

THE EUROPEAN EVIDENCE WARRANT

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Abstract

This article deals with the European Evidence Warrant – an order issued by a competent authority in one member state that must be directly recognized and enforced by a competent authority in another member state. The purpose of this legal instrument is obtaining of objects, documents and data for use in proceedings in criminal matters.

Firstly, the reasons that prompted the European Union to take action in this field are explained. Legal European standards, pertaining to procurement and transfer of evidence are presented and discussed. Secondly, the definition and the scope of the EEW are outlined. Thirdly, formal procedures relating to recognition and execution of an EEW, as well as safeguards and grounds for non-recognition and non-execution, are explicated. The principle of double criminality is described, rules pertaining to the deadlines are presented, and the possibility of legal remedies is addressed. Lastly, future prospects in this field are summarized and conclusions are provided.

Key words

European Evidence Warrant; Judicial cooperation; Mutual assistance; Mutual recognition; EU Justice and Home Affairs; European Criminal Procedure Law.

1. BACKGROUND

The disappearance of internal borders within the European Union – enabling free circulation of people and goods – has led to promotion of mobility and faster economic growth. Removing border checks, on the other hand, has also given a boost to cross-border crime. With the rapidly advancing information technology, it is easier today, more than ever before, for a criminal to commit a serious crime in any given country without even being physically present there. These reasons, as well as the terrorist attacks in the USA, Spain and the UK in 2001, 2004 and 2005 respectively, prompted EU member states to enhance their mutual cooperation in criminal matters in order to ensure safety and security for their citizens. A simplified and accelerated procedure for procurement and transmission of evidence between the member states of the EU will undoubtedly play a major role in fighting crimes with cross-border element.

1.1 COUNCIL OF EUROPE

The Convention on mutual assistance in criminal matters¹ from 1959 is the first European multilateral instrument governing cooperation in the field of criminal law. It addresses, inter alia, requests for procurement and transmission of evidence between the signatory countries. It was supplemented by the First Protocol of 1977 and once again by the Second Protocol of 2001. All EU member states have ratified the Convention together with its First Protocol, while the Second Protocol has been ratified by 10 out of 27 member states. Although it plays a central role in relation to mutual assistance in criminal matters in Europe, the Convention has significant shortcomings. An official request for obtaining evidence lodged by the requesting country is not legally binding on the requested country. Article 2 states that the requested party may refuse a request if it considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests. Every country is free to define its essential interests and consequently, its courts or justice ministry are free to decide on how to proceed with the request. Furthermore, the Convention neither specifies a form in which the request shall be made nor it prescribes deadlines within which the requested country is required to respond. It must be therefore concluded that the decision whether or when to act upon a foreign country request, depends solely on the will of the requested country. This fact renders the Convention an unreliable instrument for fighting cross-border crime.

1.2 EUROPEAN UNION

In 1999, at a special EU Presidency meeting held in Tampere in relation to the creation of an area of freedom, security and justice in the EU,² it was stressed that mutual recognition shall become the cornerstone of judicial cooperation between the member states. The principle of mutual recognition in criminal matters means that a judicial decision issued by a competent authority in one member state will be directly recognized and enforced by a competent authority in another member state. Therefore, judicial decisions should become orders – and not requests like in the case of mutual assistance principle – that will have legal binding force upon the country receiving it. Thus, the requesting country becomes an issuing country and the requested country becomes an executing country. It is stated in the Tampere Presidency Conclusions that the principle of mutual recognition should also apply to pre-trial orders, in particular to those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable; evidence lawfully gathered by one member state's authorities should be admissible before the courts of other member states, taking into account the standards that apply there.

¹ Council of Europe, *European Convention on mutual assistance in criminal matters*, 20.4.1959. Available at: <http://conventions.coe.int/Treaty/en/Treaties/Word/030.doc>

² European Council, *Presidency Conclusions*, 15-16 October, 1999, Tampere. Available at: http://www.europarl.europa.eu/summits/tam_en.htm

In 2000, the Convention on mutual assistance in criminal matters between the member states of the EU³ was signed. Together with its First Protocol of 2001,⁴ they supplement the provisions of the Council of Europe Convention from 1959. Certain criteria, under which mutual assistance must be granted, are laid down. The Convention provides for spontaneous exchange of information (i.e. without prior request). It opens up the possibility for direct mutual assistance and communications between judicial authorities instead of circulating requests through a designated central authority. The Convention entered into force in 2005 but is not ratified by all EU member states.

