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NOTE

From : Presidency
To : Coreper / Council

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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
- Text submitted for general approach

The initiative for a Directive of the European Parliament and the Council regarding the European Investigation Order in criminal matters (hereafter “the EIO”) has been presented to the Council in April 2010.

At its meeting in June 2011 the Council reached a partial general approach on the main regime (Articles 1-18, and Article Y).¹

The draft Directive has been examined extensively on several occasions by the Council preparatory bodies, including the Working Party on Cooperation in criminal matters and CATS.

¹ 11735/11 COPEN 158 EUROJUST 99 EJN 80 CODEC 1047.

Coreper, at its meeting on 29 November 2011 confirmed the general orientations agreed by CATS and instructed the experts/JHA Counsellors to continue working on the draft Directive with a view to preparing it for an agreement on a general approach at the Council in December.

Some delegations maintain parliamentary scrutiny reservations on the draft Directive.

Delegations will find attached the text of the draft Directive with the changes resulting from the discussions at the meeting of JHA Counsellors on 7 December 2011. Some specific points made by delegations are reflected in the footnotes.

The discussions at the Council preparatory bodies confirm a strong belief among delegations that, as provided for by the Stockholm Programme², this instrument is aimed at setting up of a comprehensive system for obtaining evidence in cases with a cross-border dimension, based on the principle of mutual recognition. This principle has been followed closely in the process of examination of the draft Directive. It is further noted, that, while the provisions set out in the draft Directive restrict the application of provisional measures to the collection of evidence this issue is more complex and will need to be further addressed in future discussions.

The Presidency is further convinced that the draft Directive, as set out in the Annex to this note, contains a balanced compromise text on which a general approach could be confirmed, on the understanding that it would also encompass the recitals which have been negotiated that have a direct link with the specific Articles (c.f. recitals 10, 10a, 10b, 12a, 12b, 13a, 13b, 14a, 17a, and recitals set out in footnotes: 10, 12, 14, 15, 16, 17, 19, 21, 22, 26, 30, 38), except for Article 29.2 and the annex related to Article 29.1. that will be further examined in the context of future discussions.

Accordingly, the Presidency invites delegations to confirm that the text of draft Directive set out in the Annex to this note, with the exception listed above, constitutes a sufficient basis for the Presidency to enter into discussions with the European Parliament on the entire text.

² OJ C 115 , 04.05.2010, p. 1

Coreper is asked to:

- **examine the text with a view to reaching a general approach accordingly and**
 - **invite the Council to confirm that informal discussions should begin with the European Parliament on this basis.**
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**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 evidence³, 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 matters⁴ 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.

³ OJ L 196, 2.8.2003, p. 45.

⁴ 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 almost all investigative measures. However, some measures require specific rules which are better dealt with separately, such as the setting up of a joint investigation team and the gathering of evidence within such a team Existing instruments should continue to apply to these types of measures.
- (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 Agreement⁵.

⁵ OJ L 239, 22.9.2000, p. 19.

- (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 authority 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.
- (10a) 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.
- (11) 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 State. 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.
- (12) 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.

- (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 firmly 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.⁶
- (12b) It should be possible to refuse an EIO where its recognition or execution in the executing State would involve breaching 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.

⁶ OJ L 328, 15.12.2009, p. 42.

- (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) Legal 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 remedies. In cases where the objections against 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.
- (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, 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 authority should seek to establish which expenses are to be considered as exceptionally high. The issue of costs might become a 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 withdraw 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.

- (14) The 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) 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).
- (15) 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 of proceedings in criminal matters.
- (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,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

THE EUROPEAN INVESTIGATION ORDER

Article 1

Definition of the European Investigation Order and obligation to execute it

1. The European Investigation Order (EIO) shall be a judicial decision issued or validated by a judicial authority of a Member State ("the issuing State") in order to have one or several specific investigative measure(s) carried out in another Member State ("the executing State") with a view to obtaining evidence in accordance with the provisions of this Directive. The EIO may also be issued for obtaining evidence that is already in the possession of the competent authorities of the executing State.

2. Member States shall execute any EIO on the basis of the principle of mutual recognition and in accordance with the provisions of this Directive.
3. This Directive shall not have the effect of modifying the obligation to respect the fundamental rights and legal principles as enshrined in Article 6 of the Treaty on European Union, and any obligations incumbent on judicial authorities in this respect shall remain unaffected.

Article 2
Definitions

For the purposes of this Directive:

- a) "issuing authority" means:
 - i) a judge, a court, an investigating magistrate or a public prosecutor competent in the case concerned; or
 - ii) any other competent authority as defined by the issuing State and, in the specific case, acting in its capacity as an investigating authority in criminal proceedings with competence to order the gathering of evidence in accordance with national law,
- b) "executing authority" shall mean an authority having competence to recognise an EIO and ensure its execution in accordance with this Directive.

Article 3
Scope of the EIO

The EIO shall cover any investigative measure with the exception of the setting up of a joint investigation team and the gathering of evidence within such a team as provided in Article 13 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union⁷ (hereinafter referred to as "the Convention") and in Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams⁸, except for the purposes of applying, respectively, Article 13(8) of the Convention and Article 1(8) of the Framework Decision.

Article 4
Types of procedure for which the EIO can be issued

The EIO may be 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;
- 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;
- 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 proceedings before a court having jurisdiction, in particular, in criminal matters, and

⁷ OJ C 197, 12.7.2000, p. 3.

⁸ OJ L 162, 20.6.2002, p. 1.

- 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.

