



Statewatch briefing on the European Evidence Warrant to the European Parliament

Introduction

The Commission's proposal for a Framework Decision on a European evidence warrant, first introduced in November 2003, has the valid objective of simplifying and accelerating the gathering and transfer of evidence in criminal proceedings with a cross-border element. But it would need significant amendment in order to fully ensure that the rights of criminal suspects and defendants are fully protected when such proceedings are underway.

Background

The background to the evidence warrant proposal is a complex set of treaties at Council of Europe level (comprising all 45 Member States of the Council of Europe), supplemented by pre-existing EU measures.

The core measure is the 1959 Council of Europe Convention on mutual assistance, which has been ratified by all of the EU Member States (and all new EU Member States about to join). It sets out the basic rules for the gathering and transfer of evidence in criminal proceedings where more than one State is involved. It is supplemented by a First Protocol of 1978, which has now also been ratified by all Member States and all new EU Member States about to join. A further Second Protocol from 2001 has a limited number of ratifications to date.

The Council of Europe measures have been modified as regards certain terrorist-related offences by the 1977 Council of Europe Convention on the suppression of terrorism. This Convention has also been ratified by all EU Member States and all incoming EU Member States. It has also been supplemented by a Protocol opened for signature in 2003, but that Protocol is not yet in force.

Within the EU, some limited amendments to the Council of Europe rules were made by Articles 48-53 of the Schengen Convention. These provisions are in force among 13 Member States (plus Norway and Iceland). The UK and Ireland

are also committed to apply these rules, although this commitment is not fully in force yet. Also, the new Member States must apply these rules as from joining the EU on 1 May 2004.

Subsequently, after long negotiations, the EU Member States signed the EU Mutual Assistance Convention in 2000 in order to supplement the Council of Europe and Schengen rules. Only Spain, Portugal, Finland and Sweden had ratified this Convention by early March 2004. In 2001, EU Member States signed a Protocol to the EU Convention in order to address further mutual assistance issues. No Member States had ratified the Protocol as of early March 2004.

The proposed Framework Decision on the European Evidence Warrant would in principle take effect a year or two after the adoption of the Framework Decision, thus avoiding formal ratification by national parliaments, although action by national parliaments would still be required to give effect to each Member State's obligations to implement the Framework Decision. It would replace all the Council of Europe and EU measures now in force or being ratified as regards the gathering and collection of many types of evidence, although not all types of evidence (see below).

In principle, the Council of Europe and EU measures and the proposed Framework Decision can or could be used to gather and transmit evidence of potential use not only to the prosecution, but also to the defence.

Overview of the proposal

The proposed Framework Decision would apply to the gathering and transfer of evidence in cross-border cases, except for four types of evidence as described in Article 3(2) of the proposal:

2. The European Evidence Warrant shall not be issued for the purpose of initiating:
 - (a) the taking of evidence in the form of interviews, statements or other types of hearings involving suspects, witnesses, experts or any other party;
 - (b) the taking of evidence from the body of any person, including DNA samples;
 - (c) the taking of evidence in real-time such as through the interception of communications, covert surveillance or monitoring of bank accounts; and
 - (d) the taking of evidence requiring further inquiries, in particular the compilation or analysis of existing objects, documents or data.

However, Article 3(3) of the proposal makes clear that:

3. The European Evidence Warrant may be issued with respect to obtaining existing evidence falling within paragraph 2 where the evidence has been gathered prior to the issuing of the warrant.

In particular, the Evidence Warrant will be used where one Member State's authorities request another Member State's authorities to search premises and seize property.

The main purpose of the proposal is to accelerate and simplify the process of gathering and transmitting evidence in criminal cases with a cross-border element. A simple form would be sent between Member States' authorities, including an order from the 'issuing State' (the State which sends the form) for the 'executing State' to carry out certain activities. The executing State would have to comply with the order of the issuing State unless limited grounds for refusing to comply with the order could be invoked. The proposal would abolish the possibility of refusing to comply because of differences in the law or practice of the two States or because the execution of the warrant is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of its country.

In particular, the current 'dual criminality' restrictions on executing a search and seizure order issued by one Member State to another one would be at first restricted, and then abolished. The 'dual criminality' rule allows one Member State to refuse to implement another State's request or order unless the acts in question would also be criminal under the law of the requested State. For example, some Member States criminalize abortion, while others do not. So it is impossible for the Member States which criminalize abortion to demand that the Member States which have decided to provide for legal abortions search abortion clinics and seize property belonging to the clinics. But the dual criminality rule does not prevent or hinder cooperation between States where the acts in question would clearly be illegal in both States—in the case of the recent terrorist bombings in Spain, for instance.