In 2001, the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters⁵ was adopted. One of its aims is to ensure that evidence is admissible, to prevent its disappearance and to facilitate the enforcement of search and seizure orders, so that evidence can be quickly secured in a criminal case.

In 2002, the European Arrest Warrant⁶ became the first instrument to implement the principle of mutual recognition in the field of criminal law. Council Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property and evidence⁷ was adopted soon after. With respect to evidence, it deals with freezing orders issued under the mutual recognition principle, while the mutual assistance principle applies to the procedure for transfer of evidence. Adopting measures in the form of Framework Decisions or Decisions has an advantage over Conventions as it does not require formal ratification by parliaments of member states. Ratification of Conventions by national parliaments has

³ Official Journal of the European Communities C 197, 12.07.2000.

⁴ Official Journal of the European Communities C 326/1, 21.11.2001.

⁵ Official Journal of the European Communities C 12/10, 15.1.2001. Available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:012:0010:0022:EN:PDF>

⁶ Official Journal of the European Communities L 90/1, 18.7.2002. *Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA)*, Available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:190:0001:0018:EN:PDF>

⁷ Official Journal of the European Communities L 196/45, 2.8.2003. Available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:196:0045:0045:EN:PDF>

proven slow and partially ineffective. Action by national parliaments is still required when it comes to implementation of EU Decisions into national law. This process is, unlike with the case of Conventions, mandatory and takes less time.

In 2005, the Hague Programme with a view of further straightening freedom, security and justice in the EU⁸ was adopted. In relation to procurement and transmission of evidence it states that the gathering and admissibility of evidence, conflicts of jurisdiction and the ne bis in idem principle should be completed and further attention should be given to additional proposals in that context. It calls upon the Council of the EU to adopt the proposal prepared by the EU Commission in 2003⁹ in the form of Framework Decision on the European Evidence Warrant by the end of 2005. The Action Plan implementing the Hague Programme¹⁰ foresees an adoption of a universal instrument that would replace all the existing legal instruments in the area of cross-border procurement of evidence.

In 2008, a new mutual recognition instrument was adopted in the form of a European Evidence Warrant (EEW).¹¹ It provides for a simplified and accelerated procedure for procurement and transmission of evidence between the member states of the European Union. The Framework Decision entered into force in 2009. Member states are required to transpose it into their national laws by the beginning of 2011. This new legal document is expected to result in quicker and more effective judicial cooperation in the EU. Its aim to contribute to speedier trials is in line with Article 6 of the European Convention for the Protection of Human Rights

⁸ European Council, *Presidency Conclusions*, 4-5 November, 2004, Brussels. Available at: http://ec.europa.eu/justice_home/news/information_dossiers/the_hague_priorities/doc/hague_programme_en.pdf

⁹ European Commission, *Proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters*, COM(2003) 688 final, 14.11.2003, Brussels. Available at: www.statewatch.org/news/2004/mar/com-2003-688.pdf

¹⁰ Council of the European Union, European Commission, *Action Plan implementing the Hague Programme*, 9778/2/05 REV 2, 10.6.2005, Brussels. Available at: http://ec.europa.eu/justice_home/doc_centre/doc/action_plan_jai_207_en.pdf

¹¹ Official Journal of the European Communities L 350/72. 30.12.2008, *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*, Available at:

and Fundamental Freedoms¹² in relation to trial within reasonable time. The EEW will coexist in tandem with the mutual assistance procedures, at least for a transitional time, until the mutual recognition regime completely replaces the mutual assistance principle.

2. DEFINITION AND SCOPE

Article 1 and 2 of the Framework Decision provide definitions in relation to the EEW, issuing state and authority, and executing state and authority. The EEW is defined as a judicial decision issued by a competent authority of a member state with a view to obtaining objects, documents and data from another member state for use in proceedings in criminal matters, or where administrative or other type of decision punishable under national law may give rise to proceedings before a court having jurisdiction in criminal matters. The EEW must be executed on the basis of the principle of mutual recognition. It is issued in a standard form (included in an Annex to the Framework Decision) and must be translated into an official language of the executing state.

An issuing state is the member state where the EEW was issued while issuing authority means a judge, a court, an investigating magistrate, a public prosecutor or any other judicial authority defined by the issuing state as a competent authority. There is no possibility for the police, custom, border or administrative authorities to issue an EEW. An executing state is the member state in whose territory the objects, documents or data are located or, in the case of electronic data, directly accessible under its national law. Executing authority is a competent authority that can recognize or execute an EEW.

