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NOTE

From :	Presidency
To :	Working Party on Cooperation in Criminal Matters
Prev. doc.	12201/10 COPEN 157 EUROJUST 68 EJN 24 CODEC 687
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 27-28 July 2010

I. INTRODUCTION

At its meeting of 27 and 28 July 2010 the Working Party on Cooperation in Criminal Matters has continued the preliminary examination of the initiative for a directive on the European Investigation Order. The discussions were carried out on the basis of the revised discussion paper issued by the Presidency (document 12201/10 COPEN 157 EUROJUST 68 EJN 24 CODEC 687).

The Presidency would like to thank delegations for their constructive approach and their valuable contributions to the discussions. The present note aims at reflecting on the outcome of the meeting and to illustrate the results of the preliminary reflections on some of the main issues concerning the proposed instrument, with a view to preparing the examination of the first Articles of the proposed Directive at the next meeting of the Working Party.

It remains clear that all delegations are still in the process of internal consultations and that a number of delegations have entered a general scrutiny reservation on the initiative.

Furthermore, the presidency will consider the suggestion of the DE delegation to request an advice of the EU Agency for Fundamental Rights on the initiative for directive.

II. ISSUES REFERRED TO THE COUNCIL LEGAL SERVICE

Following a suggestion made by a number of delegations, the Presidency has submitted to the Council Legal Service the following two questions, with a view to obtaining a written opinion:

- 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.

III. SPECIFIC ISSUES DISCUSSED

1. Scope

As already stated in doc. 12201/10, while delegations broadly support the idea of setting up a single legal regime for the obtaining of evidence within the EU, opinions on the actual scope of this instrument differ.

a) Measures covered

Discussions focused in particular on the list of investigative measures excluded from the field of application of the Directive, contained in Article 3 (2) of the draft text.

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

i) The setting up of Joint Investigation Teams (Article 3 (2) (a))

FI suggested that the Presidency should reconsider the exclusion of JIT's from the scope of the instrument. In the Presidency's view, this matter is submitted to a specific set of rules provided for in other legal instruments (see notably the Council Framework Decision of 13 June 2002 on joint investigation teams²). As a consequence, the inclusion in the proposed Directive of investigative measures in the framework of JITs would be a mere duplication of the existing legislation. Furthermore, the legal regime for obtaining evidence within a JIT would not fit within the legal regime currently provided in the draft directive. Therefore, such inclusion would not contribute to the efficiency and readability of the directive.

ii) Special forms of interception of telecommunications (Article 3 (2) (b) and (c))

The Presidency, on the basis of the arguments summarised in doc. 12201/10, reiterated its opinion according to which interception of telecommunications according to Article 18 (1) (a), and Article 18 (1) (b) combined with Article 18 (2) (a) and (c), of the Convention of 29 May 2000 should fall outside the scope of this Directive, since their legal regime would unnecessarily complicate the instrument with respect to cases which, in practice, have limited numerical relevance. This viewpoint was supported by a number of delegations (AT, BG, EE, ES, FR, IT, PL, PT, RO).

However, other delegations (CZ, FI, LV, NL, SE, SK) disagreed with this opinion, stating that the aim to achieve a clear picture of the matter, as well to allow for possible future technological developments, demands that all forms of interception of telecommunications be covered by this instrument.

On the other hand, there was a broad consensus on the need to detail further Article 27 in order to draw up a specific set of rules for the types of interception included in the scope of the instrument while making at the same time the provisions of the 2000 MLA Convention more readable.

² *OJ L 162, 20.6.2002, p. 1–3.*

The Presidency considers that the arguments put forward to support different opinions appear valid and deserve further reflection in the course of negotiations, with a view to finding a correct balance among the different issues at stake. In order to prepare future discussions, the Presidency has submitted a questionnaire on national practice as regards to judicial cooperation in the sector of interception of telecommunications (doc 12863/10 COPEN 169 EJM 31 EUROJUST 80 CODEC 746).

iii) Controlled deliveries (Article 26)

UK suggested to exclude controlled deliveries from the scope of the instrument, given the "hybrid" nature of the operations, which are in some Member States carried out by the police rather than under the control of judicial authorities, as well as in consideration of the sensitive nature of the issue. This point of view was supported by very few delegations (DK), while a limited number (FI, CZ) shared the point of view that the provisions in Article 26 need to be further specified.

