

III

(Preparatory acts)

MEMBER STATES' INITIATIVES

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 of ... regarding the European Investigation Order in criminal matters

(2010/C 165/02)

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 evidence⁽¹⁾, 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 matters⁽²⁾ 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.

⁽¹⁾ OJ L 196, 2.8.2003, p. 45.

⁽²⁾ 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 as well as some specific forms of interception of telecommunications, for example, interception with immediate transmission and interception of satellite telecommunications. 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 Agreement⁽¹⁾.
- (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 have the possibility to use another type of measure either because the requested measure does not exist or is not available under its national law or because the other type of measure will achieve the same result as the measure provided for in the EIO by less coercive means.
- (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. This possibility does not imply any law enforcement powers for the authorities of the issuing State in the territory of the executing 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.
- (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.
- (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.
- (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.

⁽¹⁾ OJ L 239, 22.9.2000, p. 19.

(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.

(18) [In accordance with Article 3 of Protocol No 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 No 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 by a competent 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 gathering evidence within the framework of the proceedings referred to in Article 4.

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. This Directive shall likewise not have the effect of requiring Member States to take any measures which conflict with their constitutional rules relating to freedom of association, freedom of the press and freedom of expression in other media.

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 judicial 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 or execute an EIO in accordance with this Directive. The executing authority shall be an authority competent to undertake the investigative measure mentioned in the EIO in a similar national case.

Article 3

Scope of the EIO

1. The EIO shall cover any investigative measure with the exception of the measures referred to in paragraph 2.

2. The following measures shall not be covered by the EIO:

(a) 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 Union⁽¹⁾ (hereinafter referred to as 'the Convention') and in Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams⁽²⁾;

⁽¹⁾ OJ C 197, 12.7.2000, p. 3.

⁽²⁾ OJ L 162, 20.6.2002, p. 1.

- (b) the interception and immediate transmission of telecommunications referred to in Articles 18(1)(a) of the Convention; and

- (c) the interception of telecommunications referred to in Article 18(1)(b) of the Convention insofar as they relate to situations referred to in Article 18(2)(a) and (c) and Article 20 of that Convention.

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

- (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.

CHAPTER II

PROCEDURES AND SAFEGUARDS FOR THE ISSUING STATE

Article 6

Transmission of the EIO

1. The EIO 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 judicial 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. If the issuing authority so wishes, transmission may be effected via the secure telecommunications system of the European Judicial Network.

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 jurisdiction 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 Article 6, without any further formality being required, and shall forthwith take the necessary measures for 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 provided for in Article 10 or one of the grounds for postponement provided for in Article 14.

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. The executing authority shall comply with this request provided that such participation is not contrary to the fundamental principles of law of the executing State.

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 may decide to 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;
- (b) the investigative measure indicated in the EIO exists in the law of the executing State but its use is restricted to a list or category of offences which does not include the offence covered by the EIO, or
- (c) the investigative measure selected by the executing authority will have the same result as the measure provided for in the EIO by less coercive means.

2. When the executing authority decides to avail itself of the possibility referred to in paragraph 1, it shall first inform the issuing authority, which may decide to withdraw the EIO.

Article 10**Grounds for non-recognition or non-execution**

1. 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;
- (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) in the cases referred to in Article 9(1)(a) and (b), there is no other investigative measure available which will make it possible to achieve a similar result, or
- (d) the EIO has been issued in proceedings referred to in Article 4(b) and (c) and the measure would not be authorised in a similar national case.

2. In the cases referred to in paragraph 1(b) and (c), 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.

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, shorter deadlines than those provided for in this Article are 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 referred to 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 is taken.

5. When it is not practicable in a specific case for the competent executing authority to meet the deadline set out in paragraph 3, 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 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 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).

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.

Article 13

Legal remedies

Legal remedies shall be available for the interested parties in accordance with national law. The substantive reasons for issuing the EIO can be challenged only in an action brought before a court of the issuing State.

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; or

(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 receipt of the EIO, acknowledge this reception by completing 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), the executing authority shall inform the issuing authority:

(a) immediately by any means where:

(i) 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) 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) 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) any decision taken in accordance with Article 10(1);

- (ii) 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 to 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 or 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.

CHAPTER IV

SPECIFIC PROVISIONS FOR CERTAIN INVESTIGATIVE MEASURES

Article 19

Temporary transfer to the issuing State of persons held in custody for purpose of investigation

1. An EIO may be issued for the temporary transfer of a person in custody in the executing State in order to have an investigative measure carried out 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 refusal referred to in Article 10(1), the execution of the EIO may also be refused if:

(a) the person in custody does not consent; or

(b) the transfer is liable to prolong his detention.

