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NOTE

From :	Presidency
To :	Delegations
No prev doc	7014/12 COPEN 44 EUROJUST 16 EJN 12 CODEC 506
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

In view of the COPEN meeting on Monday 19 November 2012, delegations will find attached a document containing 3 parts drawn up by the Presidency. The first part consists of an explanation on the controversial issues. The second part sets out text suggestions to "technical" Articles already discussed in a Council Working Party. The third part contains text suggestion on Articles of technical nature that had not yet been discussed in a Council Working Party after the vote in the LIBE Committee.

1. Fundamental rights clause in Article 1 (3)

During the trilogue the EP insisted in their request for amendment of Art. 1 (3) of the draft Directive (Amendment 21):

to add the words "including the right of defence of persons subject to criminal proceedings" in the first sentence;

to maintain - with amendments - the last sentence originally present in the Member States initiative ("This Directive shall likewise not have the effect of requiring Member States to take any measures which conflict with their **fundamental** constitutional rules, **including** freedom of association, freedom of the press and freedom of expression in the media" - EP amds. in bold).

Concerning this second point the Presidency - and Council Legal Service - reiterated that negotiations leading to the Council general approach had led to the removal of this sentence since it contrasts with the principle of primacy of EU law over the national law of the Member States, including constitutional rules. It was therefore made clear that the Council would not be ready to accept this proposal for amendment.

As concerns the first point, the Presidency would like to invite Member States to accept the addition proposed by EP, albeit correcting the reference to "the right of defence" to read "the rights of defence" (in conformity with the letter of Article 48 (2) of the Charter of fundamental rights).

Indeed, while it can be argued that this fundamental right is covered by the general reference to "fundamental rights and legal principles as enshrined in Article 6" TEU, it is not entirely inappropriate, in the context of a general statement such as that contained in this Article, to emphasize the fact that rights of the defence should receive particular attention in reference to criminal proceedings.

The Presidency would therefore invite Member States to accept the following compromise text for Article 1 (3) of the draft Directive:

"This Directive shall not have the effect of modifying the obligation to respect the fundamental rights and legal principles as enshrined in Article 6 of the Treaty on European Union, ***including the rights of defence of persons subject to criminal proceedings***, and any obligations incumbent upon judicial authorities in this respect shall remain unaffected".

2. Validation procedure (Articles 2 and 5a).

In the course of the trilogue the EP requested a clarification on the role of the validating authority, in relation to the issuing authority. In particular, the concern which was voiced is that the current text of the Directive does not set out with sufficient clarity the scope of the validation procedure, with the risk that it may be interpreted in a narrow sense. Since Article 5a will be the object of discussion at the next trilogue, the Presidency would like to turn to delegations to invite them to accept a partial modification of the relevant provisions in order to clarify the scope (without modifying it) and attempt to address the concerns of the EP.

In particular, the Presidency would invite MS to accept the following wording for Article 5a (3) of the draft Directive:

"3. Where an EIO is issued by an authority referred to in Article 2(a)(ii), the EIO shall be validated, after examination of its conformity with the conditions for issuing an EIO under this Directive, **in particular the conditions set out in paragraph 1**, by a judge, court, public prosecutor or investigating magistrate before it is transmitted to the executing authority."

The clarification in the text aims at highlighting that the validating authority is not intended to merely "rubberstamp" the EIO prepared by an issuing non-judicial authority. While the assessment of material conditions for requesting the investigative measure remains within the remit of the issuing authority in conformity with each Member State's legal system, the validating authority should be able to assess conditions relating to necessity, proportionality and availability of the measure in a similar national case, as set out in Article 5a (1), letters a) and b).

It remains understood - and it has been clarified by the Presidency during the trilogue - that each Member State will remain free, when implementing the Directive, to shape the validation procedure in conformity with their national legal system.

If Member States should agree to the proposed modification to the Article, the Presidency would further invite them to agree to a corresponding integration in the recitals, and in particular Recital (10a), which would read:

"(10a) The EIO should be chosen where the execution of an investigative measure seems proportionate, adequate and applicable to the case in hand. The issuing authority should therefore ascertain whether the evidence sought is necessary and proportionate for the purpose of proceedings, whether the measure chosen is necessary and proportionate for the gathering of this evidence, and whether, by means of issuing the EIO, another MS should be involved in the gathering of this evidence. **The same assessment should be carried out in the validation procedure, when the validation of an EIO is required under this Directive.** The execution of an EIO should not be refused on grounds other than those stated in this Directive, however the executing authority is entitled to opt for a less intrusive measure than the one indicated in an EIO if it makes it possible to achieve similar results."

