



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 15 October 2010**

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

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**14991/1/10  
REV 1**

**LIMITE**

**COPEN 219  
EJN 47  
EUROJUST 107  
CODEC 1049**

**WORKING DOCUMENT**

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from: The Netherlands

to: Delegations

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Subject: Follow-up of the negotiations in the draft directive regarding the European  
Investigation Order until 28 September 2010

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Delegations find attached comments from The Netherlands delegation provided as follow up of the negotiations in the draft directive regarding the European Investigation Order until 28 September 2010.

**Limit the scope of the directive to criminal procedures**

*The Netherlands delegation proposes to limit the scope of the directive to criminal procedures as envisaged in article 4 (a) because there is hardly an interest to have a broader scope.*

In the answers to the questionnaire on the types of procedure (COPEN 171) an overwhelming majority has declared that they will not and/or would not like to apply the directive for procedures envisaged in article 4 (b) and (c). These answers are no doubted based on their experiences with Schengen and the 2000 MLA convention, which provisions hardly ever were applied in administrative procedures. Only two Member States have stated that they would have no objections applying the directive to the procedures envisaged in article 4 (b) and (c), two other Member States indicated that they could accept it under certain conditions. .

**Issuing authorities**

*The Netherlands delegation proposes to discuss further the competences of the non judicial but competent authorities of some Member States before jumping to the introduction of a validation procedure.*

Only five Member States have declared in the answers to the questionnaire on competent authorities (COPEN 170) that other than judicial authorities are competent in criminal investigations and procedures to apply investigative measures. If we understood them correctly, in none of these Member States there seems to be an overall competence for the police to apply all investigative measures envisaged in the directive. Thus the issue may be less problematic than originally thought and it might be possible to find a flexible approach.

**Validation procedures**

*Without prejudice to the previous point, the Netherlands delegation invites the other delegations to discuss the content of the validation procedure in order to find an adequate solution and to avoid refusal of the recognition and execution of an EIO only because it has been issued by a non judicial authority.*

The reason for this is that the introduction of a validation procedure in the directive EIO is totally different from the FD EEW. The validation procedure was introduced in the FD EEW. This was done before the Treaty of Lisbon entered into force and therefore in a time that the legal status of mutual recognition was not yet codified in article 82 (1) (a) TFEU. That left room for some flexibility. However, that has disappeared due to article 5 (2) TEU, that obliges the EU explicitly to respect the limits of its competences.

A solution through allowing Member States to refuse the recognition and the execution of an EIO that has been issued by a non judicial authority may seem to be pragmatic on the short run, but it will leave the Member States concerned in a position that they will never be sure to get the assistance in criminal investigations and procedures they require.

In the COPEN meeting of 28 September 2010 several Member States could indicated that they could accept a validation procedure for EIOs that where issued by authorities that do not qualify as judicial or equivalent authorities. The Netherlands did not belong to that group of Member States. However, The Netherlands delegation was willing to further reflect on this point and it would like to share the outcome with the other delegations.

Neither in the FD EEW nor in the discussion on the EIO it has been established what we mean by a validation procedure. It seems inconceivable that each of the member States concerned could decide on the content of its own validation procedure and that the other Member States simply would have to accept. The content should be agreed upon by all Member States because the purpose of the validation procedure is to bring EIOs issued by non judicial authorities within the scope of article 82 (2) (a).

In the opinion of The Netherlands a validation procedure *would not be acceptable* if it would entail that an EIO issued by a police authority would be rubberstamped by a judicial authority as an indication that the EIO has been issued in accordance with the national law that does allow for police authorities to issue such an EIO.

However a validation procedure *could be acceptable*, if it would entail that an EIO issued by a police authority is reviewed by a judicial authority who will declare that the EIO has been issued in accordance with the national law that does allow for police authorities to issue such an EIO *and that he takes full responsibility for the EIO*.

### **Need for a level playing field**

***The Netherlands considers it essential to create a level playing field for all Member States that participate in the directive on the EIO.***

In its working document of 22 September 2010 (DS 1624/10) The Netherlands has pointed at the incompatibility of the predominance of the national law in relation to mutual recognition.

In the ongoing discussions it became apparent that the predominance of national law, in particular in article 9 has a further negative consequence than the incompatibility with mutual recognition. Article 9 in its present wording leads directly to a complete lack of level playing field between the Member States, since every Member State would only be obliged to recognise and execute EOIs in so far as its national law would permit it to do so. Thus, one's the directive would have been adopted and implemented, there would be no guarantee that the Member States would cooperate on an equal footing. On the contrary the authorities in our countries would no longer have any guarantee that there EIO would be executed. This would be unacceptable, because – in short - we would loose the level of cooperation we have achieved with the 200 MLA convention and protocol.