Article 5

Content and form of the EIO

1. The EIO set out in the form provided for in Annex A shall be completed, signed, and its content certified as accurate by the issuing authority.
2. Each Member State shall indicate the language(s) which, among the official languages of the institutions of the Union and in addition to the official language(s) of the Member State concerned, may be used for completing or translating the EIO when the State in question is the executing State.

Article 5a

Conditions for issuing and transmitting an EIO

1. An EIO may be issued only when the issuing authority is satisfied that the following conditions have been met:
 - (a) the issuing of the EIO is necessary and proportionate for the purpose of the proceedings referred to in Article 4; and
 - (b) the investigative measure(s) mentioned in EIO could have been ordered under the same conditions in a similar national case.
2. These conditions shall be assessed by the issuing authority in each case.

3. Where an EIO is issued by an authority referred to in Article 2(a)(ii), the EIO shall be validated, after examination of its conformity with the conditions for issuing an EIO under this Directive, by a judge, court, public prosecutor or investigating magistrate before it is transmitted to the executing authority.

CHAPTER II

PROCEDURES AND SAFEGUARDS FOR THE ISSUING STATE

Article 6

Transmission of the EIO

1. The EIO completed in accordance with Article 5 shall be transmitted from the issuing authority to the executing authority by any means capable of producing a written record under conditions allowing the executing State to establish authenticity. All further official communication shall be made directly between the issuing authority and the executing authority.
2. Without prejudice to Article 2(b), each Member State may designate a central authority or, when its legal system so provides, more than one central authority, to assist the competent authorities. A Member State may, if necessary as a result of the organisation of its internal judicial system, make its central authority(ies) responsible for the administrative transmission and receipt of the EIO, as well as for other official correspondence relating thereto.
3. (...)
4. If the executing authority is unknown, the issuing authority shall make all necessary inquiries, including via the European Judicial Network contact points, in order to obtain the information from the executing State.

5. When the authority in the executing State which receives the EIO has no competence to recognise it and to take the necessary measures for its execution, it shall, *ex officio*, transmit the EIO to the executing authority and so inform the issuing authority.
6. All difficulties concerning the transmission or authenticity of any document needed for the execution of the EIO shall be dealt with by direct contacts between the issuing and executing authorities involved or, where appropriate, with the involvement of the central authorities of the Member States.

Article 7

EIO related to an earlier EIO

1. Where the issuing authority issues an EIO which supplements an earlier EIO, it shall indicate this fact in the EIO in accordance with the form provided for in Annex A.
2. Where, in accordance with Article 8(3), the issuing authority assists in the execution of the EIO in the executing State, it may, without prejudice to notifications made under Article 28(1)(c), address an EIO which supplements the earlier EIO directly to the executing authority, while present in that State.

CHAPTER III
PROCEDURES AND SAFEGUARDS
FOR THE EXECUTING STATE

Article 8

Recognition and execution

1. The executing authority shall recognise an EIO, transmitted in accordance with the provisions of this Directive, without any further formality being required, and ensure its execution in the same way and under the same modalities as if the investigative measure in question had been ordered by an authority of the executing State, unless that authority decides to invoke one of the grounds for non-recognition or non-execution or one of the grounds for postponement provided for in this Directive.
2. The executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority unless otherwise provided in this Directive and provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State.
3. The issuing authority may request that one or several authorities of the issuing State assist in the execution of the EIO in support to the competent authorities of the executing State to the extent that the designated authorities of the issuing State would be able to assist in the execution of the investigative measure(s) mentioned in the EIO in a similar national case. The executing authority shall comply with this request provided that such assistance is not contrary to the fundamental principles of law of the executing State or does not harm its essential national security interests.

- 3a. The authorities of the issuing State present in the executing State shall be bound by the law of the executing State during the execution of the EIO. They shall not have any law enforcement powers in the territory of the executing State, unless the execution of such powers in the territory of the executing State is in accordance with the law of the executing State and to the extent agreed between issuing and executing authorities.
4. The issuing and executing authorities may consult each other, by any appropriate means, with a view to facilitating the efficient application of this Article.

Article 9

Recourse to a different type of investigative measure

1. The executing authority must, wherever possible, have recourse to an investigative measure other than that provided for in the EIO when:
 - a) the investigative measure indicated in the EIO does not exist under the law of the executing State, or;
 - b) the investigative measure indicated in the EIO would not be available in a similar domestic case ;
- 1bis. The executing authority may also have recourse to an investigative measure other than that provided for in the EIO when the investigative measure selected by the executing authority will have the same result as the measure provided for in the EIO by less intrusive means.
2. When the executing authority decides to avail itself of the possibility referred to in paragraph (1) and (1bis), it shall first inform the issuing authority, which may decide to withdraw the EIO.

3. Where, in accordance with paragraph (1), the investigative measure provided for in the EIO does not exist under the law of the executing State or it would not be available in a similar domestic case and where there is no other investigative measure which would have the same result as the measure requested, the executing authority must notify the issuing authority that it has not been possible to provide the assistance requested.

Article 10⁹

Grounds for non-recognition or non-execution

1. Without prejudice to Article 1.3, recognition or execution of an EIO may be refused in the executing State where:
- a) there is an immunity or a privilege under the law of the executing State which makes it impossible to execute the EIO or there are rules on determination and limitation of criminal liability relating to freedom of the press and freedom of expression in other media, which make it impossible to execute the EIO;
 - b) in a specific case, its execution would harm essential national security interests, jeopardise the source of the information or involve the use of classified information relating to specific intelligence activities;
 - c) (...)
 - d) the EIO has been issued in proceedings referred to in Article 4(b) and (c) and the measure would not be authorised under the law of the executing State in a similar domestic case;

⁹ Reservation by one delegation.

