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NOTE

From :	Presidency
To :	Working Party on Cooperation in Criminal Matters
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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 meeting on 12-13 July 2010

I. INTRODUCTION

During the meeting of 12 and 13 July, the Working Party on Cooperation in Criminal Matters has had a first examination of the initiative for a directive on European Investigation Order. The discussions were carried out on the basis of a discussion paper issued by the Presidency (document 11842/10 COPEN 154 EUROJUST 66 EJN 23 CODEC 657). In the present note, which reflects the outcome of that meeting, the Presidency would like to submit to the attention of the delegations new issues to be discussed during the meeting of the Working Party on 27 and 28 July 2010.

It is understood that delegations are currently in the process of internal consultations and it is furthermore noted that a number of delegations have entered a general scrutiny reservation on the initiative.

Concerning the general points of discussion, it is noted that the following two legal questions, which are going to be examined in the near future, were brought forward by the delegations:

- Firstly, the question whether this proposal is in fact a development of the “Schengen acquis”¹.
- Secondly, the question as to which could or would be the consequences of the replacement of the current legal framework for the cooperation with non-participating Member States.

The process of implementation of the Framework Decision 2008/978/JHA on the European evidence warrant has also been addressed at the request of some delegations. While recalling the legal obligation to implement this legal instrument by 19 January 2011, it has been underlined at the highest political level that this instrument would be replaced by the current proposal.

Further specific issues, which the Presidency submits to the attention of delegations, are set out under II below.

II. SPECIFIC ISSUES FOR DISCUSSION

1. Scope

During the discussions in the Working Party, delegations supported the idea of setting up a single legal regime for the obtaining of evidence within the EU. Such regime would replace the current legal framework in this respect. Although there was a common understanding that the scope of the proposed legislation should be as broad as possible, opinions on the actual extent of this instrument differed.

¹ See in this context, the previous CLS contributions in documents 12503/01 JUR 291 COPEN 59 and 11415/04 JUR 328 COPEN 91.

Moreover, some delegations raised concerns about the fact that, as the proposal now stands, some further forms of cooperation are not covered (such as the sending and service of procedural documents, as foreseen in Article 7 of the 1959 European MLA Convention and Article 5 of the 2000 EU MLA Convention). Delegations supported however the option to exclude the issue of the admissibility of evidence from the scope of the initiative. Moreover, certain delegations asked for further clarification in respect of the proceedings which could be available at national level in accordance with Article 4.

a) Measures covered

Delegations generally agreed with the approach undertaken in the initiative to include the greatest possible number of investigative measures within the scope of the instrument. However, as mentioned above, the opinions differed on what exactly falls within the bounds of such a scope.

The Presidency would like to stress that the initiative follows a comprehensive approach, which implies that all investigative measures are included, except those listed in Article 3(2) of the initiative. A number of delegations raised the concern that these exceptions undermine the objective pursued – *i.e.* the creation of a single, efficient and flexible instrument for obtaining evidence – and shared the opinion that, consequently, the number of exceptions should be reduced. The exclusion of the setting up of joint investigation teams and gathering of evidence within such teams, because of the existence of a specific legal regime for these measures, was generally accepted. Several delegations contested however the exclusion of certain types of interception of telecommunication. Furthermore, one delegation proposed to create a new exception, *i.e.* controlled deliveries.

i) Special forms of interceptions of telecommunications

The intention behind the exclusion of the special forms of interception of telecommunications referred to in Article 3 of the proposal is to exclude forms of cooperation which are not compatible with the mutual recognition regime, because of the situation they refer to:

- *interception with immediate transmission*: in the interception of telecommunications with immediate transmission referred to in Article 18(1)(a) of the 2000 EU MLA Convention (“the Convention”), the requested State does not execute an interception of telecommunications as it would do so in a national case, but redirects the telecommunications concerned towards the requesting State, so that the telecommunications may be listened to and recorded there.
- *interception of satellite telecommunications*: in the interception of satellite communications referred to in Article 18(1)(b) combined with Article 18(2)(a) and (c) of the Convention, the requested State is the State which hosts a terrestrial station for the transmission of satellite communications, but the target of the interception is not in the territory of that State. A system of remote control is even provided in Article 19 of the Convention, so that the competent authorities of the requesting State may activate themselves the interception of telecommunications without any intervention in the requested State.
- *interception of telecommunications in border regions*: Article 20 of the Convention deals with a situation where the requesting authority in Member State A needs to intercept the telecommunication of a target which is in Member State B, but where the technical assistance of the Member State B is not necessary. This can be the case either because the telecommunication are transmitted via satellite (and the terrestrial station is in a third Member State) or because the target is in a border region where the cell phone still uses the network of a service provider located in Member State A. In such cases, the interception of telecommunication “happens” to some extent in the requested State, but is not “executed” there.