3. EIO issued at the initiative of the defence

In the course of the trilogue EP insisted on their proposed amendment to Article 4 of the Directive, whereby an EIO may be issued "(aa) at the request of the representative of the suspect or detainee in order to secure the performance of the investigative procedures requested by that person in his defence".

The Presidency reiterated that this proposal is not acceptable, since it would go beyond the scope of this instrument and entail a measure of approximation of the criminal procedural laws of the Member States in relation to the rights of defence in the course of investigations.

In order to advance in negotiations, the Presidency - building on the proposal already submitted to delegations - would like to invite Member States to agree to a recital drafted along the following lines:

"The measures which can be the object of an EIO should be aimed at acquiring all elements relevant to the investigation, whether for or against the suspected or accused person. In this regard, when implementing this Directive, Member States should give due consideration to the rights of the defence, in conformity with the relevant rules under their national law, to request that certain investigative measures be carried out also at the initiative of the defence if this is allowed by a Member State's legal system.

4. Procedural rights

In the course of the trilogue EP suggested that a recital be added to the draft Directive recalling the obligation for Member States to guarantee the procedural rights of suspected or accused persons, in particular with reference to the existing EU instruments in this field (Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, and Directive 2012/13/EU on the right to information). EP has announced that it would propose wording to this effect, which will subsequently be submitted to MS for their opinion.

Article 4

Types of procedure for which the EIO can be issued

The EIO may be issued

a) with respect to criminal proceedings brought by, or that may be brought before, a judicial authority in respect of a criminal offence under the national law of the issuing State;

aa) at the request of the representative of the suspect or detainee in order to secure the performance of the investigative procedures requested by that person in his defence;

b) in proceedings brought by administrative authorities in respect of acts which are punishable under the national law of the issuing state by virtue of being infringements of the rules of law and where the decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters;

c) in proceedings brought by judicial authorities in respect of acts which are punishable under the national law of the issuing state by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters, and

d) in connection with proceedings referred to in points (a), (b), and (c) which relate to offences or infringements for which a legal person may be held liable or punished in the issuing state.

Article 5

Content and form of the EIO

1. The EIO set out in the form provided for in Annex A shall be completed, signed, and its content certified as accurate **and correct** by the issuing authority

It shall in particular, contain the following information:

- (a) data about the issuing authority and, if applicable, validating authority;
- (aa) the object of and reasons for EIO;
- (ab) the necessary information available on the person(s) concerned;
- (ac) a description of the criminal act, which is subject of the investigation or proceedings, and the applicable provisions of criminal law;
- (ad) a description of the investigative measures(s) requested and evidence to be obtained.

2. Each Member State shall indicate the language(s) which, among the official languages of the institutions of the Union and in addition to the official language(s) of the Member State concerned, may be used for completing or translating the EIO when the State in question is the executing State.

2a. The EIO set out in the form provided for in Annex A shall be translated by the competent authority of the issuing State into an official language of the executing State or **the language indicated** by the executing State in accordance with Article 5(2).¹

¹ The EP suggested at the trilogue to insert in a recital a reference to the following two Directives:
Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.
Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings

Article 7

EIO related to an earlier EIO

1. Where the issuing authority issues an EIO which supplements an earlier EIO, it shall indicate this fact in the EIO in accordance with the form provided for in Annex A.
2. When assisting in the execution of the EIO in the executing State, in accordance with Article 8(3), the issuing authority may, without prejudice to notifications made under Article 28(1)(c), address an EIO which supplements the earlier EIO directly to the executing authority, while present in that State.

2a. Any supplementary EIO must be certified in accordance with Article 5 and and validated in accordance with to Article 5a.