- e) the execution of the EIO would be contrary to the principle of ne bis in idem, unless the issuing authority provides an assurance that the evidence transferred as a result of an execution of an EIO shall not be used to prosecute a person whose case has been finally disposed of in another Member State for the same facts, in accordance with the conditions set out under Article 54 of the Convention of 19 June 1990 implementing the Schengen Agreement.
 - f) the EIO relates to a criminal offence which is alleged to have been committed exclusively outside the territory of the issuing State and wholly or partially on the territory of the executing State, the EIO seeks the use of a coercive measure and the conduct in connection with which the EIO is issued is not an offence in the executing State.
- 1a. Where the investigative measure indicated in the EIO concerns one of the following measures, Article 9(1) is not applicable and the recognition or execution of the EIO can only be refused in cases referred to in paragraph 1:
- a) the hearing of a witness, victim, suspect or third party in the territory of the executing State or
 - b) any non-coercive investigative measure;
 - c) the obtaining of information or evidence which is already in the possession of the executing authority and , this information or evidence could have been obtained, in accordance with the law of the executing State, in the framework of criminal proceedings or for the purposes of the EIO;
 - d) the obtaining of information contained in databases held by police or judicial authorities and directly accessible by the executing authority in the framework of criminal proceedings;
 - e) the identification of persons holding a subscription of a specified phone number or IP address;

- f) search and seizure where it has been requested in relation to the categories of offences set out in the Annex X, as indicated by the issuing authority in the EIO, if they are punishable in the issuing State by a custodial sentence or a detention order for a maximum period of at least three years.

(insert list of 32 offences into the Annex X)

- 1b. Without prejudice to paragraph (1), where the investigative measure indicated by the issuing authority in the EIO concerns a measure other than those referred to in paragraph (1a), the recognition or execution of the measure may also be refused:

- (a) if the conduct for which the EIO has been issued does not constitute an offence under the law of the executing State, unless it concerns an offence listed within the categories of offences set out in the Annex X, as indicated by the issuing authority in the EIO, if it is punishable in the issuing State by a custodial sentence or a detention order for a maximum period of at least three years; or.

(insert list of 32 offences into the Annex X)

- (b) if the use of the measure is restricted under the law of the executing State to a list or category of offences or to offences punishable by a certain threshold, which does not include the offence covered by the EIO.

- 1c. In relation to offences in connection with taxes or duties, customs and exchange, recognition or execution may not be opposed on the ground that the law of the executing State does not impose the same kind of tax or duty or does not contain a tax, duty, customs and exchange regulation of the same kind as the law of the issuing State.

2. In the cases referred to in paragraph 1(a), (b), (e) and (f) before deciding not to recognise or not to execute an EIO, either totally or in part, the executing authority shall consult the issuing authority, by any appropriate means, and shall, where appropriate, ask it to supply any necessary information without delay.

3. In the case referred to in paragraph 1(a) and where power to waive the privilege or immunity lies with an authority of the executing Member State, the executing authority shall request it to exercise that power forthwith. Where power to waive the privilege or immunity lies with an authority of another State or international organisation, it shall be for the issuing authority to request it to exercise that power.
4. (...)

Article 11

Deadlines for recognition or execution

1. The decision on the recognition or execution shall be taken and the investigative measure shall be carried out with the same celerity and priority as for a similar national case and, in any case, within the deadlines provided in this Article.
2. Where the issuing authority has indicated in the EIO that, due to procedural deadlines, the seriousness of the offence or other particularly urgent circumstances, a shorter deadline than those provided in this Article is necessary, or if the issuing authority has stated in the EIO that the investigative measure must be carried out on a specific date, the executing authority shall take as full account as possible of this requirement.
3. The decision on the recognition or execution shall be taken as soon as possible and, without prejudice to paragraph 5, no later than 30 days after the receipt of the EIO by the competent executing authority.
4. Unless either grounds for postponement under Article 14 exist or evidence mentioned in the investigative measure covered by the EIO is already in the possession of the executing State, the executing authority shall carry out the investigative measure without delay and without prejudice to paragraph 5, no later than 90 days after the decision referred to in paragraph 3.

5. When it is not practicable in a specific case for the competent executing authority to meet the deadline set out in paragraph 3 or on a specific date set out in paragraph 2, it shall without delay inform the competent authority of the issuing State by any means, giving the reasons for the delay and the estimated time needed for the decision to be taken. In this case, the time limit laid down in paragraph 3 may be extended by a maximum of 30 days.
6. When it is not practicable in a specific case for the competent executing authority to meet the deadline set out in paragraph 4, it shall without delay inform the competent authority of the issuing State by any means, giving the reasons for the delay and it shall consult with the issuing authority on the appropriate timing to carry out the measure.

Article 12

Transfer of evidence

1. The executing authority shall without undue delay transfer the evidence obtained or already in the possession of the competent authorities of the executing State as a result of the execution of the EIO to the issuing State. Where requested in the EIO and if possible under national law of the executing State, the evidence shall be immediately transferred to the competent authorities of the issuing State assisting in the execution of the EIO in accordance with Article 8(3).
 - 1a. The executing authority may suspend the transfer of the evidence, pending the decision regarding a legal remedy, unless sufficient reasons are indicated in the EIO that an immediate transfer is essential for the proper conduct of its investigations or the preservation of individual rights.
2. When transferring the evidence obtained, the executing authority shall indicate whether it requires it to be returned to the executing State as soon as it is no longer required in the issuing State.

3. Where the objects, documents, or data concerned are already relevant for other proceedings the executing authority may, at the explicit request and after consultations with the issuing authority temporarily transfer the evidence under the condition that it be returned to the executing State as soon as they are no longer required in the issuing State or at any other time/occasion agreed between the competent authorities.

