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## **REPORT**

on the 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 – C5-0609/2003 – 2003/0270(CNS))

Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

Rapporteur: Elena Ornella Paciotti

### ***Symbols for procedures***

- \* Consultation procedure  
*majority of the votes cast*
- \*\*I Cooperation procedure (first reading)  
*majority of the votes cast*
- \*\*II Cooperation procedure (second reading)  
*majority of the votes cast, to approve the common position*  
*majority of Parliament's component Members, to reject or amend*  
*the common position*
- \*\*\* Assent procedure  
*majority of Parliament's component Members except in cases*  
*covered by Articles 105, 107, 161 and 300 of the EC Treaty and*  
*Article 7 of the EU Treaty*
- \*\*\*I Codecision procedure (first reading)  
*majority of the votes cast*
- \*\*\*II Codecision procedure (second reading)  
*majority of the votes cast, to approve the common position*  
*majority of Parliament's component Members, to reject or amend*  
*the common position*
- \*\*\*III Codecision procedure (third reading)  
*majority of the votes cast, to approve the joint text*

(The type of procedure depends on the legal basis proposed by the Commission)

### ***Amendments to a legislative text***

In amendments by Parliament, amended text is highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.

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## PROCEDURAL PAGE

By letter of 4 December 2003 the Council consulted Parliament, pursuant to Article 39(1) of the EC Treaty, on the 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 – 2003/0270(CNS)).

At the sitting of 15 December 2003 the President of Parliament announced that he had referred the proposal to the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs as the committee responsible and the Committee on Legal Affairs and the Internal Market for its opinion (C5-0609/2003).

The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs had appointed Elena Ornella Paciotti rapporteur at its meeting of 25 November 2003.

The committee considered the Commission proposal and draft report at its meetings of 21 January, 19 February and 18 March 2004.

At the last meeting it adopted the draft legislative resolution by 25 votes to 4, with 0 abstentions.

The following were present for the vote: Jorge Salvador Hernández Mollar (chairman), Robert J.E. Evans (vice-chairman), Giacomo Santini (vice-chairman), Elena Ornella Paciotti (rapporteur), Regina Bastos (for Mary Elizabeth Banotti pursuant to Rule 153(2)), María Luisa Bergaz Conesa (for Ilka Schröder pursuant to Rule 153(2)), Mario Borghezio, Alima Boumediene-Thiery, Kathalijne Maria Buitenweg (for Heide Rühle), Giorgio Calò (for Baroness Ludford pursuant to Rule 153(2)), Gérard M.J. Deprez, Antonio Di Pietro (for Johanna L.A. Boogerd-Quaak), Timothy Kirkhope, Helmuth Markov (for Fodé Sylla pursuant to Rule 153(2)), Pasqualina Napoletano (for Adeline Hazan pursuant to Rule 153(2)), Marcelino Oreja Arburúa, Josu Ortuondo Larrea (for Pierre Jonckheer pursuant to Rule 153(2)), Fernando Pérez Royo (for Margot Keßler pursuant to Rule 153(2)), Hubert Pirker, Martine Roure, Olle Schmidt (for Bill Newton Dunn), Ingo Schmitt (for Hartmut Nassauer), Ole Sørensen (for Francesco Rutelli), Patsy Sørensen, The Earl of Stockton (for Charlotte Cederschiöld), Joke Swiebel, Anna Terrón i Cusí, Maurizio Turco and Christian Ulrik von Boetticher.

The opinion of the Committee on Legal Affairs and the Internal Market is attached.

The report was tabled on 22 March 2004.

## DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

**on the 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 – C5-0609/2003 – 2003/0270(CNS))**

### **(Consultation procedure)**

*The European Parliament,*

- having regard to the Commission proposal to the Council (COM(2003) 688)<sup>1</sup>,
  - having regard to Article 34(2)(b) of the EU Treaty,
  - having regard to Article 39(1) of the EU Treaty, pursuant to which the Council consulted Parliament (C5-0609/2003),
  - having regard to Rules 106 and 67 of its Rules of Procedure,
  - having regard to the report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs and the opinion of the Committee on Legal Affairs and the Internal Market (A5-0214/2004),
1. Approves the Commission proposal as amended;
  2. Calls on the Commission to alter its proposal accordingly, pursuant to Article 250(2) of the EC Treaty;
  3. Calls on the Council to notify Parliament if it intends to depart from the text approved by Parliament;
  4. Asks the Council to consult Parliament again if it intends to amend the Commission proposal substantially;
  5. Instructs its President to forward its position to the Council and Commission.

Text proposed by the Commission

Amendments by Parliament

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#### Amendment 1 Recital 3

(3) The Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between

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<sup>1</sup> Not yet published in OJ.

