for a definition of the EIO. It clarifies the fact that the object of the EIO is primarily a specific investigation measure. Paragraph 3 reaffirms the importance of fundamental rights and fundamental legal principles, as it is the case in all instruments on mutual recognition in criminal proceedings.

Article 2: Definitions

Article 2 provides for the definition of several concepts used in the proposal.

The definition of the issuing and executing authorities is dealt with in Article 2(1) and (2). These articles are to be read together with Article 28(1)(a) whereby Member States are required to notify the authorities designated as issuing and executing authorities and with Article 6(2) which provides for the possibility to designate central authorities. However, central authorities can only have an administrative role in the transmission of the EIO.

(a) issuing authority : most Member States will probably use point (i) which provides for the designation of a judge, a court, an investigating magistrate or a public prosecutor as the authority competent to issue an EIO. However, in order to take into account the various national systems, point (ii) allows for the designation of another type of judicial authority, as long as it is, in the specific case, acting in its capacity as an investigating authority in criminal proceedings with competence in the case concerned to order the gathering of evidence. A Member State may for example designate a police authority as an issuing authority for the purpose of the EIO but only if that police authority has the power to order the investigative measure concerned at national level. This solution is in line with existing mutual legal instruments as well as with the FD on the EEW. The latter, however, is less flexible as it contains a validation procedure through which the Member States which designated, for example, police authorities as issuing authorities, may be required by the executing State to have the EIO validated by a judicial authority *stricto sensu* (a judge, prosecutor, court or investigating magistrate). This validation procedure is among the additional complexities brought by the EEW compared to mutual legal assistance and a simplification is therefore necessary. Moreover, the solution proposed in the draft Directive is in conformity with the principle of mutual recognition.

(b) executing authority : it is also up to the Member States to decide which authority will be designated as executing authority. Member States do not, however, have a complete margin of manoeuvre as it is required that the executing authority be an authority competent to undertake the investigative measure mentioned in the EIO in a similar national case. If the EIO is issued to search a house in a specific location in Member State A, the executing authority must be an authority which would be competent, in a similar national case, to decide to search a house in the location concerned.

Article 3 : Scope of the EIO

Article 3 is an essential part of the proposal. As explained above and in the detailed statement, one of the main objectives of this proposal is to facilitate judicial cooperation in this field by replacing all existing instruments (and therefore both mutual legal assistance and mutual recognition instruments) by a single framework. Therefore, the EIO must cover, in principle, all investigative measures aiming at obtaining evidence. This rule is provided in Article 3(1).

However, some measures require specific rules which are better dealt with separately. This applies to the setting up of a Joint Investigation Team (JIT) and the gathering of evidence within a JIT (Article 3(2)(a)) which are regulated both in Article 13 of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union[1] (referred to below as the "2000 EU MLA Convention") and in Framework Decision 2002/465/JAI of 13 June 2002 on joint investigation teams [2]. The creation of the team requires for example the signing of a complex agreement. As for the obtaining of evidence within the team, the added value of the JIT is precisely that evidence freely circulates within the team which means that there is no need for an EIO among its members. The exclusion also covers two types of interceptions of telecommunications for which complex rules are provided in Articles 18-22 of the 2000 EU MLA Convention. These concern interception of satellite telecommunications as well as interception of

[1] OJ C 197, 12 July 2000, p. 3. See also: Explanatory report, OJ C 379, 29 December 2000, p. 7
[2] OJ L 162, 20 June 2002, p. 1.

telecommunications with immediate transmission to the requesting State. Incorporating such rules in the EIO would affect the consistency of the new framework and is not necessary because these investigative measures are very separated from others and there is therefore no need to provide for the possibility for a requesting or issuing authority to insert them in the same request as other investigative measures. Cooperation for the carrying out of these measures will still be possible under the existing rules, which are replaced only in so far as they deal with measures covered in the EIO (see Article 29).

It is important to note that only these types of interception of telecommunications are excluded from the scope of the EIO. Standard interception of telecommunication is covered by Article 27 of the proposal which provides for flexible rules in this respect.

Article 4: types of procedure for which the EIO can be issued

Regarding the types of procedure for which the EIO can be issued, the proposal is entirely based on Article 5 of the FD on the EEW. The EIO is designed for obtaining evidence in criminal proceedings, but it also covers some administrative proceedings having a criminal dimension and fulfilling precise criteria. Though Article 4 of the proposal and Article 5 of the FD on the EEW are identical, the rules regarding administrative proceedings are not entirely the same. Because of the significant extension of the scope in the EIO to almost all investigative measures, a new ground for refusal has been inserted which provides for the possibility to refuse the execution of the EIO if the EIO has been issued for non criminal proceedings (Article 10(1)(d)).

Article 5: content and form of the EIO

The EIO itself is the form provided in the Annex, duly completed and signed by the issuing authority (Article 5(1)). The form is therefore not a "certificate" which accompanies a separate decision, as it is the case for several mutual recognition instruments (see for example the FD on freezing orders). The solution chosen for the EIO is the same solution found for the European Arrest Warrant and the EEW where there is only one document to be transmitted by the issuing authority.

As for languages (Article 5(2)), the solution is similar to the one found in other mutual recognition instruments. Each Member State has to decide, as executing State, in which language the EIO will have to be transmitted to it. Every Member State is obliged to accept languages translated or issued in one of its official languages but Article 5(2) also invites Member States to indicate possible other languages.