Article 13

Legal remedies

1. In order to protect legitimate interest, Member States shall ensure that any interested party shall be entitled to legal remedies, which are equivalent to those, which would be available in a similar domestic case to challenge the investigative measure in question.
2. (...)
3. The substantive reasons for issuing the EIO may be challenged only in an action brought in the issuing State.
4. Where it would not undermine the need to ensure confidentiality of an investigation, as provided for in Article 18(1), the issuing and the executing authorities shall, in accordance with their national law, take the appropriate measures to ensure that information is provided about the possibilities for seeking the legal remedies referred to in paragraph 1 and 3 when these become applicable and in due time to allow their effective exercise.
5. The issuing and executing authorities shall inform each other about the legal remedies sought against the issuing or the recognition or execution of an EIO.
- 5a. (...)

- 5b. In case the evidence has already been transferred in accordance with Article 12 and the recognition or execution of an EIO has been successfully challenged in the executing State, this decision will be taken into account in the issuing State in accordance with its own national law.
6. (...)

Article 14

Grounds for postponement of recognition or execution

1. The recognition or execution of the EIO may be postponed in the executing State where:
 - a) its execution might prejudice an ongoing criminal investigation or prosecution until such time as the executing State deems reasonable;
 - b) the objects, documents, or data concerned are already being used in other proceedings until such time as they are no longer required for this purpose;
2. As soon as the ground for postponement has ceased to exist, the executing authority shall forthwith take the necessary measures for the execution of the EIO and inform the issuing authority thereof by any means capable of producing a written record.

Article 15

Obligation to inform

1. The competent authority in the executing State which receives the EIO shall, without delay and in any case within a week of the reception of an EIO, acknowledge this reception by filling in and sending the form provided in Annex B. Where a central authority has been designated in accordance with Article 6(2), this obligation is applicable both to the central authority and to the executing authority which receives the EIO via the central authority. In cases referred to in Article 6(5), this obligation applies both to the competent authority which initially received the EIO and to the executing authority to which the EIO is finally transmitted.

2. Without prejudice to Article 9(2) and (3) the executing authority shall inform the issuing authority:
- (a) immediately by any means:
 - (i) if it is impossible for the executing authority to take a decision on the recognition or execution due to the fact that the form provided for in the Annex is incomplete or manifestly incorrect;
 - (ii) if the executing authority, in the course of the execution of the EIO, considers without further enquiries that it may be appropriate to undertake investigative measures not initially foreseen, or which could not be specified when the EIO was issued, in order to enable the issuing authority to take further action in the specific case;
 - (iii) if the executing authority establishes that, in the specific case, it cannot comply with formalities and procedures expressly indicated by the issuing authority in accordance with Article 8.

Upon request by the issuing authority, the information shall be confirmed without delay by any means capable of producing a written record;

- (b) without delay by any means capable of producing a written record:
 - (i) of any decision taken in accordance with Articles 9 or 10;
 - (ii) of the postponement of the execution or recognition of the EIO, the underlying reasons and, if possible, the expected duration of the postponement.

Article 16

Criminal liability regarding officials

When present in the territory of the executing State in the framework of the application of this Directive, officials from the issuing State shall be regarded as officials of the executing State with respect of offences committed against them or by them.

Article 17
Civil liability regarding officials

1. Where, in the framework of the application of this Directive, officials of the issuing State are present in the territory of the executing State, the issuing State shall be liable for any damage caused by them during their operations, in accordance with the law of the executing State.
2. The Member State in whose territory the damage referred to in paragraph 1 was caused shall make good such damage under the conditions applicable to damage caused by its own officials.
3. The Member State whose officials have caused damage to any person in the territory of another Member State shall reimburse the latter in full any sums it has paid to the victims or persons entitled on their behalf.
4. Without prejudice to the exercise of its rights vis-à-vis third parties and with the exception of paragraph 3, each Member State shall refrain in the case provided for in paragraph 1 from requesting reimbursement of damages it has sustained from another Member State.

Article 18
Confidentiality

1. Each Member State shall take the necessary measures to ensure that the issuing and executing authorities take due account, in the execution of an EIO, of the confidentiality of the investigation.
2. The executing authority shall, in accordance with its national law, guarantee the confidentiality of the facts and substance of the EIO, except to the extent necessary to execute the investigative measure. If the executing authority cannot comply with the requirement of confidentiality, it shall without delay notify the issuing authority.

3. The issuing authority shall, in accordance with its national law and unless otherwise indicated by the executing authority, keep confidential any evidence and information provided by the executing authority, except to the extent that its disclosure is necessary for the investigations or proceedings described in the EIO.

4. Each Member State shall take the necessary measure to ensure that banks do not disclose to the bank customer concerned or to other third persons that information has been transmitted to the issuing State in accordance with Articles 23, 24 and 25 or that an investigation is being carried out.

Article Y

Costs

1. Unless otherwise provided in the Directive, all costs undertaken on the territory of the executing State which are related to the execution of an EIO shall be borne by the executing State.

2. Where the executing authority considers that the costs for the execution of the EIO may become exceptionally high, it may consult with the issuing authority on whether and how the costs could be shared or the EIO modified. The issuing authority shall be previously informed by the executing authority of the detailed specifications of the part of the costs deemed exceptionally high.

3. In exceptional situations where the consultations can not lead to an agreement, the issuing authority may decide to withdraw partially or completely the EIO or, should it decide to maintain the EIO, it will bear the part of the costs deemed exceptionally high.

