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*Committee on Civil Liberties, Justice and Home Affairs*

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## **WORKING DOCUMENT 1**

on the adoption of a Directive of the European Parliament and of the Council  
regarding the European Investigation Order in criminal matters

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Nuno Melo

## **Recital 2**

Traditional judicial cooperation in criminal matters is based on a variety of international legal instruments, which are overwhelmingly characterised by the ‘request principle’, which is understood as follows: one sovereign State makes a request to another sovereign State, which then decides whether or not to comply with that request. However, in practice, this traditional system has been problematic, slow and overly complex, thereby hindering the proper, prompt and effective administration of justice. However, in practice, this traditional system has been problematic, slow and overly complex, thereby hindering the proper, prompt and effective administration of justice. That was why the Tampere European Council in October 1999 decided that the principle of mutual recognition should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union. However, as a general rule, automatic mutual recognition is possible only in legal areas that have been substantially harmonised, which is not often the case in the EU, as for example with regard to the role of prosecutors, the admissibility of evidence and the exclusion clause (which ranges from an absolute exclusion clause to a minimalist approach in certain Member States). The comprehensive application of mutual recognition could cause serious legal and constitutional problems in certain Member States. This fact was explicitly highlighted by the German Delegation to the Council in a special document, which indicated the limited role of prosecutors in Germany, where for some measures a court order is needed, as a constitutional requirement. The same is true of the exclusion rule in cases where Member States must also take account of their constitutional requirements and the case-law of the European Court of Human Rights (evidence obtained through the use of torture cannot even be produced in the proceedings; evidence obtained through inhuman or degrading treatment cannot be regarded as evidence, although it can be produced in the proceedings (see the *Gäffen v Germany* case)). Moreover, these conditions are common to other countries, one of which is Portugal. At the same time, experience with the European Arrest Warrant has revealed substantial problems when the principle of mutual recognition is automatically applied. Some Member States, such as Ireland or the United Kingdom, have introduced a special ground for refusal based on human rights. In the *MJELR v Rettinger* case, the Irish Supreme Court indicated that applying the principle of mutual recognition does not absolve a Member State from its obligations under the European Convention on Human Rights. This would be the case, for example, with torture or inhuman or degrading treatment (and, by analogy, with evidence associated with this type of treatment). Due to all the above, and bearing everything in mind, the wording of this recital is as proposed above.

## **Recital 2b**

This concerns the need to protect differences that still exist between our countries with regard to the definition of various crimes, and to prevent a Member State opting for an EIO knowing that, in the executing State, the facts justifying this EIO do not constitute a criminal offence and are not therefore punishable. In this respect, the existing legal instruments on mutual recognition (European Arrest Warrant, European Evidence Warrant, etc.) ruled out a double criminality check by establishing a list of 32 crimes/offences, with the assumption being that these offences are harmonised in such a way that this double criminality check is not necessary. However, this has not happened in practice. For example, in the definition of ‘rape’, the Swedish definition (‘helpless state’) is so specific that it does not correspond to any other definitions in other Member States. There has also been a concern about clarifying that

proceedings associated with tax, customs duties and exchange offences are excluded from this list.

#### **Recital 10a**

A recital has been added which underlines that proportionality is a constitutional requirement in several Member States, pursuant to Article 8 of the European Convention on Human Rights. Any apparent infringement of these requirements must allow the executing authority to refuse the measure, based on the infringement of human rights or on the infringement of fundamental constitutional principles. Under the principle of proportionality, the EU must take only those measures necessary to achieve its objectives. This means that the intensity of the action must be in line with the intended objective. In other words, where the European Union can choose between several methods of action that are equally effective, it must choose the method that allows Member States and individuals the greatest freedom. However, once again, compliance with those principles that are regarded as fundamental national constitutional principles must also be ensured.

#### **Recital 10b**

It is extremely important to ensure that the EIO is sent to the competent authorities, thereby preventing the risk of the incorrect authorities being involved in the exchange of personal data. Eurojust is included as an example, as this was specially set up within the European Union to encourage and improve the coordination of criminal investigations and proceedings between competent authorities. This will ensure the confidentiality of the information transmitted, in order to protect the fundamental rights of the persons involved, and will guarantee the reciprocal exchange of information between the competent authorities. The possibility of the competent judicial authorities using other channels ensuring the confidential and secure transmission of information to the executing authority is not ruled out.

#### **Recital 11**

This recital, which is particularly developed in Article 8, aims to encourage judicial authorities to cooperate with each other, in a spirit of mutual trust, by promoting mechanisms not only to facilitate cooperation between authorities, but also to improve the judicial protection of individual rights. The possible presence of a competent authority of the issuing State during execution of the EIO, in order to assist the executing authorities, may be crucial where, for example, it is necessary to ensure admissibility of evidence or issue supplementary EIOs in the course of execution of a measure. This does not prevent this presence being refused if it would be contrary to the fundamental principles of law of the executing State. The purpose of a competent authority of the issuing State being present in the executing State can only be to provide assistance to the authorities of the executing State.