The obligation to notify the languages accepted by each Member State is provided in Article 28(1)(b).

Chapter II – Procedures and safeguards for the issuing State

Article 6: transmission and form of the EIO

Article 6 on the transmission and form of the EIO has the same content as Article 8 of the FD on the EEW which itself contains standard wording for mutual recognition instruments. All official communications have to be done through direct contacts between the issuing and executing authorities (Article 6(1)). There is however a possibility to designate central authorities to assist judicial authorities. They may be involved in the transmission and reception of the EIO but this only concerns the administrative tasks (Article 6(2)). The obligation to notify the use of a central authority is provided in Article 28(1)(c).

Other paragraphs are related to the use of the European Judicial Network (Article 6(3) and (4)) and to the obligation for the authority which wrongly received an EIO to transmit it to the competent executing authority (Article 6(5)). Article 6(6) confirms the principle of direct contacts between the competent authorities as well as the possibility of an assistance by the central authorities (Article 6(6)).

Article 7: EIO related to an earlier EIO

Article 7 is based on Article 9 of the FD on the EEW. It provides for the possibility to issue an EIO to supplement an EIO previously transmitted (Article 7(1)). It also clarifies the fact that, if the issuing authority is present during the execution of the measure, it can, during this execution, address the EIO which supplements the earlier EIO directly to the executing authority. It is therefore not necessary that the new EIO be issued in the issuing State nor is it necessary in this case to transmit the EIO via central authorities where they exist in accordance with Article 6(2).

Chapter III – Procedures and safeguards for the executing State

Article 8: Recognition and execution

Under Article 8(1), "t*he executing authority shall recognise an EIO (...) without any further formality being required, and shall forthwith take the necessary measures for 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 (...)* ". This provision clarifies the applicable legislation. The decision to take the investigative measure is taken by the issuing authority in accordance with its national law when it issues the EIO. The executing authority may only challenge that decision through the use of grounds for refusal indicated in Article 10. However, the carrying out of the measure itself will be governed by the law of the executing State.

For example, in the case of an EIO issued for the purpose of searching a house, the issuing authority is competent to decide whether or not the search of a house is a necessary measure in the case concerned (see also Article 8(1) which brings some flexibility on the choice of the measure). However, the modalities of the search will be governed by the law of the executing State. If the search of a house is possible at night in the issuing State but not in the executing State, Article 8(1) makes it possible for the executing authority to carry out the measure during daytime in accordance with its own legislation.

The fact that the law applicable for the modalities of the carrying out of the measure is the law of the executing State may however create problems in terms of admissibility of evidence in the issuing State. Therefore, the proposal contains in Article 8(2) a rule which already exists in the 2000 MLA Convention and in mutual recognition instruments. It provides for a possibility for the issuing authority to indicate in the EIO which formalities will have to be complied with to ensure the admissibility of evidence. There is an obligation for the executing authority to comply with these formalities as long as they are not contrary to the fundamental rules of the executing State. This practical solution reconciles the need to ensure admissibility of evidence and the rule on applicable law.

Article 8(3) is new compared to existing EU instruments. It provides for an explicit legal basis for the presence of a competent authority of the issuing State during the execution of the EIO in order to provide assistance to the executing authorities. Nothing prevents such presence in the existing instruments but the lack of explicit reference and the lack of any obligation contribute to the fact that this presence is not enough applied for or granted. Such presence may for example be crucial to ensure admissibility of evidence or to issue supplementing EIOs in the course of the execution of a measure (see Article 7(2)). Article 8(3) provides more than a legal basis and creates an obligation for the executing State to accept such presence of a competent authority of the executing State. It also ensures enough flexibility, however, by stating that the presence may be refused if it would be contrary to the fundamental principles of law of the executing State. The objective of the presence is to provide assistance to the executing authorities. Recital 10 clarifies the fact it does not imply any law enforcement powers for the authorities of the issuing State in the territory of the executing State.

It should also be noted that Article 8(3) is not applicable only to the presence of the issuing authority itself but to a larger extent to the "competent authorities" so that it may for example apply to the police investigator in charge in the issuing State. Finally, it should be noted that criminal and civil liability for acts committed by the persons concerned in the executing State is covered by Article 16 and 17.

Article 9 : recourse to a different type of investigative measure

One of the main changes of the EIO compared to the EEW is that the EIO is based on an investigative measure to be executed while the EEW is based on a specific type of evidence to be obtained. Therefore, and in accordance with the principle of mutual recognition, it is the issuing authority which decides on the type of investigative measure to be executed.

Article 9 brings necessary flexibility to this rule and makes it possible for the executing authority to opt for a different type of measure than the one specified in the EIO in three situations :

- Article 9(1)(a): when the investigative measure provided for in the EIO does not exist under the law of the executing State: in this situation, the execution of the measure is simply impossible. Allowing the use of another measure also helps the issuing authority by ensuring that some result will be achieved nevertheless.
- Article 9(1)(b) : when the investigative measure provided for in the EIO exists in the law of the executing State but its use is restricted to a list or category of offences which does not include the offence covered by the EIO : this case covers for example the situation where the EIO is issued in order to intercept the telecommunications of a suspect and where, in the executing State, the interception of telecommunications is available only for a list of offences which does not include the offence mentioned in the EIO. In such case, it would be unreasonable to impose the measure to the executing State.
- Article 9(1)(c): when the investigative measure selected by the executing authority will have the same result as the measure provided for in the EIO by less coercive means. This possibility allows for some flexibility in so far as the result expected from the measure decided by the issuing authority will be achieved.