To overcome this problem The Netherlands proposes to create an explicit level playing field in the directive itself for all the specific investigative measures that will be specified in the articles 11 and further. The Netherlands would further like to add to the measures specified in the directive: search and seizure, hearing witnesses and defendants and telephone interception.

The level playing field should be in a new article 8A, preceding article 9, which would read:

## Article 8a

### Application of investigative measures

Each Member State shall undertake to ensure that when receiving an EIO, the application of the investigative measures, mentioned in articles 19 until 27<sup>1</sup>, may be permitted in accordance with the provisions of this directive.

#### **Proportionality**

*The Netherlands proposes the inclusion of an article on all aspects of proportionality in the directive.*

Proportionality is important for several reasons, namely to insure the proper administration of justice and to recognise the fact the Member States do have a limited operational capacity to execute Eros.

The Netherlands is of the opinion that we should learn from the experiences with the EAW. It has become apparent from the EU evaluation and academic studies that there are two main reasons for a disproportionate use of an EAW, namely a) an EAW issued for a minor offence and b) the issuance of an EAW for the mere reason to have a person present and to ask in order to close the file without a prosecution. The latter cases occur quite often and are widespread through the EU.

Against this background it is naïve to leave the proportionality check solely to the issuing authority. We should design objective criteria that prevent the issuance of Eros for minor offences.

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<sup>1</sup> And the specific measures still to be included.

With a view of excluding minor offences the scrutiny of double criminality could serve very well since its function was closely linked to proportionality. While recognising the opinion of some Member States that double criminality is completely outdated, The Netherlands proposes to introduce the double criminality scrutiny with respect to the specific investigation measures mentioned in the articles 11 and following, while taking into account the achievements of previous FDs on the list approach.

With a view to give exclude a disproportionate use of an EIO the issuing authority should be under an obligation to check the proportionality in concreto. Furthermore the executing Member State /authority would have a limited flexibility in the execution of an EIO.

Although it becomes a long article The Netherlands would like to include all the elements of proportionality in one new article and therefore it would like to merge the proposed article 5a and elements of article 9, while adding new elements.

## **Article 8b**

### **Proportionality**

- 1) An EIO may be issued only when the issuing authority is satisfied that in the case to which the EIO relates 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) The executing authority may decide to have recourse to an investigative measure other than that indicated in the EIO if the investigative measure selected by the executing authority will have the same result as the measure indicated for in the EIO by less **intrusive** means.

- 3) In order to exclude the application of an EIO for minor offences Member States may subject the application of the investigative measures mentioned in articles 19 until 27 to the condition that the acts for which the EIO has been issued constitute an offence under the law of the executing Member State which is punishable in the issuing Member State as well as the executing Member State by a custodial sentence or detention order for a maximum period as prescribed in the articles 19 until 27<sup>1</sup>.
- 4) However, where the EIO envisages one or more of the following offences, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall under the terms of this directive and without verification of the double criminality of the act, give rise to application of the investigative measures mentioned in articles 19 until 27<sup>2</sup>:

- . participation in a criminal organisation,
  
- . terrorism,
  
- . trafficking in human beings,
  
- . sexual exploitation of children and child pornography,
  
- . illicit trafficking in narcotic drugs and psychotropic substances,
  
- . illicit trafficking in weapons, munitions and explosives,
  
- . corruption,

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<sup>1</sup> And the specific measures still to be included.

<sup>2</sup> And the specific measures still to be included.

- . fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests,
- . laundering of the proceeds of crime,
- . counterfeiting currency, including of the euro,
- . computer-related crime,
- . environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties,
- . facilitation of unauthorised entry and residence,
- . murder, grievous bodily injury,
- . illicit trade in human organs and tissue,
- . kidnapping, illegal restraint and hostage-taking,
- . racism and xenophobia,
- . organised or armed robbery,
- . illicit trafficking in cultural goods, including antiques and works of art,
- . swindling,
- . racketeering and extortion,

- . counterfeiting and piracy of products,
- . forgery of administrative documents and trafficking therein,
- . forgery of means of payment,
- . illicit trafficking in hormonal substances and other growth promoters,
- . illicit trafficking in nuclear or radioactive materials,
- . trafficking in stolen vehicles,
- . rape,
- . arson,
- . crimes within the jurisdiction of the International Criminal Court,
- . unlawful seizure of aircraft/ships,
- . sabotage.

- 5) Where the investigative measure indicated in the EIO is another one than those provided for in articles 19 until 27, the executing authority may decide to have recourse to an investigative measure other than that indicated in the EIO if it does not exist under the law of the executing Member State or its use is restricted under the law of the executing Member State to a list or category of offences which does not include the offence covered by the EIO.
- 6) When the executing authority decides to avail itself of the possibility referred to in paragraph 2 or 4, it shall first inform the issuing authority, which may decide to withdraw the EIO.