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REPORT

on the proposal for a Council framework decision on the European Evidence Warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters
(13076/2007 – C6-0293/2008 – 2003/2070(CNS))

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Gérard Deprez

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***. In the case of amending acts, passages in an existing provision that the Commission has left unchanged, but that Parliament wishes to amend, are highlighted in **bold**. Any deletions that Parliament wishes to make in passages of this kind are indicated thus: [...]. 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). Suggested corrections of this kind are subject to the agreement of the departments concerned.

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DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on the proposal for a Council framework decision on the European Evidence Warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters

(13076/2007 – C6-0293/2008 – 2003/2070(CNS))

(Consultation procedure – renewed consultation)

The European Parliament,

- having regard to Council draft 13076/2007,
 - having regard to the Commission proposal to the Council (COM(2003)0688),
 - having regard to its position of 31 March 2004¹,
 - 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 (C6-0293/2008),
 - having regard to Rules 93, 51 and 55(3) of its Rules of Procedure,
 - having regard to the report of the Committee on Civil Liberties, Justice and Home Affairs (A6-0408/2008),
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. Calls on the Council to consult Parliament again if it intends to amend the Commission proposal substantially;
 5. Should that proposal not be adopted prior to the entry into force of the Treaty of Lisbon, is determined to consider any future proposal by urgent procedure, in close cooperation with the national parliaments;
 6. Instructs its President to forward its position to the Council and Commission.

¹ OJ C 103, 29.4.2004, p. 452.

Amendment 1

Council draft Recital 8

Council draft

(8) The principle of mutual recognition is based on a high level of confidence between Member States. In order to promote this confidence, this Framework Decision should contain important safeguards to protect fundamental rights. The EEW should therefore be issued only by judges, *courts*, investigating magistrates, public prosecutors **and certain other judicial authorities as defined by Member States in accordance with this Framework Decision**.

Amendment

(8) The principle of mutual recognition is based on a high level of confidence between Member States. In order to promote this confidence, this Framework Decision should contain important safeguards to protect fundamental rights. The EEW should therefore be issued only by judges, investigating magistrates **and** public prosecutors.

Justification

One of the most important guarantees for the public is that evidence should only be collected by the judicial authorities, or in other words judges, investigating magistrates and public prosecutors.

Amendment 2

Council draft Recital 9

Council draft

(9) This Framework Decision is adopted under Article 31 of the Treaty and therefore concerns judicial cooperation within the context of that provision, aiming to assist the collection of evidence for proceedings as defined in Article 5 of this Framework Decision. **Although authorities other than judges, courts, investigating magistrates and public prosecutors may have a role in the collection of such evidence in accordance with Article 2(c)(ii)**, this Framework Decision does not cover police, customs, border and administrative cooperation

Amendment

(9) This Framework Decision is adopted under Article 31 of the Treaty and therefore concerns judicial cooperation within the context of that provision, aiming to assist the collection of evidence for proceedings as defined in Article 5 of this Framework Decision. This Framework Decision does not cover police, customs, border and administrative cooperation which are regulated by other provisions of the Treaties.

which are regulated by other provisions of the Treaties.

Justification

This amendment arises from the amendments proposed to the previous recital.

Amendment 3

**Council draft
Recital 24 a (new)**

Council draft

Amendment

24a. It is of paramount importance to adopt as soon as possible the Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, providing for an adequate level of data protection and including the processing of personal data at national level.

Justification

Parliament is calling on the Council to adopt as soon as possible the Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters.

Amendment 4

**Council draft
Recital 25**

Council draft

Amendment

(25) The EEW should coexist with existing mutual assistance procedures, but such coexistence should be considered transitional until, in accordance with the Hague Programme, the types of evidence-gathering excluded from the scope of this Framework Decision are also the subject of a mutual recognition instrument, the

(25) The EEW should coexist with existing mutual assistance procedures, but such coexistence should be considered transitional until, in accordance with the Hague Programme, the types of evidence-gathering excluded from the scope of this Framework Decision are also the subject of a mutual recognition

adoption of which would provide a complete mutual recognition regime to replace mutual assistance procedures.

instrument, the adoption of which would provide a complete mutual recognition regime to replace mutual assistance procedures. ***The European Commission should at the earliest opportunity present proposals aimed at completing the framework for recognition of criminal evidence, while also consolidating the legislation already adopted.***

The Commission is also invited to boost efforts to harmonise the system for obtaining evidence in the Member States. Harmonisation represents the best foundation for cooperation in criminal matters.