Article 9(1) is to be read together with Article 10(1)(c) which makes it possible to refuse the execution of the EIO if, in cases covered in Article 9(1), there is no alternative measure.

If the executing authority intends to use, in accordance with Article 9(1), a measure different from the one decided by the issuing authority, it is important to ensure that this will not have unexpected consequences on the investigation, especially in terms of admissibility of evidence and in terms of the results to be achieved. Article 9(2) therefore provides for an obligation to inform the issuing authority, which will have the possibility to withdraw the EIO. The issuing authority also has the possibility to redraw the EIO and, for example, to decide the use of a third type of measure.

Article 10: Grounds for non-recognition or non-execution

One of the main changes brought by this proposal compared to both mutual legal assistance and the FD on the EEW is a stricter limitation of the grounds for refusal. In mutual legal assistance, the list of grounds for refusal to execute the request is short but the grounds themselves are very wide, in particular with the reference to sovereignty and public order. The main provision in this regard is Article 2 of the European Convention of 1959 on Mutual Legal Assistance in Criminal Matters (CETS n°30), referred to below as the 1959 MLA Convention. As for the FD on the EEW, one of the complexities emerging from the instrument arises from the lengthy list provided in Article 13 of that FD.

Article 10(1) of the proposal limits the grounds for refusal to 4 cases.

- The first one (a) refers to an immunity or privilege existing under the law of the executing State. It is understood that, where there is a likelihood that the immunity or privilege may be lifted within a reasonable time, the executing authority may decide instead to postpone execution in accordance with Article 14.
- The second ground is copied from Article 9(1)(g) of the FD on the EEW. It makes it possible to refuse the execution of the EIO "if, 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". Such ground may be invoked only on a case by case basis.

- The third ground is linked to the rule that it is the issuing authority which decides on the measure to be executed and to the flexibility necessary to make this rule workable. Article 9(1)(a) and (b) provide that the executing authority has a possibility to use another measure than the one mentioned in the EIO if the measure concerned does not exist in the law of the executing State or if the measure concerned is limited to a list or category offences which does not include the offence mentioned in the EIO. But such alternative measure will not always exist. If there is no alternative measure, the execution of the EIO may be refused (Article 10(1)(c)).
- The fourth ground for refusal relates to the fact that the EIO may be used to obtain evidence not only in criminal proceedings but also in some types of administrative proceedings having a criminal dimension (Article 4). It is unreasonable to combine this application to administrative proceedings, which also exists in the FD on the EEW, together with an extension to all investigative measures. Some margin of manoeuvre should be left to the executing State in this respect. Therefore, the fact that the EIO is issued not in the framework of criminal proceedings but in the framework of administrative proceedings is mentioned as a possible ground for refusal.

Article 10(2) emphasises the need for proper consultation between the authorities involved.

Article 11: Deadlines for recognition and execution

The need to accelerate the procedure and avoid unnecessary delays is obvious. While in a lot of cases, cooperation between the authorities concerned, especially through direct contacts, leads to efficient and swift execution of the MLA request, it is also well known that in too many cases the request simply remain unanswered or is dealt with with unacceptable slowness.

Article 5(4) of the 2000 EU MLA Convention already brought some improvement by making it mandatory, when the requested authority knows that it will not be able to meet the timelimits indicated in the request, to contact the requesting authority and to provide it with indication of the estimated time needed for the execution. There was however no mandatory rule on the length of the procedure.

The FD on the EEW proposed on the contrary clear timelimits, namely 30 days for the decision on the recognition of the EEW and another 30 days for the carrying out of the measure itself, although with a possibility to derogate to these rules (Article 15). The approach followed in the present proposal is partly based on this solution.

But the proposal is expected to bring significant improvement by inserting a new principle that "the decision on the recognition or execution should be taken and the investigative measure should be carried out with the same celerity and priority as for a similar national case". Most of the current delays should be avoided if this principle is complied with, as it should be the case in a common area of freedom, security and justice. This principle here takes the form of a legal obligation inserted in Article 11(1) and become the basis for this provision on deadlines for recognition and execution. The other rules are there to supplement this principle.

These rules include specific timelimits but Article 11(2) makes it clear that the executing authority should endeavour to execute the EIO in even shorter deadlines if that is requested in the EIO. It also adds an explicit possibility for the issuing authority to state that the measure must be carried out on a specific date. This may for example be useful when searches of premises have to be carried out simultaneously in several locations.

Article 11(3) maintains the 30 days time limit already found in the FD on the EEW (Article 15(2)) for the decision on the execution or recognition of the EIO. Article 11(5) brings some flexibility, as in the FD on the EEW, with the possibility to postpone the decision but is stricter than the FD on the EEW because it is provided that this decision must be taken in any case within a total of 60 days while no limit was set in the previous instrument.

Article 11(4) also maintains a time limit for the carrying out of the measure itself. However, the scope being much wider (the EEW covered only pre-existing evidence), the 60 days period provided in the FD on the EEW is extended to 90 days in this proposal. There is also a possibility to prolong this period without any limitation. While it must be possible to take within 30 to 60 days a decision on whether or not the EIO may be executed, and although it should be possible to carry out the measure within 3 months, the wide scope of the EIO in terms of investigative measures covered makes it necessary to allow for greater flexibility.