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 and the date by which he must be 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, 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. A transferred person shall not be prosecuted or detained or subjected to any other restriction of his personal liberty for acts or convictions which precede 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 judicial authorities an opportunity to leave, has nevertheless remained in the territory, or having left it, has returned.

9. Costs arising from the transfer shall be borne by the issuing State.

Article 20

Temporary transfer to the executing State of persons held in custody for the purpose of investigation

1. An EIO may be issued for the temporary transfer of a person held in custody in the issuing State in order to have an investigative measure carried out for which his presence on the territory of the executing State is required.

2. In addition to the grounds for refusal referred to in Article 10 (1), the execution of the EIO may also be refused if:

(a) consent to the transfer is required from the person concerned and this consent has not been obtained; or

(b) the issuing and executing authorities cannot reach an agreement on the arrangements for the temporary transfer.

3. Where consent to the transfer is required from the person concerned, a statement of consent or a copy thereof shall be provided without delay to the executing authority.

4. Each Member State may indicate that, before executing the EIO, the consent referred to in paragraph 3 is required under certain conditions indicated in the notification.

5. Paragraphs 3 to 8 of Article 19 are applicable *mutatis mutandis* to the temporary transfer under this Article.

6. Costs arising from the transfer shall be borne by the issuing State. This does not include costs arising from the detention of the person in the executing State.

Article 21

Hearing by videoconference

1. If a person is in the territory of the executing State and has to be heard as a witness or expert by the judicial authorities of the issuing State, the issuing authority may, where it is not desirable or possible for the person to be heard to appear in its territory in person, issue an EIO in order to hear the witness or expert by videoconference, as provided for in paragraphs 2 to 9.

2. In addition to the grounds for refusal referred to in Article 10(1), the execution of the EIO may also be refused if:

(a) the use of videoconference is contrary to fundamental principles of the law of the executing State; or

(b) the executing State does not have the technical means for videoconference.

3. If the executing State has no access to the technical means for videoconferencing, such means may be made available to it by the issuing State by mutual agreement.

4. Article 10(2) is applicable *mutatis mutandis* to cases referred to in paragraph 2(b).

5. The EIO issued for the purpose of a hearing by videoconference shall contain the reason why it is not desirable or possible for the witness or expert to attend in person, the name of the judicial authority and of the persons who will be conducting the hearing.

6. In case of a hearing by videoconference, the following rules shall apply:

- (a) a judicial 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 issuing authority 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.

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. The cost of establishing the video link, costs related to the servicing of the video link in the executing State, the remuneration of interpreters provided by it and allowances to witnesses and experts and their travelling expenses in the executing State shall be refunded by the issuing State to the executing State, unless the latter waives the refunding of all or some of these expenses.

9. Each Member State shall take the necessary measures to ensure that, where witnesses or experts are being heard within

its territory in accordance with this Article and refuse to testify when under an obligation to testify or do not testify the truth, its national law applies in the same way as if the hearing took place in a national procedure.

10. An EIO may also be issued for the purpose of the hearing of an accused person by videoconference. Paragraphs 1 to 9 shall apply *mutatis mutandis*. In addition to the grounds for refusal referred to in Article 10(1), the execution of the EIO may also be refused if:

- (a) the accused person does not consent; or
- (b) the execution of such a measure would be contrary to the law of the executing State.

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 judicial 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 paragraphs 2 to 4.

2. In addition to the grounds for refusal referred to in Article 10(1), the execution of the EIO may also be refused if

- (a) the use of teleconference is contrary to fundamental principles of the law of the executing State; or
- (b) the witness or expert does not agree to the hearing taking place by that method.

3. The EIO issued for a hearing by telephone conference shall contain the name of the judicial authority and of the persons who will be conducting the hearing and an indication that the witness or expert is willing to take part in a hearing by telephone conference.

4. 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) notify the witness or expert concerned of the time and the venue of the hearing;

- (b) ensure the identification of the witness or expert; and
- (c) verify that the witness or expert agrees to the hearing by telephone conference.

The executing State may make its agreement subject, fully or in part, to the relevant provisions of Article 21(6) and (9). Unless otherwise agreed, the provisions of Article 21(8) shall apply *mutatis mutandis*.

Article 23

Information on bank accounts

1. An EIO may be issued in order to determine whether a natural or legal person that is the subject of a criminal investigation holds or controls one or more accounts, of whatever nature, in any bank located in the territory of the executing State.
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 and to the extent that it can be provided within a reasonable time, 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. In addition to the grounds for refusal referred to in article 10(1), the execution of an EIO referred to in paragraph 1 may also be refused if the offence concerned is not:

- (a) an offence punishable by a penalty involving deprivation of liberty or a detention order of a maximum period of at least four years in the issuing State and at least two years in the executing State;
- (b) an offence referred to in Article 4 of Council Decision of 6 April 2009 establishing the European Police Office (Europol) (hereinafter referred to as 'the Europol Decision')⁽¹⁾; or

⁽¹⁾ OJ L 121, 15.5.2009, p. 37.

