



**JUSTICE response to the Home Office
Consultation on the Proposal for a
European Evidence Warrant
March 2004 (updated July 2004)**

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JUSTICE response to the Home Office Consultation 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 (EEW)

1. JUSTICE is an independent all party law reform and human rights organisation which aims to improve British justice through law reform and policy work, publications and training. It is the British section of the International Commission of Jurists. JUSTICE has a history of engagement with European justice and home affairs issues, particularly in respect of the European arrest warrant and the development of EU-wide procedural safeguards for suspects and defendants in criminal proceedings.
2. Mutual assistance within the EU is presently governed by the 1959 Council of Europe Convention on Mutual Assistance and its Protocols of 1978 and 2001. For certain terrorist-related offences, the former have been modified by the 1977 Council of Europe Convention on the suppression of terrorism and its Protocol which opened for signature in 2003. The EU has supplemented the Council of Europe rules with articles 28-53 of the Schengen Convention and through the agreement of the 2000 EU Mutual Assistance Convention and its 2001 Protocol.
3. The Commission proposal for a Council framework decision on the European evidence warrant for obtaining objects, documents and data for use in proceedings in criminal matters (EEW) is the first step towards replacing the entire existing mutual assistance regime in the EU with the mutual recognition of requests for evidence. The next stage would cover evidence that does not already exist but that is directly available (for example interviews with suspects), then evidence that already exists but that is not directly available (for example DNA samples). The process is intended to culminate in a single consolidated instrument that will replace mutual legal assistance in the EU in the same way that the European arrest warrant has replaced extradition. The aim is to simplify and accelerate the gathering and transfer of evidence in cross-border criminal proceedings.

Mutual recognition and the EEW

4. The Council framework decision on the European arrest warrant¹ was the first measure in the field of criminal law to implement the principle of mutual recognition. It has been

¹ OJ L 190/1 18.7.2002

followed by framework decisions on the mutual recognition of financial penalties², of confiscation orders³ and of freezing orders to prevent the destruction, transformation, moving, transfer or disposal of evidence.⁴ The subsequent transfer of that evidence is presently left to mutual assistance procedures.

5. The EEW is a request issued by a judge, investigating magistrate or prosecutor of one member state to obtain objects, documents or data from another member state for use in proceedings in criminal matters. It will be transmitted via a single European document and will be directly recognised and executed - on the basis of the principle of mutual recognition - in the same way as a domestic procedural measure⁵.
6. Mutual recognition – of judicial decisions taken in other member states - rests on the presumption that the criminal justice systems of all EU member states provide comparable protection of individual rights. Therefore a request to obtain evidence issued by a judicial authority in one member state should be directly recognised and enforced in another without having to transform that request into a national decision or verify the initial decision.
7. In its analysis of other proposals in this field, JUSTICE has accepted that the principle of mutual recognition would form the basis of future developments in EU judicial co-operation in criminal matters, as determined by the Tampere European Council in 1999. This support was, however, conditional on EU-wide safeguards being developed and implemented in tandem. The Commission has said that
the treatment of suspects and the rights of the defence would not only suffer from the implementation of the principle [of mutual recognition] but that the safeguards would even be improved through the process.⁶

The explanatory notes to the EEW emphasise that

² OJ C 278/4 2.10.2001

³ 6229/04 LIMITE COPEN 20, 13.2.2004

⁴ OJ L 196/45 2.8.2003. The framework decision on freezing orders, however, is based on the mutual recognition of national orders supplemented by a European certificate annexed to the framework decision, unlike the European arrest warrant which is a single document. The Commission has proposed that the EEW follow the EAW model.

⁵ Articles 1 and 11 EEW.

⁶ Commission Communication to the Council and the European Parliament of 26 July 2000 on Mutual Recognition of Final Decisions in Criminal Matters COM (2000) 495 final, 26.7.2000.

