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THE EUROPEAN UNION**

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COVER NOTE

from: Mr Martin PREINEDER, President of the Austrian Federal Council
date of receipt: 10 November 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 translation of a letter indicating that the abovementioned initiative complies with the principle of subsidiarity.

Vienna, 10 November 2010
GZ. 27000.0040/32-L2.1/2010

Dear Mr Leterme,

At its meeting on 4 November 2010 in the course of discussions on the following EU submission:

COUNCIL 9288/10

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

(35450/EU XXIV.GP)

the EU Committee adopted the following statement addressed to the bodies of the European Union pursuant to Article 23f(4) of the Constitution in conjunction with Article 23k(3) of the Constitution:

"The initiative for a Directive, tabled by several Member States including Austria, is aimed at simplifying crossborder prosecution of criminal offences. To that end, the principle of mutual recognition should be extended to cover investigative measures and obtaining of evidence. The EU Committee of the Federal Council welcomes the objectives of this initiative, particularly since a new, uniform approach can remove the current duplication of crossborder investigative measures, thereby resulting in a higher level of legal certainty.

The basis for regarding mutual recognition as the appropriate instrument is, as the Stockholm Programme stressed, trust in the operational capacity of the European criminal justice systems. In order to strengthen that trust, the Council adopted a Roadmap in November 2009 containing six measures for strengthening procedural guarantees.

It is essential that similar precautions are taken with the European Investigation Order (EIO) in criminal matters so as to protect individuals from unreasonable or indeed questionable invasion of their privacy by states.

The current proposal for a Directive does, admittedly, include the possibility of refusing to allow an investigation order. However, the grounds for doing so are too general to provide the executing authorities with suitable criteria for assessing the admissibility of an investigation order. It should therefore be ensured that the articles concerning possible reasons for rejection are agreed and clearly drafted, so as to provide the authorities with suitable regulations for handling practical situations.

In addition, the initiative fails to establish any minimum requirements that the issuing authority can refer to when deciding on an investigation order. There is neither a legality test (cf. Article 7 of the European Evidence Warrant) nor a proportionality test. For those reasons, there seems to be an urgent need to oblige the authority of the issuing State to conduct legality and proportionality tests. To speed up proceedings, however, any duplication owing to tests being conducted by authorities in both the issuing State and the executing State should be avoided.

As regards the legal remedies available to individuals for opposing an investigation order, it would seem advisable to allow an appeal against an EIO to be brought only before a court in the issuing State. However, the procedural requirements to be observed should remain only those provided for in the law of the executing State. It should therefore be possible to refuse the transfer of evidence obtained on the basis of an investigation order, and hence its use, in another Member State if the evidence was not obtained legally or if it could not be used in a similar Austrian case (e.g. prohibitions on the gathering of evidence).

The Committee considers that the grounds on which an issuing authority may grant an investigation order need to be clearly specified (e.g. ensuring respect for editorial secrecy, professional secrets and the "ne bis in idem" principle). It must, however, be ensured that the transfer of evidence can be refused where such evidence could not be used in a comparable case in Austria, for example owing to bans on the gathering of evidence."

Complimentary close.

(Martin Preinerder)

To the
President of the
Council of the European Union
Mr Yves LETERME

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Belgium