COUNCIL OF THE EUROPEAN UNION

Brussels, 26 November 2010

16868/10

Interinstitutional File: 2010/0817 (COD)

COPEN 266
EJN 68
EUROJUST 135
CODEC 1369

NOTE

From :	Presidency
To :	Coreper/Council
Prev. doc.	16643/10 COPEN 260 EUROJUST 133 EJN 67 CODEC 1325
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 - progress report

I. INTRODUCTION

The Stockholm Programme[1], adopted on 11 December 2009, states 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'*. It further reads that '*the existing instruments in this area constitute a fragmentary regime and emphasised 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. This new model could have a broader scope and should cover as many types of evidence as possible, taking account of the measures concerned'*.

[1] OJ C 115 , 04.05.2010, p. 1

The European Council called for the submission of a proposal for '*a comprehensive system, after an impact assessment, 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'*.

In April 2010, a group of seven Member States[2] presented a proposal for a Directive of the European Parliament and the Council regarding the European Investigation Order in criminal matters[3] (hereafter "the EIO"). The objective of this proposal is to end the fragmented regime on obtaining evidence between the Member States by replacing the existing legal framework, including the Framework Decision 2008/978/JHA on the European Evidence Warrant, with a single legal instrument.

The principle of mutual recognition which underpins the initiative requires that the judicial decisions taken in one Member State in order to execute investigative measures with a view to obtaining evidence are recognised and executed in another Member State. General balance is sought in order to combine flexibility with legal certainty as well as protection of defence rights with efficiency of the procedure.

Since July 2010, the proposal has been examined by the Council. The Working Party on Cooperation in Criminal Matters met on a number of occasions in order to examine the proposal. Several of the outstanding issues were also discussed by CATS and Coreper/Council were invited to give guidance on some questions as well. Main efforts have been focused on Articles 1 to 10 of the proposal, which refer to several key issues such as the scope, the competent authorities and the grounds for refusals.

A number of delegations entered scrutiny reservations in general or on specific issues.

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2 Austria, Bulgaria, Belgium, Estonia, Slovenia, Spain and Sweden.

3 Doc. 9288/10.

The latest text of Articles 1 to 10 of the proposal for a Directive is contained in document 16643/10 COPEN 260 EUROJUST 133 EJN 67 CODEC 1325.

In follow up to the discussions held so far, the Presidency would like to present to the delegations a progress report in respect of the key issues addressed so far.

This proposal is also going to be presented by the Presidency to the European Parliament on 30 November 2010.

II. KEY ISSUES

1. Scope of the proposal

Already during the preliminary discussions, delegations broadly supported the idea of setting up a single legal regime for the obtaining of evidence within the EU. Most delegations agree that such a general scope should however not extend to forms of mutual legal assistance not directly linked to the gathering of evidence and that police cooperation should also be outside the scope of this instrument. Furthermore, exceptions to the general scope would have to be listed as narrowly as possible. While the exclusion of the joint investigation teams - which benefit from a specific regime in the EU - was generally agreed from the beginning, further examination was required regarding the inclusion within the scope of the directive of specific forms of interception of telecommunications.

The original proposal includes EIOs issued for the purpose of interceptions of telecommunications with a specific regime taking into account the sensitivity of such measure. Most delegations agreed that such measures should be covered by the new instrument. The original proposal excludes however forms of interception of telecommunications which were considered as exceptional. Following the discussions at the Working Party level on the advisability of maintaining this exclusion, the Presidency has issued a questionnaire with respect to issues related to the use of four different types of interception of telecommunications[4]. The outcome of the questionnaire[5] contributed to giving a clear view of the current practices in the Member States in respect of the use of this particular measure.

[4] Doc. 12863/10.
[5] Doc. 14591/10.

On this basis, delegations generally supported the inclusion, within the scope of the Directive, of all forms of interception of telecommunications. It was however agreed that it does not mean that provisions in the Directive on these issues should follow the structure of the 2000 EU MLA Convention. Rather, practical experience in the application of the 2000 Convention should be used to simplify, where appropriate, the current legal framework. One delegation maintained a scrutiny reservation on this solution. These discussions will be continued at a later stage as part of the negotiations on Chapter IV which is devoted to specific investigative measures.

Further discussions will also have to be continued on the procedures with respect to which an EIO may be issued. The proposed approach of the Presidency was to focus the discussions on criminal proceedings in a first stage and assess only in a second stage if the agreed solutions could be extended to some specific kind of non-criminal procedures.

The orientation drawn from the discussion is that:

- **the new instrument should cover all investigative measures aimed at the obtaining of evidence, the only exception being the joint investigation teams which benefit from a specific regime in the EU**
- **the discussions should focus on criminal proceedings in a first stage and assess only in a second stage if the agreed solutions could be extended to some specific kind of non-criminal procedures**

2. Competent authorities

a) Issuing authorities

The issue of the nature of issuing authorities was discussed on a number of occasions by the Council preparatory bodies. From the beginning, several delegations opposed the provision introducing an obligation to recognize EIOs issued by authorities other than a judge, prosecutor or investigating magistrate. Others insisted, on the contrary, on the fact that measures covered by the Directive may be ordered by non judicial authorities, such as police investigators, according to their national law and that these authorities should therefore be able to issue an EIO. In this respect, replies to the questionnaire sent by the Presidency gave an overview of the situation in the Member States[6].

[6] Doc. 13049/1/10.

