

THE EUROPEAN EVIDENCE WARRANT: AN INTRODUCTION

1. What is the European Evidence Warrant?

The European Evidence Warrant ('EEW') is an order, issued by a competent authority in one Member State, which, under the principle of mutual recognition, must be executed in another Member State.

The EEW may be deployed for the purposes of '*obtaining objects, documents and data for use in criminal proceedings*'.

The proposal for the Council Framework Decision adopts the same approach to mutual recognition as the European Arrest Warrant ('EAW'). Consequently, an EEW will be executed as if it had been issued according to domestic procedure.

The EEW is the first phase of a unified, re-modelled, fast-track regime for Mutual Legal Assistance ('MLA'). Unless and until the second and/or third phases are completed, traditional MLA procedures will run in tandem with the EEW. (see recital 18a)

2. Who may issue an EEW?

Only a Competent Authority may issue an EEW.

Under Article 2(c), 'issuing authority' shall mean:

A judge, a court, an investigating magistrate, a public prosecutor, or any other judicial authority as defined by the issuing state.

Consequently, each Member State will have the capacity to extend the list of competent issuing authorities to include other prosecuting agencies and, for example, Customs Officers.

Under Article 2(d), 'executing authority' is not defined and may also be designated by each Member State.

3. What materials may be sought under an EEW?

Under Article 3(1) '*objects, documents and data for use in criminal proceedings*' as specified in the warrant. Notwithstanding that, under Article 3(4)(a) the EEW may cover any other relevant object, document or data discovered by the executing authority during the execution of the warrant.

However, under Article 3(2) the EEW shall not be used for the purpose of requiring the executing authority to:

- Conduct interviews, take statements or initiate hearings involving the giving of evidence;
- Carry out bodily examinations or obtain bodily material;
- Obtain information in real-time, for example, by the interception of communications or by covert surveillance or by monitoring bank accounts;
- Analyse existing materials;
- Obtain communications data retained by providers of public communications networks.

Critically, under Article 3(3), such materials may be obtained if already in the possession of the executing authority prior to the issuing of the warrant.

Under Article 3(4)(b) the EEW may also cover the taking of statements from persons present during the execution of the warrant and directly

related the subject matter of the warrant. (This is a considerably different proposal than that which was first mooted - '*The statements should be limited to information concerning the identity of the person and may include relevant, spontaneous remarks made by him*'.) (see draft version discussed at Council on 19th July 2005)

4. What safeguards exist?

Under Article 6(a) an EEW may only be issued if the objects documents or data sought are necessary and proportionate for the purpose of the proceedings and if they can be obtained under the law of the issuing State in a comparable case if they were available on the territory of the issuing State, even though different procedural measures might be used.

However, such considerations may only be assessed in the issuing State. Consequently, no challenge may be brought on such grounds in the executing State – no real safeguard to an individual in the executing state whose business premises are being searched or who is being compelled to deliver documents.

Under Article 11(2) if the issuing authority is not a judge, a court, an investigating magistrate or a public prosecutor, the executing authority may decline to deploy coercive measures in executing the EEW.

Under Article 15, recognition or execution of the EEW may be refused in the executing State:

- If its execution would infringe the *ne bis in idem* principle;
- If the double criminality principal applies (see below, but unlikely save in very few cases);
- If certain extraterritoriality provisions apply;
- If the material is covered by an immunity or privilege;

- If execution would harm essential national security interests; jeopardise the source of the information; or involve the use of classified information;
- If the form is manifestly incomplete or incorrect.

Draft Article 12 has now been deleted. It contained provisions relating to the minimum standards expected of those executing warrants, including:

- The executing authority shall use the least intrusive means necessary;
- A natural person shall not be required to produce anything which may result in self-incrimination;
- A search of premises shall not start at night, save in exceptional circumstances.

5. Do dual criminality rules apply?

Like the EAW, there is a list of offences for which dual criminality is not required. Consequently, there is no requirement to demonstrate that the conduct to which the warrant relates is an offence in both the issuing and executing states.