Justification

The Commission proposal only targets existing and available evidence. The regulatory framework for the circulation of criminal evidence within the European Union should be completed as swiftly as possible so that the judicial authorities only have to use one instrument in the same investigation.

Amendment 5

Council draft Recital 25 a (new)

Council draft

Amendment

(25a) The European Commission should at the earliest opportunity present a proposal for a legislative instrument concerning procedural safeguards in criminal proceedings.

Justification

In the absence of any European procedural safeguards, the introduction of the European Evidence Warrant is liable to create legal uncertainty for defendants and third parties involved in criminal cases.

Amendment 6

Council draft Article 2 – point c

Council draft

(c) ‘issuing authority’ shall mean:

(i) a judge, **a court**, an investigating magistrate, a public prosecutor; **or**

(ii) 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 with competence to order the obtaining of evidence in cross-border cases in accordance with national law;

Amendment

(c) ‘issuing authority’ shall mean: a judge, investigating magistrate or public prosecutor ***competent under national law to issue a European Evidence Warrant;***

Justification

As the amendment to recital 8 emphasises, one of most important guarantees for the public is that evidence should only be collected by the judicial authorities.

Amendment 7

Council draft Article 4 – paragraph 1 a (new)

Council draft

Amendment

1a. 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 Warrant.

Amendment 8

Council draft

Article 4 – paragraph 6

Council draft

Amendment

6. Notwithstanding paragraph 2, 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. The relevant rules of the executing State applicable to national cases shall also be applicable in respect of the taking of such statements. *deleted*

Justification

There is no objective reason for this exception.

Amendment 9

Council draft

Article 7 – subparagraph 1 – point (b) a (new)

Council draft

Amendment

(ba) the objects, documents or data are likely to be admissible in the proceedings for which they are sought.

Justification

The collection of evidence that is not admissible in the procedure concerned would simply encumber the work of the judicial authorities instead of facilitating mutual assistance.

Amendment 10

Council draft

Article 7 – subparagraph 1 a (new)

Council draft

Amendment

1a. The issuing authority shall certify in the warrant that the conditions laid down in paragraph 1 have been fulfilled.

Justification

In order to facilitate execution of the warrant, the issuing authority must clearly certify in the relevant form that the conditions for its issue have been fulfilled.

Amendment 11

Council draft

Article 8 – paragraph 2

Council draft

Amendment

2. Each Member State may designate a central authority or, when its legal system so provides, more than one central authority to assist the competent authorities. ***A Member State may, if necessary as a result of the organisation of its internal judicial system, make its central authority(ies) responsible for the administrative transmission and reception of the EEW as well as for other official correspondence relating thereto.***

2. Each Member State may designate a central authority or, when its legal system so provides, more than one central authority to assist the competent authorities.

Justification

In order to be effective, mutual recognition must place the emphasis on direct contact between judicial authorities and limit intrusion by the central authorities.

Amendment 12

Council draft

Article 10 – paragraph 3 a (new)

Council draft

Amendment

3a. 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.

Amendment 13

Council draft

Article 11 – paragraph 4

Council draft

Amendment

4. If the issuing authority is not a judge, a court, an investigating magistrate or a public prosecutor and the EEW has not been validated by one of those authorities in the issuing State, the executing authority may, in the specific case, decide that no search or seizure may be carried out for the purpose of the execution of the EEW. Before so deciding, the executing authority shall consult the competent authority of the issuing State.

deleted

Justification

Amendment arising from the amendment to Article 2(c)

Amendment 14

Council draft

Article 11 – paragraph 5

Council draft

Amendment

5. A Member State may, at the time of adoption of this Framework Decision, make a declaration or subsequent notification to the General Secretariat of the Council requiring such validation in all cases where the issuing authority is not a judge, a court, an investigating magistrate or a public prosecutor and where the measures necessary to execute the EEW would have to be ordered or supervised by a judge, a court, an investigating magistrate or a public prosecutor under the law of the executing State in a similar domestic case.

deleted

Justification

Amendment arising from the amendment to Article 2(c).

