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COVER NOTE

from:	The President of the Italian Senate
date of reception:	8 March 2011
to:	Mr Victor Orbán, President of the Council of the European Union
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 [ref. 2010/0817 (COD) - doc. 9288/10 COPEN 117 EUROJUST 49 EJN 13 PARLNAT 13 CODEC 384] – Opinion on the application of the Principles of Subsidiarity and Proportionality

Delegations will find attached a copy of the letter indicating that the abovementioned initiative complies with the principle of subsidiarity.

Senate of the Italian Republic
The President

Rome, 8 March 2011
Ref. No 500/UC

Sir,

I enclose the text of a Resolution adopted by the Italian Senate's Justice Committee after considering the initiative by a group of Member States for a Directive of the European Parliament and of the Council regarding the European investigation order in criminal matters (9288/10).

The Resolution comments on compliance with the principles of subsidiarity and proportionality.

(Complimentary close)

(signature)

Enclosure: 1

Mr Viktor Orbán
President of the Council of the European Union
1048 BRUSSELS

SENATE OF THE ITALIAN REPUBLIC
XVIth PARLIAMENTARY TERM

Doc. XVIII
No 81

RESOLUTION OF THE 2nd STANDING COMMITTEE

(Justice)

(draftsman: CENTARO)

adopted at the first sitting on the afternoon of 2 March 2011

ON THE

INITIATIVE BY A GROUP OF MEMBER STATES FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL REGARDING THE EUROPEAN INVESTIGATION ORDER IN CRIMINAL MATTERS
(9288/10)

under Rule 144(1) and (6)

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notified to the President's Office on 8 March 2011

INDEX

Page

Within an area of freedom, security and justice, as ensured by the European Union Treaties, particular heed should be paid to the effectiveness and efficiency of means of obtaining oral or documentary evidence. The aim here is firstly to increase and speed up cooperation between Member States, also with a view to gradually standardising procedural systems as a result of familiarity with and implementation of one another's rules, and secondly, above all, to enable judicial requests to elicit a swift official response.

The transnational nature of unlawful trafficking means that crimes are often committed in a number of countries or at any rate there is a need to obtain evidence in a number of countries.

In addition, free movement of goods and people within the European Union has resulted in establishment, investment and money laundering in the most attractive locations within the EU, regardless of the source of funds.

Hence the need to speed up procedural steps to be performed outside the country in which proceedings are pending. The present system, based on various supranational bodies or national coordinators or liaison officers, is confused and unduly slow to deliver.

Clearly, the new system has to operate within the framework of the rights and fundamental principles enshrined in the EU Treaties and of individual Member States' exclusive sovereignty under those Treaties. That said, this initiative for a Directive is to be seen as a worthwhile way of speeding up and streamlining the procedures concerned, subject to the emendations and amendments put forward below.

Firstly, it would be advisable to spell out more clearly the type of proceedings (civil, criminal or administrative) covered by a European investigation order (EIO). It should be noted here that reference to criminal law only, or at most to quasi-criminal offences, significantly restricts the instrument's scope, for no good reason. While combating unlawful trafficking and transnational crime does take priority, there can be no denying the importance of obtaining evidence quickly in civil or administrative proceedings too. As pointed out, free movement of goods and people within the EU has greatly increased the scope for relationships with ramifications in a number of European

countries. There cannot, then, be any question of restricting the EIO by type or seriousness of offence.

Secondly, the time limit for recognition of an EIO should not exceed 30 days, with a similar provision for execution, if the proposal's basic rationale of speeding up and streamlining procedures is not to be thwarted.

It should also be stipulated that the legal remedies available against an EIO are to be exercised in the courts with jurisdiction under the issuing state's rules, avoiding the general wording used in the proposal.

Nor can postponement of execution be equated with postponement of recognition, for which there is no need at all. Recognition involves a judgment as to the prerequisites for an EIO, enabling it to be executed. Postponement of its execution under the circumstances listed in Article 14 is quite another matter. Recognition is thus always possible, even though execution may be postponed, since recognition is in essence a separate legal step.

It also needs to be spelt out how costs incurred by the executing state in carrying out an EIO are to be borne in full by the issuing state. It makes no organisational sense at all, nor does it serve as any procedural or substantive safeguard, to require the transferee's consent to an EIO for temporary transfer of a person in the executing state's custody to the issuing state. As is abundantly obvious, the transferee will have an interest, one way or another, in obstructing or impeding the investigation. Nor is protection of the transferee's rights under the EU Treaties in any way affected by this procedure, unless it involves extended detention.

It is hard to understand how use of a videoconference or telephone conference for a hearing could be contrary to fundamental principles of the executing state's law, if the proposal's provisions are properly applied.

