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NOTE

From :	Presidency
To :	Delegations
No prev doc	18918/1/11 REV 1 COPEN 369 EUROJUST 217 EJN 185 CODEC 2509
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 - Preamble, forms and annex related to Article 29.1

At the Council meeting on 13-14 December 2011 a general approach has been reached on the text of the draft Directive (except for Article 29.2 and the annex related to Article 29.1) and Recitals 10 to 10c, 12a, 12b, 13a, 13b, 14a to 14k, 15a and 17a.

Some delegations maintain parliamentary scrutiny reservations on the draft Directive.

The remaining Recitals of the preamble, the forms and the list of provisions of currently existing legal instruments that may be affected still need to be examined. For this purpose, delegations were requested in DS 1073/12 to provide their observations on the proposals made by the Presidency.

The current document takes into account the observations received so far from the delegations and will be submitted to an experts' meeting of the Working Party for further examination.

**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**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 82 (1)(a) thereof,

Having regard to the 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,

After transmission of the draft legislative act to the national Parliaments,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) The European Union has set itself the objective of maintaining and developing an area of freedom, security and justice.
- (2) According to Article 82(1) of the Treaty on the Functioning of the European Union, judicial cooperation in criminal matters in the Union is to be based on the principle of mutual recognition of judgments and judicial decisions, which is, since the Tampere European Council of 15 and 16 October 1999, commonly referred to as a cornerstone of judicial cooperation in criminal matters within the Union.

- (3) Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property and evidence,¹ addressed the need for immediate mutual recognition of orders to prevent the destruction, transformation, moving, transfer or disposal of evidence. However, since that instrument is restricted to the freezing phase, a freezing order needs to be accompanied by a separate request for the transfer of the evidence to the issuing state in accordance with the rules applicable to mutual assistance in criminal matters. This results in a two-step procedure detrimental to its efficiency. Moreover, this regime coexists with the traditional instruments of cooperation and is therefore seldom used in practice by the competent authorities.
- (4) 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 matters² was adopted to apply the principle of mutual recognition in such respect. However, the European evidence warrant is only applicable to evidence which already exists and covers therefore a limited spectrum of judicial cooperation in criminal matters with respect to evidence. Because of its limited scope, competent authorities are free to use the new regime or to use mutual legal assistance procedures which remain in any case applicable to evidence falling outside of the scope of the European evidence warrant.
- (5) Since the adoption of Framework Decisions 2003/577/JHA and 2008/978/JHA, it has become clear that the existing framework for the gathering of evidence is too fragmented and complicated. A new approach is therefore necessary.

¹ OJ L 196, 2.8.2003, p. 45.

² OJ L 350, 30.12.2008, p. 72.

- (6) In the Stockholm programme, which was adopted on 11 December 2009, the European Council decided that the setting up of a comprehensive system for obtaining evidence in cases with a cross-border dimension, based on the principle of mutual recognition, should be further pursued. The European Council indicated that the existing instruments in this area constitute a fragmentary regime and 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. The European Council therefore called for a comprehensive system to replace all the existing instruments in this area, including the Framework Decision on the European evidence warrant, covering as far as possible all types of evidence and containing deadlines for enforcement and limiting as far as possible the grounds for refusal.
- (7) This new approach is based on a single instrument called the European Investigation Order (EIO). An EIO is to be issued for the purpose of having one or several specific investigative measure(s) carried out in the executing State with a view to gathering evidence. This includes the obtaining of evidence that is already in the possession of the executing authority.
- (8) The EIO has a horizontal scope and therefore applies to all investigative measures aimed at gathering evidence. However, the setting up of a joint investigation team and the gathering of evidence within such a team require specific rules which are better dealt with separately. Without prejudice to the application of this Directive³, existing instruments should therefore continue to apply to this type of measure.⁴

³ Addition proposed by ES with the following explanation: "*While the exclusion of JITs from the scope of this Directive may be justified in the light of their specificities, it would be desirable to avoid any automatism preventing the authorities participating in them from using the mechanisms provided for in this Directive. Therefore, the current framework regulating JITs should be regarded as a minimum to be preserved but not as an impediment to use an EIO if deemed necessary.*"

⁴ This recital has been put in line with Article 3 as agreed in the general approach.

- (9) This Directive does not apply to cross-border observations as referred to in Article 40 of the Convention of 19 June 1990 implementing the Schengen Agreement.⁵
- (10) The EIO should focus on the investigative measure which has to be carried out. The issuing authority is best placed to decide, on the basis of its knowledge of the details of the investigation concerned, which measure is to be used. However, the executing authority should, wherever possible, use another type of measure if the requested measure does not exist under its national law or would not be available in a similar domestic case. Availability of the measure under the law of the executing State should be assessed by the executing authority⁶ only in relation to legal conditions that are essential for the execution of the measure. This does not allow the executing State to assess the underlying reasons for issuing the EIO. Availability refers to occasions where the requested measure exists under the law of the executing State but is only lawfully available in certain situations, for example when the measure can only be carried out for offences of a certain degree of seriousness; against persons for which there is already a certain level of suspicion; or with the consent of the person concerned. The executing authority may also have recourse to another type of investigative measure when it will achieve the same result as the measure provided for in the EIO by means implying less interference on the fundamental rights of the person concerned.

⁵ OJ L 239, 22.9.2000, p. 19. CZ has questioned why this measure is not covered by the scope of the Directive. If MS maintain the view that it should be exempt, CZ argues that further consideration should be given to the link between this recital and operative part of the instrument (Article 3). In the opinion of this delegation the content of this recital should be expressly quoted in Article 3 as well.

⁶ UK suggests to replace words: "*only in relation to legal conditions that are essential for the execution of the measure.*" By words: "*in accordance with its national law and procedure*". It is however reminded that this recital has already been agreed as a part of general approach.