Amendment 15

Council draft

Article 11 a (new)

Council draft

Amendment

Article 11a

Safeguards for execution

Each Member State shall take the necessary measures to ensure that the European Evidence Warrant is executed in accordance with the following minimum conditions:

(a) the executing authority shall use the least intrusive means necessary to obtain the objects, documents or data;

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

(c) the issuing authority shall be informed immediately if the executing authority discovers that the warrant was executed in a manner contrary to the law of the executing State.

2. Each Member State shall take the necessary measures to ensure that, where a search and seizure is considered necessary in order to obtain objects, documents or data, the following minimum safeguards shall apply:

(a) a search of premises shall not start at night, unless this is exceptionally necessary due to the particular circumstances of the case;

(b) a person whose premises have been searched shall be entitled to receive written notification of the search. This shall state, as a minimum, the reason for the search, the objects, documents or data seized, and the legal remedies available; and

(c) in the absence of the person whose premises are being searched, the notification described in point (b) shall be provided to that person by leaving the notification on the premises or by other suitable means.

Justification

Pending the adoption of a far-reaching instrument in the field of procedural safeguards, it would be appropriate to establish, at the least, minimum procedural safeguards concerning execution of the European Evidence Warrant.

Amendment 16

Council draft Article 12

Council draft

The executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority unless otherwise provided in this Framework Decision and provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State. ***This Article shall not create an obligation to take coercive measures.***

Amendment

Without prejudice to Article 11a, the executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority unless otherwise provided in this Framework Decision and provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State.

Justification

Pending the adoption of a far-reaching instrument in the area of procedural safeguards, it would be appropriate to establish, at the least, minimum procedural safeguards concerning execution of the European Evidence Warrant.

Amendment 17

Council draft Article 12 – subparagraph 1 a (new)

Council draft

Amendment

The issuing authority may also require the executing authority to:
(a) preserve the confidentiality of the investigation and its substance except to the extent necessary for the execution of the warrant;
(b) allow a competent authority from the issuing State or an interested party designated by the issuing authority to be present at the execution of the warrant and to have access, under the same conditions as the executing authority, to any object, document or item of data obtained on that occasion;

(c) deposit the names of the people through whose hands the evidence has passed between the execution of the warrant and its transfer to the issuing State.

Amendment 18

Council draft

Article 13 – paragraph 1 – point a a (new)

Council draft

Amendment

(aa) 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;

Justification

This clause was added by the plenary in 2004.

Amendment 19

Council draft

Article 13 – paragraph 1 – point a b (new)

Council draft

Amendment

(ab) 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 of the executing Member State;

Justification

This clause was added by the plenary in 2004.

Amendment 20

Council draft

Article 13 – paragraph 1 – point (e)

Council draft

Amendment

(e) if, in one of the cases referred to in Article 11(4) or (5), the EEW has not been validated; *deleted*

Justification

Amendment arising from the amendment concerning Article 11(4) and (5).

Amendment 21

Council draft

Article 13 – paragraph 1 – point (f)

Council draft

Amendment

(f) if the EEW relates to criminal offences which: *deleted*

(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;

Justification

A territoriality clause has no place in an instrument founded on mutual recognition.

Amendment 22

Council draft

Article 13 – paragraph 2

Council draft

2. The decision to refuse the execution or recognition of the EEW pursuant to paragraph 1 shall be taken by a judge, court, investigating magistrate or public prosecutor in the executing State. ***Where the EEW has been issued by a judicial authority referred to in Article 2(c)(ii), and the EEW has not been validated by a judge, court, investigating magistrate or public prosecutor in the issuing State, the decision may also be taken by any other judicial authority competent under the law of the executing State if provided for under that law.***

Amendment

2. The decision to refuse the execution or recognition of the EEW pursuant to paragraph 1 shall be taken by a judge, court, investigating magistrate or public prosecutor in the executing State.

Justification

Amendment arising from the amendment concerning Article 2, point (c).

