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NOTE

From :	Austria, Belgium, Bulgaria, Estonia, France, Hungary, Italy, Poland, Slovenia, Spain and Sweden
To :	Delegations
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Subject :	Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters - "Frequently Asked Questions"

Delegations will find attached Note by Austria, Belgium, Bulgaria, Estonia, France, Hungary, Italy, Poland, Slovenia, Spain and Sweden on the draft Directive on the European Investigation Order.

Proposal for a Directive regarding the European Investigation Order
Frequently Asked Questions

Note of Austria, Belgium, Bulgaria, Estonia, France, Hungary, Italy, Poland, Slovenia, Spain and Sweden

This document aims at explaining the objective and the main orientations of the initiative for a Directive regarding the European Investigation Order in criminal matters, an instrument which is currently under negotiation between the European Parliament and the Council. It relies on the general approach of the Council reached on 14 December 2011 on the text of the draft Directive[1].

This document only represents the views of the above mentioned Member States.

Why do we need a Directive regarding the European Investigation Order (EIO) in criminal matters?

Gathering evidence is at the heart of criminal proceedings. It is necessary to elucidate crime, to identify potential perpetrators and to demonstrate that the suspected/accused person is guilty or, on the contrary, to exclude from suspicion anyone wrongly accused of a crime. Criminals do not take regard to borders when they commit crimes. In order to investigate crimes with cross-border dimensions, judges and prosecutors in the European Union must cooperate across the borders. There is a strong demand for efficient tools in combating the growing transnational aspects of crime. More and more cases involve transnational elements requiring that an investigative measure can be carried out in another Member State.

[1] Doc. EU Council 18225/1/11.

Today's regime of mutual legal assistance is mostly treaty-based and often also applicable to non-EU states. The main instrument is a European Convention from 1959, but there are a number of other different multilateral and bilateral instruments. Thousands of requests for mutual legal assistance are sent every year under the current, fragmented regime for judicial cooperation in criminal matters. The system has several weak points. It is based on a limited set of general rules, providing a lot of flexibility, but also uncertainty, with regard to both the efficiency of the procedure and the respect of fundamental rights. There is also a diverging application of the double criminality requirement, complete lack of time limits and uncertainty about legal remedies for the person concerned. Most practitioners with experience in mutual legal assistance have had cases where they simply never received any reaction following the sending of a request for legal assistance or were confronted with lack of cooperation.

The Council Framework Decision 2008/978/JHA on the European Evidence Warrant of 2008 did not bring the cooperation between the Member States further. Practitioners have strongly criticised this instrument, in particular for its fragmented approach and its limited scope covering only a specific part of the obtaining of evidence and that it was unlikely to be used in practice.

The Stockholm Programme calls for the replacement of all the existing instruments by a comprehensive system covering as far as possible all types of evidence and containing deadlines for enforcement and limiting as far as possible the grounds for refusal. In line with the Stockholm programme, the Member State initiative for a Directive on the EIO is based on the principle of mutual recognition, but also encompasses elements from the mutual legal assistance regime. It provides rules which facilitate the effective gathering of evidence within the EU, while respecting fundamental rights and national systems.

What is the scope of the proposal for a Directive regarding the EIO?

The proposal for a Directive regarding the EIO deals with the obtaining of evidence in criminal matters and covers all investigative measures. The initial proposal excluded some very specific types of investigative measures, but negotiations in the Council and consultations with experts have led to an agreement in the Council that there should be no exceptions and that all measures will be covered by the Directive. The alternative would be that the practitioners still would have to use different regimes and the goal to achieve a coherent system would not be met.

The proposal for a Directive therefore covers a wide range of measures of very different nature, such as collecting relatively non sensitive data (like vehicle registration data), the identification of the owner of a telephone number, a SIM card or a bank account, the hearing of an expert or a witness, the search of a house, the seizure of evidence, the monitoring of banking transactions and the interception of telecommunications.

