European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters. Framework Decision

2003/0270(CNS) - 18/07/2008 - Amended legislative proposal for reconsultation

Before proceeding with the final adoption of the Framework Decision, and in view of the substantial amendments made to the Commission's initial proposal, the Council has requested that the European Parliament give a second opinion in time for the 20-23 October 2008 plenary session.

The key features of the draft Decision as agreed upon by the Council are the following:

Main purpose of the EEW: the underlying idea is that the European Evidence Warrant is an order that would be issued by a judicial authority in one Member State and directly recognised and enforced by a judicial authority in another Member State. As compared to the existing mutual assistance procedures that it would replace, the European Evidence Warrant would bring benefits including faster procedures and clear safeguards for the issuing of a warrant and for its execution.

Scope of application and type of proceedings concerned: the European Evidence Warrant covers the objects, documents and data specified needed in the issuing State for the purpose of criminal proceedings or other proceedings that might give rise to further proceedings before a criminal court.

The EEW is being established in **two steps**. The first step covers in principle evidence which exists and is readily available. The Commission will in due course make a proposal for a second instrument to cover other evidence. This means that the following evidence is not included in the provisions just agreed and will be covered by the second instrument:

- to conduct interviews, taking statements or initiating other types of hearings involving suspects, witnesses, experts or any other party;
- to carry out bodily examinations or obtain bodily material or biometric data directly from the body of any person, including DNA samples or fingerprints;
- to obtain information in real-time such as through the interception of communications, covert surveillance or monitoring of bank accounts;
- to conduct analysis of existing objects, documents or data.

The Council added to the Commission's proposal, the obtaining from the executing authority of communications data retained by providers of a publicly available electronic communications service or a public communications network.

Nevertheless, under the text agreed, evidence falling in these categories which has been gathered prior to the issuing of the warrant it is also covered.

Issuing and transmission of an EEW: the European Evidence Warrant will be a single document translated by the issuing authority into an official language of the executing State. No further translation would be necessary. This means that the European Evidence Warrant could be executed immediately in

the same way as a domestic procedural measure. It would lay down the objective to be achieved, while leaving it to the executing State to decide on the most appropriate way of obtaining the evidence in accordance with its domestic law.

Before sending an EEW, the issuing authority has to assess that 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.

Recognition and execution of a EEW: the executing authority will recognise a EEW, transmitted in accordance with rules provided for in the text, without any further formality being required and take the necessary measures for its execution unless that authority decides to invoke one of the grounds for non-recognition or non-execution or one of the grounds for postponement specified in the text.

In principle, any decision to refuse recognition or execution must be taken as soon as possible, and no later than 30 days after the receipt of the European Evidence Warrant by the competent executing authority. Unless either grounds for postponement exist or the executing authority has the objects, documents or data sought already in its possession, the executing authority will, in general, execute the EEW without delay, and no later than 60 days after the receipt of the European Evidence Warrant.

Grounds for non-recognition and non-execution of a EEW:

1) Territoriality: the original Commission proposal did not provide for any territoriality clause. The solution retained in the compromise text limits the scope of that ground for refusal to the cases where the offence concerned has been committed wholly or partly in the territory of the executing State, but the decision to refuse must be taken exceptionally and on a case-by-case basis. Where a competent authority considers using the ground for refusal, it shall consult Eurojust before taking the decision. Where a competent authority is not in agreement with Eurojust's opinion, Member States shall ensure that it give the reasons for its decision and that the Council be informed.

2) Double criminality: regarding the definition of offences, the proposal provides that for 32 categories of offences, double criminality may not be invoked by the executing State as a ground for refusing an EEW if the offence concerned is punishable in the issuing State with **at least three years** of imprisonment. If the EEW is not related to any of the offences set out in the list and its execution would require a search or seizure, recognition or execution of the EEW may be subject to the condition of double criminality

If the EEW is not related to any of the offences set out in the list and its execution would require a search or seizure, recognition or execution of the EEW may be subject to the condition of double criminality. In relation to offences in connection with taxes or duties, customs and exchange, recognition or execution may not be opposed on the ground that the law of the executing State does not impose the same kind of tax or duty or does not contain a tax, duty, customs and exchange regulation of the same kind as the law of the issuing State.

Germany may, by a declaration, reserve its right to make the execution of an EEW subject to verification of double criminality in cases relating to terrorism, computer-related crime, racism and xenophobia, sabotage, racketeering and extortion or swindling if it is necessary to carry out a search or seizure for the execution of the EEW, except where the issuing authority has declared that the offence concerned under the law of the issuing State falls within the scope of criteria indicated in the declaration.

The condition of double criminality shall be further examined by the Council five years after the entry into force of the Framework Directive in the light of any information transmitted to the Council. The Council may decide, acting unanimously, after consultation of the European Parliament, to add other categories of offences to the list.

The Council preparatory bodies will finalise the necessary form for the EEW and the recitals of the text with a view to the adoption of the text as soon as possible.