CHAPTER IV
SPECIFIC PROVISIONS FOR
CERTAIN INVESTIGATIVE MEASURES

Article 19

*Temporary transfer to the issuing State of
persons held in custody for purpose of conducting an investigative measure*

- 1.¹⁰ An EIO may be issued for the temporary transfer of a person in custody in the executing State for the purpose of conducting an investigative measure with a view to collecting evidence for which his presence on the territory of the issuing State is required, provided that he shall be sent back within the period stipulated by the executing State.

2. In addition to the grounds for non-recognition or non-execution referred to in Article 10 the execution of the EIO may also be refused if:
 - (a) the person in custody does not consent¹¹; or
 - (b) the transfer is liable to prolong his detention.

¹⁰ This following recital in relation to the use of the EAW Framework Decision will be added :
"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 EAW should be issued in accordance with the Council Framework Decision 2002/584/JHA."

¹¹ Reservation by one delegation which proposed to add the following wording: *"the execution of the investigative measure requires the consent of the suspected or accused person and this consent has not been obtained"*.

3. In a case under paragraph 1, transit of the person in custody through the territory of a third Member State shall be granted on application, accompanied by all necessary documents.
4. The practical arrangements regarding the temporary transfer of the person including the particularities of his custody conditions in the issuing State, and the dates by which he must be transferred from and returned to the territory of the executing State shall be agreed between the Member States concerned.
5. The transferred person shall remain in custody in the territory of the issuing State and, where applicable, in the territory of the Member State through which transit is required, for the acts or convictions for which he has been kept in custody in the executing State, unless the executing Member State applies for his release.
6. The period of custody in the territory of the issuing Member State shall be deducted from the period of detention which the person concerned is or will be obliged to undergo in the territory of the executing Member State.
7. Without prejudice to paragraph 5, a transferred person shall not be prosecuted or detained or subjected to any other restriction of his personal liberty in the issuing State for acts committed or convictions handed down before his departure from the territory of the executing State and which are not specified in the EIO.
8. The immunity provided for in paragraph 7 shall cease when the transferred person, having had for a period of fifteen consecutive days from the date when his presence is no longer required by the issuing authorities an opportunity to leave, has nevertheless remained in the territory, or having left it, has returned.
9. Costs resulting from the application of this Article shall be borne in accordance with Article Y, except for the costs arising from the transfer of the person to and from the issuing State which shall be borne by this State.

Article 20

*Temporary transfer to the executing State of persons
held in custody for the purpose of conducting an investigative measure*

1. An EIO may be issued for the temporary transfer of a person held in custody in the issuing State for the purpose of conducting an investigative measure with a view to collecting evidence for which his presence on the territory of the executing State is required.
- 1a.¹² Before issuing the EIO the person concerned shall be given opportunity to state her opinion to the issuing authority on the temporary transfer. Where the issuing State considers it necessary in view of the person's age or physical or mental condition, that opportunity shall be given to his or her legal representative. The opinion of the person shall be taken into account when deciding to issue an EIO and be transmitted to the executing authority.
2. (...)
3. (...)
4. (deleted; contained under para 5 below)
5. Paragraphs 3 to 8 of Article 19 are applicable *mutatis mutandis* to the temporary transfer under this Article.
6. Costs resulting from the application of this Article shall be borne in accordance with Article Y, except for the costs arising from the transfer of the person to and from the executing State which shall be borne by the issuing State.

¹² The following recital will be added: "*It is up to the issuing State 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 his or her opinion on the temporary transfer and that this be taken into account.*"

Article 21

Hearing by videoconference or other audio – visual transmission

1. If a person is in the territory of the executing State and has to be heard as a witness or expert by the competent authorities of the issuing State, the issuing authority may issue an EIO in order to hear the witness or expert by videoconference or other audio – visual transmission, as provided for in paragraphs 6 to 9.
 - 1a. An EIO may also be issued for the purpose of the hearing of a suspected or accused person by videoconference or other audio - visual transmission. In addition to the grounds for non-recognition or non-execution referred to in Article 10, the execution of the EIO may also be refused if:
 - a) the suspected or accused person does not consent;¹³ or
 - b) the execution of such a measure in a particular case would be contrary to the fundamental principles of the law of the executing State.
 - 1b. The practical arrangements regarding the hearing shall be agreed between the issuing and the executing authority. When agreeing such arrangements, the executing authority shall undertake to:
 - (a) summon the witness or expert concerned of the time and the venue of the hearing or;
 - (b) summon the suspected or accused person to appear for the hearing in accordance with the forms laid down by its law and inform him about his rights under the law of the issuing State, in such a time as to allow him to exercise his rights of defence effectively;
 - (c) ensure the identification of the person to be heard.
2. (...)
3. (...)
4. (...)

¹³ Scrutiny reservation by one delegation.

5. (...)
6. In case of a hearing by videoconference or other audio – visual transmission, the following rules shall apply:
- (a)¹⁴ a competent authority of the executing State shall be present during the hearing, where necessary assisted by an interpreter, and shall also be responsible for ensuring both the identification of the person to be heard and respect for the fundamental principles of the law of the executing State. If the executing authority is of the view that during the hearing the fundamental principles of the law of the executing State are being infringed, it shall immediately take the necessary measures to ensure that the hearing continues in accordance with the said principles;
 - (b) measures for the protection of the person to be heard shall be agreed, where necessary, between the competent authorities of the issuing and the executing State;
 - (c) the hearing shall be conducted directly by, or under the direction of, the competent authority of the issuing State in accordance with its own laws;
 - (d) at the request of the issuing State or the person to be heard, the executing State shall ensure that the person to be heard is assisted by an interpreter, if necessary;
 - (e) the person to be heard may claim the right not to testify which would accrue to him under the law of either the executing or the issuing State; the person concerned shall be informed about this right in advance of the hearing.