Article 12: Transfer of evidence

Article 12 of the proposal, dedicated to the transfer of evidence, is based on Article 15(5) and (6) of the FD on the EEW. The collected evidence is to be transmitted without undue delay to the issuing authority and the executing authority may require the evidence to be returned to the executing State once it is not needed any more in the issuing State. Article 12(1) makes it clear that the issuing authority may request that the evidence be immediately transmitted to the authorities which are present during the execution of the EIO. The executing authority is obliged to comply with this request if it is possible under its national law.

Article 13: Remedies

Article 13 provides that legal remedies shall be available for the interested parties in accordance with national law. As this proposal contains a general regime and does not distinguish between the types of investigative measures, it is not appropriate to provide in this proposal a single regime for legal remedies. It is however necessary, under the principle mutual recognition, to prevent that substantive reasons for issuing the EIO are challenged in an action brought before a court of the executing State.

Article 14: Grounds for postponement of recognition or execution

Article 14 provides standard wording in mutual recognition instruments to allow the postponement of the recognition or execution of the EIO. Such postponement is possible if the execution of the EIO would prejudice an ongoing criminal investigation or prosecution or if the evidence concerned is already used in other criminal proceedings. The postponement must be as brief as possible.

Article 15: Obligation to inform

This proposal has to strike the right balance between the simplification of the procedure (which implies avoiding unnecessary administrative steps) and the adequate information of the issuing authority on the state of play of the procedure in the executing State.

Article 15(1) ensures that the issuing authority will, within a week of the reception of the EIO, receive basic information on the executing authority which is in charge of the procedure. Such information will confirm that the EIO has been received and that the procedure is ongoing. It will also enable the issuing authority to contact directly the executing authority, for example to supplement the EIO with additional measures to be executed or with additional information.

Article 15(2) provides for other obligations for the executing authority to inform the issuing authority in the course of the procedure. This includes information on the fact that the EIO is incomplete or manifestly incorrect, that additional enquiries may be appropriate, that the formalities or procedures requested by the issuing authority can not be complied with, or that the execution of the EIO has been refused or postponed.

Article 16 and 17: liability regarding officials

There are several situations in which officials of the issuing State may be present in the executing State in the course of the execution of an EIO. Article 8(3) provides for an explicit possibility for such presence but it may also occur for example in the course of undercover operations or controlled deliveries. Rules on civil and criminal liability are therefore necessary. Articles 16 and 17 are based on Articles 15 and 16 of the 2000 EU MLA Convention, which derive from Articles 42 and 43 of the 1990 Schengen Convention.

Article 16 deals with the commission of criminal offences against or by these officials of the issuing State and provides for their assimilation to officials of the executing State.

Civil liability is regulated under Article 17. As mentioned in the explanatory report under Article 16 of the 2000 EU MLA Convention, *the purpose of this Article is to provide arrangements for the satisfaction of civil claims that may arise from operations carried out by the officials of a Member State on the territory of another Member State (...). The basic rule that applies is that a Member State is liable for any damage that is caused by its officials during the operations concerned. However, the Member State where the damage was caused is required, in the first instance, to make good such damage on the same basis as if the damage had been caused by its own officials. In such an event, the other Member State must reimburse in full any compensation that has been paid out to victims of the damage or persons claiming on their behalf. Subject to such reimbursement and to any claims that it may make from third parties, for example the officials who carried out the operations, no further claims for reimbursement are permitted by the Member State where the damage occurred*.

Article 18 : Confidentiality

Most EIO will contain information which has to be protected in order to safeguard the investigation. The same goes for information to be transmitted as part of the evidence collected in execution of the EIO. Article 18(1) to (3) are inspired by article 33 of the Convention of 8 November 1990 on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime. They provide the

obligation for the Member States to take the necessary measure in order to ensure that both the issuing and the executing authorities preserve the confidentiality of information and inform each other when confidentiality requirements can not be entirely complied with.

Article 18(4) is based on Article 4 of the 2001 EU MLA Protocol. It deals specifically with EIO issued to obtain banking information (see Article 23 to 25). Article 18(4) commits the Member States take the necessary measures to ensure that banks will not disclose to the bank customer or to other third persons the fact that an investigation is carried out.

Chapter IV : Specific provisions for certain investigative measures

This instrument 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. Most of these measures have been dealt with in various articles of the 2000 EU MLA Convention and the 2001 EU MLA Protocol. These articles have been used as a basis for this new instrument. The objectives of integrating these rules in the instrument are mainly to provide more details than for the general regime. Some derogations to the general regime are also provided in terms of additional grounds for refusal.

Article 19: Temporary transfer for the issuing State of persons held in custody for purpose of investigation

Article 19 relates to the situation where the issuing authority requests the presence in the issuing State of a person held in custody in the executing State. This situation is dealt with in Article 11 of the 1959 MLA Convention. Though Article 11 of the 1959 MLA Convention is part of Chapter III of that Convention, which is not directly related to obtaining evidence, this form of transfer is inserted in the instrument on the EIO because the transfer is decided in order to allow the carrying out of an investigative measure afterwards. The objective is for example to ensure that the person will be available for a hearing in the issuing State.