[I]n the ... field of judicial co-operation, in particular where coercive measures are envisaged, the Commission considers that the building of mutual trust should be fostered by specific action at the Union level in order to achieve a common minimum level of safeguards.⁷

8. The development of such safeguards has so far, however, failed to receive the same attention as moves to enhance the efficiency of investigations and prosecutions. In the absence of equivalent safeguards in all member states, mutual recognition may in fact breed mistrust, suspicion and uncertainty rather than fostering the culture of trust and co-operation necessary to effectively tackle cross-border crime.
9. It is often assumed that the European Convention of Human Rights (ECHR) can provide both the requisite level and consistency of protection to substantiate the trust at the heart of mutual recognition. All member states and accession countries are of course obliged to respect the ECHR, notably articles 3, 5, 6 and 8 in this context. However, there are important variations in the implementation of these articles between member states. This reflects the broad membership of the Council of Europe and the subsequent development of the 'margin of appreciation' doctrine applied by the European Court of Human Rights to accommodate the different legal cultures, historical traditions and moral values of 45 countries. This approach is appropriate given the ECHR's status as an international treaty rather than a constitutional document.
10. It is also important to note that even the minimum rights guaranteed by the ECHR are frequently violated, as testified by recent judgments against almost all EU member states and accession countries in the European Court of Human Rights (ECtHR). The availability of a remedy in the ECtHR cannot fully compensate for unlawful action already committed by a state against a private or legal person. JUSTICE has particular concerns relating to the rights of the defence and equality of arms in the accession countries. A recent Council of Europe report on human rights in Estonia⁸, for instance, highlighted the practice of conducting searches of advocates' offices and seizure of confidential data with the permission of a judge or court. The terms on which such search and seizure may be refused are not however defined and there is no right of appeal against such a decision. The report concludes that such practices may violate articles 6 and 8 ECHR.

⁷ At para 42.

⁸ Council of Europe, Report by Mr Alvaro Gil-Robles, Commission for Human Rights, on his visit to Estonia, Strasbourg 12 February 2004.

The UK cannot therefore rely on even those rights protected by the ECHR being guaranteed in practice.

11. With the advent of the European arrest warrant and the replacement of the mutual assistance regime signalled by the Commission proposal for a EEW, the introduction of EU standards that secure the rights of suspects and defendants affected by EU measures that implement the principle of mutual recognition is imperative and urgent. JUSTICE urges the Government to ensure adequate safeguards are explicitly included on the face of all mutual recognition instruments until a framework decision, based on the Commission's February 2003 Green Paper, establishing minimum procedural safeguards for the rights of the defence across the EU is implemented. This is the minimum required to achieve the level of protection and legal certainty necessary to ensure effective police and judicial co-operation in criminal matters between EU member states. The Commission proposal adopted in November 2003 does not however reflect the wider-reaching measures explored in its earlier Green paper and will not answer JUSTICE's concerns.
12. **In the absence of adequate minimum standards, JUSTICE can only support the adoption of further JHA measures based on the principle of mutual recognition, including the EEW, where adequate safeguards are specifically included on the face of each measure.⁹ These would supplement each member state's domestic law. As the first stage in the Commission's proposals to replace mutual assistance with mutual recognition, the EEW is likely to be used as a model for future evidence warrants and it is vital therefore that sufficient protections are incorporated from the beginning.**
13. This briefing sets out JUSTICE's detailed concerns and proposed amendments in relation to the EEW. In summary:

⁹ This was not however the experience of the European arrest warrant whose success or failure will depend largely on whether fundamental rights are respected in a comparable way across the EU. In that example, many of the vital safeguards that should have been included on the face of the framework decision itself were instead deferred to a separate proposal, not specific to the EAW, on procedural safeguards. This has been the subject of a Commission Green Paper that is presently blocked due to a dispute over its legal base. Once 10 new member states join the EU in May, the prospect of reaching a unanimous agreement on an eventual proposal will become even more remote.

Human rights protection

- The proposal for a EEW provides strikingly less human rights protection than the four other measures agreed or proposed in this area on the basis of mutual recognition (para 14)
- Reference should be made in the Preamble to the non-discrimination form of the political offence exception and the constitutional rules of the member states, modelled on the framework decisions on the European arrest warrant, on freezing orders and on confiscation orders (paras 15 - 16)
- To assist the clear and consistent implementation of the EEW, a reference should be made in the main body of the EEW to the obligation to respect article 6 TEU (para 17)

