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

2003/0270(CNS) - 01/06/2006

The Council reached a general approach on a draft Decision on the EEW for obtaining objects, documents and data for use in proceedings in criminal matters. The aim of this proposal is to establish a mechanism to facilitate the obtaining of evidence in cross-border cases based on mutual recognition principles.

The Council's agreement is based on a compromise text put forward by the Presidency which, in particular, addressed the two main outstanding issues, i.e. the possibility of a refusal of an EEW because of reasons linked to territoriality, and the definition of offences.

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. For example, this would include obtaining a statement previously given by a suspect to an investigating authority in the executing State with respect to an earlier investigation conducted by that State.

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.

The EEW may be transmitted to a Member State in which the competent authority of the issuing State has reasonable grounds to believe that relevant objects, documents or data are located or, in the case of electronic data, directly accessible under the law of the executing State.

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:

- **Territoriality**: the original Commission proposal did not provide for any territoriality clause. However, the Council decided to include it in the text at its February 2005 meeting. 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 territoriality as a ground for refusal of a EEW, it will consult Eurojust before taking the decision. If the competent authority is not in agreement with Eurojust's opinion, Member States shall ensure that it will motivate its decision and that the Council be informed.
- **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.
    - This approach is in line with earlier instruments such as the European arrest warrant, freezing orders, financial penalties or the draft text on confiscation orders.

However, 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 provisions relating to territoriality and to the German possibility for opting-out for the definition of offences will be reviewed by the Council no later than 5 years after the entry into force of this framework Decision.

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.