Article 11

Deadlines for recognition or execution

1. The decision on the recognition or execution shall be taken and the investigative measure shall be carried out with the same celerity and priority as for a similar national case and, in any case, within the deadlines provided in this Article.
2. Where the issuing authority has indicated in the EIO that, due to procedural deadlines, the seriousness of the offence or other particularly urgent circumstances, a shorter deadline than those provided in this Article is necessary, or if the issuing authority has stated in the EIO that the investigative measure must be carried out on a specific date, the executing authority shall take as full account as possible of this requirement.
3. The decision on the recognition or execution shall be taken as soon as possible and, without prejudice to paragraph 5, no later than 30 days after the receipt of the EIO by the competent executing authority.

4. Unless either grounds for postponement under Article 14 exist or evidence mentioned in the investigative measure covered by the EIO is already in the possession of the executing State, the executing authority shall carry out the investigative measure without delay and without prejudice to paragraph 5, no later than 90 days after the decision referred to in paragraph 3 is taken.

5. When it is not practicable in a specific case for the competent executing authority to meet the deadline set out in paragraph 3 or the specific date set out in paragraph 2, it shall without delay inform the competent authority of the issuing State by any means, giving the reasons for the delay and the estimated time needed for the decision to be taken. In this case, the time limit laid down in paragraph 3 may be extended by a maximum of 30 days.

6. When it is not practicable in a specific case for the competent executing authority to meet the deadline set out in paragraph 4, it shall without delay inform the competent authority of the issuing State by any means, giving the reasons for the delay and it shall consult with the issuing authority on the appropriate timing to carry out the measure.

Article 12

Transfer of evidence

1. The executing authority shall without undue delay transfer the evidence obtained or already in the possession of the competent authorities of the executing State as a result of the execution of the EIO to the issuing State. Where requested in the EIO and if possible under national law of the executing State, the evidence shall be immediately transferred to the competent authorities of the issuing State assisting in the execution of the EIO in accordance with Article 8(3).

1a. The executing authority may suspend the transfer of the evidence, pending the decision regarding a legal remedy, unless sufficient reasons are indicated in the EIO that an immediate transfer is essential for the proper conduct of its investigations or the preservation of individual rights.

2. When transferring the evidence obtained, the executing authority shall indicate whether it requires it to be returned to the executing State as soon as it is no longer required in the issuing State.

2a. Where the objects, documents, or data concerned are already relevant for other proceedings the executing authority may, at the explicit request and after consultations with the issuing authority temporarily transfer the evidence under the condition that it be returned to the executing State as soon as they are no longer required in the issuing State or at any other time/occasion agreed between the competent authorities.

Article 14

Article 14			
<i>Grounds for postponement of recognition or execution</i>	<i>Grounds for postponement of recognition or execution</i>		
1. The recognition or execution of the EIO may be postponed in the executing State where:	1. The recognition or execution of the EIO may be postponed in the executing State where:		
a) its execution might prejudice an ongoing criminal investigation or prosecution, until such time as the executing State deems reasonable; or	a) its execution might prejudice an ongoing criminal investigation or prosecution until such time as the executing State deems reasonable; (...)	(a) <i>the evidence obtained might also be relevant to ongoing criminal investigations or prosecutions or might prejudice such investigations or prosecutions</i> , until such time as the executing State deems reasonable; or Amendment 46	<u>It is suggested that the Council accepts this change.</u>
b) the objects, documents, or data concerned are already being used in other proceedings, until such time as they are no longer required for this purpose.	b) the objects, documents, or data concerned are already being used in other proceedings until such time as they are no longer required for this purpose.		

		<p><i>1a. Where the objects, documents or data concerned are already relevant for other proceedings the executing authority may, at the explicit request and after consultations with the issuing authority, temporarily transfer the evidence under the condition that it be returned to the executing State as soon as it is no longer required in the issuing State or at any other time agreed between the competent authorities.</i></p> <p>Amendment 47</p>	<p><u>Deleted by the EP in the text at the technical meeting on 7.11.12. To be confirmed by the EP at the next trilogue.</u></p>
<p>2. As soon as the ground for postponement has ceased to exist, the executing authority shall forthwith take the necessary measures for the execution of the EIO and inform the issuing authority thereof by any means capable of producing a written record.</p>	<p>2. As soon as the ground for postponement has ceased to exist, the executing authority shall forthwith take the necessary measures for the execution of the EIO and inform the issuing authority thereof by any means capable of producing a written record.</p>		<p><u>In conformity with the Council general approach.</u></p>