Article 7 of the Framework Decision stipulates that the EEW may be issued only if both of these conditions are met:

- a. obtaining the objects, documents or data sought is necessary and proportionate for the purpose of criminal proceedings or other types of proceedings that can give rise to criminal proceedings; and
- b. the objects, documents or data can be obtained under the law of the issuing State in a comparable case if they were available on the territory of the issuing State, even though different procedural measures might be used.

Gathering evidence can include obtaining objects, documents or data from a third party, from a search of premises, historical data on the use of any

¹² Council of Europe, 4.11.1950. Available at:
<http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf>

services (including financial transactions), historical records of statements, interviews and hearings, and other records, including the results of special investigative techniques.

Article 4 states that an EEW can not be issued for the purpose of requiring the executing state to:

- a. conduct interviews, take statements or initiate other types of hearings involving suspects, witnesses, experts or any other party;
- b. carry out bodily examinations or obtain bodily material or biometric data directly from the body of any person, including DNA samples or fingerprints;
- c. obtain information in real time such as through the interception of communications, covert surveillance or monitoring of bank accounts;
- d. conduct analysis of existing objects, documents or data; and
- e. obtain communications data retained by providers of a publicly available electronic communications service or a public communications network.

However, if the above mentioned objects, documents or data are already in the possession of the executing authority, the issuing state can order the executing state to transmit them. This solution opens up the possibility for police interviews or statements conducted in the past to be transmitted, but it does not allow the persons interrogated (suspects, witnesses or experts) to change or alter their statements. It is therefore questionable if such evidence can be effectively used in the courts of the issuing state.

3. PROCEDURES AND SAFEGUARDS

The Framework Decision on the EEW prescribes the formal procedure under which the EEW may be issued. It deals with the formalities relating to recognition and execution of an EEW which are to be followed by both the issuing and the executing state. Safeguards are also prescribed and the grounds for non-recognition and non-execution are consequently listed. It furthermore addresses cases falling under the principle of double criminality and sets deadlines for recognition, execution and transfer of evidence.

According to Article 8, the transmission of an EEW shall take place directly between competent authorities of the issuing and the executing state. Each member state may designate one (or more than one) central authority to assist the competent authorities. Any competent issuing authority can use

the secure telecommunications system of the European Judicial Network¹³ if it so wishes.

Protection of personal data is provided by the Council of Europe Convention for the protection of individuals with regard to the automatic processing of personal data.¹⁴ Additional protection is also afforded by the Convention on mutual assistance in criminal matters between the member states of the EU (Article 23).

3.1 RECOGNITION AND EXECUTION

Article 11 stipulates that the executing authority must, without further scrutiny, recognize an EEW, and take the necessary measures without delay for its execution in the same way as that authority would obtain the objects, documents or data under its domestic law in relation to the procedure of obtaining evidence. Each member state must ensure:

- a. that any measures which would be available in a similar domestic case in the executing state are also available for the purpose of the execution of the EEW; and
- b. that measures, including search or seizure, are available for the purpose of the execution of the EEW.

If the issuing authority is not a judge, a court, an investigating magistrate or a public prosecutor and the EEW has not been validated by one of those authorities in the issuing state, the executing authority may, in the specific case, decide that no search or seizure may be carried out for the purpose of the execution of the EEW. Before so deciding, the executing authority is obliged to consult the competent authority of the issuing state.

3.2 GROUNDS FOR NON-RECOGNITION AND NON-EXECUTION

Article 13 provides that recognition or execution of the EEW may be refused in the executing state:

- a. if its execution would infringe the ne bis in idem principle;¹⁵

¹³ Network of EU national contact points for the facilitation of judicial co-operation in criminal matters.

¹⁴ Council of Europe, European Treaty Series - No. 108, 28.1.1981. Available at: <http://conventions.coe.int/Treaty/en/Treaties/Word/108.doc>

¹⁵ Right not to be tried or punished twice in criminal proceedings for the same criminal offence.