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Member States was the first concrete measure in the field of criminal law implementing the principle of mutual recognition, ***though its implementation by Member States has been disappointingly slow and incomplete.***

#### *Justification*

*It is important to highlight the poor record of implementation in the area of mutual recognition. Measures such as the European arrest warrant and the European Evidence Warrant will only be effective when implemented by all Member States. Only eight Member States had implemented the European arrest warrant by 1 January 2004.*

#### Amendment 2 Article 6, paragraph 1 (new)

***1. The competent authority in the issuing State shall give written reasons on the compliance with the provisions of paragraph 1.***

#### *Justification*

*See the justification for the amendment to Article 6(a).*

#### Amendment 3 Article 9, paragraph 1

1. Where the issuing authority requires objects, documents or data which are additional to an earlier European Evidence Warrant issued for the purpose of the same proceedings, and the content of the original warrant remains accurate, it shall not be required to issue a new European Evidence Warrant. In such circumstances, it shall issue a warrant for additional evidence containing the information set out in Form B in the Annex.

1. Where the issuing authority requires objects, documents or data which are additional to an earlier European Evidence Warrant issued for the purpose of the same proceedings, and the content of the original warrant remains accurate, it shall not be required to issue a new European Evidence Warrant. In such circumstances, it shall issue a warrant for additional evidence containing the information set out in Form B in the Annex, ***including clearly stating the reasons why the request is valid under the original warrant and Article 6.***

### *Justification*

*The purpose of the amendment is to have a statement of reasons on the form for a request for evidence under the EEW in the case of additional evidence. New evidence not originally requested should be tested against the same criteria as original evidence under the warrant, set down under Article 6.*

*It would be good practice if the reasons for requesting the additional evidence were also stated on Form B along with the reasons for the original evidence (see earlier amendment). By clearly stating the reasons why the additional request is made the issuing authority is providing necessary transparency to its decision-making process.*

### Amendment 4 Article 22, paragraph 4 a (new)

***4a. No later than 1 October 2006, and annually thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Framework Directive, paying special attention to the application of procedural safeguards.***

### *Justification*

*Oversight should be coordinated at an EU level and open to public scrutiny. It is necessary not only to monitor the legal implementation of the EEW but also the practical application.*

*The wording is drawn from the EU Council Regulation on civil evidence cooperation (OJ L 174, 27.6.2001, p. 1) and builds on the monitoring system under the European Arrest Warrant in determining an annual report from the Commission.*

*The review would also specifically comment on the operation of the decision-making process in the issuing Member State and the operation of safeguards in the executing Member State as well as non-recognition, non-execution, non-transfer and postponement of EEWs.*

### Amendment 5 Article 25, paragraph 1

1. Member States shall take the necessary measures to comply with the provisions of this Framework Decision by 1 January 2005.

1. Member States shall take the necessary measures to comply with the provisions of this Framework Decision by 1 January 2005 ***and they shall do everything they can to agree on a Framework Decision on procedural safeguards for defendants,***

***including in relation to the collection and admissibility of evidence, before that date.***

#### *Justification*

*A Member State may only issue an evidence warrant if it would be possible to obtain the evidence under its national law in similar circumstances (Article 6(b)). There is, however, no corresponding condition applying to the execution of the evidence warrant by the executing state. Rather, the proposed directive states (in Article 1) that Member States shall execute any European Evidence Warrant. There are only two reasons for non-execution (Article 15): application of the ne bis in idem principle or the existence of an immunity or privilege under the law of the executing state.*

*Procedures and safeguards on e.g. search, seizure and interception of telecommunications are very sensitive from a fundamental rights perspective and differ considerably from one Member State to another. The European Evidence Warrant in combination with the lack of European procedural safeguards may thus create legal uncertainty for defendants and third parties involved in criminal cases. For example, the executing state can be required by the issuing state to use coercive measures (search, seizure) to execute the warrant (Article 13). And though the evidence warrant cannot be used to order the interception of telecommunications, it can be issued to obtain existing evidence which has been gathered through interception prior to the issuing of the warrant (Article 3(3)).*

#### Amendment 6

Article 25, paragraph 2 a (new)

***2a. Each Member State shall designate, in a declaration deposited with the General Secretariat of the Council, those national bodies designated as a competent “issuing authority” under (c) and a competent “executing authority” under (d).***

#### *Justification*

*The Framework Decision leaves the precise determination of who would be considered competent issuing and executing authorities to the discretion of the Member State. In order that the system operates transparently all competent authorities in a Member State should be listed with the Secretariat of the Council.*

