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NOTE

From :	Incoming Belgian Presidency
To :	CATS
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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 - Strategic guidance

In the Stockholm Programme¹, which was adopted on 11 December 2009, the European Council considered 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’*. It underlined that *‘the existing instruments in this area constitute a fragmentary regime and emphasised 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’*. *‘This new model could have a broader scope and should cover as many types of evidence as possible, taking account of the measures concerned’*. The European Council therefore called for the submission of a proposal for *‘a comprehensive system, after an impact assessment, 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’*.

¹ Doc. 5731/10.

In April 2010, a group of seven Member States² has put forward a proposal for a Directive of the European Parliament and the Council regarding the European Investigation Order in criminal matters³ (hereafter “the EIO”), which would replace the existing legal framework applicable to the gathering and transfer of evidence between the Member States, including the Framework Decision 2008/978/JHA on the European Evidence Warrant which is supposed to be implemented by 19 January 2011.

The EIO applies the principle of mutual recognition to judicial decisions taken in one Member State in order to execute investigative measures in another Member State with a view to obtaining evidence in criminal matters. However, the EIO also aims at preserving the flexibility provided for by the traditional regime of mutual legal assistance. This is reflected by a number of provisions of the EIO which deviate from existing instruments based on the principle of mutual recognition and for which simplification was deemed necessary.

The most significant innovations introduced by the EIO are described below :

- The EIO focuses on the investigative measure to be executed, rather than on the type of evidence to be gathered (Article 1).
- The EIO has a broad scope: all investigative measures are covered, except those explicitly excluded (*i.e.* joint investigative teams as well as very specific types of interceptions of telecommunications⁴) (Article 3).
- It is in principle the issuing authority which decides on the type of investigative measure to be used. However, flexibility is introduced by allowing, in a limited number of cases, the executing authority to decide to have recourse to an investigative measure other than that provided for in the EIO (Article 9).
- Clear time limits are provided for the recognition and, with more flexibility, for the execution of the EIO. The proposal also innovates by providing the legal obligation to execute the EIO with the same celerity and priority as for a similar national case (Article 11).
- The EIO provides for the use of a form that should be used in all cases.
- Other innovations - both compared to the EEW and to MLA - are the limitation of the number of grounds for refusal (Article 10) and the right of the issuing authority to request that that one or several of its officials assist in the execution of the measure in the executing State (Article 8(3)).

² Austria, Bulgaria, Belgium, Estonia, Slovenia, Spain and Sweden.

³ 9288/10 COPEN 117 EUROJUST 49 EJM 13 PARLNAT 13 CODEC 384

⁴ « Normal » types of interception of telecommunications are included in the scope of this Directive. They are not excluded in Article 3(2) and are more directly covered by Article 27.

This initiative for a Directive only covers the cooperation between judicial authorities in order to gather evidence in another Member State and does not regulate the admissibility of such evidence in the issuing Member State ⁵.

Further explanation may be found in the explanatory memorandum attached to the proposal⁶.

Before starting the discussions on this initiative at the level of the working group, the Presidency would like to exchange views on the general orientation of this project at the level of the CATS representatives, in order to give strategic guidance to the experts.

QUESTIONS FOR THE CATS REPRESENTATIVES

1. General principles

One of the starting points of the work of the cosponsors is that the future instrument should maintain aspects of the flexibility of mutual legal assistance framework, as strongly requested by the practitioners. It should lead to avoiding unnecessary formalities and procedural burden which may be necessary for instruments dealing with the arrest of people or the enforcement of sanctions but, which are not justified or not appropriate at the stage of obtaining evidence. This should however not affect the fundamental principles of mutual recognition, such as the limitation of grounds for refusal. In other words, the future instrument should focus on mutual recognition provisions that bring added value. The guiding principle should be that the future instrument has to facilitate the daily work of the practitioners, without impinging on the fundamental rights of individuals.

⁵ The only rule found in the proposal on the EIO is the one already provided in the 2000 EU MLA Convention and in the mutual recognition instruments, namely that “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” (art. 8(2)).

⁶ 9288/10 ADD 1

CATS representatives are invited to discuss the above-mentioned general principles and to agree upon general orientations to be given to the experts working group.

In particular :

- *Do you agree that the focus should be on the investigative measure to be executed, rather than on the evidence to be gathered?*
- *Do you agree that the grounds for refusal should be examined separately in the light of the objective pursued – i.e. the execution of an investigative measure – and take into account their necessity and desirability?*

2. Twofold approach

As mentioned above, and in line with the Stockholm Programme and the request of practitioners, the EIO covers almost all types of investigative measures. This, however, means bringing together measures of very different nature and sensitivity.

Therefore, the EIO provides for a twofold approach.

- On the one hand, Articles 1 to 18 provide for a general regime applicable to all the measures covered by the EIO.
- On the other hand, Articles 19 to 27 provide for specific provisions only applicable to certain measures. Some of these provisions are simply more detailed than in the general regime. Others provide real derogations for the most sensitive measures (see in particular Article 27).

CATS representatives are invited to confirm the twofold approach of the initiative, it being understood that the content and scope of the general regime on the one hand and of the specific or derogatory regime on the other hand will need further discussion.

3. Working method

The experts working group (COPEN) should firstly focus its discussions on the general regime (i.e. Articles 1 to 18).

The following issues should be dealt with as a matter of priority:

- the issuing/executing authorities (Article 2 and Article 6);
- the scope of the instrument (Article 3);
- the procedure in the executing Member State (Article 8 and Article 9);
- the grounds for refusal (Article 10);
- the time limits for recognition and execution (Article 11).

CATS representatives are invited to endorse the proposed working method and to invite the experts working group to report to CATS in due time.
