

EUROPEAN EVIDENCE WARRANT

MATTERS TO DISCUSS AT MEETING WITH THE HOME OFFICE

The Framework Decision (FD) of the European Evidence Warrant (EEW) is an instrument that is intended to further improve judicial co-operation by applying the principle of mutual recognition to a judicial decision for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters in different Member States. Criticisms have been made about the length of time the procedures can take under the current mutual legal assistance regime. However in our view, many of the time delays are due to practical or legal issues that cannot be resolved purely by having a simplified framework for recognising a judicial decision. We are therefore seeking confirmation of how the Home Office plan to implement the FD into UK legislation and are highlighting some of the issues that regularly arise in the issue and execution of production orders or search warrants in the UK either for domestic investigations or pursuant to mutual legal assistance requests. We hope that by highlighting these issues, the implementing legislation will produce a fair balance between assisting authorities to obtain material relevant to criminal proceedings and protecting the fundamental rights and freedoms of citizens of the EU.

1. The Framework Decision (FD) has a wide ambit of who can issue and execute a European Evidence Warrant (EEW). How is this going to be dealt with in UK legislation?

Article 3(3)

We understand from a letter from Andy Burnham to Lord Grenfell date stamped 29 November 2005 that it is envisaged that the courts will continue to be responsible for issuing search warrants or production orders required for the execution of an overseas EEW, in the same way that the authorities at present must obtain a search warrant or production order from the courts in order to execute an overseas mutual legal assistance request. Could you provide us with an overview of how this will be dealt with in the implementing legislation.

It has also been stated by the Home Office that it was a matter for discussion whether police authorities should be able to issue EEWs and that the matter was to be resolved during the UK's presidency. Again could you confirm the position.

Please could you confirm who will be regarded in the UK as a "competent authority", including who will be able to accept EEWs? Who will scrutinise/verify the source of EEWs? Who will be able to issue EEWs? Will there be a central authority identifying the appropriate issuing authority? Will the UK be designating a central authority or authorities who will co-ordinate the receipt and transmission of all EEW requests as envisaged under Art 7(1a)?

Will there be a mechanism contemplated for competing requests from more than one foreign jurisdiction?

2. Scope of proceedings covered by the EEW.

The Framework Decision covers administrative proceedings. What is the scope of proceedings the Home Office consider the legislation will cover and will this be specified in the implementing legislation?

3. The text dealing with safeguards for execution of the EEW (Article 12) has been deleted and replaced by a general Article (1(3)) that the FD will not modify the obligation to respect fundamental rights and fundamental legal principles as enshrined in Art 6 of the Treaty of the European Union etc. Is the intention to specify minimum conditions for the execution of the EEW in the implementing legislation?

We share the concerns of the House of Lords Select Committee on the European Union relating to the deletion of Article 12 and agree with them that Article 1(3) is not sufficient. We understand that the UK's implementing legislation will provide for an EEW to be executed in a manner consistent with existing search and seizure and production order powers. Please could you confirm if your intention is to set out in the implementing legislation any minimum conditions? We remind you of the text of previous Article 12 "Safeguards for execution" as below:

- “1. Each Member State shall take the necessary measures to ensure that the EEW 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) An actual person shall not be required to produce objects, documents or data which may result in self-incrimination;
 - (c) The issuing authorities shall be informed immediately if the executing authority discovers that the warrant was executed in 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 exceptional 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.”

In our view it is important to have at least those minimum standards specified on the face of the implementing legislation to assist both the issuing State and any parties affected by the implementing legislation to understand the procedural safeguards and legal remedies available.

We are also concerned about the over-reliance by the Council of the European Union on the European Convention of Human Rights as a mechanism by which the

fundamental rights and freedoms of citizens of the EU are protected. The volume of cases emanating from the European Court of Human Rights and the frequency of breaches of that legislation demonstrate that it cannot of itself ensure fairness in proceedings, but that particularised procedural safeguards are a vital part of all legislation.

There is no reference to the age of criminal responsibility. Will the implementing legislation provide safeguards against transmission of material related to defendants who are below the age of criminal responsibility?

4. We understand that the Home Office has indicated that a defendant in criminal proceedings would be able to make an application for an EEW. How is this to be dealt with?

Will the implementing legislation specifically allow for the defendant in criminal proceedings to make an application for an EEW and how is it envisaged the mechanism will work?

5. Procedural Safeguards in relation to the type of material – how will excluded and special procedure material be dealt with?