#### **Recital 13a**

In order to protect the right to a fair trial, effective access to justice must be ensured. The approval and execution of a European Investigation Order requires specific guarantees to ensure that the rights of all those concerned are effectively protected. The minimum rights of defence in criminal proceedings include the presumption of innocence and the right not to incriminate oneself, the right to be informed of the accusation, the right to legal representation

and the right to have the free assistance of an interpreter (Article 48 of the Charter of Fundamental Rights and Article 6(2) and (3) of the European Convention on Human Rights). This standard is particularly relevant in the context of the European Investigation Order, as witnesses obtained in a manner that infringes these rights must not be used against the accused.

## **Article 1**

Article 1 defines the EIO and clarifies that its object is primarily the execution of a specific investigative measure. Article 1(2) establishes the principle of mutual recognition as a principle characteristic of the European Union (Article 82 TFEU). This has been recognised as the cornerstone of judicial cooperation in both civil and criminal matters since the Tampere European Council in 1999. In an area and culture of greater security, freedom and responsibility, the principle of mutual recognition is regarded as a fundamental principle of European integration. In general, whereas traditional mutual legal assistance continues to be characterised by the principle of national sovereignty, the principle of mutual recognition is based on concepts of equivalence and trust. It has added value by virtue of its legal definition, with regard to both the limitation of grounds for refusal and the fixing of time-limits. In this respect, under the mutual legal assistance rules, requests are in principle executed only by central authorities. This has been relaxed over the years within the European Union, but still allows for a government filter. By contrast, the principle of mutual recognition ensures that the proceedings are entirely judicial. It enables direct transmission between judicial authorities, ensuring respect for the principle of separation of powers and not allowing any intervention by the executive. That is why this mutual trust between Member States helps to simplify and speed up procedural formalities. With regard to the limited grounds for refusal, the main weakness with mutual legal assistance lies in the fact that it allows for broad grounds for refusal. These grounds result in mistrust, which can hinder or even prevent cooperation and allow for wide discretion. Under the mutual recognition rules, the foreign order must be executed, except where one of the grounds for refusal is invoked. These are not set out in an exhaustive list, but are limited to objective reasons for refusing the cooperation. In principle, any discretionary grounds are excluded. With regard to time-limits, under the mutual legal assistance rules, there are normally no compulsory time-limits (Article 6(2) of the 1959 European Convention on Mutual Assistance in Criminal Matters). By contrast, the mutual recognition rules stipulate and fix time-limits, which are clearly indicated. Time-limits must be fixed because this facilitates and speeds up the judicial cooperation. The principle of mutual recognition means that, if the Member State executing the order trusts the decision of the Member State issuing the order, the latter must trust how the other Member State executes it. However, in this proposal, an important and justified margin of discretion is maintained in order to ensure respect for the legal and constitutional differences between the Member States. Article 1(3) reaffirms the importance of respecting fundamental rights and fundamental legal principles, as suggested by the European Union Agency for Fundamental Rights. In fact, the judicial protection of individual rights (treatment of suspects, related rights of defence, etc.) must not be negatively affected by the application of the principle of mutual recognition. On the contrary, safeguards must be reinforced throughout the process. In this respect, there will be cases in which a minimum set of common provisions enabling the application of the principle of mutual recognition may be necessary. This is particularly the case with the protection of the defendant, in terms of the rights of defence and protection of the victim, and with regard to the possibility of being heard, with respect for fundamental

freedoms. Criminal proceedings help to reinforce the general and preventive effectiveness of criminal law. In fact, the concept of legal certainty ensures that the exercise of punitive power by a State is not linked solely to substantive assumptions, but also ensures the procedural formalisms that protect fundamental rights, up to the final judicial decision ('no punishment without trial'). The aim of criminal proceedings is to ensure justice, which obviously presupposes the discovery of the truth in a procedurally valid manner, i.e. in accordance with the protection of the fundamental rights of individuals.

## **Article 2**

Article 2 contains definitions of various concepts used in the proposal.

Definitions of 'issuing State' and 'executing State' have been included, as these are frequently used throughout this Directive and mean something different from 'issuing authority' and 'executing authority'. The definition of 'issuing authority' has been amended so that it no longer includes authorities which are not judicial, such as the police. Judicial authority can be defined as all authorities exercising judicial power, i.e. authorities that deliver, in accordance with the procedures laid down by law, binding decisions that are classified as 'judicial decisions'. 'Executing authority': the Member States must also decide which authorities will be designated as executing authorities. Member States do not, however, have unlimited room for manoeuvre as the Directive requires the executing authority to be an authority competent to undertake the investigative measure mentioned in the EIO in a similar national case. If the EIO is issued to search a house in a specific location in a Member State, the executing authority must be an authority which would be competent, in a similar national case, to order a search in the location concerned.