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COVER NOTE

from: Mr Jaime GAMA, President of the Assembly of the Republic of Portugal
date of reception: 22 October 2010
to: Mr Yves LETERME, President of the Council of the European Union

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
[ref. 2010/0817 (COD) - 9288/10 COPEN 117 EUROJUST 49 EJN 13 PARLNAT 13 CODEC 384]
- Opinion on the application of the Principles of Subsidiarity and Proportionality

Delegations will find attached a copy of the letter indicating that the abovementioned initiative complies with the principle of subsidiarity.

Assembleia da República

(courtesy translation)

Mr. Yves Leterme
President of the Council of the European Union
Brussels

**Subject: Process of parliamentary scrutiny of the European initiatives under Protocol no. 2
Opinion – PARLNAT 13**

Please find enclosed the Opinion issued by the European Affairs Committee of the Assembly of the Republic of Portugal, as well as the Report issued by the Parliamentary Committee with responsibility for the matter in question (Committee on Constitutional Affairs, Rights, Freedoms and Guarantees), within the framework of the process of parliamentary scrutiny of the European initiatives under Protocol no.2 of the Treaty of Lisbon, on the following text:

- ***PARLNAT 13 - 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.***

Furthermore, we should like to inform you that the Assembly of the Republic has, therefore, concluded the process of scrutiny of the aforementioned initiative.

On this date, the above-mentioned documents were also forwarded to the President of the European Parliament and the President of the European Commission.

Please accept, Mr. President, the assurances of my highest consideration and esteem.

THE PRESIDENT OF THE ASSEMBLY OF THE REPUBLIC

JAIME GAMA

Lisbon, 21 October 2010
Official letter no. 412/PAR/10/hr

ASSEMBLY OF THE REPUBLIC
EUROPEAN AFFAIRS COMMITTEE

OPINION
PARLNAT 13

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**

I - Introductory note

1 - Under Article 6 of Law No 43/2006 of 25 August 2006 governing monitoring, assessment and pronouncement by the Assembly of the Republic within the scope of the process of constructing the European Union, the European Affairs Committee is the permanent specialist parliamentary committee with responsibility for the overall monitoring and assessment of European affairs.

2 - In application of that responsibility and pursuant to Article 7 of the aforementioned Law, the European Affairs Committee has submitted to the Committee on Constitutional Affairs, Rights, Freedoms and Guarantees for consideration and possible report the opinion analysed below.

Initiative PARLNAT 13 - 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**

II - Analysis

1 - According to the document under consideration this initiative was submitted by a group of Member States comprising Belgium, Bulgaria, Estonia, Spain, Austria, Slovenia and Sweden with a view to the adoption of a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters.

2 - The general aim of the proposal for a Directive is to enhance the effectiveness of the procedures for obtaining evidence in criminal proceedings with a cross-border dimension.

3 - It is stressed in the document under consideration that the requesting States argue that the present legislative framework in this area, consisting of arrangements for judicial assistance and mutual recognition, is fragmented and impedes the activity of the judicial authorities.

4 - To overcome this difficulty they propose the establishment of a single instrument for obtaining evidence located in another Member State in connection with criminal proceedings and the subsequent replacement of all existing instruments relating to the gathering of evidence, including the mutual judicial assistance Conventions, Council Framework Decision 2003/577/JHA of 22 July 2003 concerning the execution in the EU of orders freezing property and evidence and Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant.

5 - It is also stated that, apart from the general aim, the following specific objectives are pursued: swiftness; legality of evidence; simplification of procedures; a high degree of protection of fundamental rights, especially procedural rights; reduction of financial costs; enhanced mutual trust and cooperation between Member States, and preservation of the specific characteristics of national systems and their judicial culture.

6 - This draft legislative act defines the European Investigation Order (EIO) as "*a judicial decision issued by a competent authority of a Member State ("the issuing State") in order to have one or several specific investigative measure(s) carried out in another Member State ("the executing State") with a view to gathering evidence*", within the framework of the following proceedings:

- 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;

- 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;
- 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;
- in the context of the proceedings referred to above, those which relate to offences or infringements for which a legal person may be held liable or punished in the issuing State.

7 - The European Investigation Order applies to all investigative measures except for the setting up of joint investigation teams and the interception and immediate transmission of telecommunications.

8 - It is also proposed that the executing authority should recognise a European Investigation Order transmitted in accordance with the formal and practical procedures, without any further formality being required.

9 - It is further proposed that the measures necessary for its execution be immediately taken in the same way and under the same conditions as if the investigative measure in question had been ordered by an authority of the executing State.

10 - It is important to note that this proposal for a Directive respects the principle of subsidiarity for two fundamental reasons:

- The first concerns the need to strengthen the process of European integration through the introduction of measures to enhance the effectiveness of judicial cooperation between Member States in criminal matters;
- Secondly, the objectives laid down in this legislative act can only be achieved through the European Union.

11 - Accordingly, given the nature of the matter at hand and the rise in ever more complex cross-border crime, the effectiveness of mechanisms for obtaining evidence cannot be ensured through isolated, individual action by each State.

III - Conclusions

1 - This opinion was drawn up pursuant to and in conformity with the provisions of Law No 43/2006 of 25 August 2006 setting out the powers of the Assembly of the Republic *for monitoring, assessment and pronouncement within the scope of the process of constructing the European Union.*

2 - The initiative in question respects and complies with the principle of subsidiarity.

3 - The matter in question does not fall within the sphere of the Assembly of the Republic's reserved legislative responsibility, and Article 2 of Law No 43/2006 of 25 August 2006 accordingly does not apply.