- b. if, in double criminality cases (see below) the EEW relates to acts which would not constitute an offence under the law of the executing state;
- c. if it is not possible to execute the EEW by any of the measures available to the executing authority in the specific case;
- d. if there is an immunity or privilege under the law of the executing state which makes it impossible to execute the EEW;¹⁶
- e. if the issuing authority has not been validated as a competent authority;
- f. if the EEW relates to criminal offences which:
 - i. under the law of the executing state are regarded as having been committed wholly or for a major or essential part within its territory, or in a place equivalent to its territory; or
 - ii. were committed outside the territory of the issuing state, and the law of the executing State does not permit legal proceedings to be taken in respect of such offences where they are committed outside that state's territory;
- g. if, in a specific case, its execution would harm essential national security interests, jeopardize the source of the information or involve the use of classified information relating to specific intelligence activities; or
- h. if the form provided for in the Annex is incomplete or manifestly incorrect and has not been completed or corrected within a reasonable deadline set by the executing authority.

Recognition and execution may also be rejected if the executing authority objectively believes that an EEW was 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. Such a request would be in contradiction to Article 6 of the Treaty on the European

¹⁶ No universal definition of *immunity* or *privilege* exists in the EU. The definition of these terms is left to national laws of every member state separately.

Union¹⁷ and would infringe the provisions of the Charter of Fundamental Rights of the European Union¹⁸ (see Chapter VI).

3.3 DOUBLE CRIMINALITY

The principle of double criminality stipulates that the alleged crime for which the EEW was issued must be criminal in both the issuing and the executing states. Article 14 provides that the recognition or execution of the EEW shall not be subject to verification of double criminality unless it is necessary to carry out a search or seizure. If it is necessary to carry out a search or seizure for the execution of the EEW, offences punishable in the issuing state by a custodial sentence or a detention order for a maximum period of at least three years, shall not be subject to verification of double criminality under any circumstances. These offences are:

- participation in a criminal organization - swindling
- terrorism - racketeering and extortion
- trafficking in human beings - counterfeiting and piracy of products
- corruption - forgery of means of payment
- fraud - murder, grievous bodily injury
- laundering of the proceeds of crime - organized or armed robbery
- counterfeiting currency - trafficking in stolen vehicles
- computer-related crime - rape
- environmental crime - arson
- forgery of administrative documents and trafficking therein - crimes within the jurisdiction of the International Criminal Court
- illicit trade in human organs and tissue - unlawful seizure of aircraft/ships

¹⁷ Official Journal of the European Communities C 191 29.07.1992. Available at:

http://eur-lex.europa.eu/en/treaties/dat/11992M/tif/JOC_1992_191__1_EN_0001.pdf

¹⁸ Official Journal of the European Communities C 364/1. 18.12.2000. Available at:
http://www.europarl.europa.eu/charter/pdf/text_en.pdf

- racism and xenophobia
- sabotage
- illicit trafficking in nuclear or radioactive materials
- illicit trafficking in hormonal substances and other growth promoters
- kidnapping, illegal restraint and hostage-taking
- illicit trafficking in cultural goods, including antiques and works of art
- sexual exploitation of children and child pornography
- facilitation of unauthorized entry and residence
- illicit trafficking in weapons, munitions and explosives
- illicit trafficking in narcotic drugs and psychotropic substances

The Framework Decision opens up the possibility for further offences to be added to the list should the Council and Parliament consider this necessary. It is stated in the Framework Decision that the condition of double criminality will be further examined by the Council in 2014. If the Council (after obtaining consent by the Parliament) so decides, the principle of double criminality might be completely abolished. In such case, a competent authority in one member state will be allowed to order a competent authority in another member state to provide evidence even though the offence for which the evidence is required is not a crime in the executing state.

Abortion is one example which can illustrate the principle of double criminality in this context. Although a small number of member states criminalize abortion, under the current legal framework, it will not be possible for them to issue an EEW and request search and seizure of evidence in connection to abortion from a member state that considers abortion legal. Issuing an EEW for all type of criminal offences will become possible only if the principle of dual criminality is abolished in the future.

At the time of the negotiations in relation to the Framework Decision on the EEW, the Netherlands feared that it might get swamped by evidence warrants in relation to purchase of drugs. Germany on the other hand was worried about the lack of definitions for six particular crimes (terrorism, sabotage, extortion, racism and xenophobia, racketeering, and computer crime) which are not subject to verification of double criminality. In order to reassure the Netherlands, one more ground for non-recognition was added stating that an EEW might be refused if the alleged offence was committed wholly or for a major or essential part on the territory of the executing state. Germany secured a five years opt-out for the mentioned crimes and will be free to decide whether they are criminal offences under German law.