Nor does it make any sense, under the legal system, to provide for refusal by a person to be heard via a videoconference or telephone conference whatever their part in the proceedings. While a defendant or a person under investigation may claim the right not to reply in such circumstances, the same cannot apply for witnesses or experts. The latter are required to assist in an investigation and may even be forced to appear, as may a defendant too in some cases (e.g. for identification or confrontation).

Clearly, should the limitations criticised above remain in these provisions, they would ultimately undermine the effectiveness of the investigative instrument provided by the proposed Directive.

There seems no need, moreover, for the stipulation in Articles 23(4) and 24(3).

It is essential to spell out more clearly what is meant by "controlled deliveries" and how they are to be carried out, so as to avoid any danger of discretionary power or misunderstandings between EIO-issuing and executing states. There should be no question here of any interference with the operation without first consulting the relevant body in the issuing state, even informally unless to do so would compromise the confidentiality of the operation or its chances of success.

For the notification arrangements, see the points made above concerning a transferee's consent.

In conclusion, the Committee takes a favourable view, while making the points, comments and provisos set out above.

OPINION OF THE 14th STANDING COMMITTEE

(EUROPEAN UNION POLICY)

(draftsman: Mauro Maria MARINO)

13 October 2010

The 14th Standing Committee, having considered document 9288/10,

recognising the need to overcome the complexity and piecemeal nature of the present rules governing cross-border gathering of evidence, as also pointed to by the European Council in the Stockholm programme for an area of freedom, security and justice for citizens (2010-2014);

in view of the importance to Member States of availability of an instrument ensuring that current procedures are speeded up and streamlined, with greater mutual trust and cooperation between Member States, while respecting the diversity of individual national judicial systems;

whereas EU judicial cooperation is based on the principle of mutual recognition of decisions,

takes a favourable view, for its part, while making the following points:

1. The proposal appears to comply with the principle of subsidiarity in that it applies to action to obtain evidence in a Member State other than that in which proceedings are being conducted. Such action is of necessity cross-border in nature and therefore requires rules at EU level.

2. That assessment does not, however, obviate the need for consideration of the proposal's legal basis, specified as Article 82(1)(a) of the Treaty on the Functioning of the European Union (TFEU). The relationship between that provision and Article 82(2) and (3) of the TFEU needs to be weighed up here. Paragraph 2, in particular, states that the European Parliament and the Council may, by means of directives, establish minimum rules in order to "facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters". Under paragraph 2(a), such rules are to concern matters including "mutual admissibility of evidence between Member States", an aspect addressed by this proposal.

Paragraph 3 also enables a Member State to refer the matter to the European Council, with the ordinary legislative procedure being suspended, if it considers that proposed measures would affect its criminal justice system (the "emergency brake").

Lastly, as the proposal also provides for involvement of police authorities, e.g. in controlled deliveries and interception, consideration should be given to whether there is any connection with Article 87 of the TFEU, on police cooperation, although this requires a special legislative procedure for adoption of rules in that area.

3. The principle of proportionality does appear to be respected, although closer consideration needs to be given to European criminal investigation orders involving significant costs in operations to obtain evidence. In such cases, it would be fair to arrange for costs to be shared between issuing and executing states.

   With regard to costs incurred in carrying out a European criminal investigation order, too, it might be more consistent with the principle of proportionality for the order to be confined to more serious offences, or else for it also to apply to lesser offences, but with costs in that case being charged to the issuing state. More serious offences could be defined on the basis of Article 2(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant, which may be issued for "acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months".

4. On the substance of the proposal, while respect for the fundamental rights of individuals is addressed in Article 1(3), it would be advisable to spell out that intention more clearly by means of specific provisions. There are some shortcomings to be seen as regards the rights of the person under investigation. In particular, those under investigation should have to be informed of evidence obtained by means of a European investigation order. Regard also needs to be paid here to the proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings (COM(2010) 392), submitted by the Commission on 20 July 2010 and now being discussed separately.

   For the purpose of protecting the rights of those under investigation, again, there is a need to consider whether the time limits set for recognition and execution of a European criminal investigation order are sufficient for a suitable line of defence to be prepared and for any legal remedies to be exercised. On the latter point, governed by Article 13 of the proposed Directive, more detailed provisions should be laid down.

Article 9 or 10 of the proposal should include a provision enabling the executing state to refuse to recognise or execute a European criminal investigation order if the substantive requirements under its legislation would not, in similar cases governed entirely by national law, allow the evidence to be obtained.

It would also be desirable to include measures concerning protection of data or retention of evidence obtained by the executing state.

As regards the specific provisions in Chapter IV of the proposal, it does not seem sufficiently clear what is meant by "controlled deliveries", for which a definition should be given.