Article 19(2) provides for grounds for non-recognition which are additional to those provided for the general regime of the EIO in Article 10. Based on Article 11 of the 1959 MLA Convention, these additional grounds are the following: the person in custody does not consent, his presence is necessary at criminal proceedings pending in the territory of the requested Party and the transfer is liable to prolong his detention.
Article 19(3) to (8) call for no special comment. Article 19(9) provides that costs arising from the transfer shall be supported by the issuing State, as it is already the case under Article 20 of the 1959 MLA Convention.

Article 20: Temporary transfer to the executing State of persons held in custody for purpose of investigation

Article 20, which is based on Article 9 of the 2000 MLA Convention, is also related to the transfer of a person held in custody. However, while Article 19 covers the situation where the person is held in custody in the executing State and is to be transferred in the issuing State, Article 20 relates to a person held in custody in the issuing State and whose transferred is expected to the executing State. Such transfer may be needed for example to bring the suspected person to the crime scene (in cases where the offence has been committed in the executing State).

Article 20(2) provides for grounds for non-recognition, based on Article 9 of the 2000 EU MLA Convention, which are additional to those provided for the general regime of the EIO in Article 10. The first additional ground relates to the importance in some Member States of the prior consent of the person concerned. The second additional ground is related to the absence of agreement between the authorities concerned concerning the arrangements for the temporary transfer.

Article 20(3) and (4) are related to the consent of the person to be transferred. As in the 2000 EU MLA Convention, whether or not the consent is required is left to the national law of the Member States concerned. Each Member State may indicate that such consent will always be required or will be required under certain conditions. Article 28(1)(d) provides for an obligation to notify this requirement or these conditions to the Commission so that the issuing State will be aware of this before issuing the EIO.

Article 20(5) does not require further explanation.

Article 20(6) repeats the principle contained in Article 19(9) but, as the person will in this case be detained in the executing State, it clarifies the fact that the costs borne by the issuing State, which cover for example the transportation of the person, do not cover costs arising from the detention itself in the executing State.

Article 21: Hearing by videoconference

Article 21 is based on Article 10 of the 2000 EU MLA Convention and the following explanations are also widely copied from the explanatory report to the 2000 EU MLA Convention.

As explained in that report, the development of new technology has made it possible for a person in one country to communicate with a person in another country via a direct video link. Article 21 is designed to serve as a basis for and facilitate the use of this procedure to overcome difficulties that can arise in criminal cases when a person is in one Member State and attendance at a hearing in a second Member State is not desirable or possible. The Article applies generally to hearings of experts and witnesses, but may, under the particular conditions contained in Article 21(9), also be applied to hearings of accused persons.

Article 21(1) makes it clear that an EIO may be issued in the issuing State to use videoconference to hear a person who is in the executing State. The circumstances in which such EIO may be issued are that the issuing authority requires the person in question to be heard as a witness or expert and that it is not desirable or not possible for him or her to travel to that State for a hearing. "Not desirable" could for example apply in cases where the witness is very young, very old, or in bad health; "not possible" could for instance cover cases where the witness would be exposed to serious danger by appearing in the issuing State.

Executing the EIO is in principle mandatory but, as in the 2000 EU MLA Convention, it may be refused if it would be contrary to the fundamental principles of the law of the executing State. This is an additional ground for non-recognition compared to those provided in Article 10(1) as part of the standard regime for the EIO (Article 21(2)). In that context the reference to "fundamental principles of law" implies that execution of the EIO may not be refused for the sole reason that hearing of witnesses and experts by videoconference is not provided under the law of the executing State, or that one or more detailed conditions for a hearing by videoconference would not be met under national law (see explanatory report to the 2000 EU MLA Convention).

Article 21(2) also provides that the execution may be refused if the executing State lacks the technical means for videoconference but Article 21(3) makes it clear that these resources may be made available by the issuing State.

Under Article 21(4), the obligation to consult the issuing authority provided in Article 10(2) applies to cases where the executing authority intends to use one of these additional grounds related to fundamental principles of the law or to lack of technical means.

The hearing by videoconference is based on the fact that that it is not possible or desirable for the witness or expert to attend in person (Article 20(1)). The EIO must explain the reasons for that. It is however entirely up to the issuing State to assess the relevant circumstances (Article 20(1)(5).

The rules to be observed where a hearing takes place by way of videoconference are set out in Article 21(6).

- In particular, provision has been made in point (a) for the attendance, and if necessary the intervention of a judicial authority from the executing State to ensure, *inter alia*, that the fundamental principles of law of that Member State are not contravened during a hearing.
- Under point (b), steps to ensure the protection of the person to be heard are, where necessary, to be agreed between the relevant competent authorities. These may include the application of any legislation which the issuing State may have on the protection of persons to be heard.
- Point (c) states that hearings are to be conducted directly by, or under the direction of, the judicial authorities of the issuing State in accordance with its own laws.

- Without prejudice to point (e), the person to be heard by way of a videoconference must not have fewer rights than they would if they were participating in a hearing in the issuing State.
- In addition, point (d) requires the executing authority to make an interpreter available for the person to be heard if this is necessary and is sought by the issuing Member State or the person in question.
- A safeguard is provided for that person in point (e) under which he or she is entitled to claim any right not to testify which he or she would enjoy under the law of either the executing or the issuing State. Where such a right is claimed, it will fall to be determined by the judicial authority conducting the hearing subject, of course, to the duty of the judicial authority from the executing State to take the necessary measures for the conduct of the hearing according to the fundamental principles of its law. The relevant judicial authorities should consult together in relation to any claim to refuse to testify at a hearing.