- (10a)⁷ 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 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.
- (10b) In view of ensuring the transmission of the EIO to the competent authority of the executing State, the issuing authority may make use of any possible/relevant means of transmission, including for example the secure telecommunications system of the European Judicial Network, Eurojust, Interpol or other channels used by judicial or law enforcement authorities. Where the EIO has been validated by a judicial authority, that authority may also be regarded as an issuing authority for the purposes of transmission of the EIO.
- (10c) When making a declaration concerning the language regime, Member States are encouraged to include at least one language which is commonly used in the European Union other than their official language(s)⁸.
- (10d) To ensure the effectiveness of judicial cooperation in criminal matters, the possibility of refusing to recognise or execute the EIO, as well as the grounds for postponing its execution, should be limited.⁹

⁷ UK considered that the text of this recital is not clear enough in respect of the wording of article 5a. It is however reminded that this recital has already been agreed as a part of general approach

⁸ ES suggested to modify this recital to further clarify the issue of official languages. It is however reminded that this recital is a part of general approach.

⁹ Previously Recital 12.

(11)¹⁰ The execution of an EIO should, to the widest extent possible, and without prejudice to fundamental principles of the law of the executing State, be carried out in accordance with the formalities and procedures expressly indicated by the issuing authority. The issuing authority may request that one or several authorities of the issuing State assist in the execution of the EIO in support of the competent authorities of the executing State. The executing authority should comply with such request, if necessary by setting conditions as to the scope and nature of the attendance of the authorities of the issuing State.¹¹

(12) (...)

(12a) The principle of *ne bis in idem* is a fundamental principle of law in the European Union. Therefore the executing authority should be entitled to refuse the execution of an EIO if its execution would be contrary to such principle and it is firmly¹² confirmed that the trial of the person concerned has been finally disposed of for the same facts and under the conditions set out in Article 54 of the Convention of 19 June 1990 implementing the Schengen Agreement. Given the preliminary nature of the proceedings underlying an EIO and the complexity of analysis of the conditions required by Article 54, the executing authority should inform and consult with the issuing authority, which should consider this information and take the necessary measures in relation to the proceedings underlying the issuing of an EIO. Such consultation is without prejudice to the obligation of the executing authority to consult the issuing authority in accordance with Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings.¹³

¹⁰ UK considered that some clarification could still be added to this recital.

¹¹ CZ considers that this recital repeats the wording of Article 8 and thus as void could be deleted.

¹² UK suggested deletion of this word. It is however reminded that this recital is a part of general approach.

¹³ OJ L 328, 15.12.2009, p. 42.

- (12b) It should be possible to refuse an EIO where its recognition or execution in the executing State would involve breaching of an immunity or privilege in that State. There is no common definition of what constitutes an immunity or privilege in the European Union and the precise definition of these terms is therefore left to national law, which may include protections which apply to medical and legal professions, but should not be interpreted in a way which would run counter to the obligation to abolish certain grounds for refusal in Article 7 of the Council Act of 16 October 2001 establishing, in accordance with Article 34 of the Treaty on European Union, the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union. This may include as well, even though they are not necessarily considered as privilege or immunity, rules relating to freedom of the press and freedom of expression in other media.
- (13) Time restrictions are necessary to ensure quick, effective and consistent cooperation between the Member States in criminal matters. The decision on the recognition or execution, as well as the actual execution of the investigative measure, should be carried out with the same celerity and priority as for a similar national case. Deadlines should be provided to ensure a decision or execution within reasonable time or to meet procedural constraints in the issuing State.

(13a) ¹⁴Legal remedies available against an EIO should be at least equal to those available in the domestic case against the investigative measure concerned. In accordance with their national law Member States should ensure the applicability of these legal remedies including by informing in due time any interested party about the possibilities and modalities for seeking the legal remedies¹⁵. In cases where the objections against the EIO are submitted by interested party in the executing State in respect of the substantive reasons for issuing the EIO, it is advisable that information about such challenge is transmitted to the issuing authority and that the interested party is informed accordingly.

¹⁴ This recital is a part of the general approach agreement. However ES made the following observation and proposed some changes to the recital (replacement of "is advisable" by "should"): *Although the situation is properly targeted by art. 13.3, the current wording of Recital 13 a may offer the false impression that substantial matters may be challenged at the level of the executing authority. The consultations with the issuing authority mentioned in the recital should be complemented with the clear indication that these consultations are but a way to convey to the issuing authority the allegations, but do not constitute a remedy before the executing authority, nor a substitute for the remedy to be filed before the issuing authority.*

¹⁵ UK suggested to add the following reference to confidentiality: *and ensuring that doing so does not undermine the need to ensure the confidentiality of the investigation in the issuing State*" It is reminded that this recital is part of the general approach.

(13b) The expenses incurred in the territory of the executing Member State for the execution of an EIO should be borne exclusively by that Member State. This arrangement complies with the general principle of mutual recognition. However, the execution of an EIO may incur exceptionally high costs on the executing State. Such exceptionally high costs may, for example, be complex experts' opinions or large police operation or surveillance activities over a large period of time. This should not impede the execution of the EIO and the issuing and executing authorities should seek to establish which expenses are to be considered as exceptionally high. The issue of costs might become subject to consultations between the Member States concerned and they are recommended to resolve this issue during the consultations stage. As the last resort, the issuing authority may decide to withdraw¹⁶ the EIO or to maintain it and the part of the costs which are estimated exceptionally high by the executing State and absolutely necessary in the course of the proceedings, should be covered by the issuing State. The given mechanism does not constitute an additional ground for refusal, and in any case should not be abused in a way to delay or bar execution of the EIO.

¹⁶ UK suggested to add: "*or modify*" It is noted however that Article Y does not foresee such possibility. This delegation also proposed to delete the words " and absolutely necessary in the course of the proceedings " It is however reminded that this recital is a part of general approach.