Dual criminality' has been limited in several EU measures: the EU Framework Decision on the European arrest warrant, the EU Framework Decision on freezing orders, the proposed EU Framework Decision on mutual recognition of financial penalties and the proposed EU Framework Decision on recognition of confiscation orders. But in no case has dual criminality been abolished entirely, whereas the Commission proposes to abolish it entirely in its proposal for a European evidence warrant. Moreover, the proposed Evidence Warrant would contain fewer grounds permitting a State to resist execution of the warrant than would most other EU measures in this field. For instance, it would not be possible to object to execution of the warrant on grounds of jurisdiction. So one Member State could insist on searches and seizures of abortion clinics in another Member State even if all the abortions in question were carried out on the territory of the Member State which has decided to legalise abortion.

Analysis of the proposal

The basic principle of speeding up proceedings to gather and transfer evidence between Member States is not objectionable, as it could lead to speedier trials, in accordance with the obligation in Article 6 of the European Convention on Human Rights to ensure a trial within a reasonable time. Moreover, as pointed out above, in principle the collection and transfer of evidence could work for the defence as well as the prosecution in criminal cases. The Commission's proposal does include some safeguards to guard against abuse. But these are not sufficient to fully secure the protection of human rights obligations relating to a fair trial and the respect for private life, including personal data protection.

The following sets out an overview of the main concerns about the proposal, and is followed by specific detailed proposals for amendments.

First of all, the detailed protection for human rights is not as extensive as provided for in other Framework Decisions. In particular, there is no provision expressly allowing for refusal to execute a warrant on human rights grounds, as provided for in two other Framework Decisions (and arguably implicitly provided for in the other two).

The Framework Decision should also provide expressly that warrants should only be issued and executed where the infringement of the right to private life (particularly the searches of homes) can be justified in accordance with the principles in the case law of the European Convention of Human Rights.

Some safeguards for personal data protection and against self-incrimination are included, but could be improved and clarified along the lines of other EU measures.

Secondly, the Framework Decision should be altered to make it clear that it does not require executing Member States to comply with instructions from an issuing Member State unless the law and practice of the executing Member State normally allows such instructions to be carried out. The problem with the approach of the Commission's proposal is that the procedural law and practice of each Member State strikes a careful balance between civil liberties and human rights on the one hand, and the need to ensure effective prosecutions and investigations on the other. This balance could be overturned if a State is required to apply the practices which are particular to another Member State, rather than its own practices.

Thirdly, the evidence warrant should provide for all the grounds for refusal to execute the warrant applicable to the European arrest warrant, plus the

ground of national sovereignty and security applicable to the Council of Europe Mutual Assistance Convention. The Commission has not made out a convincing case for abolishing these exceptions.

Fourthly, the Framework Decision should provide for disclosure of the warrant and assistance for persons affected by its execution, and the detailed rules on remedies in the proposal need to be amended to secure further protection for criminal suspects.

Fifthly, there should be a rule to ensure that once evidence is transferred to another Member State, the person being prosecuted with the use of that evidence is not prejudiced by the cross-border elements of the case.

Proposed amendments from Statewatch

Amendment 1
Recital 19

Add the following words:

Nothing in this Framework Decision may be interpreted as prohibiting refusal to execute a European evidence warrant when there are reasons to believe, on the basis of objective elements, that the warrant is issued for the purpose of prosecuting or punishing a person on account of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.

This Framework Decision does not prevent any Member State from applying its constitutional rules relating to due process, privacy and the protection of personal data, freedom of association, freedom of the press and freedom of expression in other media.

Justification

The proposal does not fully include the provisions on human rights protection enshrined in the Framework Decisions on the European arrest warrant and on freezing orders, and agreed during discussions concerning the proposed Framework Decisions on mutual recognition of confiscation orders and mutual recognition of financial penalties. The above provision is standard in the other Framework Decisions, with the addition of an express reference to data protection and the right to privacy.

Amendment 2
Article 1(3) (new)

This Framework Decision shall not have the effect of amending the obligation to respect the fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty.

The proposal does not fully include the provisions on human rights protection enshrined in the Framework Decisions on the European arrest warrant and on freezing orders, and agreed during discussions concerning the proposed Framework Decisions on mutual recognition of confiscation orders and mutual recognition of financial penalties. The above provision is standard in the other Framework Decisions.