That list includes all the offences on the equivalent EAW list, and adds the following: infringement of road traffic regulations, smuggling, intellectual property offences, threats and acts of violence against persons, criminal damage, theft, and offences created in implementation of certain EU obligations.

The Commission had proposed that the power of an executing state to make a dual criminality test on an EEW would cease after five years, but the Council has decided that there should simply be a review at that time. Nevertheless, given the long list of offences (with no further definition) for which no such test is allowed, there is theoretical scope for an EEW being issued in respect of an act that is not an offence in the executing state.

Germany had made this one of their key issues during negotiation and they received a temporary derogation from the provisions of the framework decision with regard to a number of offences: extortion, terrorism, racism, environmental crime, sabotage and cyber-crime.

These offences were highlighted by the German constitutional court in its recent ruling on the EAW. Germany's concern was based on the fact that there is no EU-wide definition of these crimes and therefore a suspect may not be clear with regards the substance of the allegation against them. Most Member States were opposed to including definitions as it would be tantamount to harmonising the criminal laws of the Member States. For the six offences listed above, Germany will not automatically refuse to enforce an EEW, but will firstly verify whether the offence constitutes a crime in Germany before complying (i.e. Germany will apply the dual criminality principle, which was meant to be waived for the listed offences).

In the final text of the EEW dated 15th January a declaration is given by Germany as to what definitions they will use – see pages 47 and 48.

6. Can the defence seek an EEW?

There is no clear statement within the Framework Decision that the defence will be able to seek and have issued an EEW.

If the defence are prevented from issuing an EEW and/or any equivalent procedure, there may be clear breaches of Article 6 to the ECHR and, in particular, the equality of arms principle.

There remains the prospect of enormously divergent implementation practices and procedures throughout the European Union.

In the United Kingdom, the Home Office has stated to the House of Lords in correspondence that the defendant would be able apply to the court for an EEW. Whilst the precise procedure for this will have to be determined during the transposition procedure, the Home Office has suggested that the procedure would work along the lines of article 7(3)(c) of the Crime International Co-operation Act which provides that a defendant may apply to a court for assistance in obtaining evidence from abroad.

7. Time for Responding to an EEW?

Time frames for interested parties to make representations are very short. The material sought under an EEW must be obtained within 60 days of issue. Interested parties will have considerably less time than that to mount any challenge.

8. When will the EEW come into force?

The European Commission brought forward a proposal for a draft Framework Decision in November 2003. The original commission proposal may be found at:

http://europa.eu.int/eur-lex/en/com/pdf/2003/com2003_0688en01.pdf

The Council reached broad agreement on a text at the Justice and Home Affairs Councils on 1-2 June 2006. Further negotiations took place between June-December 2006 and a final text was produced in January 2007. That text may be found at:

<http://register.consilium.europa.eu/pdf/en/06/st16/st16870-re01.en06.pdf>

The text is subject to legal-linguist revision, consequently an implementation date has not yet been fixed and will be dependent on the

date of final adoption and publication in the Official Journal. It is likely to be adopted by the end of July 2007 and therefore required to be transposed into national law by summer 2009.

Some other useful links:

[http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-
//EP//NONSGML+TA+P5-TA-2004-
0243+0+DOC+PDF+V0//EN&language=EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P5-TA-2004-0243+0+DOC+PDF+V0//EN&language=EN)

<http://register.consilium.europa.eu/pdf/en/06/st11/st11235.en06.pdf>

<http://register.consilium.europa.eu/pdf/en/06/st10/st10081.en06.pdf>

**GAVIN IRWIN
BARRISTER
CHAMBERS OF MICHAEL GLEDHILL QC
2 DYERS BUILDINGS
HOLBORN, LONDON.
EC1N 2JT.**

gavin.irwin@2dyersbuildings.com

20th April 2007