Amendment 23

Council draft

Article 13 – paragraph 3

Council draft

Any decision under paragraph 1(f)(i) in relation to offences committed partly within the territory of the executing State, or in a place equivalent to its territory, shall be taken by the competent authorities referred to in paragraph 2 in exceptional circumstances and on a case-by case basis, having regard to the specific circumstances of the case, and in particular to whether a major or essential part of the conduct in question has taken place in the issuing State, whether the

Amendment

deleted

EEW relates to an act which is not a criminal offence under the law of the executing State and whether it would be necessary to carry out a search and seizure for the execution of the EEW.

Justification

Amendment resulting from the removal of the territoriality clause.

Amendment 24

**Council draft
Article 13 – paragraph 4**

Council draft

Amendment

4. Where a competent authority considers using the ground for refusal under paragraph 1(f)(i), it shall consult Eurojust before taking the decision. ***deleted***

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.

Justification

Amendment resulting from the removal of the territoriality clause.

Amendment 25

**Council draft
Article 13 – paragraph 5**

Council draft

Amendment

5. In cases referred to in paragraph 1(a), (g) and (h), before deciding not to recognise or not to execute an EEW, either totally or in

5. 5. In cases referred to in paragraph 1(a), *(aa)*, *(ab)*, (g) and (h), before deciding not to recognise or not to execute an EEW,

part, the competent authority in the executing State shall consult the competent authority in the issuing State, by any appropriate means, and shall, where appropriate, ask it to supply any necessary information without delay.

either totally or in part, the competent authority in the executing State shall consult the competent authority in the issuing State, by any appropriate means, and shall, where appropriate, ask it to supply any necessary information without delay.

Justification

Amendment bringing the clause into line with the rest of Article 13, as reformulated.

Amendment 26

Council draft

Article 14 – paragraph 2 – introductory part

Council draft

2. If it is necessary to carry out a search or seizure for the execution of the EEW, the following 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 and*** as they are defined by the law of ***that*** State, shall not be subject to verification of double criminality under any circumstances:

Amendment

2. If it is necessary to carry out a search or seizure for the execution of the EEW, the following offences as they are defined by the law of ***the issuing*** State, shall not be subject to verification of double criminality under any circumstances:

Justification

Verification of double criminality should gradually disappear from instruments founded on mutual recognition. The provision which this amendment removes is a step in the opposite direction and was not envisaged in the European Commission proposal.

Amendment 27

Council draft

Article 15 – paragraph 3

Council draft

3. Unless ***either*** grounds for postponement under Article 16 ***exist*** or the executing

Amendment

3. Unless ***one of the*** grounds for postponement under Article 16 ***justifies it***

authority has the objects, documents or data sought already in its possession, the executing authority shall take possession of the objects, documents or data ***without delay and, without prejudice to paragraph 4***, no later than 60 days after the receipt of the EEW by the competent executing authority.

or the executing authority has the objects, documents or data sought already in its possession, the executing authority shall take possession of the objects, documents or data ***as early as possible and*** no later than 60 days after the receipt of the ***European Evidence Warrant*** by the competent executing authority, ***without prejudice to paragraph 4***.

Amendment 28

Council draft

Article 15 – paragraph 3 a (new)

Council draft

Amendment

3a. In the absence of an action brought in accordance with Article 18 and unless one of the grounds for postponement referred to in Article 16 justifies it, 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. When the objects, documents or data obtained are transferred, the executing authority shall state whether it requires them to be returned to the State of execution as soon as they cease to be needed by the issuing State.

Justification

It is also necessary to set a maximum deadline for the transfer of the objects, documents or data obtained under a European Evidence Warrant.

Also, it is more logical to put the various provisions relating to transfer together in one paragraph and to place this paragraph before the one relating to any inability to comply with the deadlines laid down.

Amendment 29

Council draft

Article 15 – paragraph 4

Council draft

4. When it is not practicable ***in a specific case*** for the competent executing authority to meet the deadline set out ***in paragraphs 2 or 3 respectively***, it shall without delay inform the competent authority of the issuing State ***by any means***, giving the reasons for the delay and the estimated time needed for the action to be taken.

Amendment

4. When it is not practicable ***under exceptional circumstances*** for the competent executing authority to meet the deadline set out ***in this Article***, it shall without delay inform ***Eurojust and*** the competent authority of the issuing State ***in writing***, giving the reasons for the delay and the estimated time needed for the action to be taken.