Article 21(7) provides for minutes of a videoconference hearing to be drawn up by the judicial authority of the executing State and transmitted to the issuing State. The said paragraph sets out the items to be included in the "minutes". They are not concerned with the substance of the hearing. It should also be noted, however, that, arising from the need to ensure the protection of relevant persons, including participants in the executing State other than the person heard, the Member States concerned may, subject to their domestic law, agree on specific arrangements to be made in respect of the minutes. As a result of such an agreement it could be the case, for example, that the names of certain persons who were present in the executing State at the hearing would not be recorded in the minutes but their functions should if appropriate, be indicated.

In view of the substantial costs that could be involved, Article 21(8*)* establishes the rule that certain expenses arising from a videoconference hearing will be refunded to the executing State by the issuing State. It is, however, left open to the executing Member State to waive such refunds in whole or in part.

Article 21(9) provides that if, in the course of a hearing by videoconference, a person refuses to testify or provides false testimony, the executing State must be in a position to deal with that person in the same way as if he or she were appearing at a hearing conducted under its own national procedures. This follows from the fact that the obligation to testify at a videoconference hearing arises, pursuant to this paragraph, under the law of the executing State. The paragraph is in particular intended to guarantee that the witness, in case of non-compliance with an obligation to testify, is subject to consequences of his or her behavior similar to those applicable in a domestic case where videoconferencing is not used. Where the difficulties mentioned in paragraph 9 occur, the issuing and the executing authorities may communicate with each other in relation to the application of the paragraph. This will normally imply that the authority of the issuing State conducting the hearing as soon as possible provides the executing authority with the information necessary to enable the latter to take appropriate measures against the witness or expert.

Article 21(10) allows Member States to extend the application of this Article to videoconference hearings involving accused persons. Under the 2000 EU MLA Convention, this was only a possibility with complete margin of manoeuvre for the Member States. A non binding provision would not be compatible with the current proposal. However, flexbility is ensured through additional grounds for refusal related to the absence of consent from the accused person to be heard by videoconference and to the fact that the execution of the EIO is contrary to the law of the executing State.

Article 22: Hearing by telephone conference

Article 22 is based on Article 11 of the 2000 EU MLA Convention. As explained in that report, telephone-conference hearings represent a further area in which means of telecommunications can be employed in the mutual assistance field. Such hearings can be particularly useful in situations where, for example, a statement on a routine matter is required from a witness. In addition they can be arranged and conducted quite easily and economically. This Article sets out the arrangements to

apply between the Member States in respect of requests relating to hearings by telephone conference. It should be noted, however, that nothing in Article 22 is intended to undermine the practice that exists in some Member States whereby a person is heard as a witness by telephone from abroad, perhaps on consular premises, without the assistance of the Member State where he or she is situated.

Article 22(1) provides that the EIO may be issued to obtain a telephone conference hearing where a person who is to be heard as a witness or expert by the judicial authorities of a Member State is present in another Member State.

Article 22(2) provides two grounds for refusal in addition to those referred to in Article 10(1). The execution of the EIO issued to obtain a teleconference may be refused if the use of the teleconference is contrary to fundamental principles of the law of the executing State and if the witness or expert does not agree that the hearing takes place by that method. In accordance with paragraph 4, the executing Member State may, in so far as the practical arrangements relating to the hearing are concerned, require that the provisions in Article 21(6) and (9) will operate in respect of the hearing to the extent that they are applicable. Article 21(8) will apply automatically unless the Member States agree otherwise.

Article 23: information on bank account

Articles 23 to 25 are based on Articles 1 to 3 of the 2001 EU MLA Protocol which deal with banking information. Each Article is dedicated to one of the following three measures : obtaining information on bank accounts (Article 23), obtaining information on banking transactions made in the past (Article 24) and continuous monitoring of banking transactions made in the future (Article 25). The following explanations are also widely copied from the explanatory report to the 2001 EU MLA Protocol.

Article 23 covers the EIOs issued to obtain information on bank accounts held or controlled by a natural or legal person. The obligation contained in Article 23(2) extends to being able to trace bank accounts throughout the territory of the executing State. This paragraph does not oblige the Member States to set up a centralised register of bank accounts, but leaves it to each Member State to decide how to comply with the provision in an efficient way. If the executing authority manages to trace any bank accounts in its territory it is under an obligation to provide the issuing State with the bank account numbers and all its details.

Article 23 is restricted to information on bank accounts that are held, or controlled, by a natural or legal person that is the subject of a criminal investigation. Also accounts for which any such person has powers of attorney are, under certain conditions included (Article 23(3)).

Accounts that are controlled *by* the person under investigation include accounts of which that person is the beneficial owner and this applies irrespective of whether those accounts are held by a natural person, a legal person or a body acting in the form of, or on behalf of, trust funds or other instruments for administering special purpose funds, the identity of the settlers or beneficiaries of which is unknown. The concept of beneficial owner is defined in Article 3(6) of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing[1].