*This is not an innovation, merely a continuation of a procedure already adopted in European conventions, for example Article 24 of the EU 2000 Convention on Mutual Assistance in Criminal Matters (OJ C 197, 12.7.2000, p. 1, at p. 16).*



## EXPLANATORY STATEMENT

### Commission proposal

The proposal under consideration is a further piece in the complex jigsaw puzzle which the system of police and judicial cooperation will have to complete if the area of freedom, security and justice without internal borders (which is provided for in the Treaties as a necessary corollary of the freedom of movement which exists within the European Union) is to come into being. Freedom of movement (a cornerstone of the single market) may pose a threat to public safety if the crime-prevention authorities are restricted to the territory of their Member State - hence the need for a cooperation system to be developed on the basis of the principle of mutual recognition which was established at the 15-16 October 1999 Tampere European Council (conclusion 33) and for the application of which in the criminal sector the Council has already adopted (on 29 November 2000) a programme of measures<sup>1</sup>.

The first and most important instrument which has so far been adopted is the Council's framework decision of 13 June 2002 on the European arrest warrant and surrender procedures between the Member States<sup>2</sup>.

The subsequent framework decision of 22 July 2003 on the execution in the European Union of orders freezing property or evidence<sup>3</sup> established the mutual recognition of decisions intended to prevent the destruction, removal and concealment of evidence, whilst the transfer thereof continues to be governed by the legal-assistance procedure.

The new proposal for a framework decision contains provision for the issue of a 'European warrant' (i.e. a judicial order issued in one Member State to be executed within other Member States) for the purpose of obtaining objects, documents or data for use in criminal proceedings, including objects, documents or data obtained from third parties or as a result of searching premises, historical data relating to the use of electronic communication networks or of services (including financial transactions), records of statements, interrogations and hearings, extracts from judicial files, and so on.

The European evidence warrant cannot, however, be used in order to initiate action or to request the performance of investigations (interrogations, hearings, interception of communications, monitoring or surveillance of individuals, and so on) with a view to obtaining evidence; it may be used only in order to obtain evidence which is already available in the State of execution (including records of interrogations and recordings of intercepted communications, if these were gathered beforehand and are already available in the requested State).

Despite its limited scope, the proposal for a decision has the following advantages:

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<sup>1</sup> Programme of measures for the implementation of the principle of mutual recognition of decisions in criminal matters (2001/C12/02).

<sup>2</sup> Council framework decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).

<sup>3</sup> Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence. OJ L 196, 2.8.2003, pp. 45-55.

- a judicial order issued by one Member State is recognised directly, without its having to be converted into a 'national' decision; the European warrant is forwarded directly to the competent authority for execution (see Article 7);
- minimum safeguards are laid down and are applicable to both the issue and the execution of the warrant (see Article 12);
- the warrant is drawn up in a standardised fashion using a single form (see Annex to the proposal for a decision);
- deadlines are set for the recognition and execution of the warrant and the transfer of the evidence (see Article 17);
- grounds for non-recognition or non-execution are laid down and defined (see Article 15); in particular, rules and restrictions apply to the concept of dual criminality (see Articles 16 and 24);
- legal remedies for coercive measures are laid down (see Article 19).

### **Rapporteur's view**

The rapporteur would draw attention to the fact that the EU Convention on mutual assistance in criminal matters adopted in May 2000<sup>1</sup> and the 2001 protocol thereto<sup>2</sup> have not yet been ratified by the Member States and are thus not yet in force.

She therefore considers it essential to adopt a framework decision applying the principle of mutual recognition which, as provided for by the Tampere European Council and in subsequent decisions, will take the place of the current arrangements for judicial assistance in criminal matters.

This is a relatively small but still important step towards making judicial cooperation in criminal matters more effective and providing it with a sounder basis, particularly in view of the entry into force on 1 January 2004 of the framework decision on the European arrest warrant.

The rapporteur does not intend to table any amendments, given that the Commission has submitted a balanced proposal that is in keeping with the intention of making a first step towards mutual recognition in criminal matters.

She therefore calls on the committee to adopt the Commission proposal.

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<sup>1</sup> Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 197, 12.7.2000, p. 1.

<sup>2</sup> Council Act of 16 October 2001 establishing, in accordance with Article 34 of the Treaty on European Union, the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 326, 21.11.2001, p. 1.

23 February 2004

## **OPINION OF THE COMMITTEE ON LEGAL AFFAIRS AND THE INTERNAL MARKET**

for the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

on the 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 – C5-0609/2003 – 2003/0270(CNS))

Draftsman: Giuseppe Gargani

### **PROCEDURE**

The Committee on Legal Affairs and the Internal Market appointed Giuseppe Gargani draftsman at its meeting of 1 December 2003.

