



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 17 June 2011

11569/11

**Interinstitutional File:
2010/0817 (COD)**

LIMITE

**COPEN 154
EUROJUST 95
EJN 79
CODEC 1027**

NOTE

From :	Presidency
To :	CATS
Prev. doc.	11735/11 COPEN 158 EUROJUST 99 EJN 80 CODEC 1047
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 - Orientation debate

I. INTRODUCTION

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 in April 2010 and since then has been discussed on several occasions in the Working Party on Cooperation in criminal matters.

Some delegations maintain parliamentary scrutiny reservations on the draft Directive.

A partial general approach on the main regime (Articles 1 to 18, including Article Y) has been reached at the meeting of the Council on 9/10 June 2011, allowing to proceed with the examination of the specific provisions on certain investigative measures. The text, as agreed by the Council, is to be found in document 11735/11 COPEN 158 EUROJUST 99 EJM 80 CODEC 1047. It could possibly be revised in light of the further conclusions reached on the part dealing with certain measures when an overall compromise package shall be presented at a later stage. The general approach will then constitute the basis for further negotiations with the European Parliament with a view to reaching an agreement on the draft Directive according to the ordinary legislative procedure.

The remaining part of the Directive (Articles 19 to 34) is to be found in document 9145/10 COPEN 115 EUROJUST 47 EJM 12 CODEC 363.

Before starting the discussions on the specific provisions for certain investigative measures at the level of the Working Party, the Presidency would like to exchange views on the general orientation of the last chapter at the level of the CATS representatives, in order to further proceed with the examination of the text.

II. QUESTIONS SUBMITTED TO THE CATS REPRESENTATIVES

The aim of the draft Directive is to provide a single regime for obtaining evidence in another Member State. Therefore, the proposed instrument intends to replace the currently existing regimes contained in several instruments or international conventions.

The existing instruments or conventions often provide specific rules for certain types of investigative measures which take into account the specificities or sensitiveness of the measure concerned. Most of these specific rules have been dealt with in various Articles of the 2000 EU MLA Convention and the 2001 EU MLA Protocol. Such additional provisions should then be included in the EIO.

The specific investigative measures set out under Articles 19 to 27 of the draft Directive are the following:

- Temporary transfer for the issuing State of persons held in custody for purpose of investigation
- Temporary transfer to the executing State of persons held in custody for purpose of investigation
- Hearing by videoconference
- Hearing by telephone conference
- Information on bank account
- Information on banking transactions
- The monitoring of banking transactions
- Controlled deliveries
- Investigative measures implying gathering of evidence in real time, continuously and over a certain period of time

Some of these provisions aim at providing more detailed rules on certain investigative measures of the draft Directive. Others provide actual derogations for the most sensitive measures in terms of additional grounds for non recognition or non execution.

On this basis, CATS representatives are invited to deal with the following questions:

1. Scope:

At the Council meeting on 9/10 June, it has been confirmed that the new instrument should cover all investigative measures aimed at obtaining evidence and that all forms of interception of telecommunications should be covered by the Directive and specific provisions should be introduced in Chapter IV. Further discussions should clarify the relation of the EIO with the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution of orders freezing property or evidence. Some delegations regretted that the scope does not cover the provisions of the 2000 MLA Convention on service of documents.

The objective of the chapter IV of the draft Directive should be to encompass all specific provisions aimed at gathering evidence contained in the *acquis* (current MLA regimes). The existing provisions should be adjusted in order to correspond to the present instrument based on the mutual recognition principle. Flexibility provided for by the existing regime of mutual legal assistance should be preserved. There should be no steps backwards with respect to the current legal framework. Practical experience in the application of the 2000 Convention should be used to simplify, where appropriate, the current legal framework.

Moreover, the question of the inclusion of the freezing of assets will have to be examined further. In order to avoid practitioners having to use two different forms, Eurojust underlined in its opinion (doc. 6814/11) that the proposal should not only cover freezing of evidence but also freezing of assets in view of their confiscation, and should thus replace the Framework Decision 2003/577/JHA in its entirety. Eurojust also argued that, in practice, it might be difficult to distinguish between evidence, instruments and proceeds of crime as the same asset could be classified under all these categories. The Presidency recalls that the draft Directive only covers investigative measures aimed at gathering evidence, and that the inclusion of freezing of assets in view of their confiscation would enlarge the scope of the proposal.

CATS representatives are invited to discuss the above-mentioned scope and to agree upon the following principles to be followed by the Working Party in order to further proceed with the examination of the text, as well as to express their opinion on the need to replace the Framework Decision 2003/577/JHA in its entirety and thus enlarging the scope of the proposal to measures aimed at freezing of assets in view of their confiscation:

The Working Party should first focus on the provisions already contained in the draft Directive and on specific provisions that should be introduced on various forms of interception of telecommunications;

Flexibility provided for by the existing regime of mutual legal assistance should be preserved. There should be no steps backwards compared to the current legal framework. Practical experience in the application of the 2000 Convention should be used to simplify, where appropriate, the current legal framework.

2. Derogatory grounds for non recognition or non execution

According to Article 27, the draft Directive would also cover measures implying the gathering of evidence in real time, continuously or over a certain period of time (such as ‘simple’ interception of telecommunications, infiltration, observation, etc).

As was highlighted in the explanatory memorandum of the draft Directive, these measures are characterised by significant differences in the legislations of the Member States, given their impact and limitation of fundamental rights, in particular the right to privacy. This is also why measures of this category are submitted, in mutual legal assistance instruments, to an less binding regime than other measures. In order to combine the objectives of preserving the current flexibility of the MLA regime and of having a comprehensive instrument on the gathering of evidence, Article 27 therefore provides that an EIO may be issued for the purpose of carrying out this type of measures but that the execution may be refused if the use of this measure would not be authorised in a similar national case.

According to the general orientations drawn from the discussions at the level of the Council in November 2010, a wide ground for non recognition or non execution based on the fact that the measure would not be authorized in a similar national case or under national law was not considered appropriate, except for the most sensitive measures. The text of the partial general approach adopted at the last Council meeting, in particular Articles 9 and 10 of the draft Directive, provide for greater flexibility for most of the coercive measures. Derogatory grounds for non recognition or non execution, where provided for a certain measure in chapter IV, would apply in addition to the other grounds for non recognition or non execution already provided for in the draft Directive.

The Presidency is of the opinion that, given the flexibility already provided in Articles 9 and 10 of the current proposal, the insertion of derogatory grounds for refusal in Chapter IV should be avoided or at least restricted to the most sensitive measures.

CATS representatives are invited to confirm the above-mentioned principles and to express their opinion on the need to provide for a wider margin of manoeuvre to the executing authority with respect to the most intrusive investigative measures and, where relevant, to identify the measures concerned.

3. Relation to previous instruments

Article 29 of the original proposal lists the instruments that are replaced by the Directive. Article 29(1) refers to the “corresponding provisions” of applicable MLA conventions. According to the explanatory memorandum, such general wording was considered better than listing the articles that are maintained and those that are replaced, in order to avoid any legal vacuum as these MLA conventions will still be applicable to forms of cooperation that do not concern the gathering of evidence.

CATS representatives are invited to confirm the use of a flexible wording used in Article 29 (1) rather than listing the articles that are maintained and those that are replaced.

III. CONCLUSIONS

CATS is invited to address the specific issues set out under II above with a view to providing guidance to the Working Party in respect of the future examination of the Draft directive.