¹⁴ Following recital will be added: "*With a view to the proportionate use of European Arrest Warrants for the purpose of prosecution, judicial authorities should consider whether issuing an European Investigation Order for the hearing of a suspected or accused person via videoconferencing could serve as an effective alternative.*"

7. Without prejudice to any measures agreed for the protection of the persons, the executing authority shall on the conclusion of the hearing draw up minutes indicating the date and place of the hearing, the identity of the person heard, the identities and functions of all other persons in the executing State participating in the hearing, any oaths taken and the technical conditions under which the hearing took place. The document shall be forwarded by the executing authority to the issuing authority.
8. (...)
9. Each Member State shall take the necessary measures to ensure that, where (...) the person is being heard within its territory in accordance with this Article and refuses to testify when under an obligation to testify or does not testify the truth, its national law applies in the same way as if the hearing took place in a national procedure.
10. (moved to paragraph 1a)

Article 22

Hearing by telephone conference

1. If a person is in the territory of one Member State and has to be heard as a witness or expert by competent authorities of another Member State, the issuing authority of the latter Member State may issue an EIO in order to hear a witness or expert by telephone conference as provided for in paragraph 4.
2. (...)
3. (...)
4. Unless otherwise agreed, the provisions of Article 21(1b.), (6), (7) and (9) shall apply *mutatis mutandis*.

Article 23

Information on bank and other financial accounts

- 1¹⁵. An EIO may be issued in order to determine whether any natural or legal person that is the subject of the criminal proceedings holds or controls one or more accounts, of whatever nature, in any bank located in the territory of the executing State, and if so, provide all the particulars of the identified accounts.
2. Each Member State shall, under the conditions set out in this Article, take the measures necessary to enable it to provide the information referred to in paragraph 1.
3. The information referred to in paragraph 1 shall also, if requested in the EIO include accounts for which the person that is the subject of the proceedings has powers of attorney.
4. The obligation set out in this Article shall apply only to the extent that the information is in the possession of the bank keeping the account.
5. (...)
6. The issuing authority shall state in the EIO why it considers that the requested information is likely to be of substantial value for the purpose of the criminal proceedings and on what grounds it presumes that banks in the executing State hold the account and, to the extent available, which banks may be involved. It shall also include in the EIO any information available which may facilitate its execution.

¹⁵ The following recital will be added: *"An EIO may be issued in order to get evidential information 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."*

- 7.¹⁶ An EIO may also be issued to determine whether any natural or legal person that is the subject of the criminal proceedings holds one or more accounts, in any non-bank financial institution located on the territory of the executing State. Paragraphs 3 to 6 shall apply *mutatis mutandis*. In such case and in addition to the grounds for non-recognition and non-execution referred to in Article 10, the execution of the EIO may also be refused if the execution of the measure would not be authorised in a similar national case.

Article 24

Information on banking and other financial operations

1. An EIO may be issued in order to obtain the particulars¹⁷ of specified bank accounts and of banking operations which have been carried out during a specified period through one or more accounts specified within, including the particulars of any sending or recipient account.
2. Each Member State shall, under the conditions set out in this Article, take the measures necessary to be able to provide the information referred to in paragraph 1.
3. The obligation set out in this Article shall apply only to the extent that the information is in the possession of the bank holding the account.
4. The issuing authority shall indicate in the EIO why it considers the requested information relevant for the purpose of the criminal proceedings.

¹⁶ The following recital will be added: "*Where in this Directive a reference is made to the financial institutions this term should be understood according to the relevant definitions of Art. 3 of the Directive 2005/60/EC.*" Scrutiny reservation by one delegation.

¹⁷ The following recital will be added: '*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.*'

5. An EIO may also be issued with regard to the information provided for in paragraph 1 with reference to the financial operations conducted by non- banking financial institutions. Paragraphs 3 to 4 shall apply *mutatis mutandis*. In such case and in addition to the grounds for non-recognition and non-execution referred to in Article 10, the execution of the EIO may also be refused if the execution of the measure would not be authorised in a similar national case.

Article 25

The monitoring of banking transactions

(Moved to Article 27)

Article 26

Controlled deliveries

(Moved to Article 27)

Article 27

*Investigative measures implying the gathering of evidence in real time,
continuously and over a certain period of time*

1. When the EIO is issued for the purpose of executing a measure implying the gathering of evidence in real time, continuously and over a certain period of time, such as:
- (a) monitoring banking or other financial operations that are being carried out through one or more specified accounts;
 - (b) controlled delivery on the territory of the executing State;

its execution may be refused, in addition to the grounds for non-recognition and non-execution referred to in Article 10, if the execution of the measure concerned would not be authorised in a similar national case.

2. The practical arrangements regarding the measure referred under paragraph 1 (b) and wherever else necessary, shall be agreed between the Member States concerned.
3. The issuing authority shall indicate in the EIO why it considers the requested information relevant for the purpose of the criminal proceedings.
4. The right to act and to direct and control operations related to the execution of an EIO referred to in paragraph 1 shall lie with the competent authorities of the executing State.

Article 27a
Covert investigations

1. An EIO may be issued for the purpose of requesting the executing State to assist issuing State in the conduct of investigations into crime by officers acting under covert or false identity (covert investigations).
2. The issuing authority shall state in the EIO why it considers that this particular measure is likely to be relevant for the purpose of the criminal proceedings. The decision on the recognition and execution of an EIO issued under the conditions set out in this Article shall be taken in each individual case by the competent authorities of the executing State with due regard to its national law and procedures.
3. Execution of an EIO referred to in paragraph 1 may be refused, in addition to the grounds for non-recognition and non-execution referred to in Article 10, if the execution of the measure concerned would not be authorised in a similar national case or where it was not possible to reach an agreement on the arrangements for the covert investigations , as set out in paragraph 4.