We understand the UK's implementing legislation will provide for an EEW to be executed in a manner consistent with existing search and seizure production order powers. Please could you confirm how the obtaining of access to excluded material or special procedure material will be dealt with under the EEW? If it will be by an application to a circuit judge, who will be able to provide the court with sufficient information to comply with the requirements under PACE? For example for access to special procedure material the court needs to be satisfied that there are reasonable grounds for believing that:

- (a) A serious arrestable offence has been committed; and
- (b) There is material which consists of or includes special procedure material and does not also include excluded material on the specified premises;
- (c) The material is likely to be of substantial value (whether by itself or with other material) to the investigation of the offence; and
- (d) The material is likely to be relevant evidence, that is, likely to be admissible at a trial for the offence.
- (e) In addition, the Judge must be satisfied that other methods of obtaining the material have been tried without success or have not been tried because it appeared that they were bound to fail.
- (f) It is in the public interest that a Production Order should be made. In deciding upon the public interest test, the Judge must have regard to the benefit likely to accrue to the investigation if the material is obtained and to the circumstances under which the person in possession of the material holds it. It is the last access condition that has perhaps been the source of most debate, particularly in cases involving journalists.

What safeguards will be in place for the return, use, destruction and onward transmission of such material?

6. Procedural Safeguards in relation to the type of material – how will privileged material be dealt with?

There is not a common European definition of privileged material or, indeed, a common principle of who owns privilege, i.e. the client or the lawyer. How will privileged material be dealt with under the EEW? How will the implementing legislation ensure the LPP rules of the issuing and executing states are protected? How will LLP be asserted in the executing state? Who will arbitrate if there is any dispute about privilege and how and where will this be determined?

7. Procedural Safeguards in relation to the type of material – how will personal data be dealt with?

Under UK legislation, personal data is regarded as special procedure material. Please see our comments above in relation to special procedure material in general.

The Commission's proposal for a Framework Decision on the Protection of Personal Data (FDPPD) processed in the framework of police and judicial co-operation in criminal matters was adopted on 14 June 2006 and is due to be debated by the European Parliament in December 2007. The Framework Decision includes general rules on the lawfulness of processing personal data, provisions concerning specific forms of processing, transmission and making available of personal data to competent authorities of other Member States, further processing, in particular further transmission of data received from one or made available by the competent authorities of other Member States. It also deals with the rights of the data subject, confidentiality and security of processing, judicial remedies, liability, sanctions and supervisory authorities. Particular attention has been paid to the principle that personal data is only transferred to those third countries and international bodies that ensure an adequate level of protection.

Article 10(2) of the EEW was deleted during negotiations. It originally stated the following: "Personal data obtained under this Framework Decision shall remain confidential except insofar as it is necessary to disclose it for the purposes specified in Paragraph 1 (i.e. the criminal proceedings) or for other reasons specified in national law". Our understanding is that this was deleted due to the FDPPD being adopted. Please outline the position which will apply if the EEW implementing legislation is in force in advance of the proposed FDPPD. What protections will be in place concerning the on-going confidentiality and the onward transmission of such material?

8. Procedural safeguards in relation to obtaining material already in the possession of the authorities

The EEW allows for the issuing State to make a request for material that is already in the possession of the authorities. This raises several issues, in particular because in many European jurisdictions transmitted documentation forms part of "the file" and essentially becomes available to all parties with no restrictions on use:

- (a) Information obtained under compulsion – pre-existing material could include tapes and transcripts of interviews that have been held under powers of compulsion, such as s.2 Criminal Justice Act 1987, which are subject to procedural safeguards which restrict the use of the interviews in criminal proceedings. When a mutual legal assistance request is made for individuals to be interviewed using compulsory powers, the normal procedure is for the requesting investigating authority to provide undertakings that replicate the statutory safeguards in the UK legislation. However, if the material is already

in the hands of the investigator and an EEW is issued, what procedural safeguards will be in place to ensure that similar undertakings are obtained and / or restrictions are placed on the use of the material in criminal proceedings?

- (b) If it is determined that the material had been obtained illegally in the UK, what mechanism will be in place to challenge transmission?
- (c) What protection will be in place to ensure that material that is in the hands of the prosecutor that would normally be sensitive material and the subject of a PII application will be treated with similar confidentiality? For example, suspicious transaction reports made subject to the Proceeds of Crime Act 2002 would currently be regarded as sensitive material and not discloseable.
- (d) What safeguards / procedures are envisaged where statements obtained under torture, emanating from third countries, appear in police files within the Union? We note in correspondence that the Home Office have said that they do not accept that there should be an obligation on the executing authority to comment on the circumstances in which information has been obtained – this stance could be relevant both for information obtained under compulsory powers as well as under torture. In our view there should be a legal obligation as well as a matter of public policy that such issues are raised.