Opinion

The European Affairs Committee is therefore of the opinion that the scrutiny process is concluded in respect of the initiative under consideration.

Palácio de S. Bento, 19 October 2010

The Reporting Member

(s.)

Luísa Roseira

The Chairman of the Committee

(s.)

Vitalino Canas

OPINION

Initiative PARLNAT 13 - 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**

1. Introductory note

A group of Member States comprising Belgium, Bulgaria, Estonia, Spain, Austria, Slovenia and Sweden presented an initiative with a view to the adoption of a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters.

The Council of the European Union forwarded the abovementioned draft legislative act to the national parliaments in order to initiate the process provided for in Protocol (No 2) on the application of the principles of subsidiarity and proportionality.

2. Objectives of the proposal

The general aim of the proposal for a Directive is to enhance the effectiveness of the mechanisms for obtaining evidence in criminal proceedings with a cross-border dimension. The requesting States argue that the present legislative framework in this area, consisting of arrangements for judicial assistance and mutual recognition, is fragmented and impedes the activity of the judicial authorities.

To overcome this difficulty they propose the establishment of a single instrument for obtaining evidence located in another Member State in connection with criminal proceedings and the subsequent replacement of all existing instruments relating to the gathering of evidence, including the mutual judicial assistance Conventions, Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the EU of orders freezing property and evidence and Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.

Apart from that general aim, the following specific objectives are pursued: swiftness; legality of evidence; simplification of procedures; a high degree of protection of fundamental rights, especially procedural rights; reduction of financial costs; enhanced mutual trust and cooperation between Member States, and preservation of the specific characteristics of national systems and their judicial culture.

3. Content

This draft legislative act defines the European Investigation Order (EIO) as "*a judicial decision issued by a competent authority of a Member State ("the issuing State") in order to have one or several specific investigative measure(s) carried out in another Member State ("the executing State") with a view to gathering evidence*", within the framework of the following proceedings: 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; 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; 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 finally, in connection with proceedings referred to above which relate to offences or infringements of the rules of law for which a legal person may be held liable or punished in the issuing State.

The European Investigation Order applies to all investigative measures except for the setting up of joint investigation teams (Article 13 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the EU; Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams) and the interception and immediate transmission of telecommunications (Article 18 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the EU).

It is proposed that the executing authority should recognise a European Investigation Order transmitted in accordance with the formal and practical procedures, without any further formality being required. It is also proposed that the measures necessary for its execution be immediately taken in the same way and under the same conditions as if the investigative measure in question had been ordered by an authority of the executing State.

The decision on recognition or execution must be taken as soon as possible and no later than 30 days after the receipt of the EIO by the competent executing authority. That time limit may be extended, as a maximum, by the same period.

The execution of the investigative measure must be effected no later than 90 days after that decision is taken. If the executing State cannot meet this deadline it must consult with the issuing authority

on the appropriate timing for execution of the measure.

The recognition or execution of the EIO may be postponed in the executing State where its execution might prejudice an ongoing criminal investigation or prosecution or 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.

In addition, recognition or execution of an EIO may be refused in specific cases, in particular where there is an immunity or a privilege under the law of the executing State which makes it impossible to execute the EIO or its execution would harm essential national security interests, jeopardise the source of the information or involve the use of classified information relating to specific intelligence activities. However, one of the main innovations of this instrument compared with the existing legislative framework is that it limits the possibilities for refusing to execute or recognise an EIO.

It should also be stressed that this proposal for a Directive, among other measures, lays down the right to have recourse to interested parties and the possibility for officials of the issuing State to lend assistance in executing an EIO in the executing State.

Finally, it should be stated that the initiative contains specific provisions for the following investigative measures: temporary transfer of persons held in custody to the issuing State or the executing State for purposes of investigation; hearing by videoconference or telephone conference; obtaining information on and monitoring of bank accounts, and controlled deliveries.

4. Principle of subsidiarity

This proposal for a Directive respects the principle of subsidiarity for two fundamental reasons. The first concerns the need to strengthen the process of European integration through the introduction of measures to enhance the effectiveness of judicial cooperation between Member States in criminal matters. Secondly, the objectives laid down in this legislative act can be achieved only through the European Union. Given the nature of the matter at hand and the rise in ever more complex and cross-border crime, the effectiveness of mechanisms for obtaining evidence cannot be ensured through isolated, individual action by each State.

However, the effectiveness of this measure in practice will depend essentially on the conditions and means of investigation available to each State internally, as well as the swiftness of response by particular private entities, notably banks. It is clear that the possibility provided for in the measure under consideration for the executing State, in the event of being unable to meet the deadline for executing the investigative measure, to consult the issuing authority on the appropriate timing for execution of the measure, without the legal requirement for any other time limit, may undermine one of the main objectives which is swiftness of response.

On the other hand we would stress the importance of legislative simplification of the procedure for conducting hearings by videoconference and telephone conference. Simplification of the procedure for hearing witnesses or experts who are not in the State that issued the EIO will obviate recourse to letters rogatory which, apart from adding to the sluggishness of procedures, may not be sufficiently clear. The possibility of conducting hearings by videoconference or telephone conference furthers the principle of immediacy which informs our procedural arrangements in criminal matters and creates better conditions for the judicial authorities to evaluate evidence.

5. Opinion

In the light of the above, the Committee on Constitutional Affairs, Rights, Freedoms and Guarantees is of the opinion that **Initiative PARLNAT 13** - 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** - respects the principles of subsidiarity and proportionality and that this report should be submitted to the European Affairs Committee.

Palácio de São Bento, 29 September 2010

The Reporting Member

(s.)
(Isabel Oneto)

The Chairman of the Committee

(s.)
(Osvaldo de Castro)