Protections in the issuing state

- The possibility of an issuing authority being a 'prosecutor with competence under national law' will not guarantee independence and may result in EEWs being issued in inappropriate cases or by authorities which do not exercise recognisably judicial functions (para 19)
- The issuing authority should be required to supply reasons for its decision to issue a warrant under article 6 EEW. This would ensure transparency of decision making and facilitate legal challenges (para 21)
- An issuing authority should not be exempted from the obligation to complete or correct a EEW unless the executing authority is satisfied that the conditions in article 6 EEW have been met and the information provided is sufficient to execute the EEW fairly and lawfully (paras 22 – 23)

Types of proceedings

- The EEW may be issued by administrative authorities in respect of decisions that may or may not give rise to criminal proceedings. The protections of article 6 ECHR will not therefore always be applied to proceedings in which evidence obtained under a EEW is admitted (paras 24 - 25)
- There is a danger that the EEW will be abused by an issuing authority in order to conduct a 'fishing expeditions' where proceedings have not already been instituted (paras 26 – 27)

Protections in the executing state

- An executing authority is not permitted to refuse to comply with any formalities and procedures requested by the issuing authority under article 13 EEW, even where to

do so would violate the ECHR or the executing state's fundamental principles of law (paras 28 – 33)

- Any request by the issuing authority under article 13 to use coercive measures should only be executed pursuant to a judicial order in the executing state (paras 32 - 33)

Grounds for non-recognition or non-execution

- An executing authority should be permitted to refuse to recognise or execute a EEW on all the grounds included in the framework decision on the European arrest warrant. These include the existence of an amnesty in the executing state; where the person who is the subject of the proceedings or investigation in connection with which the EEW is issued is below the age of criminal responsibility in the executing state; and on territorial grounds (para 35 – 36)
- An executing authority should retain the possibility, provided in the 1959 Council of Europe Mutual Assistance Convention, of refusing to recognise or execute a EEW where to do so would prejudice the sovereignty, security, *ordre public* or other essential interests of its country (para 37)
- There is no human rights clause on the basis of which an executing authority must refuse to recognise or execute a EEW where to do so would violate the ECHR. This would clarify para 9 of the Preamble and aid consistency of implementation across the EU (para 38)

Data protection

- The EEW may be used to obtain criminal records yet it does not establish specific rules on the transmission of criminal records, nor do EU-wide minimum standards exist (paras 40 – 41)
- There is no basis on which an executing authority can refuse to recognise or execute a EEW where such recognition or execution would violate the national law or international obligations of the executing member state regarding transmission or other processing of personal data (paras 39 – 43)

Double criminality

- Double criminality is removed for 39 types of offence, and for all offences where it is not necessary to conduct a search of private premises. Searches of premises of legal persons will therefore no longer be protected by double criminality at all. Removal of this safeguard is not restricted by any penalty threshold. It will be abolished altogether after a maximum transition period of five years (paras 42 – 51)

Legal remedies

- The availability of legal remedies has been restricted to situations where coercive measures are employed (paras 52 - 53)
- The substantial reasons for issuing a EEW can only be challenged in the issuing state, ignoring the fact that a remedy after the fact can never fully compensate an individual for the unlawful acts of the state (para 55)
- No provision is made for the right to legal counsel, interpreters or legal aid. These will be indispensable in many cases where a legal challenge is mounted in a foreign jurisdiction (para 56)
- Objects, documents or data obtained pursuant to a EEW may be transferred even where a legal remedy is pending. This, again, wrongly assumes that a legal remedy after the fact can provide full compensation for unlawful state action (para 57)

Equality of arms

- It is not clear that a defence team could apply to a competent judicial authority to issue a EEW, jeopardising the equality of arms principle (para 58)
- The proposal also does not ensure that the defence will have adequate access to any data, documents or objects obtained pursuant to a EEW prior to transfer (para 59)

Record keeping

- Records of who has handled objects, documents or data obtained in the executing state pursuant to a EEW must always be kept in order to facilitate any eventual legal remedy (para 60)

Jurisdiction issues associated with computer data

- In the absence of harmonised data protection laws across the EU, the proposals to apply mutual recognition to jurisdiction issues associated with computer data are premature (paras 61 – 62)

Human rights protection

14. Paragraphs 8 and 9 of the EEW Preamble itself highlight the importance of safeguards to protect fundamental rights in building the 'high level of confidence' between member states. However, the proposal for a EEW provides strikingly less human rights protection than the four other measures agreed or proposed in this area on the basis of mutual

recognition. This will jeopardise the mutual trust on which the success of the EU mutual recognition scheme depends.