Justification

Failure to meet deadlines can only be justified by exceptional circumstances. It is important that Eurojust also be warned and that there is a written record of the information transmitted.

Amendment 30

Council draft

Article 15 – paragraph 5

Council draft

5. Unless a legal remedy is pending in accordance with Article 18 or grounds for postponement under Article 16 exist, the executing State shall without undue delay transfer the objects, documents or data obtained under the EEW to the issuing State.

Amendment

deleted

Justification

This paragraph is covered and supplemented by the Lefrançois amendment that aims to add a new paragraph 3a to this Article. Please refer therefore to the justification for this amendment.

Amendment 31

Council draft

Article 15 – paragraph 6

Council draft

Amendment

6. When transferring the objects, documents or data obtained, the executing authority shall indicate whether it requires them to be returned to the executing State as soon as they are no longer required by the issuing State.

deleted

Justification

This paragraph is incorporated verbatim by the Lefrançois amendment that aims to add a new paragraph 3a to this Article.

Please refer therefore to the justification for this amendment.

Amendment 32

Council draft

Article 17 a (new)

Council draft

Amendment

Article 17a

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.

These rights shall be fully respected, 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.

Amendment 33

Council draft

Article 18 – paragraph 1

Council draft

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 the recognition and execution of an EEW pursuant to Article 11, in order to preserve their legitimate interests. ***Member States may limit the legal remedies provided for in this paragraph to cases in which the EEW is executed using coercive measures.*** The action shall be brought before a court in the executing State in accordance with the law of that State.

Amendment

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 the recognition and execution of an EEW pursuant to Article 11, in order to preserve their legitimate interests. The action shall be brought before a court in the executing State in accordance with the law of that State.

Justification

As in the case of the amendment aimed at reintroducing Article 11a, pending the adoption of a far-reaching instrument in the area of procedural safeguards, 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.

Amendment 34

Council draft

Article 23 paragraph 1

Council draft

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

Amendment

1. Member States shall take the necessary measures to comply with the provisions of this Framework Decision by ... ***and they shall do everything they can to agree before that date on a Framework Decision on procedural rights in criminal proceedings throughout the European Union, taking the European Parliament's opinion into consideration.***

Amendment 35

Council draft

Article 23 – paragraph 1 a (new)

Council draft

Amendment

1a. Member States shall indicate, in a declaration deposited with the Secretariat-General of the Council, the national bodies appointed to act as issuing authorities and executing authorities.

Justification

The Framework Decision allows each Member State to precisely establish which bodies are to be considered competent issuing authorities and executing authorities. If the system is to function transparently, all the competent authorities of a Member States must be registered with the Council's Secretariat-General.

There is nothing new in this provision, which takes its lead from a procedure that already appears in European conventions, such as in Article 24 of the Convention on mutual assistance in criminal matters (OJ C 197, 12.7.2000, p. 1).

Amendment 36

Council draft

Article 23 – paragraph 3

Council draft

Amendment

3. Any Member State that intends to transpose the ground for refusal set out in Article 13(1)(f) into its national law shall notify the Secretary General of the Council thereof upon adoption of this Framework Decision by making a declaration.

deleted

Justification

This provision becomes superfluous once the territoriality clause falls.

Amendment 37

Council draft

Article 23 – paragraph 4

Council draft

Amendment

4. Germany may by a declaration reserve its right to make the execution of an EEW subject to verification of double criminality in cases referred to in Article 14(2) 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.

deleted

Should Germany wish to make use of this paragraph, it shall notify a declaration to that effect to the Secretary-General of the Council upon the adoption of this Framework Decision. The declaration shall be published in the Official Journal of the European Union.

Justification

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. Also, this provision could only be inserted in the text because mutual assistance in criminal matters is still subject to Third Pillar rules, which, by requiring unanimity among the Member States, authorise the right of veto.

This provision is all the more unacceptable in that, at least in certain cases, the offences listed in the opt-out are subject to European harmonisation legislation (Framework Decision on the fight against terrorism) or proposed legislation that has not yet been formally adopted but which is under consideration (Framework Decision on combating racism and xenophobia).