- (c) to the extent that it may not be covered by the Europol Decision, an offence referred to in the 1995 Convention on the Protection of the European Communities' Financial Interests⁽²⁾, the 1996 Protocol thereto⁽³⁾, or the 1997 Second Protocol thereto⁽⁴⁾.

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 investigation into the offence 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.

Article 24

Information on banking transactions

1. An EIO may be issued in order to obtain the particulars 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 State shall indicate in the EIO why it considers the requested information relevant for the purpose of the investigation into the offence.

Article 25

The monitoring of banking transactions

1. An EIO may be issued in order to monitor, during a specified period, the banking operations that are being carried out through one or more accounts specified within.
2. Each Member State shall, under the conditions set out in the Article, take the measures necessary to enable it to provide the information referred to in paragraph 1.
3. The issuing State shall indicate in the EIO why it considers the requested information relevant for the purpose of the investigation into the offence.
4. The practical details regarding the monitoring shall be agreed between the competent authorities of the issuing and the executing States.

⁽²⁾ OJ C 316, 27.11.1995, p. 49.

⁽³⁾ OJ C 313, 23.10.1996, p. 2.

⁽⁴⁾ OJ C 221, 19.7.1997, p. 12.

Article 26**Controlled deliveries**

1. An EIO may be issued to undertake a controlled delivery on the territory of the executing State.

2. 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 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, including the measures referred to in Articles 25 and 26, implying the gathering of evidence in real time, continuously and over a certain period of time, its execution may be refused, in addition to the grounds for refusal referred to in Article 10(1), if the execution of the measure concerned would not be authorised in a similar national case.

2. Article 10(2) applies *mutatis mutandis* to cases referred to in paragraph 1.

3. The executing authority may make the execution of an EIO referred to in paragraph 1 subject to an agreement on the allocation of costs.

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;

(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;

(*) Two years from the entry into force of this Directive.

(d) the requirement of consent to the transfer from the person concerned in the case the Member State wishes to make use of the possibility provided for in Article 20(4).

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 Network (¹).

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;

— 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.

2. Framework Decision 2008/978/JHA is repealed. This Directive applies between the Member States to the freezing of items of evidence in substitution for the corresponding provisions of Framework Decision 2003/577/JHA.

3. Member States may continue to apply the bilateral or multilateral agreements or arrangements in force after ... (*) insofar as these make it possible to go beyond the aims of this Directive and contribute to simplifying or further facilitating the evidence gathering procedures.

(¹) OJ L 348, 24.12.2008, p. 130.

4. Member States may conclude bilateral or multilateral agreements and arrangements after ... (*) insofar as these make it possible to go further into or extend the provisions of this Directive and contribute to simplifying or further facilitating the evidence gathering procedures.

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 paragraph 4.

6. If the Commission is of the view that a bilateral or multi-lateral agreement or arrangement notified to it does not comply with the conditions set out in paragraphs 3 and 4, it shall invite the Member States concerned to terminate, modify or refrain from concluding the agreement or arrangement in question.

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 31

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.

3. By ... (**), Member States shall transmit to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Directive.

4. The Commission shall, by ... (****), submit a report to the European Parliament and to the Council, assessing the extent to which the Member States have taken the necessary measures in order to comply with this Directive, accompanied, if necessary, by legislative proposals.

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. 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*.

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

...

(*) The date of entry into force of this Directive.

(**) Three months after the entry into force of this Directive.

(***) Two years after the entry into force of this Directive.

(****) Three years after the entry into force of this Directive.

ANNEX A

EUROPEAN INVESTIGATION ORDER (EIO)

This EIO has been issued by a competent judicial authority. I request that the investigative measure or measures specified below be carried out and the evidence thereafter obtained as a result of the execution of the EIO be transferred.

(A) INVESTIGATIVE MEASURE TO BE CARRIED OUT**1. Description of the investigative measure(s) for which the execution is required:**

.....
.....
.....
.....

2. If the investigative measure(s) relates to one or more of the specific investigative measure(s) listed below, please indicate it by ticking the relevant box(es):

- Temporary transfer to the issuing State of persons held in custody for the purpose of investigation
- Temporary transfer to the executing State of a persons held in custody for the purpose of investigation
- Hearing by videoconference
- Hearing by telephone conference
- Information on bank accounts
- 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

3. Where applicable, location of the execution (if not known, the last known location):

.....
.....
.....
.....