15. Paragraph 19 of the EEW preamble states that the framework decision respects article 6 TEU as reflected by the EU Charter. Paragraph 19 does not however refer to the non-discrimination form of the political offence exception, nor to the constitutional rules of the member states, in the way that paragraph 6 of the preamble to the framework decision on freezing orders, paragraph 12 of the Preamble to the European arrest warrant and paragraph 10 of the framework decision on confiscation orders do. JUSTICE proposes that paragraph 19 EEW be amended as follows:

This framework decision respects the fundamental rights and observes the principles recognised by article 6 of the Treaty on European Union and reflected by the Charter of Fundamental Rights of the European Union, notably Chapter VI thereof. Nothing in this framework decision may be interpreted as prohibiting refusal to obtain objects, documents or data for which a European evidence warrant has been issued when there are objective reasons to believe, on the basis of objective elements, that the European evidence warrant is issued for the purpose of prosecuting or punishing a person on account of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.

This framework decision does not prevent any member state from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.

16. Although the preamble is not a binding part of the text, an important example of the effect that it can have on implementing laws in the member states is section 13 of the Extradition Act 2003 which specifically incorporates the non-discrimination form of the political offence exception as a mandatory ground for refusal of a European arrest warrant.
17. The framework decision on freezing orders, the European arrest warrant and the draft framework decision on confiscation orders also include a provision in the main text to the effect that the framework decision will not amend the obligation to respect the fundamental rights and fundamental legal principles enshrined by article 6 TEU. **A**

comparable provision should be included in the main text of the EEW for reasons of enforceability, clarity and consistency.

Protections in the issuing state

18. The principal safeguards in the issuing state are (i) the nature of the issuing authority and (ii) that certain minimum conditions for issuing a EEW, set out in article 6, are met and testified to by that issuing authority.

19. In relation to the nature of the issuing authority, article 2(c) EEW restricts this to judges, investigating magistrates or prosecutors with competence under national law to issue a EEW. JUSTICE is concerned that the unqualified inclusion of 'prosecutor with competence under national law' is too wide and may, in some member states, result in EEWs being issued by persons who are not sufficiently objective and vigilant to prevent EEWs being issued in inappropriate cases. The catalogue of improperly conducted investigations and prosecutions by HM Customs and Excise over the last five years shows how damaging to mutual recognition it would be to allow such a body to issue an EEW in one member state where there was no method for challenging the substantive decision to issue the EEW in another member state. **JUSTICE believes there should be a qualitative control on the nature of the issuing authority that would ensure a degree of judgment exercised independently of a prosecutor. Requests by prosecutors should therefore be sent to a judge or magistrate of the issuing state who will then decide whether it would be appropriate to issue a EEW.**

20. The issuing authority must declare in the EEW form that the following conditions, set out in article 6 EEW, are satisfied:
 - (a) the EEW is only to be issued when the objects, documents or data are necessary and proportionate to the purpose of the criminal proceedings
 - (b) Objects, documents and data can be obtained under the law of the issuing state in similar circumstances if they were available on its territory, even though different procedural measures might be used
 - (c) The objects, documents or data are likely to be admissible in the proceedings for which they are sought

21. These are fundamental safeguards aimed at preventing abuse of the EEW, for instance to circumvent protections that exist in the issuing state's national law but not in other member states. **These provisions would be strengthened by placing an obligation on the issuing authority to supply reasons in the EEW form for reaching its**

decision under article 6(a). This would facilitate any eventual legal challenge by interested parties and ensure transparency of decisions, bolstering mutual trust between member states and the successful development of the mutual recognition programme.