3.4 DEADLINES FOR RECOGNITION, EXECUTION AND TRANSFER

Article 15 of the Framework Decision on the EEW prescribes the deadlines for recognition and execution of an EEW as well as for the transfer of the requested evidence. If the competent authority of the executing state decides to refuse recognition or execution of an EEW it must, no later than 30 days after the receipt of the EEW, inform the authority of the issuing state. If, on the other hand, an EEW was recognized and accepted, the executing authority must take possession of the objects, documents or data and transfer them without delay, no later than 60 days after the receipt of the EEW. If, in a specific case, there are justified reasons for delaying the transfer of the evidence, the executing authority is obliged to inform the issuing authority giving the reasons for the delay and the estimated time needed for the action to be taken. When transferring the objects, documents or data obtained, the executing authority is supposed to indicate whether it requires them to be returned to the executing State as soon as they are no longer required by the issuing State.

3.5 LEGAL REMEDIES

Article 18 deals with the legal remedies. Member states must put in place the necessary arrangements to ensure that all interested parties, including bona fide third parties, have legal remedies against the recognition and execution of an EEW in order to preserve their legitimate interests. The action is to be brought before a court in the executing state in accordance with the law of that state. The substantive reasons for issuing the EEW may be challenged only in an action brought before a court in the issuing state. If the action is brought in the executing state, the judicial authority of the issuing state must be informed thereof and of the grounds of the action, so that it can submit the arguments that it deems necessary. It shall also be informed of the outcome of the action. The executing state may suspend the transfer of objects, documents and data pending the outcome of a legal remedy.

4. FUTURE PROSPECTS AND CONCLUSIONS

In June 2009, the European Commission circulated a Communication titled “An area of freedom, security and justice serving the citizen”¹⁹ to the Council and Parliament. In the view of the Commission the Union is establishing a comprehensive system for obtaining evidence in cross-border cases. It calls for a “real” European evidence warrant to replace all the existing legal instruments in this field. It envisages further regulation of the

¹⁹ European Commission, COM (2009) 262 final, 10.6.2009. Available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0262:FIN:EN:PDF>

procurement and transfer of evidence including electronic evidence, court videoconferencing and scientific evidence.

In November 2009, the Commission published a Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility.²⁰ According to the text, the fact that procurement and transfer of evidence is regulated both by mutual recognition and mutual assistance principles could result in confusion between practitioners who might not use the most appropriate instrument for the evidence sought. The best solution would therefore be adoption of a single instrument which would replace the existing legal regime for procurement of evidence. This new instrument would be based solely on the principle of mutual recognition principle and would cover all types of evidence. This practically means abolishment of the dual criminality rule and a possibility to request evidence that does not already exist. Taking of statements from suspects, witnesses and experts in real time, or ordering real time interception of communications or monitoring of bank accounts would also become possible.

The EEW offers a simplified and accelerated procedure for procurement and transmission of evidence between the member states of the EU. It has a potential to assist the fight against crimes with cross-border element. This legal instrument will coexist in tandem with the mutual assistance procedures, at least for a transitional time, until the mutual recognition regime completely replaces the mutual assistance principle. It is regrettable that, at this stage, it does not cover taking of statements from suspects, witnesses and experts as they play an important role in criminal procedure cases. High level of trust between the member states will be required for proper implementation of the Framework Decision on the EEW. The risk that some states might be trusted more than others, depending on the quality of their judicial system and the prevalence of the rule of law, is a real one and practice might prove that not all of the member states will benefit equally from the EEW.

It might be argued, on the other hand, that the EEW erodes state sovereignty in the sphere of criminal law by allowing judicial orders issued by other states' authorities to be considered as legal and binding by domestic authorities. Without the possibility to scrutinize an EEW issued by another member state, the executing state might be compelled to lower its level of legal protection in order to satisfy a request. Regarding double criminality cases, the executing state will be obliged to provide evidence for offences that are not considered criminal under its national law. If the double criminality rule is abolished, authorities of the executing state will have to

²⁰ European Commission COM(2009) 624 final, 11.11.2009, Available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0624:FIN:EN:PDF>

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conduct search and seizure even for those offences that are not punishable in their state. The procedure of obtaining such evidence, although illegal in the executing state, will become legal following a request by another EU member state. This brings up the question of legal certainty and the protection of constitutional rights of the citizens in the executing state.

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