The promoters of the initiative believe that the incorporation in the EIO of these types of interception of telecommunications would affect the consistency of the new framework. They also consider that their exclusion would not affect the objective of this instrument, because these forms of interception seem to be seldom used. It should be noted that the structure of Title III of the Convention is extremely complicated, if not obscure, and the consequences of bringing such complicated rules in the EIO have to be taken into account. Therefore, in terms of simplifying the work of the practitioners, the disadvantages of including these forms of interception of telecommunications in the scope of the instrument seemed to outweigh the advantages.

Finally, it should also be recalled that ordinary forms of interception are covered by the EIO.

Delegations are invited to reflect further, on the basis of the explanation provided above, on the opportunity or not to include these types of interception of telecommunications, or some of them, in the scope of the EIO.

Delegations are also invited to transmit to the Presidency information they have on the implementation in practice of Articles 17 to 22 of the Convention to facilitate the discussion on these issues.

ii) Controlled deliveries

Controlled deliveries are explicitly referred to in the proposal (see Article 26). During the last meeting, one delegation requested the exclusion of controlled deliveries from the scope of the instrument. It was argued that controlled deliveries fall within the scope of police cooperation rather than within the scope of judicial cooperation.

Apart from the fact that controlled deliveries are included in Article 11 of the 2000 EU MLA Convention, it should be noted that they are also referred to in the Articles 9c, 9d and 13 of the Council Decision setting up Eurojust, as amended by the Council Decision 2009/426/JHA on the strengthening of Eurojust², which tend to emphasise the judicial cooperation dimension of these measures. It seems also that in a number of Member States a judicial authorisation is needed for the execution of controlled deliveries.

If necessary, more detailed rules could be provided in the instrument to ensure that the inclusion of controlled deliveries facilitates their execution and does not hamper it.

Delegations are invited to agree on the fact that controlled deliveries should be included in the scope of this instrument, as it is the case in the current proposal.

² OJ L 138, 4.6.2009, p. 14-32)

b) Other forms of mutual legal assistance

Certain delegations shared the opinion that the scope should not be limited to merely investigative measures, but should be extended to other forms of mutual legal assistance, such as the sending and service of procedural documents. The Presidency would like to emphasise that this proposal aims to replace the rogatory letters and not the complete system of mutual legal assistance. Taking into account the characteristics of the different phases of the judicial procedure, the concern was raised, during the meeting of the Working Party, that such an extension could risk undermining the readability and efficiency of the instrument. Furthermore, it was mentioned that mutual recognition might not be the most appropriate principle to be applied to such other forms of mutual legal assistance.

In the light of the wording and spirit of the Stockholm Programme, the Presidency considers that the extension of the scope of the EIO to forms of mutual legal assistance other than those aimed at obtaining evidence goes beyond the objectives pursued and would possibly undermine the simplicity, efficiency and readability of the instrument. Delegations are invited to consider this issue.

c) Other issues on the scope

During the discussions in the Working Party, the delegations indicated a number of further issues concerning the scope of the initiative:

- The fact that the initiative also applies to the obtaining of evidence that is already in the possession of the executing authority, although this is already mentioned in Recital 9.
- The fact that the initiative covers all investigative measures aimed at obtaining evidence, regardless of the stage of the procedure (e.g. also hearings before courts).
- The fact that the initiative only applies to judicial cooperation and not to police cooperation.

The Presidency believes that these principles are laid out with sufficient clarity in the text, but invites delegations to express their point of view on these points and to consider giving their support to the addition of the following sentence at the end of Article 1(1): ‘The EIO may also be issued for obtaining evidence that is already available to the competent authorities of the executing State’. Additional recitals could also be added if delegations consider that further clarification is needed.

d) Procedures

During the discussions in the Working Party, it appeared that further clarification was needed with regard to the proceedings available at national level in accordance with Article 4 (b) and (c). In order to collect more information, the Presidency has drafted a questionnaire enclosed in document 12213/10 COPEN 160 EJM 27 EUROJUST 71 CODEC 693.

2. Competent authorities

a) Issuing authority

During the discussions in the Working Party, it appeared that further clarification was needed with regard to the possible issuing authorities designated by Member States in accordance with Article 2 (1) (ii). In order to collect more information, the Presidency has drafted a questionnaire enclosed in document 12212/10 COPEN 159 EJM 26 EUROJUST 70 CODEC 692.

b) Executing authority

The Presidency recalls that the proposal aims at defining the executing authority not only as the competent authority to recognise and execute an EIO, but also as an authority competent to decide on an investigative measure in a similar national case.

Although delegations could agree with the definition of the executing authority, there seems to be a need to clarify the wording of Article 2 (b), in particular concerning the fact that the executing authority shall be an authority competent to ‘*undertake*’ the investigative measure in a similar national case.