9. Is computer material/inextricably linked material excluded from the EEW?

Under Art 3(2)(d), the EEW cannot be issued for the purpose of requiring the executing authority to conduct analysis of existing objects, documents or data. We therefore believe that this excludes any analysis of computer data/inextricably linked material. However, if the Home Office disagrees, could you confirm why you disagree and how inextricably linked material, in particular material held on computer disks, will be dealt with. Is there to be a process of seizure, check for relevance and then transfer? This appears to us to be the only way to ensure that only material specified in the EEW is transmitted to the issuing State, however it will require analysis of the data which is specifically excluded in the EEW.

10. Return/copy of material

We understand the UK's implementing legislation will provide for an EEW to be executed in a manner consistent with existing search and seizure production order powers. Material that is determined to fall outside of the warrant and is no longer relevant may be returned. Relevant seized material can be retained for as long as is necessary in the circumstances. Facilities to photograph or copy the material is generally made available. Frequently hardware items such as telephones, fax machines and computers are returned. Will the implementing legislation ensure similar return of material seized pursuant to an EEW?

11. Legal Remedies

How will interested parties be informed of their legal remedies? Is there to be guidance issued concerning various topics including: the detail that should be provided within a EEW; legal remedies and challenging an EEW; how to apply for an EEW?

How do the Home Office envisage grounds for non-recognition or non-execution or postponement of recognition or execution being considered or invoked either by (i) issuing authority or (ii) interested party? [see Articles 15 and 18]

Under Article 19(1) member states are given an option to limit the remedies provided to cases where the EEW is executed using coercive measures. Is the intention for the UK to adopt this option? If so, what categories of seized material will fall outside of “coercive” material. How will this be dealt with in the implementing legislation? If this option is exercised, will this include material which is already in the possession of the authorities under Art3 (3)? Will this include material that is in an authority’s possession for reasons other than a criminal investigation.

Article 19(6) gives the executing State the discretion to suspend the transfer of objects, documents and data pending the outcome of a legal remedy. By what mechanism can representations be made in order to ensure the suspension of the transmission of material? Will the implementing legislation permit transmission whilst legal proceedings are pending? If so, and if such proceedings are successful, what guarantees would be in place for the return of the material and destruction of any copies held by the issuing authorities?

12. Legal assistance

The Framework Decision is silent on the provision of legal aid for those who are affected by an EEW. This is of particular concern where the Framework Decision specifies that under Article 19(1) legal remedies the substantive reasons for issuing an EEW may only be challenged in an action brought before a court in the issuing State. This will be likely to result in complex proceedings, potentially requiring an analysis of the laws of both the issuing and executing State and translation and interpretation facilities. In reality there is no legal remedy without provision of legal aid in both jurisdictions. How will the implementing legislation deal with the provision of legal assistance?

13. Translation of material

What procedures/mechanisms are envisaged to translate documentation in order for issues of relevance, LPP, special procedure and excluded material to be assessed?

14. EEW and mutual legal assistance.

It is currently envisaged that the EEW should co-exist with existing mutual assistance procedures but this should be considered as transitional until the second phase of evidence gathering instrument have been adopted. It is likely that requests for assistance will incorporate both material covered under the EEW and under the old mutual legal assistance regime. How is the Home Office approaching this parallel process?

15. Article 3(4)(b) notes that if requested by the issuing authority, the EEW may also cover taking statements of persons present during the execution of the EEW and directly related to the subject of the EEW?

Article 3(2)(a) provides that an EEW cannot be used for the purpose of conducting interviews etc, however Article 3(4)(b) notes that if requested by the issuing authority, the EEW may also cover taking statements of persons present during the execution of the EEW and directly related to the subject of the EEW. Relevant rules of the executing State applicable to national cases shall also be applicable in respect of taking such statements. What safeguards will exist to prevent Article 3(4)(b) defeating the restriction contained in Article 3(2)(a)? Under PACE questions can only be asked with the purpose of furthering the proper and effective conduct of a search but must not go beyond this without cautioning. However, under certain

enactments (eg s194 Enterprise Act) there is a requirement for an explanation to be given on any document appearing to be of a relevant kind. Such questioning must be confined to the document itself and its authorship. What remedy is available if statements are taken which do not comply with these restrictions? Will those interviewed in these circumstances be cautioned? If they are cautioned will the right to silence be under the issuing or executing state criminal procedures or both?

16. Article 11 - notification requiring validation

Is the Home Office considering making a declaration or notification requiring validation of law cases where the issuer does not fall under the definition of "issuing an authority"? [See Article 11(3)]. What will be the definition of "Any other judicial authority".