22. The guarantees in article 6 may be weakened where an incomplete or incorrect EEW is issued. Under article 18(2)(a) EEW, where a form is incomplete an executing authority may postpone execution of a EEW until the form has been completed or corrected. Alternatively, however, it may decide under article 18(2)(b) to exempt the issuing authority from this requirement where it considers the information provided is sufficient to execute the warrant fairly and lawfully. This can never be the case where it is not clear that the conditions of article 6 have been satisfied.
23. Given that the form provides the only basis for the executing authority to check the EEW's legality and compatibility with fundamental rights, JUSTICE proposes an amendment to article 18 that would provide greater legal certainty for executing authorities and ensure the rights of interested parties are preserved. JUSTICE proposes to amend article 18(2)(b) as follows

... the executing authority may:

(b) exempt the issuing authority from this requirement [to complete or correct the form] if:

- (i) it is satisfied that the conditions of article 6 of the European evidence warrant have been met; and**
- (ii) it considers that the information provided is sufficient to execute the warrant fairly and lawfully, taking account in particular of the conditions in article 6 and the rights of interested parties.**

Types of proceedings

24. Under article 4 EEW, a EEW may be issued with respect to:

- (a) criminal proceedings;
- (b) proceedings brought by administrative authorities in respect of acts which are punishable under the national law of the issuing member state by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters; and
- (c) proceedings referred to above which relate to offences for which a legal person may be held liable in the issuing state.

25. The extension of the EEW to proceedings brought by administrative authorities whose decision *may* give rise to proceedings before a court is too wide and extends the ambit of the EEW to cases where criminal proceedings in a court may or may not take place. JUSTICE is concerned that the fair trial protections of article 6 ECHR will not always be engaged in proceedings brought by administrative authorities. The framework decision on freezing orders with which the EEW proposal has a logical link does not share this ambiguity and is clearly limited to criminal proceedings. **JUSTICE would therefore support the deletion of article 4(b) EEW.**
26. JUSTICE is also concerned that the Commission proposal does not make clear whether use of the EEW will be confined to cases where an offence has been committed or is suspected of having been committed, and criminal proceedings have already been instituted or that offence is being investigated. **As presently worded, the lack of any threshold in articles 1(1), 3(1) and 4 creates a danger that the issuing state could use the EEW as a ‘fishing exercise’ prior to the commencement of proceedings or an investigation.**
27. Section 3 of the Criminal Justice (International Co-operation) Act 1990 on ‘Overseas evidence for use in United Kingdom’ presently makes requests conditional on:
- (a) an offence having been committed or the existence of reasonable grounds for suspecting that an offence has been committed; and
 - (b) that proceedings in respect of the offence have been instituted or that the offence is being investigated.

JUSTICE supports the insertion of a similar threshold into article 6 EEW, prior to existing clauses (a) – (c).

Protections in the executing state

28. Paragraph 9 of the Preamble outlines the principal protections in the executing state and is subsequently expanded in articles 11 and 12 EEW. These require, as a general rule, that objects, documents or data requested by a EEW be obtained in the same way as domestic measures (article 11) and that minimum conditions be complied with in the execution of a EEW, notably where search and seizure is carried out, and to protect the privilege against self incrimination (article 12).

29. These protections are, however, diluted by article 13 under which the issuing state can 'require' the executing authority to execute the warrant in accordance with certain 'formalities', namely:
- (a) using coercive measures to execute the warrant where, in the issuing authority's opinion, there is a significant risk that the objects, documents or data might be altered, moved or destroyed;
 - (b) keeping the fact that the investigation is being carried out and its substance confidential;
 - (c) allowing a competent authority of the issuing state or an interested party nominated by the issuing authority to be present during the execution of the warrant and to have the same access as the executing authority to any object, document or data obtained pursuant to the warrant;
 - (d) keeping a record of who has handled the evidence; and
 - (e) complying with other specified formalities and procedures expressly indicated by the issuing authority, unless they are contrary to the fundamental principles of law in the executing state.
30. JUSTICE has a number of concerns relating to these provisions. In relation to the first three formalities, the EEW goes significantly further than article 4 of the EU 2000 Convention. It removes the possibility for the executing state to refuse to comply, even where the requested formalities or procedures would be contrary to the fundamental principles of law in the executing state. At the time of drafting the EU 2000 Convention, member states acknowledged the necessity of guaranteeing compliance with each state's fundamental principles of law. The arguments for maintaining this explicit safeguard can be made with even more force today given the new basis of co-operation in accordance with the principle of mutual recognition. **All procedures or formalities carried out pursuant to a EEW – including any special requests - must therefore comply with the executing state's fundamental principles of law or be refused.**
31. The relationship between article 13 and article 12 is also problematic. Article 12 requires the executing state to ensure a EEW is executed in accordance with certain minimum conditions, including at article 12(1) that (a) the least intrusive means necessary are used to obtain the evidence; (b) a natural person shall not be required to produce evidence which may result in self incrimination; and, at article 12(2)(b) that where a search and seizure is necessary a person whose premises have been searched shall be entitled to receive written notification of the search. An article 13(a) request for the executing state to use coercive measures would therefore directly conflict with article