It also concerns the whole range of criminal proceedings, from less serious offences to organised crime like trafficking in human beings and terrorism. Proportionate use of the EIO will have to be assessed by the issuing authority in each individual case taking into account the nature of the alleged offence and the investigative measure concerned.

The scope of the proposal for a Directive distinctly differs from that of the European Arrest Warrant. The latter is issued with a view to the arrest and surrender of a requested person for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order. An efficient and streamlined mechanism for the gathering of evidence would counteract a disproportionate use of European Arrest Warrants for the purpose of prosecution, since the issuing of an EIO for, for example, the hearing of a suspected or accused person via videoconferencing could serve as an effective alternative.

Why is the proposal for a Directive regarding the EIO based on the principle of mutual recognition and what does that mean?

The principle of mutual recognition is the cornerstone of judicial cooperation in criminal matters since the European Council of Tampere in 1999. The Lisbon Treaty also provides clearly that "*judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions*" (art. 82 TFEU). This has been reiterated by the European Council in the Stockholm Programme.

As explained before, there is a need for a consolidation and improvement of today's mutual legal assistance. Normal features of mutual recognition include strict time limits for the execution of a decision, as well as strictly defined grounds for refusal excluding political involvement. Thus, mutual recognition does not imply automaticity in the execution of the judicial decision. The execution of an EIO should be executed in a way that meets the issuing State's needs, but the national law of the executing State will also be respected in the execution.

Is the proposal for a Directive regarding the EIO only about collecting evidence against the accused person and how does the proposal for a Directive preserve the fundamental rights of the suspected/accused person?

No, the proposal for a Directive regarding the EIO can not be seen as an instrument directed against the accused person. It is an instrument about collecting evidence. The collection of evidence may result in two directions: demonstrating the innocence or the guilt of the accused person. An EIO may also be used by competent authorities – according to the possibilities that the law of the issuing member state provides in this regard – to collect evidence in another member state on the demand of defence lawyers.

As regards to the procedural rights of the suspected/accused person, major improvements have been made at the level of the EU on the basis of the Resolution of the Council for a Roadmap for strengthening procedural rights of suspected and accused persons in criminal proceedings[2]. It is understood that newly and future adopted legal instruments in this field will be directly applicable to the proceedings under this proposal for a Directive and that only additional guarantee that are needed for the specific purpose of collecting of evidence need to be specified in this proposal. Examples of these additional guarantees are notably to be found in the specific grounds for refusal and the provisions on legal remedies (see *infra*).

Which authorities are going to be competent to issue and execute an EIO?

Under mutual legal assistance, requests for assistance have to be issued by 'judicial authorities', but it is up to each Member State to define which authorities are covered, and that includes currently authorities which are not judicial *stricto sensu*, including, in some Member States, police authorities.

A similar rule was contained in the initial proposal for a Directive regarding the EIO. Member States were allowed to designate non judicial authorities, as long as these authorities have the power to order the investigative measure concerned at national level.

However, discussions in the Council have led to a more restrictive approach. Should a Member State decide to designate another authority than a judge, a court or a prosecutor (such as a police authority) as issuing authority, an EIO issued by such an authority will have to be validated by a judge or prosecutor before it is transmitted to the executing State.

The EIO regime will therefore provide for more judicial scrutiny than the existing regime of mutual legal assistance.

[2] OJ C 295, 4.12.2009, p. 1-3.

As regards to the executing authorities, the proposal for a Directive provides that it will be the authority which is competent under the national law of the executing State to act in a capacity of investigating authority for the gathering of evidence. This flexible wording takes into account the differences of national systems of the Member States and the wide range of measures covered.

Will there be a single procedure for all types of investigative measures?

No, this will not entirely be the case.

There will be only one instrument applicable to all investigative measures and, therefore, judges and prosecutors will be able to include various investigative measures in a single form when they send an EIO to another Member State for execution in a concrete case. The general regime (authorities involved, time limits, etc.) will apply to all measures.

