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NOTE

From :	Presidency
To :	Coreper/Council
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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 - state of play report

I. INTRODUCTION

The Stockholm Programme¹, calls for the pursuing of ‘*the setting up of a comprehensive system for obtaining evidence in cases with a cross-border dimension, based on the principle of mutual recognition*’. It argues, 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*’.

¹ OJ C 115 , 04.05.2010, p. 1

Against this background, in April 2010, a group of seven Member States² presented a proposal for a Directive of the European Parliament and the Council regarding the European Investigation Order in criminal matters³ (hereafter “the EIO”). The objective of the draft directive is to end the fragmented regime on obtaining evidence between the Member States by replacing the existing legal framework, including the Framework Decision 2008/978/JHA on the European Evidence Warrant, with a single legal instrument. The draft directive is based on the principle of mutual recognition. A general balance is sought in the instrument for combining the flexibility necessary for such a broad instrument with legal certainty as well as protection of defence rights with efficiency of the procedure.

Since July 2010, the proposal has been examined by the Council preparatory bodies. The Working Party on Cooperation in Criminal Matters met on a number of occasions in order to discuss the proposal. Several of the outstanding issues were also considered by CATS and during the Belgian Presidency the Coreper/Council were invited to give guidance on some questions as well. Since the beginning of this year, the main efforts have been focused on Articles 1 to 18 of the proposal. In particular the key issues such as the scope, the competent authorities, legal remedies and the grounds for non execution and non recognition were examined.

A number of delegations entered scrutiny reservations in general or on specific issues.

In follow up to the discussions held so far, the Presidency would like to present to the delegations a state of play report in respect of the key issues addressed so far.

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

³ Doc. 9288/10.

II. KEY ISSUES

1. Scope of the proposal

Already during the preliminary discussions, delegations broadly supported the idea of setting up a single legal regime for the obtaining of evidence within the EU. Most delegations agree that such a general scope should however not extend to forms of mutual legal assistance not directly linked to the gathering of evidence and that police cooperation should also be outside the scope of this instrument. At this stage of negotiations the discussions are carried out while bearing in mind the context of criminal proceedings. It will still be discussed and decided whether the scope of the proposal could also be extended to some specific kinds of procedure which are not purely criminal in nature but which are linked with criminal acts.

Furthermore, it is recalled that delegations generally supported the inclusion, within the scope of the Directive, of all forms of interception of telecommunications. It was however agreed that it does not mean that provisions in the Directive on these issues should follow the structure of the 2000 EU MLA Convention. Rather, practical experience in the application of the 2000 Convention should be used to simplify, where appropriate, the current legal framework. One delegation maintained a scrutiny reservation on this solution. These discussions will be continued at a later stage as part of the negotiations on Chapter IV which is devoted to specific investigative measures.

Accordingly:

- **the new instrument should cover all investigative measures aimed at the obtaining of evidence, and further discussion regarding the inclusion of all forms of interception of telecommunications will be carried out while examining Chapter IV of the directive;**
- **it will still need to be decided whether the scope of the proposal could be extended to some specific kinds of procedures which are not purely criminal in nature but which are linked with criminal acts.**

2. Competent authorities

The question of the nature of issuing authorities was discussed on a number of occasions by the Council preparatory bodies. The discussions taking place during the Hungarian Presidency further confirmed the agreement between the delegations that measures covered by the Directive may be ordered by non judicial authorities, such as police investigators, according to national law of the issuing member state and that under certain conditions these authorities should therefore be able to issue an EIO. Accordingly, a compulsory validation procedure in respect of the conformity of the EIO with the conditions for issuing of an EIO, where the latter has been issued by a competent authority other than a judge, prosecutor or investigating magistrate has been introduced. This orientation was generally supported by the delegations.

Concerning the definition of the executing authorities delegations reiterated the need to rely on the executing State to decide which would be the competent authority for the execution of an EIO.

Accordingly:

- **concerning the issuing member state, the draft Directive refers only to the EIOs where they have been issued or validated by a judge, court, a prosecutor or an investigating magistrate;**
- **concerning the executing member state, the draft Directive leaves the designation of the authorities competent to execute an EIO to the Member States.**

3. Grounds for non recognition or non execution

The Council meeting in December 2010 has instructed the Council preparatory bodies to carry out the discussions on the issue of grounds for non recognition or non execution while bearing in mind the following principles:

- there should be no regression compared to the *acquis* (both MLA and mutual recognition instruments), in terms of availability of the measure and possibility of checking for double criminality;
- the current cooperation should be further improved;
- this new approach should not add complexity for practitioners.

In addition it is understood that even if the evolution from mutual legal assistance to mutual recognition will not involve full automaticity in the execution of the decisions, grounds for non recognition or non execution should only be specific ones and that a wide ground for non recognition or non execution, drafted in general terms as in the existing regime of mutual legal assistance, should be avoided.

Accordingly, the Council preparatory bodies continued the examination of this issue. It was the main item discussed at the meetings of the Working Party and of the JHA Counsellors in March and April 2011.