The Presidency will carefully consider the arguments provided, but considers that at this stage controlled deliveries will remain covered by the instrument. Furthermore, the Presidency leaves open the possibility of redrafting Article 26 and invites the delegations to consider possible proposals in this regard.

b) Other forms of mutual legal assistance

A number of delegations (CZ, FI, NL, SK) suggested including other forms of mutual legal assistance, e.g. the serving of procedural documents in another MS, in the scope of the instrument, to avoid fragmentation of the legal regime.

The Presidency, supported by other delegations (AT, ES, FR, HU, LU, PL, SI, UK), while appreciating the reasons given, considers that this inclusion would unnecessarily complicate the proposed text by bringing together two areas which should be inspired by different principles: indeed, at the core of the EIO lies the principle of mutual recognition which does not in itself apply to the entire scope of "traditional" mutual legal assistance instruments.

c) Other issues on the scope

Following the suggestion of several delegations, the Presidency has proposed to add 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*", to further clarify the scope of the instrument. There was general support for this proposal, which will be included in the text.

2. Executing authorities

Discussions within the Working Party on the definition of authorities competent to execute the EIO (Article 2 (b)) has shown that further reflection and clarification is needed on this matter.

Indeed, while some delegations (CZ, FI) suggested that only the authorities which will proceed to recognition of the EIO should be the object of definition in the text, others (IT) were of the opinion that the definition of executing authorities should also be clearly linked to the competence to order a measure like the one requested via the EIO in a similar national case.

The Presidency will further reflect on this matter, inviting all delegations to consider possible adaptations of the definition proposed in order to address the above concerns.

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

As regards 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, envisaged in Article 8 (3), one delegation (NL) proposed to add to the text of the Article the last sentence of recital (11), stating that "this possibility does not imply any law enforcement powers for the authorities of the issuing State in the territory of the executing State". A number of delegations lent their support to this proposal (CZ, DE, LU, UK), which the Presidency considers valid to further clarify the meaning of the provision.

Furthermore, several delegations (CZ, DE, FI, LU, UK) have, with various arguments, expressed the need to retain some form of control or constraint by the executing MS on the types of authorities of the issuing State which would be allowed to participate in the procedure, as well as on the rules to be observed during this process.

The Presidency appreciates the validity of these arguments and will further reflect on these issues, inviting all delegations to consider possible proposals in this regard.

4. Grounds for refusal

Discussions continued on the issue of grounds for non-recognition or non-execution of the EIO (Article 10), on the basis of the considerations expressed in doc. 12201/10.

The Presidency, while reiterating that at this early stage in the procedure no option or proposal may be ruled out, would like to summarize the opinions expressed in the course of the discussion on the grounds for refusal the inclusion of which was proposed by delegations.

- *Submission of incomplete forms:* while delegations agreed that, in itself, the submission of a EIO form not duly completed should not amount to a ground for refusal, several delegations (CZ, HU, NL) expressed the concern that the executing authorities could be "blocked" if the issuing authorities do not comply with the requests for further information submitted according to Article 15 (2) (a) (i) of the proposed text. These delegations suggested therefore to include such non-compliance as a ground for refusal. Other delegations (FI, IT) pointed out that, even without such explicit ground for refusal, the possibility to reject the request underlying an incomplete EIO derives already from the text of Article 15 (2) of the proposal.

- *Proportionality:* two delegations (DE, UK) reiterated that a possibility for the executing authorities to reject the EIO for lack of proportionality should be included in the text. However, a large majority of delegations (CZ, ES, FR, IT, LT, LU, LV, PL, SK) opposed this view, maintaining that no such ground for refusal should be introduced and that, at most, a check by the issuing authorities could suffice. Another delegation (FI) suggested, as an alternative, to refer to Article 7 of Council Framework Decision 2008/978/JHA on the European evidence warrant.

Given the wide support for the current version of the text, the Presidency will maintain it unchanged for the moment, encouraging delegations to formulate alternative proposals to take into account the question of proportionality.

- *Breach of fundamental human rights*: two delegations (DE, UK) expressed the view that an express ground for refusal for this case should be provided for. Other delegations (CZ, FI, PL) opposed this view, arguing that such explicit reference would undermine the mutual trust which must inspire the instruments of mutual recognition, while refusal to execute an EIO would nonetheless always be possible in case of breach of fundamental rights. The Presidency shares this second opinion.

- *Double criminality*: a number of delegations have expressed the view that a requirement for double criminality should be included as possible ground for refusal, either in general (HU, LT) or with regard to certain measures (CZ, DE, UK).