With a view to addressing this issue and taking into account the chosen legal basis for this proposal, the Presidency tabled a compromise proposal based on the introduction of a compulsory validation procedure in respect of the conformity of the EIO with the conditions for issuing of an EIO, where the latter has been issued by a competent authority other than a judge, prosecutor or investigating magistrate. This orientation was generally supported by the delegations.

b) Executing authorities

The definition of the executing authorities was also discussed on a number of occasions at Working Party level. Delegations thereby agreed on the need to rely on the executing State to decide which would be the competent authority for the execution of an EIO.

The orientation drawn from the discussion is that:

- **the new instrument should only apply to EIOs which have been issued or validated by a judge, a prosecutor or an investigating magistrate**
- **the designation of the authorities competent to execute an EIO should be left to the Member States**

3. Grounds for non recognition or non execution based on categories of measures

The issue of grounds for refusal was examined extensively by the Council preparatory bodies and was the main item for discussion on this file at the JHA Council of 9 November. Most delegations agreed that, even if the evolution from mutual legal assistance to mutual recognition will not involve full automaticity in the execution of the decisions, grounds for refusal should only be specific ones and that a wide ground for refusal, drafted in general terms as in the existing regime of mutual legal assistance, should be avoided. Delegations underlined that, beside other elements, the efficiency of the instrument will depend on such approach and that accordingly, it should be ensured that there will be no step backwards in comparison to the existing instruments. The modalities of the execution will however still be governed by national law of the executing State.

Some grounds for refusal such as, for example, immunity and privilege or essential national security interests should be applicable irrespective of the measures concerned. Discussions will have to be continued on the exact content of this list.

Most delegations also endorsed the approach proposed by the Presidency to differentiate categories of investigative measures, on the basis of the coerciveness or intrusiveness of the measure, in order to specify the additional grounds for refusal applicable to them.

The following principles highlighted during the discussion at Council gave further guidance:

- there should be no regression compared to the *acquis* (both MLA and mutual recognition instruments), in terms of availability of the measure and possibility of checking for double criminality;
- the current cooperation should be further improved;
- this new approach should not add complexity for practitioners.

On this basis, the Presidency presented a proposal for grounds for refusal based on a combination of generic and specific differentiation between measures and grounds for refusal linked to them. This proposal is based on the following distinction:

- a first category would cover non-coercive measures and hearings for which no additional grounds for refusal would be provided;
- a second category would cover all other coercive measures, without listing the specific measures covered, and would provide for additional grounds for refusal e.g. double criminality, authorization in a similar domestic case, the measure does not exist under the law of the executing State or its use is restricted to a list or category of offences which does not include the offence covered by the EIO;
- however, double criminality and authorization in a similar domestic case will not constitute a ground for refusal where the execution of coercive measures concerns serious offences (see Article 2(2) of Framework Decision 2002/584/JHA on the European Arrest Warrant).

The Presidency underlined that the above proposed approach should be understood as a package and that the balance of the proposed text is to be found in the correlation of solutions introduced by these three branches.

The orientation drawn from the discussion is that:

- **grounds for refusals should only be specific ones**
- **when differentiating between categories of investigative measures, the solution should be looked for on the basis of the threefold approach proposed by the Presidency**

4. Proportionality

Also the issue of proportionality emerged at an early stage of the discussions. Following the orientation debate at the Council in November, the following principles were supported by most delegations:

- proportionality should systematically be checked by the issuing authority;
- the executing authority should be entitled to opt for a less intrusive measure than the one indicated in the EIO if it makes it possible to achieve similar results;
- proportionality should not constitute a general ground for refusal for the executing authority applicable to all kinds of measures;
- direct communication between the issuing and executing authority should play an important role.

The Presidency proposed to delegations an approach whereby, in addition to the proportionality check made by the issuing authority on the issuing of the EIO, the executing authority would have the possibility to consult with the issuing authority on the relevance of the execution of an EIO where it had reason to believe that, in the specific case, the investigative measure concerned a minor offence. The provision proposed by the Presidency underlined the importance of communication between the competent authorities of the issuing and executing States in order to assess the possibility, in such a case, of withdrawal of the EIO. This new provision was generally supported by the delegations. Some delegations put forward however that the provision could *de facto* provide for a hidden ground for refusal. One delegation suggested that a provision could be added to the effect of obliging issuing authority to provide the relevant motivation of its EIO, *ab initio*.

The orientation drawn from the discussion is that further discussions on this question should be based on the principles set out in the Presidency proposal.

5. Costs

Question related to the distribution of costs occasioned by the execution of an EIO proved to be a particularly sensitive issue for the delegations. During the orientation debate at the JHA Council of 9 November, the Council agreed that disproportionate costs or lack of resources in the executing State should however not be a ground for refusal for the executing authority. With a view to further reflecting on possible alternative solutions, the Presidency proposed a solution in which there would be the possibility of making, in exceptional circumstances, the execution of the investigative measure subject to the condition that the costs will be born by (or shared with) the issuing State. In this case, the issuing authority would have the possibility to withdraw the EIO.

Delegations generally agreed with this approach. However some concerns were raised as to the consequence of the solution proposed in the case where the consultations between the issuing and executing authorities do not lead to a conclusion in respect of costs or the withdrawal of the EIO. Further clarification was felt necessary and discussions will have to be continued on this specific question.

The orientation drawn from the discussion is that further discussions on this question should be based on the principles set out in the Presidency proposal.

III. CONCLUSION

Coreper/Council are invited to:

- **take note of this progress report and of the orientations described above on the key issues discussed so far;**
- **instruct the Working Party to continue the discussions on this basis with a view to reach a general approach within the Council.**