Amendment 38

Council draft

Article 23 – paragraph 5 a (new)

Council draft

Amendment

5a. Each year, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Framework Decision, 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 of the proposed amendment is taken from the Council Regulation (EC) on cooperation between the courts of the Member States in the taking of evidence in civil matters (OJ L 174, 27.6.2001, p. 1), while the idea of requiring the Commission to present an annual report builds on the monitoring system under the European Arrest Warrant.

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 39

Council draft

Article 24 – paragraph 2

Council draft

Amendment

2. At the beginning of every calendar year, Germany shall inform the Council and the Commission of the number of cases in which the ground for non-recognition or non-execution referred to in Article 23(4) was applied in the previous year.

deleted

Justification

This provision should be deleted in the interests of consistency with the previous amendment concerning Article 24(4).

Amendment 40

Council draft

Annex – Section B – point ii a (new)

Council draft

Amendment

ii (a) the objects, documents and data sought by this warrant are likely to be admissible in the proceedings for which they are sought.

Justification

The collection of evidence that is not admissible in the procedure concerned would simply encumber the work of the judicial authorities instead of facilitating mutual assistance.

Amendment 41

Council draft

Annex – Section C – point d

Council draft

Amendment

(d) any other judicial authority as defined by the issuing State and, in the specific case, acting in their capacity as an investigating authority in criminal proceedings with competence to order the obtaining of evidence in cross-border cases in accordance with national law. ***deleted***

This EEW has been validated by a judge or court, investigating magistrate or a public prosecutor (see sections D and O).

Justification

These provisions should be deleted in the interests of consistency with the amendments concerning the issuing authority.

Amendment 42

**Council draft
Annex – Section D**

Council draft

Amendment

***(D) THE JUDICIAL AUTHORITY
VALIDATING THE EEW (WHERE
APPLICABLE)***

deleted

***If point (d) in Section C has been ticked
and this EEW is validated, tick the type of
judicial authority which has validated this
EEWt:***

- (a) judge or court***
- (b) investigating magistrate***
- (c) public prosecutor***

Official name of the validating authority:

.....
.....
.....

Name of its representative

.....
.....
.....

Post held (title/grade)

.....
.....
.....

File reference

.....
.....
.....

Address:

.....
.....
.....
.....
.....

Tel. No: (country code) (area/city code).....
Fax No : (country code))(area/city code):.....
E-mail:.....
.....

Justification

This section of the Annex should be deleted in the interests of consistency with the amendments concerning the issuing authority.

Amendment 43

Council draft
Annex – Section E

Council draft

Amendment

(E) WHERE A CENTRAL AUTHORITY HAS BEEN MADE RESPONSIBLE FOR THE ADMINISTRATIVE TRANSMISSION AND RECEPTION OF EEWS AND, IF APPLICABLE, FOR OTHER OFFICIAL CORRESPONDENCE RELATING THERETO *deleted*

Name of the central authority :.....
.....

Contact person, if applicable (title/grade and name):.....
.....

Address:.....
.....

File reference :

Tel. No: (country code) (area/city code):
.....

Fax No: (country code) (area/city code)
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E-mail.....

Justification

Amendment arising from the two previous amendments.

Amendment 44

**Council draft
Annex – Section F**

Council draft

Amendment

**(F) THE AUTHORITY OR
AUTHORITIES WHICH MAY BE
CONTACTED (IN THE CASE WHERE
SECTION D AND/OR E HAVE BEEN
COMPLETED):** *deleted*

- Authority under section C
Can be contacted for questions
concerning.....*
- Authority under section D
Can be contacted for questions
concerning.....*
- Authority under section E
Can be contacted for questions
concerning.....*

Justification

Amendment arising from the two previous amendments.

Amendment 45

**Council draft
Annex – Section I – Footnote**

Council draft

Amendment

***Where the EEW is addressed to Germany,
and according to the declaration made by
Germany in accordance with Article 23(4)
of the Council Framework
Decision 2007/.../JHA of ...⁺ on the
European Evidence Warrant for the
purpose of obtaining objects, documents
and data for use in proceedings in
criminal matters, the issuing authority
may additionally complete box N.1 to
confirm that the offence(s) fall(s) within
the scope of criteria indicated by Germany
for this type of offence.*** *deleted*

OJ: please insert the number and date of this Framework Decision.

