Briefing on the European Investigation Order

For Council and Parliament

Partial general approach

July 2011

For further information contact

Jodie Blackstock, Senior Legal Officer (EU: JHA)
Email: jblackstock@justice.org.uk Tel: 020 7762 6436
JUSTICE, 59 Carter Lane, London EC4V 5AQ Tel: 020 7329 5100
Fax: 020 7329 5055 E-mail: admin@justice.org.uk Website: www.justice.org.uk

Introduction and Summary

1. JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is also the British section of the International Commission of Jurists.

2. The Council agreed a partial general approach on the European investigation order in its meeting on the 9/10 June 2011.[1] This will form the basis of further negotiations with the European Parliament. We responded in detail to the original initiative and this briefing should be read in conjunction with our first.[2]

3. The partial general approach has many improvements from a perspective of safeguarding access to justice and fundamental rights on the initial draft of the Initiative. In particular, a proportionality test, an equivalence with national law test, and validation of the issue of an EIO by a judicial authority in the issuing state have been included in article 5a. We hope that the form for transmission of an EIO once agreed will require the issuing member state to clearly demonstrate that they have satisfied these tests. Grounds for refusal of execution have been widened to include *ne bis in idem*, a dual criminality requirement (subject to the previously agreed framework list of 32 offences), and the territoriality principle in article 10. Legal remedies are more robust by ensuring remedies are equivalent to that which would be available under domestic law and that information is provided to interested parties to ensure that they can access these remedies. We welcome these safeguards.

4. However, some amendments do not go far enough or have added unnecessary confusion or restriction to the operation of the safeguards that have been provided.

---

[1] Council of the European Union, 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, *Initiative for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters*, partial general approach 11735/11 (Brussels, 17 June 2011)

[2] Available here: http://www.justice.org.uk/data/files/resources/294/Briefing-on-the-European-Investigation-Order-for-council-and-parliament.pdf

Recital (15) and (17a)

5. Recital (15) confirms that the directive will supersede various instruments so far as they deal with obtaining evidence for the use of proceedings in criminal matters. Equally, recital (17a) confirms that personal data must be protected in accordance with provisions in the area of police and judicial cooperation. These instruments must be set out to ensure legal certainty.

Article 7 EIO related to earlier EIO

6. Article 7(2) allows for the issuing authority to supplement an existing EIO when it is present in the executing country to assist with the gathering of evidence in accordance with article 8(3). It is not clear how this will comply with the proportionality and validation tests under article 5a. One mechanism would be to ensure that the original judicial authority can be immediately contacted to give the validation remotely. It must, however, be explicit in this article that any supplement must conform to article 5a to ensure proportionality and independent decision making are maintained.

Article 8 Recognition and execution

7. Article 8(3a) has been inserted to state that issuing authorities present in the executing state are bound by the national law. It confirms that they will not have any law enforcement powers but then goes on to provide: '*unless the execution of such powers in the territory of the executing state is in accordance with the law of the executing state and to the extent agreed between issuing and executing authorities.*'

8. We do not think that there should be any occasion where a non national authority can exert law enforcement powers in another member state. Each state will have its own training programmes for law enforcement officers to ensure that they comply with national law, procedure and standards. Issuing authorities will not adhere to those specific training requirements and could therefore breach national law and procedure by engaging in enforcement operations. They could also breach national safeguards for the protection of persons or materials connected with the operation. Equally issuing and executing authorities cannot agree between them when this would be possible as a non national agency would have no lawful power to act under the executing state's national law. We cannot think of any reason why the executing

authority would not be sufficient to carry out the investigation. To allow non national agencies to exert law enforcement powers would be a very worrying development. In any event, there is no legal base in the Treaty on the Functioning of the European Union to allow this. The proposal has been presented in accordance with article 82(1) on mutual recognition of judicial decisions. Police cooperation has a legal base in article 87 but there is no provision in the article to allow law enforcement powers to be exercised in another member state.

Article 9 Recourse to a different type of investigation measure

9. Article 9(1bis) is included as a discretionary measure when the same result could be achieved by less intrusive means. This should be a mandatory measure in addition to the others specified in article 9(1). If less intrusive means are available, these should be taken in all cases in order to ensure that the response does not disproportionately interfere with the affected person's right to private and family life under article 7 of the Charter on Fundamental Rights (CFR) and article 8 of the European Convention on Human Rights.

Article 10

10. We cannot think of any reason to exclude the measures under article 10(1a) from the ambit of article 9(1). The same reasons for recourse to a different measure could occur in any of these instances in the same way as other evidence requests, and such requests should be subject to the same protections. For example, if a non-coercive measure is requested that is not available under national law, there should still be recourse to a measure that is available. In an event, article 10(1a) should be included in article 9 not article 10 as it does not confer a ground of refusal but an exemption to article 9(1).

11. Article 10(1b) imports a dual criminality check which we do welcome. However, we think the drafting is confusing to follow. The article should form article 10(1)(g) rather than a separate article. Equally article 10(1c) should follow on in 10(1)(g) rather than forming a separate article.

12. Article 10(2) is far too widely drafted. It applies to all the grounds for refusal, yet where such grounds exist in almost all situations it would not be necessary to consult

with the issuing authority to decide not to recognise the request. Only in relation to article 10(1)(e), where assurances are required from the issuing state, could such dialogue take place. This article should only apply to that specific measure.

13. Article 10(3) refers to the power to waive a privilege or immunity and expediting that process. It makes no reference to the person who might be affected by the lifting of such a privilege. The article must operate subject to ensuring legal remedies are available in accordance with article 13 and in any event with the right to a fair and public hearing guaranteed by article 47 CFR.

Article 13 Legal Remedies

14. Article 13(4) provides that information should be provided about the possibilities for seeking legal remedies '*when these become applicable'.* This provision is not clear enough about when this might be. In our view the article should specify 'once a decision is made to give effect to the request' so that it is clear that the onus is on the executing authority to inform the affected parties *prior* to the gathering of evidence. The article is qualified by the need to ensure the confidentiality of an investigation. However, this should not mean that affected persons are not informed at all. As drafted this is how the member states could interpret the provision.

15. The qualification should come *after* the right to be informed has been set out. As such, if there are then any reasons to preserve confidentiality, the article should set out that need but ensure that once the evidence is gathered and secured, the affected persons are informed that they can seek legal remedies. The evidence should then be held pending its transfer to allow legal remedies to be effected.

16. Article 13(5b) requires the issuing state to '*take into account,*' in accordance with national law, a decision taken in the executing state after transfer of evidence that a request should not have been recognised. We do not agree that this is the correct approach. Where a legal remedy is raised, there should be no transfer until a decision is taken in relation to it. This article should be amended to allow the staying of either the carrying out of an investigation measure, or the transfer of evidence gathered (depending on the stage at which the legal remedy is pursued) until a decision has been reached. As such, there will be no unlawful use of the evidence in the issuing state. Where a legal remedy is invoked after transfer, article 13(5b) should state that

‘the evidence should be excluded in accordance with national law’, not simply taken into account. It is entirely unfair on the affected person who has successfully invoked a legal remedy not to have the benefit of it simply because this is a mutual recognition instrument.

Jodie Blackstock
JUSTICE
July 2011