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

2003/0270(CNS) - 13/10/2008

The Committee on Civil Liberties, Justice and Home Affairs adopted a report drafted by Gérard **DEPREZ** (ALDE, BE), and amended the Council framework decision on the European Evidence Warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.

The European Parliament is asked to give a second opinion on this proposal, which was the subject of a Council compromise.

The main amendments – adopted in the framework of the consultation procedure – are as follows :

Issuing authority: the committee felt that one of the most important guarantees for the public is that evidence should only be collected by the judicial authorities. The definition of issuing authority is narrowed so that it includes only a judge, investigating magistrate or public prosecutor competent under national law. Members deleted the part of Council's text where issuing authority could also mean any other judicial authority as defined by the issuing State and, in the specific case, acting in its capacity as an investigating authority in criminal proceedings.

Scope: a new clause states that the European Evidence Warrant is an instrument available to both the defence and the prosecution. Consequently both the defence and the prosecution may ask the competent judicial authority to issue a European Evidence. Members deleted the Council's text stating that the EEW may, if requested by the issuing authority, also cover taking statements from persons present during the execution of the EEW and directly related to the subject of the EEW. They felt that there was no reason for this clause.

Issuing conditions:the issuing authority shall certify in the warrant that the conditions laid down have been fulfilled.

Data protection: anyone affected by an exchange of data carried out in accordance with the present framework decision may claim the right to data protection, including blocking, correction, deletion and access to information pertaining to them, as well as access to any means of redress to which they are entitled under the legislation of the issuing State or the executing State.

Safeguards for execution: pending the adoption of a far-reaching instrument in the field of procedural safeguards, Members proposed to establish, at the least, minimum procedural safeguards concerning execution of the European Evidence Warrant. A new clause stipulates that each Member State shall take the necessary measures to ensure that the European Evidence Warrant is executed in accordance with certain minimum conditions.

Grounds for non-recognition or non-execution: recognition or execution of the EEW may be refused in the executing State: (i) if the offence on which it is based is covered by amnesty in the executing Member

State, where that State had jurisdiction to prosecute the offence under its own criminal law; (ii) if the person who is the subject of the European evidence warrant may not, owing to his age, be held criminally responsible for the acts on which the evidence warrant is based under the law.

Territoriality: the Council had inserted a 'territoriality clause' which was not in the original proposal. This allowed a Member State to refuse an EEW 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. The committee felt that such a clause had no place in an instrument founded on mutual recognition.

Double criminality: the Council had stated that if it is necessary to carry out a search or seizure for the execution of the EEW, certain offences, if they are 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. Members deleted the text on custodial sentence and detention orders, and felt that verification of double criminality should gradually disappear from instruments founded on mutual recognition.

Deadlines: Members stated that it was necessary to set a maximum deadline for the transfer of the objects, documents or data obtained under a European Evidence Warrant. Accordingly, the executing State shall transfer to the issuing State the objects, documents or data obtained by virtue of the European Evidence Warrant, immediately where the latter are already under the control of the executing authority or, where this is not the case, as early as possible and no later than 30 days following the date on which the executing authority takes possession of the evidence. Failure to meet deadlines can only be justified by exceptional circumstances.

Remedies: Members deleted a clause stating that Member States may limit the legal remedies provided for to cases in which the EEW is executed using coercive measures. Pending the adoption of a far-reaching instrument in the area of procedural safeguards, they felt that it would be appropriate to establish, at the least, minimum procedural safeguards concerning execution of the European Evidence Warrant, and therefore to provide for the broadest possible means of remedy.

Opt-out clause: an opt-out clause in favour of Germany was deleted. The clause had stated that Germany may 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. Members stated that the inclusion of an opt-out clause in a Europe-wide legal instrument is in itself contrary to the European spirit, where the trend should be towards increasing consolidation of shared bases of cooperation between Member States.