Justification

Amendment stemming from the removal of Germany's opt out.

Amendment 46

Council draft

Annex – Section (N) – point 1

Council draft

Amendment

Optional information to be given only in relation to Germany: *deleted*

It is declared that the offence(s) concerned under the law of the issuing State falls(s) within the scope of criteria indicated by Germany in the declaration made in accordance with Article 23(4) of Framework Decision ...

Justification

Amendment stemming from the removal of Germany's opt out.

EXPLANATORY STATEMENT

Proposal for a Framework Decision (COM(2003)0688 final)

The aim of the Commission proposal is to facilitate the collection of cross-border evidence. Like the European Arrest Warrant (EWA), the European Evidence Warrant (EEW) is based on the principle of the mutual recognition of judicial decisions, which the Tampere Council of 1999 made a cornerstone of cooperation in judicial matters.

The basic idea behind the proposal is that a decision issued by a judicial authority in one Member State should be directly recognised and executed in another Member State, thereby making mutual judicial assistance swifter and more effective.

In the area of the collection of criminal evidence, the European Commission has adopted a case by case approach, which means that the EEW proposal is only a first step in a process designed to replace traditional mutual assistance with instruments based on the principle of mutual recognition.

For the time being, the scope of the EEW is limited to existing and already available evidence: objects, documents and data.

The proposal does not apply, therefore, to the collection of statements from witnesses or victims, or to interviews with suspects or defendants. Nor does it include:

- the taking of evidence from a person's body or of DNA samples;
- real-time evidence gathering, such as through the interception of communications or monitoring of bank accounts;
- the gathering of evidence requiring further enquiries, such as the commissioning of an expert's report or undertaking of a computerised comparison of information (computer matching) in order to identify a person.

Pending completion of the system with other judicial instruments, evidence not covered by the EEW will be collected using traditional mutual assistance tools.

The Commission proposal provides that the European Evidence Warrant can only be issued by a judge, investigating magistrate or public prosecutor.

As in the case of the European Arrest Warrant, a form is used for the EEW. This is annexed to the framework decision and has to be translated by the issuing authority into the official language, or one of the official languages, of the executing Member State. This enables the European Evidence Warrant to be executed immediately.

The Commission proposal does not authorise any verification of double criminality in cases where execution of the EEW does not require a search of private premises, or if the offence is on the list of the 32 categories of offences set out in Article 16 (which is the same as the list in the Framework Decision on the European Arrest Warrant).

The framework decision does not address the issue of the admissibility of the evidence collected, save to specify that it is the issuing judicial authority that certifies that the information requested is likely to be admissible in the proceedings for which it is being sought. The proposal for a framework decision also takes up the principle established in Article 4 of the Convention of 29 May 2000, under which the requested State must, to the maximum extent possible, provide assistance in accordance with the formalities and procedures expressly indicated by the requesting State. The requested State can only refuse to comply with these requirements where this would be contrary to the fundamental principles of its national law.

The text as resulting from the discussions in the Council

The scope of this legal instrument, which was already somewhat limited in the proposal from the European Commission, was gradually scaled down during the course of the discussions in the Council. At the same time, certain safeguards have been removed:

- the Council signalled its agreement on the list of 32 infractions for which, if it is necessary to carry out a search or a seizure, double criminality cannot be invoked, but added one important condition: the offences must be punishable in the issuing State by a custodial sentence or a detention order of a maximum of **at least 3 years** (Article 14.2 of the text sent to Parliament for re-consultation). This was not provided for in the Commission proposal;
- it was also decided to insert into the framework decision the principle of a ‘**territoriality clause**’, allowing a Member State to refuse a European Evidence Warrant for offences committed wholly or for a major part within its territory (Article 13.1 f) of the text sent to Parliament for re-consultation);
- moreover, Germany reserved its right, under an **opt out** mechanism, to issue a declaration making the execution of a European Evidence Warrant 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 warrant, 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 (Article 23(4) of the text sent to Parliament for re-consultation);
- while the Commission proposal defined the issuing authority as a judge, investigating magistrate or public prosecutor, the text approved in the Council **broadens the definition of issuing authority** to include ‘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 with competence to order the obtaining of evidence in cross-border cases in accordance with national law’ (Article 2.1(c) of the text sent to Parliament for re-consultation);

- Article 12 of the Commission proposal, relating to **safeguards for execution**, was deleted.