Amendment 3
Article 3(3)

Delete

Justification

This provision would allow the exclusions in Article 3(2) of the proposal to be circumvented easily, by means of informal contacts between the two authorities in order to encourage such evidence to be collected before the formal transmission of an evidence warrant.

Amendment 4
Article 4(b)

...may give rise to proceedings before a court having jurisdiction in particular in criminal matters, ***provided that the suspect is ensured the right to a fair trial as guaranteed by the European Convention on Human Rights and the relevant provisions of national law;*** and

Justification

EU criminal law measures should only apply to administrative law proceedings if it is certain that the full protections for a fair trial for criminal suspects guaranteed by national and international law will be ensured.

Amendment 5
Article 6(2) (new)

If the execution of a European Evidence Warrant would affect the right to private or family life, home or correspondence of an individual, it may only be issued if its issue is necessary and proportionate in a democratic society in order to combat criminal offences and if the interference with such rights

is prescribed by a law which is sufficiently precise and accessible and the consequences of which are sufficiently foreseeable for the individuals concerned.

Justification

It is necessary to ensure that the conditions permitting interference with private life as set out in the jurisprudence of the European Court of Human Rights are fully complied with when the warrant is issued. See also amendment 10, which applies the same rule to the executing Member State.

Amendment 6

Article 6(3) (new)

The competent authority shall:

- (a) keep a written record of its reasons for considering that the criteria in paragraph 1 have been complied with; and**
- (b) give written reasons on the evidence warrant indicating that the criteria in paragraph 1 have been complied with.**

Justification

It is necessary to create a written record for later use to prove that the safeguards in Article 6 have been complied with, and to transmit this information to the executing State. It is not sufficient to limit this requirement to the proportionality condition only (amendment 4 submitted by an MEP), as the other safeguards in Article 6 are all important also.

Amendment 7

Article 10(5), (6) and (7)(new)

- (5) Where data is exchanged pursuant to this Framework Decision, a data subject may claim the rights relating to data protection, including blocking, correction, deletion, and access to personal data and related remedies, which would accrue to him or her under the law of either the issuing or the executing Member State. In particular, a data subject may claim the rights that would accrue to him or her under the law of either the issuing or the executing Member State regarding the use of a criminal record in the executing Member State transmitted pursuant to this Framework Decision, including the rules on rehabilitation of offenders and concerning use of that record to determine guilt or sentencing in criminal proceedings.**
- (6) The judge, investigating magistrate or prosecutor in the executing State shall ensure that, where the execution of the European Evidence Warrant would entail the transmission of personal data to**

the issuing Member State, the warrant shall only be executed on condition that the data is subject in the issuing state to at least the same protection that it would receive under the law of the executing State.

- (7) Personal data obtained under this Framework Decision can only be transmitted to a third State with the prior consent of the executing State, unless the issuing State has obtained the consent of the data subject or unless the transmission of the data is necessary to prevent an immediate and serious threat to public security.

Justification

It is necessary to ensure more effective guarantees for data protection rights. Paragraph (5) is based on Article 10 of the EU Mutual Assistance Convention, which allows suspects to claim the protection of the national law of either Member State in regard to the right against self-incrimination. Logically the same rule should apply as regards data protection. Paragraph (6) seeks to achieve the same aim by requiring the executing Member State to ensure adequate data protection before transfer. Paragraph (7) is based on the standard rules protecting against transmission of data outside the European Union, with an exception so that, for instance, data could be transmitted if its transmission could be relevant to preventing an imminent terrorist attack.

Amendment 8 Article 11

Replace the words: ‘Except as otherwise provided for in this Framework Decision,’ with ‘Except where this Framework Decision sets a higher standard,’

Justification

It should be made clear that the Framework Decision can set higher standards than the usual national law on certain points, but does not require Member States to set lower standards than their usual procedural law or practice in order to execute the evidence warrant. The procedural law and practice of each Member State strikes a careful balance between civil liberties and human rights on the one hand, and the need to ensure effective prosecutions and investigations on the other. This balance could be overturned if a State is required to apply the practices which are particular to another Member State, rather than its own practices. See also amendment 11.