(14) ¹⁷The EIO provides a single regime for obtaining evidence. Additional rules are however necessary for some types of investigative measures which should be included in the EIO, such as the temporary transfer of persons held in custody, hearing by video or telephone conference, obtaining of information related to bank accounts or banking transactions or controlled deliveries. Investigative measures implying a gathering of evidence in real time, continuously and over a certain period of time are covered by the EIO, but flexibility should be given to the executing authority for these measures given the differences existing in the national laws of the Member States.

(14a)¹⁸ This Directive sets rules on carrying out, at all stages of criminal proceedings, including the trial phase, of an investigative measure, if needed with the participation of the person with a view to collecting evidence. For example an EIO may be issued for the temporary transfer of the person to the issuing State or for carrying out of a hearing by videoconference. However, where the person is to be transferred to another Member State for the purposes of prosecution including bringing that person before a court for the purpose of the standing trial an European Arrest Warrant should be issued in accordance with the Council Framework Decision 2002/584/JHA.

¹⁷ CZ considers that this recital while restating the relevant provisions in the operative part of the text may also add to the confusion where it comes to the verification of the proportionality of the issuing of an EIO (last sentence). Therefore this delegation proposes to delete it.

¹⁸ UK proposed to replace this recital by the following one: "*This Directive sets rules on carrying out investigative measures at all stages of criminal proceedings including the trial phase, and includes where necessary the participation of persons held in custody. For example an EIO may be issued for the temporary transfer of a person in custody to the issuing or executing State to conduct an investigative measure. However, an EIO should not be issued for the purpose of securing the surrender of a person to the issuing State for the purpose of prosecution, to be sentenced or to serve a sentence; in these circumstances a European Arrest Warrant should be issued in accordance with the Council Framework Decision 2002/584/JHA.*" It is however reminded that this recital has already been agreed as a part of general approach.

- (14b) It is up to the issuing authority to consider, in accordance with its law, whether an EIO should be issued for the temporary transfer of the person in custody for the purpose of carrying out of an investigative measure in the executing State. Accordingly, legal conditions, such as e.g. consent of the person are to be determined under the law of the issuing State. As a minimum requirement, the Directive sets an obligation to give the person concerned an opportunity to state their opinion on the temporary transfer and that this opinion be taken into account.
- (14c) With a view to the proportionate use of European Arrest Warrants for the purpose of prosecution, judicial authorities should consider whether issuing an EIO for the hearing of a suspected or accused person via videoconferencing could serve as an effective alternative.
- (14d) An EIO may be issued in order to get (...) evidence concerning the accounts, of whatever nature, held in any bank or any non-banking financial institution by the person subject to criminal proceedings. This possibility is to be understood broadly as comprising not only suspected or accused persons but also any other person in respect of which such information is found necessary by the competent authorities in the course of criminal proceedings.
- (14e) Where in this Directive a reference is made to the financial institutions this term should be understood according to the relevant definitions of Article 3 of the Directive 2005/60/EC.
- (14f)¹⁹ When an EIO is issued to obtain the ‘particulars’ of a specified account, ‘particulars’ is understood to include at least the name and address of the account holder, details of any powers of attorney held over the account, and any other details or documents provided by the account holder when the account was opened and that are still held by the bank.

¹⁹ SK proposed to add words: *the account balance* in the last sentence. The wording of this recital was however already agreed upon as a part of general approach.

- (14g) Possibilities to cooperate under the provisions on interception of telecommunications should not be limited to the content of the telecommunication, but could also cover collection of traffic and location data associated with such telecommunications, allowing competent authorities to issue an EIO for purposes of obtaining less intrusive data on telecommunications. An EIO issued to obtain historical traffic and location data related to telecommunications should be dealt with under the general regime related to the execution of the EIO and may be considered, depending on the national law of the executing State, as a coercive measure.
- (14h) Where several Member States are in the position to provide the necessary technical assistance, an EIO should be sent to only one of them and priority should be given to the State where the person is located. Member States where the subject is located and from which no technical assistance is needed to carry out the interception should be notified thereof [according to the Article 27d]. Conversely, where the technical assistance may not be received from merely one Member State, an EIO may be transmitted to more than one executing State.
- (14i) In an EIO containing the request for interception of telecommunications the issuing authority should provide the executing authority with sufficient information such as details of the criminal conduct under investigation, in order to allow the executing authority to assess whether the measure would be authorised in a similar national case.
- (14j) Member States should have regard to the importance of ensuring that technical assistance can be provided by a service provider operating publicly available telecommunications networks and services in the territory of the Member State concerned, in order to facilitate cooperation under this instrument in relation to the lawful interception of telecommunications.

(14k)²⁰ This directive, because of its scope, deals with provisional measures only with a view to gathering evidence. In this respect, it should be underlined that any item, including financial assets, may be subject to various provisional measures in the course of criminal proceedings, not only with a view to gathering evidence but also with a view to confiscation. It is important to recognise that the distinction between the two objectives of provisional measures is not always obvious and that the objective of the provisional measure may change in the course of the proceedings. For this reason, it is crucial for future works to maintain a smooth interrelationship between the various instruments applicable in this field. Furthermore, for the same reason, the assessment on whether the item is to be used as evidence and therefore the object of an EIO should be left to the issuing authority.

(15)²¹ This Directive replaces Framework Decisions 2003/577/JHA and 2008/978/JHA as well as the various instruments on mutual legal assistance in criminal matters in so far as they deal with obtaining evidence for the use in criminal proceedings.

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(15a) The offences listed in Annex D should be interpreted consistently with their interpretation under the already existing legal instruments on mutual recognition.

²⁰ This recital is a part of the general approach. UK considered that the wording of this recital should be made clearer.

²¹ CZ considers that this recital should be deleted and its content comprehensively regulated in Article 29. UK considered that this recital will need to be further modified once Article 29 is agreed upon.