Article 15

<i>Obligation to inform</i>	<i>Obligation to inform</i>		
<p>1. The competent authority in the executing State which receives the EIO shall, without delay and in any case within a week of receipt of the EIO, acknowledge this reception by completing and sending the form provided in Annex B. Where a central authority has been designated in accordance with Article 6(2), this obligation is applicable both to the central authority and to the executing authority which receives the EIO via the central authority. In cases referred to in Article 6(5), this obligation applies both to the competent authority which initially received the EIO and to the executing authority to which the EIO is finally transmitted.</p>	<p>1. The competent authority in the executing State which receives the EIO shall, without delay and in any case within a week of <u>the reception of an EIO</u>, acknowledge this reception by <u>filling in (...)</u> and sending the form provided in Annex B. Where a central authority has been designated in accordance with Article 6(2), this obligation is applicable both to the central authority and to the executing authority which receives the EIO via the central authority. In cases referred to in Article 6(5), this obligation applies both to the competent authority which initially received the EIO and to the executing authority to which the EIO is finally transmitted.</p>		<p><u>At the technical meeting on 7.11.12 the EP accepted the text of the Council general approach. To be confirmed at the next trilogue.</u></p>
<p>2. Without prejudice to Article 9(2), the executing authority shall inform the issuing authority:</p>	<p>2. Without prejudice to Article 9(2) <u>and (3)</u> the executing authority shall inform the issuing authority:</p>	<p>2. Without prejudice to Article 9(2), the executing authority shall inform the issuing authority:</p> <p>Compromise amendment 13</p>	<p><u>At the technical meeting on 7.11.12 the EP suggested to add "and 2a" after Article 9(2). To be confirmed at the next trilogue.</u></p> <p><u>This change is in conformity with the Council general approach.</u></p>

<p>(a) immediately by any means where:</p>	<p>(a) immediately by any means:(...)</p>	<p>(a) immediately by any means where: Compromise amendment 13</p>	<p><u>At the technical meeting on 7.11.12 the EP suggested a slight change: after "any means" insert "where" and delete "if" in all subpoints (i) -(iii). To be confirmed at the next trilogue.</u></p> <p><u>It is suggested that the Council accepts this change.</u></p>
<p>(i) it is impossible for the executing authority to take a decision on the recognition or execution due to the fact that the form provided for in the Annex is incomplete or manifestly incorrect;</p>	<p>(i) if it is impossible for the executing authority to take a decision on the recognition or execution due to the fact that the form provided for in the Annex is incomplete or manifestly incorrect;</p>	<p>(i) it is impossible for the executing authority to take a decision on the recognition or execution due to the fact that the form provided for in the Annex is incomplete or manifestly incorrect; Compromise amendment 13</p>	
<p>(ii) the executing authority, in the course of the execution of the EIO, considers without further enquiries that it may be appropriate to undertake investigative measures not initially foreseen, or which could not be specified when the EIO was issued, in order to enable the issuing authority to take further action in the specific case;</p>	<p>(ii) if the executing authority, in the course of the execution of the EIO, considers without further enquiries that it may be appropriate to undertake investigative measures not initially foreseen, or which could not be specified when the EIO was issued, in order to enable the issuing authority to take further action in the specific case;</p>	<p>(ii) the executing authority, in the course of the execution of the EIO, considers without further enquiries that it may be appropriate to undertake investigative measures not initially foreseen, or which could not be specified when the EIO was issued, in order to enable the issuing authority to take further action in the specific case; Compromise amendment 13</p>	