Accounts for which the person that is the subject of the proceedings has powers of attorney are as such covered by the notion of accounts "controlled" by the person, but in respect of such accounts a special provision applies (Article 23(3)). They are not automatically covered. It presupposes that the need for such information has been specifically mentioned in the EIO by the issuing authority. Furthermore, it presupposes that the information can be provided within a reasonable time. That expression implies an obligation on the executing authority not to make every effort, however costly and time consuming it may be to collect the information, but to make an effort which is proportional, in terms of resources, to the importance and urgency of the case. The executing authority will be in a position to make such an appraisal on the basis of the information that the

[1] OJ L 309, 25 November 2005, p. 15.

issuing authority must supply under Article 23(6). One reason for these restrictions is that information relating to powers of attorney often is more complicated to get access to, even if it is 'in the possession of the bank'. For example, it may be that such information is not available via the computer system of the head office of the bank, but has to be found in the local offices of the bank. In some cases, the information sought may be available only in files other than computer files.

Article 23(4) clarifies that the obligation to supply information only applies to the extent the information is available to the bank keeping the account. Accordingly, the proposal does not put any new obligations on Member States or banks to retain information relating to bank accounts.

Article 23(5), based on the limitation found in Article 1 of the 2001 EU MLA Protocol, makes it possible to refuse the execution of the EIO if the offence covered is not contained in the categories listed in the provision.

Article 23(6) requires from the issuing authority specific information to be provided in the EIO. The intention is to restrict the EIO where possible to certain banks and/or accounts and to facilitate the execution of the EIO. It puts an obligation on the issuing authority to consider carefully if the information "is likely to be of substantial value for the purpose of the investigation into the offence" and to state this expressly in the EIO, and also to consider carefully to which Member State or States it should send the EIO. This paragraph implies that the issuing authority may not use this measure as a mean to "fish" information from just any - or all - Member States but that it must direct the EIO to a Member State which is likely to be able to provide the requested information. However, the provision does not allow the executing authority to question whether the requested information is likely to be of substantial value for the purpose of the investigation concerned pursuant to the first indent of the paragraph.

The EIO should also include information relating to the banks it is thought may hold relevant accounts, if such information is available. From this it follows that the issuing authority should try to limit the EIO to certain types of bank accounts only and/or accounts kept by certain banks only. This will enable the executing authority to restrict the execution of the EIO accordingly. The issuing authority shall also provide the executing authority with any other information, which may facilitate the execution of the EIO.

Article 24: information on banking transactions

Article 24 relates to EIOs issued to obtain information on bank accounts or banking transactions carried out in the past. It is based on Article 2 of the 2001 EU MLA Protocol. There is a link between Article 23 and Article 24 in that the issuing authority may have obtained the details of the account by means of the measure provided for in Article 23 and subsequently may ask for information on banking operations that have taken place on the account. However, the measure is self-standing and may also be decided in respect of a bank account that has become known to the investigating authorities of the issuing authority by any other means or channels.

Article 24(1) does not — as does Article 23 — make any references to accounts linked to a person that is the subject of a criminal investigation. This clarifies that the EIO may cover accounts held by third persons, persons who are not themselves subject of any criminal proceedings but whose accounts are, in one way or another, linked to a criminal investigation. Any such link must be accounted for by the issuing State in the EIO. A practical example is the situation where the bank account of an innocent, and totally unaware, person is used as a ‘means of transport’ between two accounts, which are held by the suspect, in order to confuse and hide the transaction. Article 24 allows the issuing authority to get information on any transactions to or from such an account.

The transactions on which information has to be provided are those carried out during a specified period through one or more accounts specified in the EIO. The information to be transmitted in the execution of such EIO also includes "the particulars of any sending or recipient account" (Article

23(1)). It is therefore not enough for the executing authority, in response to the EIO, to provide information that a certain amount of money was sent to/from the account or from/to another account on a certain date but also to provide the issuing authority with information relating to the recipient/sending account, i.e. the bank account number and other details necessary to enable the issuing authority to proceed with an EIO in respect of that account. This will enable the issuing authority to trace the movements of money from account to account.

Article 24(2) corresponds to the first sentence of Article 23(2). See the comment above on that provision.

Article 24(3) corresponds to Article 23(3). See the comment above on that provision.

Article 24(4) corresponds to Article 23(6), first indent, but has a less demanding wording due to the fact that EIO issued in accordance with Article 24 by nature are more specific than those under Article 23.

Article 25: The monitoring of banking transactions

Monitoring banking transactions that will take place in the future is a measure already covered by Article 3 of the 2001 EU MLA Protocol. However, as explained in the explanatory report of this Protocol, " *this Article (...) only obliges Member States to set up the mechanism — Member States shall be able to provide the assistance upon request — but leaves to each Member State to decide if and under what conditions the assistance may be given in a specific case*".

Such wide margin of manoeuvre is not in line with current developments of judicial cooperation in the EU, especially under the mutual recognition principle. Although very much based on Article 3 of the 2001 EU MLA Protocol, Article 25 of this proposal is therefore to some extent different.

However, the specificity of the measure and its sensitivity are taken into account and the proposal contains the necessary flexibility in this regard. This flexibility is not reflected in Article 25 itself but in Article 27. Monitoring of banking transactions is a measure implying gathering of evidence in real time, continuously and over a certain period of time and is therefore covered by Article 27 which provides flexibility by adding a specific ground for non recognition (see below).

Article 25(1) provides for the possibility to issue an EIO in order to monitor banking transactions taking place in the future.

Article 25(2) corresponds to the first sentence of Article 23(2). See the comment above on that provision.

Article 25(3) corresponds to Article 24(4).

Article 25(4) states that the practical details regarding the monitoring shall be agreed between the competent authorities of the issuing and the executing State.