²² BE proposed to add the following new recital: "*Where reference is made to mutual assistance in relevant international instruments such as conventions concluded within the Council of Europe. Member States should always apply this directive in their relations with other participating Member States.* "

- (16) Since the objective of this Directive, namely the mutual recognition of decisions taken to obtain evidence, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the action, be better achieved at the level of the Union, the Union may adopt measures in accordance with the principle of subsidiarity, as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve that objective.
- (17) This Directive respects the fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and by the Charter of Fundamental Rights of the European Union, notably Title VI thereof. Nothing in this Directive may be interpreted as prohibiting refusal to execute an EIO when there are reasons to believe, on the basis of objective elements, that the EIO has been issued for the purpose of prosecuting or punishing a person on account of his or her sex, racial or ethnic origin, religion, sexual orientation, nationality, language or political opinions, or that the person's position may be prejudiced for any of these reasons.
- (17a) Personal data processed, when implementing this Directive, should be protected in accordance with the provisions on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters and with relevant international instruments in this field.
- (18) [In accordance with Article 3 of Protocol N° 21 on the Position of the United Kingdom and Ireland in respect of the area of Freedom, Security and Justice annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, the United Kingdom and Ireland have notified their wish to take part in the adoption of this Directive.]
- (19) In accordance with Articles 1 and 2 of Protocol N° 22 on the Position of Denmark annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application,

ANNEX A²³**EUROPEAN INVESTIGATION ORDER (EIO)**²⁴

This EIO has been issued by a competent authority²⁵. I request that the investigative measure or measures specified below be carried out and the evidence thereafter obtained as a result of the execution of the EIO be transferred.

(A)

Issuing State.....

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Executing State:.....

(AA) CONDITIONS FOR ISSUING AN EIO

The issuing authority confirms that:

- The issuing of an EIO is necessary and proportionate for the purpose of the proceedings specified below
- The investigative measure(s) mentioned in the EIO could have been ordered under the same conditions in a similar national case.

(AAA)²⁷ INVESTIGATIVE MEASURE TO BE CARRIED OUT**1. Description of the investigative measure(s)²⁸ (...)required:**

.....

2. If the investigative measure(s) relates to one or more of the specific investigative

²³ UK has suggested that this form could also be prepared in an electronic way, along the example of EAW forms available at EJM website.

²⁴ This Order must be written in or translated into one of the official languages of the executing Member State or any other language accepted by that State.

²⁵ Proposal by DE to add “or validated by a competent judicial authority”

²⁶ Proposal by UK to include the reference number of the issuing and executing State. It is reminded that the file reference of the issuing State can be found in section C.

²⁷ CZ proposed to divide this box into three parts: first containing the list of most popular measures (tick the box) , second providing for a space to describe non standard measures, third providing for a space to indicate the location of the search.

²⁸ UK suggested “*description of the assistance required*”. The Presidency would like to propose the current wording.

measure(s) listed below, please indicate it by ticking the relevant box(es) (for additional requirements for certain measures see below box Fa.²⁹):

- ³⁰Temporary transfer to the issuing State of persons held in custody for the purpose of conducting an investigative measure (...) (for information concerning the consent of the person see under box Fa.1))
- Temporary transfer to the executing State of persons held in custody for the purpose of conducting an investigative measure (...) (non binding opinion of the person on his transfer is attached).
- Hearing by videoconference or other audio-visual transmission. (for information concerning the consent of the person see under box Fa.1 (please tick the box))
 - witness
 - expert
 - suspected or accused person
- Hearing by telephone conference (please tick the box)
 - witness
 - expert³¹
- Information on bank and other financial accounts
- Information on banking and other financial operations
- Investigative measures implying gathering of evidence in real time, continuously and over a certain period of time ³²(controlled deliveries, monitoring of bank accounts, etc.)
- Covert investigations
- Interception of telecommunications
- Provisional measure(s) to prevent the destruction, transformation, moving, transfer or disposal of an item that may be used as evidence.

3. Where applicable, location of the execution within the executing member state³³ (if not known, the last known location):

.....
.....
.....

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²⁹ Proposal by DE

³⁰ DE suggested to add a reference to the transfer through the territory of another MS.

³¹ Proposals by DE

³² DE suggested to divide this box into the different measures, controlled deliveries etc. Presidency would like to point out that such a proposal may have a counterproductive result since Article 27 does not as such list out all measures. .

³³ Proposal by DE.

³⁴ SE proposed to insert as point 4: “Where applicable, indicate the time or period of time the measure should be executed or for which period of time the investigative measure concerns (e.g. time period for banking/financial operations) It is reminded that information on this can be found in box (Fa) (3) (A) and box (G).

B) IDENTITY OF THE PERSONS CONCERNED

State all information, as far as known³⁵, regarding the identity of the (i) natural or (ii) legal person(s) against whom the proceedings are/may be/is taking place³⁶:

(i) In the case of natural person(s)

Name:

Forename(s):

Maiden name, if applicable:

Aliases, if applicable:

Sex:

Nationality:

³⁷Identity number of social security number ³⁸

Date of birth:

Place of birth:

Residence and/or known address; if address not known, state the last known address:

.....

Language(s) which the person understands:

.....

(ii) In the case of legal person(s)

Name:

Form of legal person:

Shortened name, commonly used name or trading name, if applicable:

.....

Registered seat:

Registration number:

Address of the legal person:

³⁹

³⁵ Proposal by FR to insert ”and/or relevant”

³⁶ DE proposed to further clarify that information should be provided for each of the persons, by inserting the following sentence: "(if more than one person is concerned, please provide the respective information below)".

³⁷ Addition by SE.

³⁸ DE proposed to add: “Type and number of the identity document(s) (ID card, passport), if available:”

³⁹ DE proposed to add information on whether the physical or legal person is a witness, expert or suspect/accused.