12(1)(a). In order to comply with article 12(1)(a), with the requirements of necessity and proportionality, and with the basic principle of mutual recognition that underpins this framework decision, the executing authority must execute a EEW in the same way as it would a domestic evidence warrant, using the least intrusive means necessary. **Wherever coercive measures are specifically required by the issuing state, this conflicts with the basic rules governing execution of a EEW and must only be carried out pursuant to an order by a judicial authority in the executing state.**

32. A contradiction is also apparent in article 13(b) on confidentiality, which could prevent the effective use of any legal remedies clause. It would also jeopardise the privilege against self-incrimination protected by article 12(1)(b) since this privilege relies on having been cautioned on the existence of an investigation or proceedings. The right in article 12(2)(b) to receive written notification of any search of premises that has been carried out, including the reason for the search, the objects, documents or data seized and the legal remedies available could also not be complied with where the issuing state requested the investigation be kept confidential under article 13.
33. **JUSTICE proposes the insertion into article 13 of the following human rights provisions, based on article 4(1) of the EU 2000 Convention:**
- (2) Where coercive measures are required under article 13(1)(a), these must only be carried out pursuant to an order by a judicial authority in the executing state.**
 - (3) Where the competent executing authority agrees to recognise and execute a European evidence warrant, the executing state shall comply with the special formalities and procedures expressly indicated by the issuing state, unless otherwise provided in this framework decision and subject to article 13(2) and (4).**
 - (4) Notwithstanding article 13(3) above, the executing authority shall refuse to comply with the special formalities and procedures requested by the issuing state where there are reasonable grounds to believe that such formalities and procedures would contravene the ECHR, notably the requirements of proportionality and necessity, or the fundamental principles of law in the executing member state.**

Grounds for non-recognition or non-execution¹⁰

34. The framework decision repeals the optional grounds for refusal in article 51 Schengen, namely double criminality and consistency with the law of the requested state, as well as article 2(b) of the 1959 Council of Europe Convention – where execution of a request is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of its country, and the limited form of the political offence exception still allowed pursuant to article 9 of the 2001 Protocol to the 2000 EU Convention on Mutual Assistance. Article 15(2) of the EEW only includes two optional grounds for non-recognition or non-execution. These are (a) double jeopardy with respect to proceedings in a third state and (b) where there is an immunity or privilege under the law of the executing state which makes it impossible to execute a EEW. The only mandatory ground for refusal under article 15 EEW is double jeopardy as defined by the EU framework decision on double jeopardy.¹¹

35. Although the framework decision on freezing orders does not include any mandatory grounds for non-recognition or non-execution, the European arrest warrant by contrast includes double jeopardy, the existence of an amnesty in the executing state and the age of criminal responsibility in the executing state. There does not seem to be any principled reason for distinguishing these provisions in the EEW (or the framework decision on freezing orders for that matter) from those in the European arrest warrant. **JUSTICE would support the addition to article 15 EEW of the following mandatory grounds for non-recognition or non-execution, modelled on article 3 of the European arrest warrant**

The competent judicial authority of the executing state shall oppose the recognition or execution of the European evidence warrant:

(a) If the offence in connection with which the European evidence warrant is issued is covered by an amnesty in the executing member state, where that state had jurisdiction to prosecute the offence under its own criminal law.

(b) If the person who is the subject of the criminal proceedings in connection with which the European evidence warrant is issued may not, owing to his age, be held criminally responsible for the acts on

¹⁰ Article 15 EEW.

¹¹ 16258/03 LIMITE DROIPEN 89 COMIX 780 20.1.2004

which the evidence warrant is based under the law of the executing state.