Some delegations raised concerns that this wording would cover authorities competent to take action in order to execute the measure, even though these authorities are not competent to decide on the use of an investigative measure at national level.

Delegations are invited to confirm whether there is need for further clarification on this point.

3. Participation of competent authorities of the issuing State during the execution of the EIO in the executing State

Article 8(3) - which provides the possibility for the issuing authority to 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 – is a new provision compared to the existing legal framework.

During the discussion on this provision, delegations raised a number of issues related to:

- the types of authorities of the issuing State which may be concerned (a)
- the extent of participation of the authorities of the issuing State (b)
- the mandatory regime (c)
- the rules governing the intervention of these authorities in the territory of the executing State (d)

a) Types of authorities

Article 8(3) is not only applicable to the presence of the issuing authority itself, but, to a larger extent, to all competent authorities of the issuing State, so that it may, for example, apply to a police investigator in charge in the issuing State.

During the discussions in the Working Party, one delegation mentioned the possibility of the presence of a lawyer from the issuing State under this provision. The Presidency's view is that this possibility is already provided for under Article 8(2) and that Article 8(3) should be restricted to official authorities of the issuing State in order to assist the executing authority.

b) Extent of participation

The objective of the presence of authorities of the issuing State is to provide assistance to the executing authorities. As outlined in the explanatory memorandum to the proposal³, such presence may also be crucial to ensure admissibility of evidence or to issue supplementing EIOs in the course of the execution of the measure.

Regarding the extent of participation, Article 8(3) does not only provide for the presence of such authorities, but also allows their active participation in the execution of the EIO. However, recital 11 clearly states that such participation does not imply any law enforcement powers for the authorities of the issuing State in the territory of the executing State.

c) Mandatory regime

As also outlined in the explanatory memorandum to the proposal, Article 8(3) does not only provide a legal basis for the presence of competent authorities of the issuing State during the execution of the EIO in order to provide assistance to the executing authorities, but it also creates an obligation for the executing State to accept such presence, except where it would be contrary to the fundamental principles of its law. Such wording, while emphasising that the rule should be that such participation has to be accepted, provides nonetheless for a necessary flexibility. One delegation requested to add an additional possibility to refuse the participation in case it would affect national security interests.

³ 9288/10 ADD 1 COPEN 117 EUROJUST 49 EJM 13 PARLNAT 13 CODEC 384

d) Rules on intervention

According to Article 8(1), during their presence on the territory of the executing State, competent authorities of the issuing State are subject to the law of the executing State. Criminal and civil liability for acts committed by the persons concerned in the executing State is covered by Article 16 and 17 of the proposal. If necessary, the inclusion of more detailed rules, for example on carrying weapons, could be considered.

Delegations are invited to reflect on the above explanation and to express their point of view on this point.

4. Grounds for refusal

During the discussions at the meeting of the Working Party on 12-13 July 2010, particular attention has been devoted to the issue of grounds for non-recognition or non-execution of the EIO (Article 10).

As already pointed out in the previous discussion document, the approach chosen by the promoters of the initiative has been to limit grounds for refusal to those strictly necessary, taking into account the sector covered by the EIO. Catalogues of grounds for refusal, taken from existing instruments on judicial cooperation, have been scrutinized in order to assess whether the situations described therein could be considered applicable to the specific function of the EIO.

Also, the intention of the promoters of the initiative has been to exclude from the proposal those grounds for refusal which are not fully in coherence with the principle of mutual recognition as basis for judicial cooperation, as envisaged by Article 82 (1) TFEU.

In the course of the discussion, several delegations, while agreeing in principle on the approach outlined above, have voiced concerns over the reduced number of grounds for refusal included in the text. Several proposals have been made asking for the expansion of the list contained in Article 10 by adopting grounds for refusal mostly inspired by existing instruments.

Given the current status of discussions, it is premature to take a final position in one way or another on the specific proposals submitted by delegations. In the Presidency's view, it is necessary that delegations agree beforehand on a methodological approach to this issue. In this respect, all proposals for expansion of the list contained in Article 10 must be assessed in the light of the principles outlined above in order to decide whether specific grounds for refusal are needed or not for the correct functioning of the envisaged cooperation mechanism.

Accordingly, the Presidency would like to submit to the attention of delegations the following points concerning the specific proposals submitted in the course of the discussions:

- *Submission of incomplete forms:* in the view of the Presidency, it would be detrimental to the efficiency of the mechanism, as well as excessively formalistic, to allow for outright refusal of execution in case the EIO form submitted by the issuing authority were to be considered incomplete by the competent authority of the executing State without requesting that the latter activate the consultation procedure specifically laid out for such cases in Article 15 (2) (a) (i) of the proposal.