4. Covert investigations shall take place in accordance with the national law and procedures of the Member State on the territory of which the covert investigation takes place. The right to act, to direct and to control operation related to the investigative measures referred to in paragraph 1 shall lie solely with the competent authorities of the executing State. The duration of the covert investigation, the detailed conditions, and the legal status of the officers concerned during covert investigations shall be agreed between the Member States with due regard to their national law and procedures.
5. (...)

CHAPTER IV (A)

INTERCEPTION OF TELECOMMUNICATIONS

Article 27b¹⁸

Interception of telecommunications

with technical assistance of another Member State

- 1¹⁹. An EIO may be issued for the interception of telecommunications in the State from which technical assistance is needed.

¹⁸ Scrutiny reservation by four delegations. .

¹⁹ Following recital will be added: "*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.*" Scrutiny reservation by four delegations.

2. Where more than one State is in a position to provide the complete necessary technical assistance for the same interception of telecommunications, the EIO shall be sent to only one of them, and priority shall always be given to the State where the subject is or will be located.²⁰
3. An EIO referred to in paragraph 1 shall also contain the following:
 - (a) information for the purpose of identifying the subject of this interception;
 - (b) the desired duration of the interception; and
 - (c) the provision of sufficient technical data in particular the target identifier, to ensure that the EIO can be executed.
- 3a. The issuing authority shall indicate in the EIO why it considers the requested measure relevant for the purpose of the criminal proceedings.
4. In addition to the grounds for refusal provided in Article 10, the execution of an EIO referred to in Paragraph 1 may also be refused if the measure would not have been authorised in a similar national case. The executing State may make its consent subject to any conditions which would be observed in a similar national case.²¹

²⁰ The following recital will be added: *“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.”*

²¹ The following recital will be added: *“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.”*

5. An EIO referred to in paragraph 1 may be executed by :
- a) transmitting telecommunications immediately to the issuing State; or
 - b) intercepting, recording and subsequently transmitting the outcome of interception of telecommunications to the issuing State.

The issuing authority and the executing authority shall consult each other with a view to agreeing on whether the interception is carried out in accordance with paragraph 5(a) or (b).

6. When issuing an EIO referred to in paragraph 1 or during the interception, the issuing authority may, where it has a particular reason to do so, also request a transcription, decoding or decrypting of the recording subject to the agreement of the executing authority.
7. Costs resulting from the application of this Article shall be borne in accordance with Article Y, except for the costs arising from the transcription, decoding and deciphering of the intercepted communications which shall be borne by the issuing State.

Article 27c²²

[Deleted]

Article 27d

Notification of the Member State where the subject is located from which no technical assistance is needed

1. Where, for the purpose of conducting an investigative measure, the interception of telecommunications is authorized by the competent authority of one Member State (the ‘intercepting Member State’) and the communication address of the subject specified in the interception order is being used on the territory of another Member State (the ‘notified Member State’) from which no technical assistance is needed to carry out the interception, the intercepting Member State shall inform the competent authority of the notified Member State of the interception:
 - a) prior to the interception in cases where the competent authority of the Member State knows when ordering the interception that the subject is or will be on the territory of the notified Member State;
 - b) during the interception or after the interception has been carried out, immediately after it becomes aware that the subject of the interception is or has been during the interception, on the territory of the notified Member State.²³
2. The notification referred to in paragraph 1 shall be done by using the form provided for in Annex C.

²² Following recital will be added: "*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 communications.*"

²³ One delegation asked for some limitation to be added in point b).

3. The competent authority of the notified Member States may, in case where the interception would not be authorized in a similar national case, notify, without delay and at the latest within [96]²⁴ hours after the reception of the notification referred to in paragraph 1, the competent authority of the intercepting State that:
- a) the interception may not be carried out or shall be terminated; and,
 - b) where necessary, that any material already intercepted while the subject was on its territory may not be used, or may only be used under conditions which it shall specify. The competent authority of the notified State shall inform the competent authority of the intercepting State of reasons justifying the said conditions.
4. Article 5(2) shall be applicable *mutatis mutandis* for the notification referred to in paragraph 2.

²⁴ One delegation proposed the insertion of a possibility to extend the delay.

CHAPTER IV(B)²⁵
PROVISIONAL MEASURES

Article 27e

Provisional measures

1. An EIO may be issued in order to take any measure with a view to provisionally preventing the destruction, transformation, moving, transfer or disposal of item that may be used as evidence.²⁶
2. The executing authority shall decide and communicate the decision on the provisional measure as soon as possible and, whenever practicable, within 24 hours of receipt of the EIO.
3. When the provisional measure referred to in paragraph 1 is requested the issuing authority shall indicate in the EIO whether the evidence shall be transferred to the issuing State or shall remain in the executing State. The executing authority shall recognise and execute such EIO and transfer the evidence in accordance with the procedures laid down in the Directive.

²⁵ Scrutiny reservation by four delegations, one of them considered that specific paragraph devoted to costs should be introduced.

²⁶ The following recital could be added: *"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."* Scrutiny reservation by one delegation.