As a result of the discussions, the category- based proposal presented to Coreper/Council in December 2010 (doc 16868/10) was restructured and amended with a view to offering a simpler and more comprehensive approach.⁴ The new proposal of the Presidency seeks to consolidate the provisions on the general and special grounds for non-recognition and non-execution into one single Article.

The applicability of some grounds for refusal such as, for example, immunity and privilege or essential national security interests was maintained irrespective of the measures concerned. Regarding the proposals put forward by the delegations, discussions will have to be continued on the exact list of general grounds of refusal. Those rules have to be drafted very carefully and this list should be kept as short as possible in order to avoid that the new regime offers less broad spectrum of co-operation than the existing one.

Some delegations proposed addition grounds for refusal such as territoriality limitation or the age of the suspect. However these proposals did not obtain general support in the Working Party. One delegation raised a special problem that concerns its constitutional rules regarding the protection of the rights of journalists and related professions, but support was rather limited for including such a specific ground for refusal.

⁴ C.f 7654/11 COPEN 47 EUROJUST 32 EJM 22 CODEC 402 for detailed description of the

It is further proposed to distinguish the applicable grounds for non recognition or non execution depending on the intrusiveness of the measure sought by the EIO, with some exceptions proposed in respect of offences listed under Article 2.2 of EAW Framework Decision. However, to counterbalance the proposed draft, a non-exhaustive (minimum) list of measures for which only general grounds for non recognition or non execution will be applicable has been proposed. In order to ensure that the text is balanced, i.e. offers added value and yet remains flexible and user-friendly, further examination of the text of Article 10 will be necessary, in light, in particular, of the submissions made by the delegations at the last meeting on 1 April 2011.

Accordingly:

- **grounds for non recognition or non execution should be as specific and as limited as possible;**
- **a list of measures for which only general grounds for non recognition or non execution apply should be set out;**
- **further discussion on the content of specific groups of grounds for non recognition or non execution should be carried out bearing in mind the overall balance of the provision and the general objective of adding value and keeping the text simple and user-friendly.**

4. Legal remedies

The question of "legal remedies" was already discussed throughout the Belgian Presidency. The discussions continued during this semester and two main issues were addressed. Firstly, it is the question of the relation between legal remedies provided for in Article 13 with the legal remedies already existing under national law. A majority of delegations were of the opinion that the directive should not be understood as imposing upon the Member States any obligation to provide more legal remedies than what is available in respect of the same investigative measures carried out in a similar national case. Secondly, the relationship between Article 13 and Articles 11 and 12 setting the time limits and Article 14 listing the grounds for postponement of recognition or execution was examined. In order to address concerns voiced by delegations and the need to ensure a comprehensive mechanism on this issue, the Presidency proposes a new wording of Article 13⁵.

⁵ c.f. 8036/11 COPEN 53 EUROJUST 34 EJM 24 CODEC 470 for detailed description of the new proposal.

The principal rule, reflected in Article 13, is that Member States should ensure the applicability of legal remedies which already exist in their national law. This main principle is applicable both in the issuing and executing State. It is assumed that each Member State has in its law legal remedies although those remedies may differ between Member States and may apply at different stages of proceedings and also have different impact on these proceedings. It should also be underlined that the substantive reasons of the EIO may only be challenged in the issuing State.

In the instance no legal remedy is available in the executing State, either because according to national law the person is not informed of the investigative measure being carried out, or because the investigative measure is carried out at an early stage of the procedure, it is understood that any interested party will nonetheless have the possibility to challenge the measure at least in the course of the procedure carried out in the issuing State.

Accordingly the Working Party will continue its examination of this question.

5. Costs

The question related to the distribution of costs occasioned by the execution of an EIO proved to be a particularly sensitive issue for the delegations. The guidance given by the Council in December 2010 was that the disproportionate costs or lack of resources in the executing State should not be a ground for non recognition or non execution for the executing authority. Accordingly, modifications were introduced into the text in order to allow for the possibility of making, in exceptional circumstances, the execution of the investigative measure subject to the condition that the costs will be born by (or shared with) the issuing State. In this case, the issuing authority should have the possibility to withdraw the EIO.

It should be noted also that the Article Y⁶, on costs constitutes a general rule of the Directive and that other specific provisions relating to costs (e.g. Article 20 (9) or Article 27) will be provided for in respect of particular measures.

⁶ c.f. 8036/11 COPEN 53 EUROJUST 34 EJM 24 CODEC 470 for detailed description of the new proposal.

Delegations generally agreed with this approach. However some concerns were raised as to the consequence of the solution proposed in the case where the consultations between the issuing and executing authorities do not lead to a conclusion in respect of costs or the withdrawal of the EIO. Further clarification was felt necessary and discussions will have to be continued on this specific question.

Accordingly the Working Party will continue its examination of this question.

III. CONCLUSION

Coreper/Council are invited to:

- **take note of this progress report as described above on the key issues discussed so far;**
- **instruct the Working Party to continue the discussions on this basis with a view to reaching a general approach within the Council as soon as possible.**