Meijers Committee
Standing committee of experts on
international immigration, refugee
and criminal law

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To (by e-mail) The Presidency of the Council of the European Union
Ministry of Public Administration and Justice
Deputy Prime Minister
Mr. T. Navracsics

Reference CM1106
Regarding Initiative for a Directive regarding the European Investigation Order in criminal matters of 29 April 2011, 2010/0817 (COD)
(see council document 8474/11)
Date Utrecht, June 9 2011

Dear Mr. Navracsics,

Please find attached a note of the Standing Committee of experts on international immigration, refugee and criminal law regarding the initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Grand Duchy of Luxembourg, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive regarding the European Investigation Order in criminal matters of 29 April 2011.

The main concerns of the Standing Committee are the following:

- according to the Committee terminology in the draft Directive should be defined with much more clarity;
- in the Committee's view the draft Directive must contain an article that explicitly deals with providing the possibility for the defence to make use of an European Investigation Order (EIO);
- the Committee is of the opinion that some additional issues regarding the grounds of refusal should be taken into account in order for the EIO to be fully in line with the requirements of the EU Charter of Fundamental Rights and the European Convention on Human Rights;
- the Committee is of the opinion that a common system of legal remedies should be set up in the Directive, that will prevent unequal treatment and will be foreseeable for all EU citizens. Moreover, the Directive should therefore also indicate which Member State is responsible under the ECHR regarding the activities under the EIO Directive.

We hope you will find these comments useful.

Should any questions arise, the Meijers Committee is prepared to provide you with further information on this subject.

Yours sincerely,

Prof. C.A. Groenendijk
chairman

cc. The members of the LIBE-committee of the European Parliament
The European Commission

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1. Definitions

Article 2 of the draft Directive is called definitions. The article however only defines '*the issuing authority'* and the *'executing authority'*. The draft Directive contains a number of terms that in the view of the Committee require a proper definition. What are for instance are '*coercive measures'*? These terms might mean very different things throughout the EU. Does the gathering of intelligence through informants fall within the scope of *'investigative measures*"? Is tapping telephones in the UK a '*coercive measure'* as it is in most EU-member states or is it to be considered as the gathering of intelligence that falls outside the scope of the European Investigation Order (EIO)? What about surveillance in the public domain, obtaining CCTV-images? Does police cooperation require the use of an EIO (e.g. a check if a person or a vehicle is registered)? **Terminology should be defined with much more clarity**.

Which proceedings are meant in Article 4, under b? The condition that the decisions mentioned there *may* give rise to proceedings before courts having jurisdiction, *in particular*, in criminal matters may give rise to misunderstandings and may broaden the scope of the EIO beyond punitive sanctions. Can an EIO for instance be issued by a public servant working for the city council (in accordance with Article 5a, section 3) who considers to revoke a restaurant/bar license on the basis that alcohol is served that is imported without paying proper taxes in the Union (VAT-fraud) and who wants to prove his suspicion through the use of an agent provocateur in a different member state? Can the tax authority in member state A de facto order a house raid in member state B? Can the competition authority in member state A de facto bug a car or a home in country B?

The current text lacks the required legal clarity on these sort of questions. Yet the answers to these questions not only determine the scope of the EIO, but are also of relevance for the interpretation of, for instance, Article 10 of the EIO, which, with respect to refusal grounds, makes a distinction between coercive and non-coercive measures. Clarity is moreover required because '*investigative measures'* and especially '*coercive measures'* can and often will have a deep impact on citizen's human rights. It is consistent case-law of the European Court of Human Rights (ECtHR) that such infringements require legal clarity.

2. The defence is out on the EIO

The draft Directive does not contain the possibility for the defence to make use of the EIO. The Standing Committee strongly believes that the defence should have its own possibilities for collecting evidence and should not be dependent on the authorities. It is obvious, however, that the defence needs to be able to both challenge the evidence that is brought by the prosecution and investigate potentially exculpatory evidence.

Art 6, 3 d of European Convention on Human Rights (ECHR) reads:
'*Everyone charged with a criminal offence has the following minimum rights:*
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (…)'

It follows from the Dayanan case (ECtHR 13 October 2009, Dayanan v. Turkey, 7377/03, paragraph 32) that *'the accused must be afforded the possibility of investigating facts and, in particular, potentially favorable evidence'.*

It goes without saying that often witnesses, documents and all sorts of evidence are available in another Member State. In the Committee's view the draft Directive must therefore contain an article that explicitly deals with providing the possibility for the defence to make use of an EIO.

3. Grounds for refusal

With mutual recognition being the main rule (cf. Article 8 of the draft Directive) due attention for the (scope of the) grounds for refusal (Article 10) and postponement (Article 14) is vital. The Standing Committee welcomes the inclusion of Article 5a and Article 10 section 1a, as they make clear that an EIO may never be used to circumvent legal restrictions on the exercise of investigatory powers by the issuing or executive authority. Article 9 of the draft Directive moreover allows for a limited proportionality and subsidiarity test by the executing state, which is responsible for any action it takes when executing an EIO. Yet, although the Standing Committee is also pleased that the *ne bis in idem*-principle is now included into the draft Directive, it is of the opinion that the following issues should also be taken into account in order for the EIO to be fully in line with the requirements of the EU Charter of Fundamental Rights and the ECHR.