(C) THE COMPETENT AUTHORITY WHICH ISSUED THE EIO

Official name:

.....
Name of its representative:

.....
Post held (title/grade):

.....
⁴⁰Tick the type of authority which issued the EIO:

- (a) judicial authority
- (b) any other competent authority as defined by the issuing State and, in the specific case,

acting in their capacity as an investigating authority in criminal proceedings with competence to order the obtaining of evidence (...) ⁴¹ in accordance with national law

- This EIO has been validated by a judge or court, investigating magistrate or a public prosecutor (see sections Ca and J) ⁴².

.....
File reference:

.....
Address:

.....
Tel. No: (country code) (area/city code)

.....
Fax No: (country code) (area/city code)

.....
E-mail:

.....
Languages in which it is possible to communicate with the issuing authority:

.....
Contact details of the person(s) to contact if additional information on the execution of this EIO is necessary or to make necessary practical arrangements for the transfer of the evidence:

.....

⁴⁰ Proposal by BE

⁴¹ DE suggested to delete reference to "cross border" cases

⁴² UK suggested to delete this part and instead make a reference under letter b) above to Sections Ca and J)

⁴³ (Ca) THE JUDICIAL AUTHORITY VALIDATING THE EIO (WHERE APPLICABLE)

⁴⁴(...)

Official name of the validating authority:

.....

Name of its representative

.....

Post held (title/grade)

.....

File reference

.....

Address:

.....

.....

Tel. No: (country code) (area/city code)

Fax No: (country code) (area/city code)

E-mail:

⁴⁵Where the EIO has been validated, please indicate if the main contact point for the executing authority to communicate with should be:

main issuing authority

validating authority

⁴⁶Languages in which it is possible to communicate with the validating authority:

.....

Contact details of the person(s) to contact if additional information on the execution of this EIO is necessary or to make necessary practical arrangements for the transfer of the evidence:

.....

⁴³ CZ comment as above suggested to merge this box with box J (into a new box K) to avoid confusion. Text modified following a suggestion from UK.

⁴⁴ Proposal by the Presidency to delete as a consequence of the BE proposal in footnote 40

⁴⁵ Addition suggested by UK in order to ensure that the executing authority knows precisely which is its counterpart in the issuing state.

⁴⁶ The addition of subsequent points was suggested by DE.

(D) ⁴⁷RELATION TO (...) EARLIER EIO

If applicable, indicate if this EIO supplements an earlier (...) EIO and, if so, provide information relevant to identify the (...) earlier EIO (the date of issue of such EIO, the authority to which it was transmitted and, if available, the date of transmission of the EIO, and reference numbers given by the issuing and executing authorities).

.....
.....
.....

If so, please indicate as well if an EIO has already been addressed to another MS.

.....
.....
.....

(E) TYPE OF PROCEEDINGS FOR WHICH THE EIO WAS ISSUED

Tick the type of proceedings for which the EIO was 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; or
- 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; or
- 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 (...) ⁴⁸proceedings before a court having jurisdiction in particular in criminal matters;
- 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.

⁴⁷ Text aligned with the operative part of the instrument. DE proposed to add also a possibility to indicate whether the EIO is issued in relation to previous cooperation between the non judicial authorities (customs, police) and, if so, provide information relevant to identify this cooperation (authorities concerned, file numbers and date).

⁴⁸ Alignment with the text of Article 4.

(F)⁴⁹ GROUNDS FOR ISSUING THE EIO

1. Summary of the facts and description of the circumstances in which the offence(s) underlying the EIO has (have) been committed, including time and place, as known to the issuing authority⁵⁰:

.....

.....

.....

2. Nature and legal classification of the offence(s) resulting in the EIO and the applicable statutory provision/code:

.....

2a. If applicable, tick one or more of the following offences⁵¹ punishable in the issuing State by a custodial sentence or detention order of a maximum of at least three years as defined by the laws of the issuing State:

- participation in a criminal organisation,
- terrorism,
- trafficking in human beings,
- sexual exploitation of children and child pornography,
- illicit trafficking in narcotic drugs and psychotropic substances,
- illicit trafficking in weapons, munitions and explosives,
- corruption,
- fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests,
- laundering of the proceeds of crime,
- counterfeiting currency, including of the euro,
- computer-related crime,
- environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties,
- facilitation of unauthorised entry and residence,
- murder, grievous bodily injury,
- illicit trade in human organs and tissue,
- kidnapping, illegal restraint and hostage-taking,
- racism and xenophobia,
- organised or armed robbery,
- illicit trafficking in cultural goods, including antiques and works of art,
- swindling,

⁴⁹ DE suggested that point should be added in order to identify "*Relevance of the requested evidence for the purpose of the investigation(s)/criminal proceeding(s)*".

⁵⁰ UK suggests this point reads as following: "Summary of the facts setting out why the EIO has been issued, including description of the circumstances, any offence(s) relating to the application including where the offences were committed and the dates, as known to the issuing authority". UK also propose some further amendments to the content of this box, in particular to add reasons why the measure is necessary for the purpose of the criminal proceedings and indicate the link between the evidence to be obtained and the facts and circumstances of the offence underlying the EIO.

⁵¹ DE suggested to add reference to Article 10 (1b).

- racketeering and extortion,
- counterfeiting and piracy of products,
- forgery of administrative documents and trafficking therein,
- forgery of means of payment,
- illicit trafficking in hormonal substances and other growth promoters,
- illicit trafficking in nuclear or radioactive materials,
- trafficking in stolen vehicles,
- rape,
- arson,
- crimes within the jurisdiction of the International Criminal Court,
- unlawful seizure of aircraft/ships,
- sabotage.

(Fa)⁵² ADDITIONAL REQUIREMENTS FOR CERTAIN MEASURES

(1)⁵³ If the temporary transfer to the issuing State of a person held in custody for the purpose of investigation is requested, please indicate (if known), whether the person has consented to this measure:

- Yes**
- No**
- Request that the persons consent is sought**

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(1b)⁵⁵ in cases of transit of the person to another member state on the basis of an EIO(...) the following documents are attached :

.....