Article 26: Controlled deliveries

Controlled deliveries are mainly used in investigations related to offences of illicit trafficking. The objective is to avoid stopping a carrier of illicit goods (for example a truck containing illicit drugs) and to wait for example until the final delivery. It is an essential measure to dismantle a criminal organisation rather than arresting only, for example, the truck driver.

Article 73 of the 1990 Schengen Convention already dealt with controlled deliveries but only in the sector of drug trafficking. It was extended to other forms of crime by Article 12 of the 2000 EU MLA Convention.

The explanatory report to the 2000 EU MLA Convention states under Article 12 that : "*The expression 'controlled delivery' has not been specifically defined in the Convention and it should be interpreted in accordance with national law and practice. The provision applies if, for example, the illicit consignment, with the consent of the Member States concerned, has been intercepted and allowed to continue with the initial contents intact or removed or replaced in whole or in part*".

Article 26 provides explicitly the possibility to use an EIO to execute a controlled delivery. General rules on the EIO are applicable so that it is not necessary to bring here the whole content of Article 12 of the 2000 EU MLA Convention. The only rule which needed specific reference is provided in Article 26(2) and related to the fact that the operation is always directed and controlled by the competent authorities of the executing State.

Article 27: Investigative measures implying gathering of evidence in real time, continuously and over a certain period of time

Article 27 is a key component of this proposal and of the attempt to provide a global, flexible and efficient regime.

It encompasses several investigative measures which imply gathering of evidence in real time, continuously and over a certain period of time. This includes for example the interception of telecommunications [1], the observation of a place or a person or an undercover operation. It also includes measures which are explicitly mentioned in this proposal, such as controlled deliveries or the monitoring of banking transactions.

The use of these measures is necessary in many investigations, especially on organised crime or terrorism. It is therefore essential to cover them in this proposal. Failing to do so would mean that judicial authorities would still be confronted with several regimes and would not be able to insert in a single document all investigative measures they want to see executed in another Member State.

[1] Only very specific forms of interceptions of telecommunications are excluded from the scope of this proposal. See the explanations provided under Article 3(2)(b) and (c).

However, these measures are also characterised by significant differences in the legislations of the Member States which have important impact because these measures imply a sensitive limitation of fundamental rights, in particular privacy. This is also why measures of this category are submitted, within the mutual legal assistance instruments, to an even less binding regime than other measures.

Taking these considerations into account, it is both necessary to include these measures in the scope of the EIO and unrealistic and inappropriate to limit the grounds for non-recognition to those grounds provided in the standard regime of the EIO.

In order to reconcile the objectives of flexibility and of having a wide scope, Article 27 therefore provides that an EIO may be issued for the purpose of carrying out this type of measures but that the execution may be refused if the use of this measure would not be authorised in a similar national case.

It may be that a stricter regime will be necessary and achievable in the future for these measures and it will be possible to amend or supplement the instrument on the EIO to achieve that goal. But this objective goes beyond the objective of the current proposal.

Chapter V : Final provisions

Article 28: Notifications

Article 28 provides for the obligation to notify the Commission of several decisions to be taken in the course of the implementation of this instrument (designation of competent authorities, languages accepted for the EIO, requirement of consent referred to in Article 20(a) on the transfer of a detained person).

Article 29: Relations to other agreements and arrangements

As explained in details above and in the detailed statement, one of the main objectives of this proposal is to have a single regime applicable to gathering evidence in another Member State. Therefore, this proposal has to replace the currently existing regimes. At the same time, it is important to note that instruments which are the basis for these existing regimes often provide rules which go beyond the collecting of evidence (see for example the service of writs in the 1959 MLA Convention). Furthermore, Article 4(2) makes it necessary to maintain, although for a very limited part, the instruments which are the basis for cooperation for the measures which are exceptionally kept out of the scope of this proposal. To allow cooperation to continue for these measures and for the aspects which do not concern gathering evidence, it is not possible to maintain only a few provisions of these instruments. For example, it is important to maintain several articles of the 1959 MLA Convention to make it possible to use this convention for the service of writs. In order to avoid any legal *vacuum*, it is better to avoid trying to list the articles which are maintained and those which are replaced. This is why Article 29(1) provides that this proposal which focuses on collecting evidence replaces "the correspond provisions" of the instruments which are listed.

This proposal will also replace part of Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (Article 29(2)). Maintaining a separate instrument, which is in any case not much used in practice, is a source of unnecessary complexity. However, Framework Decision 2003/577/JHA is applicable not only to freezing of evidence but also to freezing of property with a view to confiscation. Therefore, it should not be entirely repealed.

Articles 29(3) to (4) are standard provisions allowing for the application of instruments, for example regional instruments, which contribute to facilitating or simplifying evidence compared to the present proposal.

Article 30: Transitional arrangements

The procedure for the execution of a rogatory letter may be long and is never instantaneous. Therefore, transitional arrangements are necessary. The basis for the transitional rule will be the date of the reception of the request. Rogatory letters received before the beginning of application of the Directive on the EIO will continue to be dealt with under the mutual legal assistance instruments. The same goes for decisions to freeze evidence transmitted under Framework Decision 2003/577/JHA.

Article 31 : Transposition

This article does not require additional explanation.

Article 32 : Report on application

This article does not require additional explanation.

Article 33: Entry into force

This article does not require additional explanation.