The Presidency maintains the view that, at the present moment, reintroducing double criminality as a prerequisite for the execution of an EIO would constitute a step backward in the process of the creation of an Area of freedom security and justice, since it would undermine the process of the creation of mutual trust among Member States.

One delegation (NL) drew the attention of the Working Party on the relationship with Article 9(1)(b) cumulated to Article 10(1)(c) and wondered if these provisions do not, in practice, lead to similar or wider possibilities to refuse the execution of an EIO than a ground for refusal based on double criminality. The Presidency insisted on the fact that these provisions have been designed to provide limited flexibility, but that they do not intent to form a wide ground for refusal. The Presidency will further reflect on this issue with a view to finding the adequate balance.

- *Ne bis in idem*: several delegations (DE, FI, HU, LT, NL, UK) have suggested to include *ne bis in idem* as an optional ground for refusal, stating that this would prevent the executing authorities from having to carry out investigative activity which could not, in any event, lead to prosecution in the issuing State. Other delegations (AT, CZ, ES, IT) opposed this view, by stating that possible conflicts of jurisdiction or '*ne bis in idem*'-cases should be dealt with according to other instruments³, given also the fact that the EIO pertains to a preliminary phase of the criminal proceedings. The Presidency will consider these arguments further.

- *Age limit to criminal liability*: certain delegations (CZ, FI, HU) have suggested including it as optional ground for refusal; other delegations (EE, FR, MT, SI) have opposed this suggestion. FR has pointed out, in particular, that the solution to the issue depends on whether the minor age of the alleged offender is an obstacle to the investigation or to the actual prosecution in the issuing State.

At the present stage, the Presidency will maintain the text as it stands, while reflecting further on the arguments put forth in the course of the debate.

- *Need to ensure the effectiveness of ongoing proceedings in the executing State*: no delegation has reiterated this as possible grounds for refusal. UK, however, has expressed the view that this situation is linked to the question of *ne bis in idem* cases.

- *Excessive cost of the requested measure*: CZ, while accepting the Presidency's view that in itself this should not constitute a ground for refusal, has stressed the need to give the issue of repartition of costs great attention in the future course of negotiations, possibly envisaging derogations to the general rule whereby each State will bear the costs for operations related to the EIO which are carried out under its jurisdiction. IT and LU have supported this opinion. FI and HU have expressed support for the text as currently standing.

The Presidency reiterates its commitment to deal thoroughly with the question of costs in the future course of the negotiations on the proposed instrument.

³ See notably Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings

- *Other grounds for refusal:* in the course of the discussion, some delegations (CZ, DE, IT and IE) have suggested adding a general ground for refusal whereby the executing authority could refuse to execute a EIO if the requested measure would not be authorised in a similar national case. IT, in particular, has specified that this "reciprocity test" should extend to the evaluation of the substantial reasons underlying the request enshrined in the EIO. The Presidency, supported by other delegations (FR, SI) has expressed and maintains serious reservations with regard to this proposal, which in its opinion runs contrary to the concept of mutual recognition on which the proposal is based. Furthermore, the Presidency considers that the text already provides (in the current text of Articles 9 and 10) a large degree of flexibility whereby the executing authorities may adapt the request for collection of evidence with respect to their national legal system.

During this debate the issue was raised whether or not the text should stipulate that the issuing authority would only be able to request, via an EIO, the execution of an investigative measure on the condition that it is authorised to order this investigative measure in a similar national case.

5. Time limits

Four delegations (FI, IT, NL, UK) suggested including an express time limit for the transfer of the evidence gathered following the execution of a EIO (Article 12(1)). Others (CZ, HU) supported the current text of the provision, which allows for an adequate degree of flexibility in favour of the executing authorities. UK and IT also pointed out that deadlines in Articles 11 and 12 should be coordinated with the exercise of any means of review according to Article 13 of the draft text.

6. Legal remedies

Following concerns voiced by several delegations during the previous meeting of the Working Party, the Presidency has suggested submitting to delegations a brief questionnaire concerning legal remedies available under the national law of MS in cases similar to the ones provided for in the Directive. Some delegations have opposed this suggestion (DE, HU, LT). CZ has pointed out that this instrument does not in any way impose modifications of national law with regard to available remedies.

The Presidency will further consider the arguments put forth in the course of the discussion in view of the future negotiations on the proposed instrument.