(1c)⁵⁶ Hearing by video or telephone conference

Authority that will conduct the hearing (contact details/language): ...

- (a) Hearing by videoconference or other audio-visual transmission:**
 - (aa) The suspected or accused person has given his/her consent**
 - (bb) measures of protection necessary....**
 - (cc) interpreter needed: yes / no ...**
 - (dd) The witness/expert/suspect or accused person has right not to testify due to the following provisions under the law of the issuing state:**
- (b) Hearing by telephone conference:**
 - (aa) interpreter needed: yes / no ...**
 - (bb) The witness/expert/suspect or accused person has right not to testify due to the**

⁵² BE proposed to delete this section, arguing that such information could easily be communicated through direct contacts between the issuing and executing authorities.

⁵³ CZ considered that since the person is in custody in the executing State it should be for the executing State to provide this information. Therefore this point should be removed.

⁵⁴ UK suggested to include information about the consent of the person in situations covered by article 20, including the opinion of the person.

⁵⁵ Proposal by DE

⁵⁶ Proposal by DE

following provisions under the law of the issuing state:

(2) If a provisional measure to prevent the destruction, transformation, moving, transfer or disposal of an item, that may be used as evidence, is requested, please indicate whether, after the execution of the provisional measure(s):

- **the item shall be transferred to the issuing State**
- **the item shall remain in the executing State please indicate:**
 - **the date of lifting of provisional measure.....**
 - **the estimated date for the submission of a subsequent request concerning the item and details of what the request will be for:**
.....

(3) If one or more of the following measures is requested, please indicate, for each of them, why you consider the measure relevant⁵⁷ for the purpose of the criminal proceedings:

(A)

- Information on bank accounts that the person holds or controls.
 - Information on other financial accounts that the person holds
-
-

- Information on bank accounts in respect to which the subject has the power of attorney.
 - Information on other financial accounts in respect to which the subject has the power of attorney
-
-

On what grounds do you assume that the person subject to investigation holds or controls an account in any bank or other non- bank financial institution located in the executing State and, to the extent available, indicate which banks may be involved, or provide any other available information that may facilitate its execution⁵⁸:

⁵⁷ UK proposed to replace “relevant” with “necessary”.

⁵⁸ DE suggested to divide this paragraph into separate subpoints in respect of which the information should be provided. The form was already slightly modified in line with this proposal.

⁵⁹ Modification suggested by FR in order to allow for more accuracy in cases where no operations would be carried out in the specified period of time.

⁶⁰ UK suggested to supplement the form with the request of following information: Collateral Intrusion Is the target believed to be the sole user of the device? If No, what can be done to mitigate collateral intrusion? Why can the information expected to be gained from interception not be provided by other more conventional techniques? Is there likely to be any Legally Privileged information obtained?"

⁶¹ DE suggested to add “(d) relevance of the requested information for the purpose of the criminal proceedings”

⁶² Suggestion by UK

- Information on banking operations
 - Information on other financial operations
- Indicate the relevant period of time (...) ⁵⁹ and the related accounts)

(B)

- Investigative measures implying gathering of evidence in real time, continuously and over a certain period of time, including the relevance of the requested information for the purpose of the criminal proceedings

(C)

- Covert investigations

(D)

- ⁶⁰Interception of telecommunications (please provide following information)

(a) information for the purpose of identifying the subject of this interception:

(b) the desired duration of the interception:

(c) technical data (in particular the target identifier- such as mobile telephone, landline telephone, email address, internet connection), to ensure that the EIO can be executed:

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Please indicate your preference concerning the method of execution

- Immediate transmission
- Recording and subsequent transmission

Transcription, decoding or decrypting of an interception of telecommunications*:

- Yes
- No

If you also require transcription, decoding or decrypting, please specify the particular reason for this request:

*Please be aware that the costs of any transcription, decoding or decrypting must be met by the issuing authority⁶²

(H) SPECIFIC MODALITIES FOR THE EXECUTION

1. Tick and complete, if applicable

- It is requested that the executing authority comply with the following formalities and procedures:⁶³

.....

.....

.....

If in obtaining evidence the executing authority has to inform a person of the existence and content of the EIO, it is requested that the executing State contact the issuing authority before proceeding.⁶⁴

2. Tick and complete, if applicable

- It is requested that one or several officials of the issuing State assist in the execution of the EIO in support of⁶⁵ the competent authorities of the executing State.⁶⁶

Official name of the above-mentioned authority or authorities:

.....

Contact details:.....

Language that may be used for communication⁶⁷

(G) EXECUTION OF THE EIO

1. Deadlines for execution of the EIO are laid down in Directive XXX/.../JHA. However, if a shorter deadline is necessary, please indicate any earlier deadline and the reason for this by ticking the relevant box:

Earlier deadline or specific deadline :..... (dd/mm/yyyy)

Reasons:

[] procedural deadlines (please specify).....

[] seriousness of the offence

[] other particularly urgent circumstances (please specify):

.....

.....

(GG) LEGAL REMEDIES

⁶⁸A legal remedy has already been sought against the issuing of the EIO concerned (please tick):

Yes / no

B. Legal remedies available in the issuing state:

⁶³ It is assumed that the executing authority will comply with the formalities and procedures indicated by the issuing authority unless they are contrary to the fundamental principles of the law of the executing State.

⁶⁴ Amendment by UK

⁶⁵ Amendment by UK

⁶⁶ This possibility does not imply any law enforcement powers for the authorities of the issuing State in the territory of the executing State.

⁶⁷ Proposal by DE

⁶⁸ Suggestion by DE

1. Description of the legal remedies, if available,⁶⁹ for interested parties, including bona fide third parties, available in the issuing State, including necessary steps to take:

.....
.....

2. Competent authority before which the action may be taken:

.....

3. Information as to those for whom the action is available:

.....