4. When in accordance with paragraph 3 an EIO is accompanied by an instruction that the evidence shall remain in the executing State, the issuing authority shall indicate the date of lifting the provisional measure referred to in paragraph 1, or the estimated date for submission of the request for the evidence to be transferred to the issuing State.
- 4a. (...)
5. After consulting the issuing authority, the executing authority may in accordance with its national law and practices lay down appropriate conditions in the light of the circumstances of the case in order to limit the period for which the provisional measure referred to in paragraph 1 will be maintained. If, in accordance with those conditions, it envisages lifting the provisional measure, it shall inform the issuing authority, which shall be given the opportunity to submit its comments. The issuing authority shall forthwith notify the executing authority that the measures referred to in paragraph 1 have been lifted.

Article 27f

[Deleted]

CHAPTER V

FINAL PROVISIONS

Article 28

Notifications

1. By ...* each Member State shall notify the Commission of the following:
- (a) the authority or authorities which, in accordance with its internal legal order, are competent according to Article 2 (a) and (b) when this Member State is the issuing State or the executing State;

* OJ: Please insert the date: Three years from the entry into force of this Directive.

- (b) the languages accepted for the EIO, as referred to in Article 5(2);
 - (c) the information regarding the designated central authority or authorities if the Member State wishes to make use of the possibility under Article 6(2). This information shall be binding upon the authorities of the issuing State;
 - (d) Member State may also provide the list of necessary documents it would require under Article 19(3).
2. Member States shall inform the Commission of any subsequent changes to the information referred to in paragraph 1.
 3. The Commission shall make the information received in application of this Article available to all the Member States and to the European Judicial Network (EJN). The EJN shall make the information available on the website referred to in Article 9 of the Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network²⁷.

Article 29

Relations to other agreements and arrangements

1. Without prejudice to their application between Member States and third States and their temporary application by virtue of Article 30, this Directive replaces, as from ..., * the corresponding provisions of the following conventions applicable in the relationships between the Member States bound by this Directive:

[European Convention on mutual legal assistance in criminal matters of 20 April 1959 as well as its two additional protocols of 17 March 1978 and 8 November 2001 and the bilateral agreements concluded pursuant to Article 26 of that Convention;

²⁷ OJ L 348, 24.12.2008, p. 130.

* OJ: Please insert the date: Three years from the entry into force of this Directive.

Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985;

Convention of 29 May 2000 regarding mutual legal assistance in criminal matters between the Member States of the EU and its protocol of 16 October 2001.]

The detailed list of specific provisions replaced by this Directive shall be introduced in an Annex.²⁸

2. Framework Decision 2008/978/JHA is repealed in relation to all Member States which participated in the adoption of this Directive²⁹. This Directive applies between the Member States bound by it to the freezing of items of evidence in substitution for the corresponding provisions of Framework Decision 2003/577/JHA.
3. In addition to this Directive, Member States may conclude or continue to apply bilateral or multilateral agreements or arrangements with other Member States after ...* only insofar as these make it possible further strengthen the aims of this Directive and contribute to simplifying or further facilitating the evidence gathering procedures and provided that the level of safeguards set out in this Directive is respected.
4. (merged with paragraph 3)

²⁸ Reservation by two delegations. It is understood that the Naples II convention will not be included in the list of the conventions that will be replaced by the present Directive.

²⁹ This paragraph will not be submitted to the Council for the agreement on a general approach. The implications of an adoption of this Directive in respect of existing instruments will be further examined in a horizontal context in respect of all MS concerned.

* OJ: Please insert the date: Three years from the entry into force of this Directive.

5. Member States shall notify to the Commission by ...* the existing agreements and arrangements referred to in paragraph 3 which they wish to continue to apply. The Member States shall also notify the Commission within three months of the signing of any new agreement or arrangement referred to in paragraph 3.
6. (...)

Article 30

Transitional arrangements

1. Mutual assistance requests received before* shall continue to be governed by existing instruments relating to mutual assistance in criminal matters. Decisions to freeze evidence by virtue of Framework Decision 2003/577/JHA and received before*** shall also be governed by the latter.
2. Article 7(1) is applicable *mutatis mutandis* to the EIO following a decision of freezing taken by virtue of Framework Decision 2003/577/JHA.

Article 31³⁰

Transposition

1. Member States shall take the necessary measures to comply with this Directive by ...*.
2. When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

* OJ: Please insert the date: Three years after the entry into force of this Directive.

* OJ: Please insert the date: Three years after the entry into force of this Directive.

*** OJ: Please insert the date: Three years after the entry into force of this Directive.

³⁰ Following recital will be added: "*The offences listed in Annex X should be interpreted consistently with their interpretation under the already existing legal instruments on mutual recognition.*"

* OJ: Please insert the date: Three years after the entry into force of this Directive.

3.³¹ By ...^{**}, Member States shall transmit to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Directive.

4. (...)

Article 32

Report on the application

No later than five years after the date of entry into force of this Directive, the Commission shall present to the European Parliament and the Council a report on the application of this Directive, on the basis of both qualitative and quantitative information, including in particular, the evaluation of its impact on the cooperation in criminal matters and the protection of individuals, as well as the execution of the provisions on the interception of telecommunications in light of technical developments.³² The report shall be accompanied, if necessary, by proposals for amending this Directive.

Article 33

Entry into force

This Directive shall enter into force on the twentieth day following its publication in the *Official Journal of the European Union*.

³¹ This paragraph will need to be modified subject to the agreement on the explanatory documents on the transposition of directives. C.f. doc 14603/11 INST 429. COM proposed the deletion of Paragraph 3.

^{**} OJ: Please insert the date: Five years after the entry into force of this Directive.

³² Scrutiny reservation by one delegation.

Article 34

Addressees

This Directive is addressed to the Member States in accordance with the Treaties.

Done at ...,

For the European Parliament

The President

For the Council

The President