Reducing the risk for a systemic flaw

The Standing Committee is of the opinion that, despite the provisions just mentioned, there is a real risk that under the proposed system the safeguards that are available under the individual legal systems of the Member States are played off against one another in cases of transnational evidence gathering.

Infringements on human rights, in order to be justifiable, need to have a legal basis that is accessible, foreseeable and in line with the rule of law. As the ECtHR stated in *Malone v UK*, 2 August 1984, Series A nos. 28/82: 'the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence.' These requirements not only protect the suspect, but also third parties, whose homes may be searched or phones may be tapped.

There is no compelling reason to lower these standards in a transnational setting, particularly not in relation to coercive measures. Yet this is precisely what may happen if, as a result of Article 10, section 1c, of the draft Directive (list offences), certain national limitations on the use of coercive measures may no longer be invoked by the executing state. This affects the foreseeability of the law. The distinction between Article 10, section 1a (a) and (b), on the one hand and section 1a (c) and (d) on the other moreover seems artificial.

The result of the approach taken in Article 10, section 1c, may very well be that, although the national legal systems of every Member States individually are perfectly in line with Article 8 ECHR, the system of transnational evidence gathering in the Area of Freedom, Security and Justice drops below the standards of Articles 7 and 8 EU Charter of Fundamental Rights and Article 8 ECHR. Also in light of Article 53 EU Charter of Fundamental Rights the Standing Committee considers this to be problematic. **It is therefore strongly recommended that Article 10, section 1c, be deleted.**

Inclusion of a general human rights exception

The gathering of evidence easily conflicts with human rights. In the draft Directive there is no general refusal ground for human rights violations. There are however several recitals (cf. recital 17 and 17a) in the preamble that refer to the importance of due respect for human rights. So does Article 1, section 3, of the draft Directive. The latter provision may give rise to misunderstandings and diverging implementation by Member States. The Standing Committee therefore advices to include in Article 10, section 1, a refusal ground expressly stipulating that the recognition or execution of an EIO may not come at the expense of human rights, at the least not those contained

in the EU Charter of Fundamental Rights or the ECHR. **Violation of human rights should lead to refusal of mutual assistance, also in the context of mutual recognition.**

Mandatory refusal grounds
The wording of the draft Directive seems to suggest that the refusal grounds mentioned above may be invoked by the Member States. Particularly with respect to *ne bis in idem* and Article 10 section 1 b the Standing Committee strongly advices that these refusal grounds be transformed into mandatory grounds for refusal in order to avoid any misunderstanding. Both Article 54 Convention Implementing the Schengen Agreement (CISA) and Article 50 EU Charter of Fundamental Rights prohibit a second trial. **Ne bis in idem should be a mandatory ground for refusal.**

4. Legal remedies

Article 13 of the draft Directive refers the citizen back to the Member States to seek legal remedies. This will result in a panoply of all kinds of situations. Whereas some Member States may have procedures to seek remedies against issuing mutual assistance requests, others may not. Similarly, concerning remedies against the execution of a request. In addition, suspects, accused and third parties may not be aware of the EIO then after the evidence has been collected or only learn of it later, at a stage in which the evidence is used in trial.
Article 13, section 5 should lead to a mandatory exclusionary rule of the evidence collected. If the law of the executing Member State does not allow the material to be collected as evidence it may not be used as evidence in other Member States. **The Standing Committee is of the opinion that a common system of legal remedies should be set up** in the Directive, that will prevent unequal treatment and will be foreseeable for all EU citizens.

In 1950, the ECHR was drafted in a context in which, as a rule, all facts relevant in the proceedings of citizens more or less took place within the boundaries of one specific state. This was also the case for human rights violations; in essence, where human rights violations occurred, only one state was responsible and accountable for these violations.
However, the situation in the European society of 2011 is completely different. The EU and its Member States have developed intensive cooperation in judicial matters, e.g. in order to combat crime and illegal migration. In all these circumstances human rights violations may occur. Because of the important subsidiarity principle with regard to the protection of human rights at a national level, complaints lodged with the ECtHR are only admissible if all national legal remedies have been exhausted. This principle, however, generates new questions regarding the admissibility of claims against the EU itself and against Member States involved in the alleged violations committed in the course of interstate cooperation.

More difficulties probably will arise in the context of complaints regarding alleged violations that would occur during the cooperation between Member States. Would any violation occur during interstate cooperation, it can easily happen that the applicant is unaware which very Member State must be held responsible for the alleged violation. This is especially the case in the context of cooperation between Member States of the EU, whereas this cooperation is based on the principle of mutual recognition. In these cases, applicants are likely to be overcharged by requiring them to exhaust the legal remedies in all Member States involved before being able to refer their application to the ECtHR (see also the comment of the Standing Committee on the admissibility of claims in the light of accession of the EU to the ECHR of 23 May 2011 CM1105). **The Directive should therefore also indicate which Member State is responsible under the ECHR regarding the activities under the EIO Directive.**