4. Time limit for submission of the action:

.....

5. Authority in the issuing State which can supply further information on procedures for seeking legal remedies in the issuing State and on whether legal assistance and interpretation and translation is available (if different from (C))⁷⁰:

Name: ...

Contact person (if applicable): ...

Address: ...

Tel. No: (country code) (area/city code) ...

Fax No: (country code) (area/city code) ...

E-mail: ...

Language(s) that may be used for communication:

⁶⁹ Suggestion by CZ.

⁷⁰ Addition suggested by DE

(I) FINAL PROVISIONS AND SIGNATURE

1. Other information relevant to the case, if any⁷¹ :

.....
.....

2. Signature of the issuing authority and/or its representative certifying the content of the EIO as accurate:

.....
Name:.....
Post held (title/grade):.....
Date:.....
Official stamp (if available):

(J)⁷² IF SECTION (Ca) IS COMPLETED, SIGNATURE AND DETAILS OF THE VALIDATING AUTHORITY

.....
Name:.....
Post held (title/grade):.....
Date:.....
Official stamp (if available):

⁷¹ CZ suggested to add reference to the file number in criminal proceedings. See section C of this annex.

⁷² CZ suggested to merge sections Ca and J

ANNEX B

CONFIRMATION OF THE RECEIPT OF AN EIO

This form has to be completed by the authority of the executing State which received the EIO referred to below.

<p>(A) THE EIO CONCERNED</p> <p>Competent authority which issued the EIO:</p> <p>File reference:</p> <p>Date of issuing:</p> <p>Date of receipt:</p>
<p>(B) THE AUTHORITY WHICH RECEIVED THE EIO⁽⁷³⁾</p> <p>Official name of the competent authority:</p> <p>Name of its representative:</p> <p>Post held (title/grade):</p> <p>Address:</p> <p>Tel. No: (country code) (area/city code)</p> <p>Fax No: (country code) (area/city code)</p> <p>E-mail:</p> <p>File reference</p> <p>Languages in which it is possible to communicate with the authority:</p>

⁷³ This section is to be completed by each authority which received the EIO. This obligation falls upon the authority competent to recognise and execute the EIO and, where applicable, upon the central authority or the authority which transmitted the EIO to the competent authority.

(C) (WHERE APPLICABLE) THE COMPETENT AUTHORITY TO WHOM THE EIO IS TRANSMITTED BY THE AUTHORITY UNDER (B)

Official name of the authority:

.....
Name of its representative:

.....
Post held (title/grade):

.....
Address:

.....
Tel. No: (country code) (area/city code)

.....
Fax No: (country code) (area/city code)

.....
E-mail:

.....
Date of transmission

.....
⁷⁴File reference

.....
Language(s) that may be used for communication:

D) Any other information which may be relevant for the issuing authority:

.....
.....
.....

E) SIGNATURE AND DATE

Signature:

Date:

Official stamp (if available):

⁷⁴ Addition suggested by DE.

ANNEX C
NOTIFICATION

This form is used in order to notify a Member State about the interception of telecommunication that will be, is or has been carried out on its territory without its technical assistance. I hereby inform(notified Member State) of the interception.

<p>(A)⁷⁵ THE COMPETENT AUTHORITY Official name of the competent authority of intercepting Member State⁷⁶: Name of its representative: Post held (title/grade): Address: Tel. No: (country code) (area/city code) Fax No: (country code) (area/city code) E-mail: File reference Date of issuing: Languages in which it is possible to communicate with the authority:</p>
--

⁷⁵ CZ made the following comment which is presented for MS considerations: "*it should be specified whether we talk about an authority which is actually carrying out the interception or if it is the authority which ordered the interception (and therefore which competent authority is a partner for communication). CZ prefers that it is the authority which ordered the interception especially with regard to the fact that it would be exactly this authority who would order the termination of the interception if needed. If most of the states prefer that it is the authority which is actually carrying out the interception, the authority which ordered the interception should at least be indicated in this box, as well as the file no. of its decision to carry out the interception (if its not the same authority)*"

⁷⁶ UK proposed to replace it by the following wording: "*Competent Authority in the Member State where the interception occurred.*" Presidency is of the opinion that this amendment may be confusing as it could refer to both the intercepting and the notified state and therefore it proposes to maintain the current text

(B) INFORMATION CONCERNING THE INTERCEPTION

(I)⁷⁷ Information about state of play: This notification takes place (please tick)

- prior to the interception (...)
- during the interception (...)
- after the interception (...)

(II) the (anticipated⁷⁸) duration of the interception (as known to the issuing authority):

....., starting from.....

(III) information for the purpose of identifying the subject of this interception:

IDENTITY OF THE PERSONS CONCERNED

State all information, as far as they are known, regarding the identity of the (i) natural or (ii) legal person(s) against whom the proceedings are/may be/is taking place:

(i) In the case of natural person(s)

Name:.....

Forename(s):.....

Maiden name, if applicable:

Aliases, if applicable:.....

Sex:

Nationality:

⁷⁹Identity number or social security number.....

Date of birth:.....

Place of birth:.....

Residence and/or known address; if address not known, state the last known address:

.....

Language(s) which the person understands:

.....

(ii) In the case of legal person(s)

Name:.....

Form of legal person:.....

Shortened name, commonly used name or trading name, if applicable:

.....

Registered seat:.....

Registration number:

Address of the legal person

.....

(...)⁸⁰

⁷⁷ Suggestions by DE

⁷⁸ Suggestion by CZ

⁷⁹ Addition by SE.

⁸⁰ This point has been included under II above.

(IV)⁸¹ information regarding the purpose of this interception:

State all information necessary, including a description of the case, in order to enable the notified authority to assess the following:

- whether the interception would be authorised in a similar national case; and whether the material obtained can be used in legal proceedings;⁸²
- where the interception has already occurred, whether that material can be used in legal proceedings

(...)