Re-consultation of the European Parliament

Prior to formal adoption of the framework decision, and in view of the substantial amendments made to the original Commission proposal, the European Parliament was asked to issue a second opinion, which the Council requested for the plenary session of 20-23 October 2008.

Chairman/Rapporteur's position

The rapporteur takes the view that this was an initiative already limited in scope, but also considers that a major step could be taken towards an integrated European criminal law enforcement area, provided that the content of the proposal is not shorn of its added value. It seems to the rapporteur that the text approved by the Council not only reflects an initiative void of any ambition, but also proposes the introduction of muddled and even inconsistent arrangements.

The amendments made during the discussions are a clear sign that unanimity will not allow the European Union to make significant headway towards an integrated criminal law enforcement area, and that a legislative process that allows for the right of veto is no longer manageable as it is helping create a European legal system of variable geometry, based on the specific interests of one or other Member State. This is perfectly illustrated by the insertion of a territoriality clause into the framework decision, the paring-down of scope in relation to dispensing with double criminality, and Germany's opt out.

With this in mind, your chairman and rapporteur would like to take this opportunity to call very humbly on the Member States, pending entry into force of the Treaty of Lisbon, to give serious consideration to the option available under Article 42 TEU, which beyond a shadow of doubt would enable stumbling blocks of this kind to be avoided.

Through the amendments made, your chairman/rapporteur has sought to restore a modicum of balance to the text. He therefore suggests:

- taking over the main amendments adopted by the plenary in 2004, where these are still relevant;
- removing the new provisions introduced by the Council, where these seem to him incompatible with the principles that should govern mutual recognition;
- re-establishing the maximum possible safeguards pending the adoption of a cohesive and far-reaching instrument in the field of procedural rights.
- highlighting the scale and nature of the legislative framework that should swiftly be implemented across the Member States to ensure an integrated European criminal law enforcement area, not least via the introduction of tools facilitating to the maximum mutual

judicial assistance and direct contact between judicial authorities, and through significant legislative progress in the area of the recognition of all criminal evidence, the ***protection of personal data processed in the framework of police and judicial cooperation in criminal matters***, and procedural safeguards (including the presumption of innocence and the principle of *ne bis in idem*).

– calling on the Member States to set the European criminal law enforcement area in a more effective and democratic legislative framework that does not leave the door open to the exercising of national rights of veto, in order to enable implementation of the coordinated battery of European legislative measures made necessary by the spread of transnational crime.

PROCEDURE

Title	Framework decision on obtaining proof in criminal proceedings (European Evidence Warrant)
References	13076/2007 – C6-0293/2008 – COM(2003)0688 – C5-0609/2003 – 2003/0270(CNS)
Date of consulting Parliament	4.12.2003
Committee responsible Date announced in plenary	LIBE 2.9.2008
Committee(s) asked for opinion(s) Date announced in plenary	JURI 2.9.2008
Not delivering opinions Date of decision	JURI 22.9.2008
Rapporteur(s) Date appointed	Gérard Deprez 15.9.2008
Discussed in committee	15.9.2008 13.10.2008
Date adopted	13.10.2008
Result of final vote	+: 31 -: 1 0: 1
Members present for the final vote	Alexander Alvaro, Roberta Angelilli, Emine Bozkurt, Philip Bradbourn, Kathalijne Maria Buitenweg, Maddalena Calia, Giusto Catania, Jean-Marie Cavada, Carlos Coelho, Elly de Groen-Kouwenhoven, Esther De Lange, Panayiotis Demetriou, Gérard Deprez, Bárbara Dührkop Dührkop, Claudio Fava, Armando França, Urszula Gacek, Kinga Gál, Jeanine Hennis-Plasschaert, Ewa Klant, Magda Kósáné Kovács, Henrik Lax, Rareș-Lucian Niculescu, Martine Roure, Sebastiano Sanzarello, Csaba Sógor, Vladimir Urutchev, Renate Weber, Tatjana Ždanoka
Substitute(s) present for the final vote	Edit Bauer, Marco Cappato, Genowefa Grabowska, Bill Newton Dunn
Date tabled	15.10.2008