- *Proportionality:* it appears as self-evident that a realistic approach towards a rational use of available resources for investigations demands that a certain threshold of seriousness of the offence to be investigated via the EIO be respected by the issuing authorities. In this respect, an assessment of proportionality at some stage of the procedure is an issue which certainly merits further consideration. However, in the view of the Presidency it should be left to the responsibility of the issuing authority to apply that test: in this respect, the formulation of a specific ground for refusal would place the option in the hands of the executing authorities, which are perhaps not the best placed to assess all the conditions of a specific case. In this context, it should also be mentioned that executing authorities will always be allowed to have recourse to different investigative measure provided by national law if they can have the same result while using less coercive means (Article 9 (1) (c)). The Presidency suggests that further reflection be made on whether or not it would be appropriate to insert an obligation on the issuing authority to apply some form of proportionality test.

- *Breach of fundamental human rights*: similar considerations as those expressed above concern the possibility to refuse execution in case of alleged violations of fundamental rights with regard to the execution of the EIO. The Presidency's view is that the inclusion of such a specific ground for refusal is not necessary, as the respect of these rights constitutes one of the basic conditions of mutual trust among EU Member States and must, in any case, be respected both by the issuing and the executing States, as recalled in Article 1 (3) of the proposal.

- *Double criminality*: in the Presidency's view, also taking into consideration the question of proportionality as outlined above, the reintroduction in this proposal of the requisite of double criminality would constitute a step backwards as regards to the current framework of mutual legal assistance as well as in the progressive implementation of the principle of mutual recognition.

- *Ne bis in idem*: to ensure the proper and efficient administration of justice, it appears clear that mechanisms should be in place to ensure that, wherever possible, overlapping proceedings in different Member States with respect to the same offences are avoided. However, the question may be asked whether this particular instrument is the proper ground on which these questions may be solved, or rather if it necessary to ensure that they may be the object of other mechanisms, such as that provided for by Council Framework Decision 2009/948/JHA on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings.

- *Age limit to criminal liability*: the question should be asked whether different national regulations with respect to the age limit for criminal liability may be construed in a manner similar to privileges and immunities as taken in consideration under Article 10(a), or if such differences may be overcome in the context of mutual recognition. The Presidency recalls the fact that the execution of an EIO may also lead to prove the non culpability of the person concerned.

- *Need to ensure the effectiveness of ongoing proceedings in the executing State:* in order to ensure that the act of investigation which is the object of an EIO does not unduly interfere with ongoing investigations in the executing State, a specific ground for postponement of execution has been provided in Article 14 (1) (a) of the proposal. Therefore, in the Presidency's view, it is not necessary to provide a ground for refusal based on the same situation.
- *Excessive costs of the requested measure:* while the considerations expressed above with regard to the principle of proportionality may be recalled, in order to assess the necessity of a ground for refusal based on this issue the question must be asked on whether the reciprocal operation of the EIO mechanism could be held sufficient to compensate each Member State for the expenses incurred when giving execution to requests coming from other Member States. Also, the Presidency observes that the issue of repartition of costs for the execution of the EIO will have to be analyzed in depth in the course of the negotiations.

The Presidency submits the above considerations to the attention of delegations in view of further discussions on the approach chosen towards the question of grounds for non-recognition or non-execution of an EIO.

5. Time limits

Time limits for recognition and execution of the EIO provided for in Article 11 have been extensively explained in the previous discussion paper and during the meeting of 12 and 13 July. Discussions in the Working Party have shown that there is a clear support among the delegations to include time limits in the instrument, taking into account the impact on costs and workload for the executing State.

Some delegations pointed out that the basic deadline of 30 days provided for in Article 11(3) was too long. One delegation insisted on the necessity for the issuing State not to delay the actual issuing of the EIO.

Several delegations have also underlined the need to include clearer time limits for the further transfer of evidence provided for in Article 12.

Delegations are invited to further comment on this point.

6. Legal remedies

During the discussions at the Working Party, several delegations expressed concerns in respect of Article 13. Delegations considered it to be not precise enough, and asked for more clarification in the text.

In the opinion of the promoters of the initiative, legal remedies should be based on what is currently provided for under mutual legal assistance instruments and at national level. According to their view, the EIO should not have the consequence to oblige Member States to provide more legal remedies compared to what is available in respect of the same investigative measures carried out in a similar national case.

Furthermore, it seemed important to ensure that grounds which have led to the issuing of the EIO can only be challenged before courts of the issuing State.

Several delegations also raised the issue of the relation between available legal remedies and time limits provided for in Articles 11 and 12. In the Presidency's view, legal remedies should in any case be exercised within the time limits provided for in Articles 11 and 12, as they do not constitute a ground for postponement of recognition or execution according to Article 14.

Delegations are invited to express their opinion on this point and are encouraged to provide written contributions in order to further develop the content of this Article.