(iii) the executing authority establishes that, in the specific case, it cannot comply with formalities and procedures expressly indicated by the issuing authority in accordance with Article 8.	(iii) if the executing authority establishes that, in the specific case, it cannot comply with formalities and procedures expressly indicated by the issuing authority in accordance with Article 8.	(iii) the executing authority establishes that, in the specific case, it cannot comply with formalities and procedures expressly indicated by the issuing authority in accordance with Article 8. Compromise amendment 13	
		<i>(iv) the issuing authority makes modifications to the EIO or the EIO has expired or has been revoked</i> Compromise amendment 13	<u>EP agreed to delete at the technical meeting on 7.11.12. To be confirmed at the next trilogue.</u> <u>It is suggested that the Council accepts this deletion.</u>
Upon request by the issuing authority, the information shall be confirmed without delay by any means capable of producing a written record;	Upon request by the issuing authority, the information shall be confirmed without delay by any means capable of producing a written record;	Upon request by the issuing authority, the information shall be confirmed without delay by any means capable of producing a written record; Compromise amendment 13	<u>In conformity of the Council general approach.</u>
(b) without delay by any means capable of producing a written record:	(b) without delay by any means capable of producing a written record:	(b) without delay by any means capable of producing a written record: Compromise amendment 13	

(i) any decision taken in accordance with Article 10(1);	(i) of any decision taken in accordance with Articles <u>9 or 10</u> (...);	(i) of any decision taken in accordance with Articles <u>9 or 10</u> ; Compromise amendment 13	
(ii) the postponement of the execution or recognition of the EIO, the underlying reasons and, if possible, the expected duration of the postponement.	(ii) of the postponement of the execution or recognition of the EIO, the underlying reasons and, if possible, the expected duration of the postponement.	(ii) of the postponement of the execution or recognition of the EIO, the underlying reasons and, if possible, the expected duration of the postponement. Compromise amendment 13	
Article 16			
<i>Criminal liability regarding officials</i>	<i>Criminal liability regarding officials</i>		
When present in the territory of the executing State in the framework of the application of this Directive, officials from the issuing State shall be regarded as officials of the executing State with respect to offences committed against them or by them.	When present in the territory of the executing State in the framework of the application of this Directive, officials from the issuing State shall be regarded as officials of the executing State with respect of offences committed against them or by them.	<i>Where, in the framework of the application of this Directive, officials from the issuing State are present in the territory of the executing State, they shall be regarded as officials of the executing State with respect to offences committed against them or by them.</i> Amendment 48	<u>It is suggested that the Council accepts this amendment since it is identical in substance to the Council general approach.</u>

Article 17

<i>Civil liability regarding officials</i>	<i>Civil liability regarding officials</i>		
1. Where, in the framework of the application of this Directive, officials of the issuing State are present in the territory of the executing State, the issuing State shall be liable for any damage caused by them during their operations, in accordance with the law of the executing State.	1. Where, in the framework of the application of this Directive, officials of the issuing State are present in the territory of the executing State, the issuing State shall be liable for any damage caused by them during their operations, in accordance with the law of the executing State.		<u>In conformity with the Council general approach.</u>
2. The Member State in whose territory the damage referred to in paragraph 1 was caused shall make good such damage under the conditions applicable to damage caused by its own officials.	2. The Member State in whose territory the damage referred to in paragraph 1 was caused shall make good such damage under the conditions applicable to damage caused by its own officials.		<u>In conformity with the Council general approach.</u>
		<p><i>2a. The issuing State whose officials have caused damage to any person in the territory of the executing State shall reimburse the latter any sums it has paid to the victims or persons entitled on their behalf.</i></p> <p>Amendment 490</p>	<u>It is suggested that the Council accepts this change.</u>

<p>3. The Member State whose officials have caused damage to any person in the territory of another Member State shall reimburse the latter in full any sums it has paid to the victims or persons entitled on their behalf.</p>	<p>3. The Member State whose officials have caused damage to any person in the territory of another Member State shall reimburse the latter in full any sums it has paid to the victims or persons entitled on their behalf.</p>		<p><u>If the Council accepts EP amendment in paragraph 2a this text should be deleted.</u></p> <p><u>It is suggested to accept the EP amendment.</u></p>
<p>4. Without prejudice to the exercise of its rights vis-à-vis third parties and with the exception of paragraph 3, each Member State shall refrain in the case provided for in paragraph 1 from requesting reimbursement of damages it has sustained from another Member State.</p>	<p>4. Without prejudice to the exercise of its rights vis-à-vis third parties and with the exception of paragraph 3, each Member State shall refrain in the case provided for in paragraph 1 from requesting reimbursement of damages it has sustained from another Member State.</p>		<p><u>In conformity with the Council general approach.</u></p>