Amendment 9 Article 12(1)(b)

- (b) a ~~natural~~ person shall not be required to produce objects, documents or data which may result in self-incrimination **under the law of either the issuing or the executing Member State;** and

Justification

It is doubtful whether the limitation of this sub-paragraph to natural persons is compatible with the European Convention on Human Rights and many national constitutions. Furthermore, the Framework Decision should indicate which national rules regarding self-incrimination are applicable. It is logical to follow Article 10 of the EU Mutual Assistance Convention, which allows suspects to claim the protection of the national law of either Member State in regard to the right against self-incrimination.

Amendment 10
Article 12(3) (new)

If the execution of a European Evidence Warrant would affect the right to private or family life, home or correspondence of an individual, it may only be executed if its execution is necessary and proportionate in a democratic society in order to combat criminal offences and if the interference with such rights is prescribed by a law which is sufficiently precise and accessible and the consequences of which are sufficiently foreseeable for the individuals concerned.

Justification

It is necessary to ensure that the conditions permitting interference with private life as set out in the jurisprudence of the European Court of Human Rights are fully complied with when the warrant is issued. See also amendment 5, which applies the same rule to the issuing Member State.

Amendment 11
Article 13

Add the words: ‘Subject to Articles 11 and 12, the issuing authority...’

Justification

See justification for amendment 8. It should be made clear that the executing State could only carry out the ‘special requests’ in Article 13 where it would normally carry out such a practice and where national law permits it. Otherwise Article 11 would be purely symbolic, as executing Member States will frequently be carrying out coercive measures in accordance with an issuing Member State’s law and practice, not their own.

It should also be made clear that the measures taken pursuant to Article 13 cannot derogate from the essential safeguards set out in Article 12.

Amendment 12
Article 15(1)

1. A judge, investigating magistrate or prosecutor in the executing State shall oppose the recognition or execution of the European Evidence Warrant if:
 - a) this would infringe the *ne bis in idem* principle according to the Framework Decision 2003/.../JHA on the application of the principle of *ne bis in idem*¹, or where the issuing Member State has agreed that preference is given to the forum of another Member State in accordance with Article 4 of that Framework Decision, in accordance with other EU instruments or otherwise by agreement of the issuing Member State;
 - b) the offence on which the evidence warrant 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;
 - c) 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 of the executing State;
 - d) there are reasons to believe, on the basis of objective elements, that the warrant is issued for the purpose of prosecuting or punishing a person on account of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons;
 - e) the execution of the warrant would prevent a Member State from applying its constitutional rules relating to due process, privacy and the protection of personal data, freedom of association, freedom of the press and freedom of expression in other media; or
 - f) there are substantial grounds to believe that the execution of the warrant would undermine the obligation to respect the fundamental rights and fundamental legal principles enshrined in Article 6 of the Treaty, in particular regarding the right to a fair trial or the right to respect for private life, including data protection.

¹ OJL ...

Justification

Point (a) should be amended to refer to the 'lis pendens' principle as set out in the proposed Framework Decision on ne bis in idem (the proposed wording is adapted from Article 5(5) of the latest draft (Council doc. 16258/03, 20 Jan. 2004) as well as the mechanisms for agreeing jurisdiction in other EU measures (for example, following agreement within Eurojust or consultations in accordance with the guidelines for agreeing priority jurisdiction set out in the Framework Decisions on terrorism and on counterfeiting currency, among others) and any other decision by the issuing Member State to relinquish jurisdiction.

Also, it is logical to align the mandatory exceptions to the European evidence warrant with the mandatory exceptions applicable to the European arrest warrant (new (b) and (c)). Furthermore, for the sake of legal certainty, the exceptions which should be provided for in the preamble and in Article 1, in line with other Framework Decisions in this field (see amendments 1 and 2), should be expressly set out (new (d), (e) and (f)). Point (f) could be used to resist execution of an evidence warrant where the issuing Member State intends to proceed with an in absentia trial that would breach the minimum standards applicable pursuant to Article 6 ECHR, as interpreted by the European Court of Human Rights.

Amendment 13 Article 15(2)

2. A judge, investigating magistrate or prosecutor in the executing State may also oppose the recognition or execution of the European Evidence Warrant if:
 - (a) its execution would infringe the *ne bis in idem* principle with respect to proceedings in a third State; or
 - (b) there is an immunity or privilege under the law of the executing State which makes it impossible to execute the European Evidence Warrant.
 - (c) the person who is the subject of the European evidence warrant is being prosecuted in the executing Member State for the same act as that on which the European evidence warrant is based;
 - (d) the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European evidence warrant is based or to halt proceedings, or where a final judgment has been passed in a Member State, in respect of the same acts, which prevents further proceedings;

- (e) criminal prosecution or punishment in respect of the same acts is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law;
- (f) the European evidence warrant relates to offences which:
 - (i) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or
 - (ii) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory;
- (g) the requested authority considers that the execution of the warrant is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of its country.