.....
.....
.....
.....
.....
.....
.....

Please note that any objection to the interception or the use of already intercepted material must be made no later than 96 hours after the reception of this notification.

(D) SIGNATURE AND DATE

Signature:

Date:

Official stamp (if available):

⁸¹ CZ considered that the obligation to provide information about the interception should be more detailed.

⁸² Additions by UK

ANNEX D (related to Article 10)⁸³

LIST OF OFFENCES

- participation in a criminal organisation,
- terrorism,
- trafficking in human beings,
- sexual exploitation of children and child pornography,
- illicit trafficking in narcotic drugs and psychotropic substances,
- illicit trafficking in weapons, munitions and explosives,
- corruption,
- fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests,
- laundering of the proceeds of crime,
- counterfeiting currency, including of the euro,
- computer-related crime,
- environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties,
- facilitation of unauthorised entry and residence,
- murder, grievous bodily injury,
- illicit trade in human organs and tissue,
- kidnapping, illegal restraint and hostage-taking,
- racism and xenophobia,
- organised or armed robbery,
- illicit trafficking in cultural goods, including antiques and works of art,
- swindling,
- racketeering and extortion,
- counterfeiting and piracy of products,
- forgery of administrative documents and trafficking therein,
- forgery of means of payment,
- illicit trafficking in hormonal substances and other growth promoters,
- illicit trafficking in nuclear or radioactive materials,
- trafficking in stolen vehicles,
- rape,
- arson,
- crimes within the jurisdiction of the International Criminal Court,
- unlawful seizure of aircraft/ships,
- sabotage.

⁸³ Proposal by DE to delete annex D

ANNEX E (related to Article 29.1)⁸⁴

⁸⁵List of provisions of currently existing legal instruments replaced by this Directive on the European investigation order, in respect of the Member States participating to its adoption

<u>EIO Measure</u>	<u>Corresponding provisions in existing instruments</u>
<i>General investigative measures / transfer of evidence</i>	Article 3 CoE 1959 MLA Convention ⁸⁶ Article 13 CoE 1959 MLA Convention Art (...) <u>1 and 2</u> of 1978 Additional Protocol to CoE 1959 MLA Convention ⁸⁷ ⁸⁸ Articles <u>3, 4 and 6</u> EU 2000 MLA Convention ⁸⁹ (...) ⁹⁰ (...) <u>Articles 4-9 EU 2001 MLA Protocol</u> ⁹¹ Article 51 Schengen ⁹² Convention ⁹³

⁸⁴ This Annex has been amended by the Presidency following the observations made by the delegations and consultation with the CLS.

⁸⁵ BE commented “*Explicit mention should be done about the fact that other provisions may also be affected while not completely replaced by the draft directive (e.g. Art. 15 and 16 of the EU 2000 MLA Convention, etc*”

⁸⁶ Deletion followed by suggestion by SK, CZ

⁸⁷ Modification following suggestion by BE.

⁸⁸ CZ proposed to include also reference to Articles 8-10 of the 1959 Convention..

⁸⁹ SK, CZ proposes to delete this point.

⁹⁰ Reference to the Naples II Convention deleted following the outcome of the discussions at the Council on 13-14 December 2011. BE suggested that an opinion from the Customs Cooperation Working Party, which has already discussed this issue, could be sought before taking a final decision on it. Very strong position of CZ against inclusion of any provisions of Naples Convention. UK/DE/FR favoured the deletion.

⁹¹ Inclusion following suggestion by BE.

⁹² CZ suggested “The Schengen implementing Convention”

⁹³ BE proposes to add also reference to Articles 48, 49, 50 and 53. It is noted however that these provisions are already repealed by the 2000 MLA Convention or do not fall within the scope of this proposal.

<i>Specific investigative measures</i>	
Temporary transfer to the issuing State of persons held in custody for purpose of investigation	Article 11 CoE 1959 MLA Convention as modified by Second Additional Protocol to CoE 1959 MLA Convention ⁹⁴
Temporary transfer to the executing State of persons held in custody for purpose of investigation	Article 9 EU 2000 MLA Convention Article 13 Second Additional Protocol to CoE 1959 MLA Convention

Hearing by videoconference	Article 10 EU 2000 MLA Convention Article 9 Second Additional Protocol to CoE 1959 MLA Convention
Hearing by telephone conference	Article 11 EU 2000 MLA Convention Article 10 Second Additional Protocol to CoE 1959 MLA Convention
Information on bank account	Article 1 EU 2001 MLA Protocol
Information on banking transactions	Article 2 EU 2001 MLA Protocol
(...)	(...)
(...)	(...)
Investigative measures implying gathering of evidence in real time, continuously and over a certain period of time.	<u>Article 3 EU 2001 MLA Protocol (monitoring of banking transactions)</u> <u>Article 18 Second Additional Protocol to CoE 1959 MLA Convention</u> <u>Article 12 EU 2000 MLA Convention (Controlled deliveries)</u>

⁹⁴ DE suggests to limit this reference only to Article 3 of the second protocol

<u>Covert investigations</u>	<u>Article 19 Second Additional Protocol to CoE 1959 MLA Convention Article 14 EU 2000 MLA Convention</u>
<u>Interception of communications</u>	<u>Title III EU 2000 MLA Convention</u>
<u>[⁹⁵Preliminary:] Provisional measures preventing the destruction, transformation, moving, transfer or disposal of items that may be used as evidence</u>	<u>[Preliminary:] Articles ... Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence as far as property that could be subject to evidence is concerned</u>

⁹⁵ Addition suggested by DE. However, the Presidency would like to draw the attention of the delegations to the specific wording of Article 29.2 of the present Directive. Therefore, Presidency would like to propose that clarification is introduced into Article 29 (1) last sentence so that it reads as follows: The detailed list of specific provisions of the above mentioned conventions replaced by this Directive is set out in an Annex.