It considered the draft opinion at its meetings of 27 January and 19 February 2004.

At the latter meeting it adopted, by 15 votes to 11, with no abstentions, an amendment calling on the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs to reject the framework decision.

The following were present for the vote: Giuseppe Gargani (chairman and draftsman), Willi Rothley (vice-chairman), Ioannis Koukiadis (vice-chairman), Bill Miller (vice-chairman), Paolo Bartolozzi, Maria Berger, Janelly Fourtou, Marie-Françoise Garaud, Evelyne Gebhardt, José María Gil-Robles Gil-Delgado, Malcolm Harbour, Lord Inglewood, Hans Karlsson (for Fiorella Ghilardotti), Carlos Lage (for Carlos Candal pursuant to Rule 153(2)), Kurt Lechner, Klaus-Heiner Lehne, Toine Manders, Arlene McCarthy, Manuel Medina Ortega, Angelika Niebler (for Bert Doorn), Anne-Marie Schaffner, Astrid Thors (for Diana Wallis), Marianne L.P. Thyssen, Ian Twinn (for Rainer Wieland), Joachim Wuermeling and Stefano Zappalà.

## SHORT JUSTIFICATION

The Commission has submitted a proposal seeking to establish a European evidence warrant for use in criminal proceedings.

The framework decision before us is based on the principle of mutual recognition of judicial decisions which the Tampere European Council established as the cornerstone of all judicial cooperation in both civil and criminal matters.

The Commission's basic objective is to replace the existing judicial assistance arrangements, based on a system of letters rogatory governed by international conventions, with a mutual recognition system. Mutual recognition should, in particular, speed up procedures and clarify matters as regards both issue and execution. In addition, the safeguards and rights of defence afforded to interested parties will be enhanced.

The European warrant is a judicial order made out on a standard form and issued by an EU Member State for execution on the territory of other Member States.

The European warrant does not apply to all forms of evidence, but only to documents, objects and databases in respect of which the various national legal systems provide for measures such as production orders and search and seize orders. The warrant's scope also extends to police information and copies of criminal records. It does not include evidence taken from the body of a person (including DNA), evidence obtained in real-time (e.g. by intercepting communications and monitoring bank accounts), the taking of oral testimony or the commissioning of expert's reports.

The proposal for a framework decision aims to introduce a European warrant for the purpose of obtaining evidence in the sphere of criminal proceedings on the basis of the principle of mutual recognition of judicial decisions.

However, any initiative in this area should take account of the need to protect fundamental rights, rather than focusing purely on the prospect of cooperation between the Member States. This means that any further transfer of powers from the Member States to the European Union may occur only if citizens' rights are legally guaranteed.

While the execution of each European arrest warrant and evidence warrant is based not only on 'formal' compliance with the said framework decision but also on the necessary respect for the fundamental rights and legal principles enshrined in Article 6 TEU – which underpin the principle of mutual recognition – those rights and principles should be clearly set out in a tangible form in order for them to be effective.

Since the European Union's system as a whole does not provide effective legal protection of fundamental rights, we may state without fear of contradiction that the proposal for a decision is premature.

Moreover, the European Parliament does not have legislative powers in respect of criminal law or criminal procedural law, which form part of the proposal under review. It is only being consulted.

Approving this proposal for a framework decision would, therefore, openly contravene the fundamental principle of every democratic system, under which restrictions on freedoms may only be imposed by virtue of a legislative act approved by Parliament, which is the sole democratically representative organ. And any restriction must be imposed within limits which are clearly defined in the constitution<sup>1</sup>.

It is not without reason that the most advanced constitutional legal thinking holds that the principle 'no powers without rights' is such an important rule of modern constitutionality that it may be placed alongside the historic principle 'no taxation without representation'.

In conclusion, the proposal should be rejected. A European Evidence Warrant may only be adopted once a European constitutional treaty has entered into force which provides effective protection of fundamental rights and provides for the European Parliament's legislative role.

## **AMENDMENTS**

The Committee on Legal Affairs and the Internal Market calls on the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, as the committee responsible, to reject the proposal for a framework decision.

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<sup>1</sup> For Italy, Articles 14 and 15 of the Constitution state:

Article 14

Personal domicile is inviolable.

No domicile may be inspected, searched, or seized save in cases and in the manner laid down by law in accordance with the safeguards set out to protect personal liberty.

Verifications and inspections for public health and safety, or for economic and fiscal purposes, are governed by special laws.

Article 15

Freedom and secrecy of correspondence and other forms of communication are inviolable.

Limitations on them may only be imposed by judicial decision stating the reasons and in accordance the safeguards laid down by the law.