Justification

It is logical to align the exceptions to the European evidence warrant with the exceptions applicable to the European arrest warrant (points (c) to (f)). Point (g) continues in force Article 2(b) of the Council of Europe Mutual Assistance Convention, as the Commission has not presented a convincing reason for abolishing this safeguard.

Amendment 14
Article 16

Member States may not make the admissibility of a warrant for search or seizure dependent on conditions other than the following:

(a) the act giving rise to the warrant is punishable under the law of both Member States by a penalty involving deprivation of liberty or a detention order of a maximum period of at least six months, or is punishable under the law of one of the two Member

States by an equivalent penalty and under the law of the other Member State by virtue of being an infringement of the rules of law which is being prosecuted by the administrative authorities, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters;

(b) execution of the letters rogatory is consistent with the law of the requested Member State.

Justification

The Commission has not made out a sufficient case for limiting or abolishing the principle of dual criminality as it applies to search and seizure cases. This Article should therefore be replaced by the current rule governing search and seizure (Article 51 of the Schengen Convention).

Amendment 15

Article 18a (new)

Rights of persons concerned by the warrant

1. When a warrant is executed, the executing competent judicial authority shall, in accordance with its national law, inform all concerned persons of the European evidence warrant and of its contents.
2. A person who is concerned by the execution of a European evidence warrant shall have a right to be assisted by a legal counsel and by an interpreter in accordance with the national law of the executing Member State.

Justification

Article 19 of the proposal does not offer sufficient remedial protection. Given the importance of the warrant, guarantees equivalent to those in Article 11 of the Framework Decision on the European arrest warrant should be provided for.

Amendment 16

Article

19

Legal remedies for ~~coercive~~ measures

1. Member States shall put in place the necessary arrangements to ensure that any interested party, including bona fide third parties, have legal remedies against a European Evidence Warrant executed pursuant to Article 11 ~~using coercive measures~~, in order to preserve their legitimate interests.
2. The action shall be brought before a court in the issuing State or in the executing State in accordance with the national law of each. However, the substantial reasons for issuing the European Evidence Warrant, including whether the criteria in Article 6 have been met, may be challenged only in an action brought before a court in the issuing State.

3. The issuing State shall ensure that any time limits for bringing an action mentioned in paragraphs 1 and 2 are applied in a way that guarantees the possibility of an effective legal remedy for interested parties.
4. If the action is brought in the executing State, the judicial authority of the issuing State shall be informed thereof and of the grounds of the action, so that it can submit the arguments that it deems necessary. It shall be informed of the outcome of the action.
5. **Without prejudice to Article 18a**, the issuing and executing authorities shall take the necessary measures to facilitate the exercise of the right to bring an action mentioned in paragraph 1, in particular by providing relevant and adequate information to interested parties.
6. The executing State may suspend the transfer of objects, documents and data pending the outcome of a legal remedy. ~~However, despite the existence of a legal remedy in the executing State, the issuing authority may require the executing State to transfer the objects, documents and data 60 days after the execution of the European Evidence Warrant. In such cases, if, as the outcome of the legal remedy in the executing State, the transfer of the objects, documents and data would not have been allowed, these shall immediately be returned to the executing State.~~

Justification

Article 19 of the proposal needs further enhancement. There is no convincing reason to limit remedial protection to cases where coercive measures are applied. The relationship with the proposed new Article 18a should be clarified. Finally, the exception provided for in paragraph 6 would render the possibility of suspensive effect of any appeal meaningless.

Amendment 17

Article

19a

(new)

Subsequent use of evidence

The use of the evidence acquired pursuant to this Framework Decision shall in no way prejudice the rights of the defence in subsequent criminal proceedings in which that evidence is used, in particular as regards the admissibility of the evidence, the obligation to disclose that evidence to the defence and the ability of the defence to challenge that evidence.

Justification

It should be clarified that the right of the defence to a fair trial in subsequent criminal proceedings is not prejudiced by this Framework Decision.

Amendment 18
Article

23(2)(b)

Deleted.
Justification

This amendment is consequential upon amendment 14.

Amendment 19
Article

24(2)

Deleted.

Justification

This amendment is consequential upon amendment 14.

Prepared by Professor Steve Peers, University of Essex.

**Statewatch,
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