

European Investigation Order in criminal matters. Initiative Belgium, Bulgaria, Estonia, Spain, Austria, Slovenia and Sweden

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Ministers continued work on the creation of a European Investigation Order (EIO) in criminal matters, with the aim of establishing mutual recognition as the basis for allowing one Member State to carry out investigative measures at the request of another Member State.

On the basis of a working document, Ministers discussed five main issues:

- the scope of the proposal;
- the competent authorities in the issuing and executing state;
- the grounds for non-recognition or non-execution based on categories of measures;
- the question of proportionality and
- the issue of costs.

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**.

Delegations generally supported the inclusion, within the scope of the Directive, of all forms of interception of telecommunications. However, one delegation maintained a scrutiny reservation on this solution.

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 noncriminal procedures

Competent authorities

a) Issuing authorities: 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. 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: delegations 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.

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

Proportionality: 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.

Costs: 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.