(B) IDENTITY OF THE PERSONS CONCERNED

Information regarding the identity of the (i) natural or (ii) legal person(s) against whom the proceedings are/may be/is taking place:

(i) In the case of natural person(s)

Name:

Forename(s):

Maiden name, if applicable:

Aliases, if applicable:

Sex:

Nationality:

Date of birth:

Place of birth:

Residence and/or known address; if address not known, state the last known address:

.....

Language(s) which the person understands (if known):

.....

(ii) In the case of legal person(s)

Name:

Form of legal person:

Shortened name, commonly used name or trading name, if applicable:

.....

Registered seat (if available):

Registration number (if available):

Address of the legal person:

(C) THE JUDICIAL AUTHORITY WHICH ISSUED THE EIO

Official name:

.....

Name of its representative:

.....

Post held (title/grade):

.....

File reference:

.....

Address:

.....

Tel. No: (country code) (area/city code)

.....

Fax No: (country code) (area/city code)

.....

E-mail:

.....

Languages in which it is possible to communicate with the issuing authority:

.....

Contact details of the person(s) to contact if additional information on the execution of this EIO is necessary or to make necessary practical arrangements for the transfer of the evidence:

.....

(D) RELATION TO POSSIBLE EARLIER EIO

If applicable, indicate if this EIO supplements an earlier EIO and, if so, provide information relevant to identify the earlier EIO (the date of issue of such EIO, the authority to which it was transmitted and, if available, the date of transmission of the EIO, and reference numbers given by the issuing and executing authorities).

.....
.....
.....
.....

(E) TYPE OF PROCEEDINGS FOR WHICH THE EIO WAS ISSUED

Tick the type of proceedings for which the EIO was 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; or
- b) 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; or
- c) 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 further proceedings before a court having jurisdiction in particular in criminal matters.

(F) REASON FOR ISSUING THE EIO

1. **Summary of the facts and description of the circumstances in which the offence(s) underlying the EIO has (have) been committed, including time and place, as known to the issuing authority:**

.....
.....
.....
.....

2. **Nature and legal classification of the offence(s) resulting in the EIO and the applicable statutory provision/code:**

.....
.....
.....
.....

(G) EXECUTION OF THE EIO

1. Deadlines for execution of the EIO are laid down in Directive XXX/.../JHA. However, if a shorter deadline is necessary, please indicate any earlier deadline and the reason for this by ticking the relevant box:

Earlier deadline or specific deadline: (dd/mm/yyyy)

Reasons:

[] procedural deadlines

[] seriousness of the offence

[] other particularly urgent circumstances (please specify):
.....
.....

(H) SPECIFIC MODALITIES FOR THE EXECUTION**1. Tick and complete, if applicable**

- It is requested that the executing authority comply with the following formalities and procedures (¹)

.....
.....
.....
.....

2. Tick and complete, if applicable

- It is requested 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 (²).

Official name of the above-mentioned authority or authorities:
.....

Contact details:

(I) FINAL PROVISIONS AND SIGNATURE**1. Other information relevant to the case, if any:**

.....
.....

2. Signature of the issuing authority and/or its representative certifying the content of the EIO as accurate:

.....

Name:

Post held (title/grade):

Date:

Official stamp (if available):

⁽¹⁾ It is assumed that the executing authority will comply with the formalities and procedures indicated by the issuing authority unless they are contrary to the fundamental principles of the law of the executing State.

⁽²⁾ This possibility does not imply any law enforcement powers for the authorities of the issuing State in the territory of the executing State.

ANNEX B

CONFIRMATION OF THE RECEIPT OF AN EIO

This form has to be completed by the authority of the executing State which received the EIO referred to below.

(A) THE EIO CONCERNED

Judicial authority which issued the EIO:

File reference:

Date of issuing:

Date of reception:

(B) THE AUTHORITY WHICH RECEIVED THE EIO⁽¹⁾

Official name of the competent authority:

Name of its representative:

Post held (title/grade):

Address:

Tel. No: (country code) (area/city code)

Fax No: (country code) (area/city code)

E-mail:

File reference:

Languages in which it is possible to communicate with the authority:

⁽¹⁾ This section is to be completed by each authority which received the EIO. This obligation falls upon the authority competent to recognise and execute the EIO and, where applicable, upon the central authority or the authority which transmitted the EIO to the competent authority.

(C) (WHERE APPLICABLE) THE COMPETENT AUTHORITY TO WHOM THE EIO IS TRANSMITTED BY THE AUTHORITY UNDER (B)

Official name of the authority:

.....

Name of its representative:

.....

Post held (title/grade):

.....

Address:

.....

.....

Tel. No: (country code) (area/city code)

.....

Fax No: (country code) (area/city code)

.....

E-mail:

.....

Date of transmission:

.....

(D) SIGNATURE AND DATE

Signature:

Date:

Official stamp (if available):