Nevertheless, there will be some differences depending on the type of investigative measure concerned.

For example, Chapter IV of the proposed Directive contains specific rules for some investigative measures. They are either more detailed rules related to the specific measure concerned (for example hearing by videoconference) or derogatory rules related in particular to the sensitivity of the measure (for example interception of telecommunications and covert investigations).

In the course of negotiations in the Council, it emerged that it was not possible to provide a completely horizontal regime for all measures given the wide variety of measures covered by the EIO. Therefore, some level of categorisation is needed with regards to grounds for refusal[3].

[3] See articles 9 and 10 of the text provisionally agreed in Council (Doc. EU Council 18225/1/11).

A first category of measures will be submitted to a regime with only a few grounds for refusal. It includes for examples hearing of witnesses and suspects or obtaining information from vehicle registration databases. Only general grounds for refusal of the execution of the EIO will be applicable such as, for example, the existence of a privilege or immunity for the person concerned. It concerns very common measures and the idea is that this regime with only general grounds for refusal will lead to swift execution.

A second category of measures will be submitted to a regime with wider possibilities for refusal while at the same time ensuring efficient cooperation. It will apply to coercive measures that do not fall under the first and third categories. In addition to the general grounds for refusal, the executing authority will also be able to refuse the execution because of lack of double criminality, except for a list of serious offences. The executing authority will also be allowed to reply that the execution was not possible because the measure does not exist in its national law or would not have been 'available' in similar national case. The concept of "availability" of the measure refers 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 nor the proportionality of the measure. 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 regime with the widest possibilities for refusal is elaborated for some of the most sensitive measures, such as interception of telecommunications and other measures involving real time gathering of evidence. The widest margin of manoeuvre concerning these measures is justified by their peculiarities or highly sensitive nature.

This modulation of the regime for execution is a way of balancing the effect of mutual recognition to the wide range of measures included in the proposal for a Directive. The alternative would be to introduce wide grounds for refusal applicable to all measures which would undermine the whole idea of mutual recognition. It will make possible to rely on precise and limited grounds for refusal, bring legal certainty and improve the work of all parties, including judges, prosecutors and defence lawyers.

Is mutual recognition about obliging judicial authorities to take measures they would not take at national level?

The idea of mutual recognition is not about obliging judicial authorities to take measures they would not take at national level. However, mutual recognition is neither about enabling the executing authority to look at details of the file, nor redoing the investigation carried out in the issuing State.

Mutual legal assistance made it possible for the requested authority to refuse to cooperate if such cooperation would violate its public order, but even that did not amount to a right to assess whether the measure would have been taken in exactly the same national case. Such examination was only allowed for specific measures, such as interception of telecommunications (see art. 18 of the 2000 EU MLA Convention).

Hundreds of thousands of requests for mutual legal assistance are issued every year. A minimum level of efficiency requires that the issuing authority can know in advance whether its EIO is likely to be executed. For this reason, it is important to define grounds for refusal which are strictly limited, but which, at the same time, make it possible to protect fundamental principles of law.

What are the guarantees provided in the proposal for a Directive in terms of legal remedies?

Unlike mutual legal assistance, the proposal for a Directive provides clear and comprehensive rules on legal remedies and, in particular, the obligation for both the issuing and executing States to ensure that any person subject to an EIO has access to equivalent legal remedies as had he been the subject of a similar national investigation.

In the instance no legal remedy is available in the executing State, either because the execution of the investigative measure is by nature confidential, or because the investigative measure is carried out at an early stage of the procedure, the proposal for a Directive ensures that any interested party will nonetheless have the possibility to challenge the measure at least in the course of the criminal proceeding carried out in the issuing State.

The question of the suspension of the transfer of the evidence in case a legal remedy is introduced in the executing State is let to the discretion of the executing authority. However, in case the evidence has already been transferred and the recognition or execution of the EIO has been successfully challenged in the executing State, this decision will have to be taken into account in the issuing State in accordance with its own national law.