36. Unlike the framework decisions on the arrest warrant, confiscation orders and financial penalties, the EEW does not contain an optional ground for non-recognition or non-execution of a EEW on territorial grounds, that is where the offence was committed in part or in whole on its territory. JUSTICE proposes the addition of this further ground for non-recognition or non-execution on the basis of territoriality in the same terms as article 4(7) of the arrest warrant

The competent judicial authority of the executing state may oppose the recognition or execution of the European evidence warrant where it relates to offences which:

- (c) (i) **Are regarded by the law of the executing member state as having been committed in whole or in part in the territory of the executing member state or in a place treated as such; or**
- (ii) **have been committed outside the territory of the issuing member state and the law of the executing member state does not allow prosecution for the same offences when committed outside its territory.**

37. In addition, the protection offered by article 2(b) of the 1959 Council of Europe Convention, namely that a request may be refused 'where execution of a request is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of its country' should be preserved. This remains a vital protection and no justification has been offered for its removal.

38. Finally, JUSTICE advocates the addition of a mandatory 'human rights clause' that would oblige the executing state to refuse to recognise or execute a EEW where there are objective and reasonable grounds to suspect that the execution of the EEW would amount to a violation of a defendant's or third party's human rights. This would clarify, for implementation purposes, paragraph 19 of the EEW Preamble. An amendment could be modelled on article 21 of the UK Extradition Act 2003 which implements article 1(3) of the European arrest warrant, referred to above. The inclusion of such a provision would greatly enhance the certainty and consistency of implementation across the EU and, in turn, bolster the trust at the heart of mutual recognition. JUSTICE proposes a new article in the following terms:

The competent judicial authority of the executing state shall oppose the recognition or execution of the European evidence warrant

(d) Where there are objective and reasonable grounds to believe that recognition or execution of the European evidence warrant would be in contravention of the ECHR.

Data protection

39. According to paragraph 18 of the preamble, personal data processed under the EEW will be protected in accordance with the 1981 Council of Europe Convention¹² and article 23 of the 2000 EU Convention on Mutual Assistance in Criminal Matters¹³, as well as by article 10 EEW. Article 10 mirrors article 23 of the EU 2000 Convention and provides that personal data may be used by the issuing state for the purpose of (a) proceedings for which the EEW may be issued; (b) other judicial and administrative proceedings directly related to the proceedings referred to under point (a); (c) for preventing an immediate and serious threat to public security. Personal data may only be used for any other purpose with the prior consent of the executing state, unless the issuing state has obtained the consent of the data subject. Article 10 EEW differs from article 23 of the 2000 Convention in also allowing confidential personal data to be disclosed ‘for other reasons specified in national law’. **This last provision does not give adequate weight to an individual’s right to privacy and data protection, it is too vaguely worded and will create uncertainty for data subjects as well as for executing authorities that have to decide whether execution of a EEW will comply with article 8 ECHR and other national and international data protection standards. It should be deleted.**

40. JUSTICE also has specific concerns about the transmission of criminal records in the absence of EU-wide minimum standards on criminal records rules. If article 8 remains in subsequent drafts of the Commission proposal for a EEW, specific rules on the treatment of such records in the issuing member state must be established on the face of the EEW. The negotiations currently taking place between France, Germany and Spain to create a common criminal records network and the decision of the 22 other member states withhold their participation reflects the fact that the vast majority of member states agree that the sharing of such information is not appropriate at the present time.

¹² Council of Europe Convention For the Protection of Individuals with Regard to Automatic Processing of Personal Data, ETS No 108, entry into force 1 October 1985.

¹³ OJ C 197/1 12.7.2000

41. The executing state should, for example, be able to refuse to supply criminal records on the ground that the convictions are 'spent' (that is, no longer on the record by reason of the passage of time since the conviction, for example under the provisions of the Rehabilitation of Offenders Act 1974). It could not be argued that such a conviction would aid an inquiry or proceedings in the issuing state as the conviction would not have become spent unless a substantial period of time had passed since the conviction without the person having been subsequently convicted of another offence.

42. JUSTICE supports the insertion of a mandatory ground for refusal where execution would violate the national law or international obligations of the executing member state regarding transmission or other processing of personal data.

43. Additionally, the executing authority may make execution of a EEW conditional upon assurances by the issuing state that personal data will be protected after transmission to the same extent as in the executing state. To strengthen this provision, an amendment to article 10 EEW could be made as follows:

Article 10 – Conditions on the use of personal data

2A. The executing state shall seek guarantees from the issuing state that:

- (a) any data transmitted shall be subject in the issuing state to at least the same protection as applies under the law of the executing state;**
- (b) the data subject shall have at least the same rights in the issuing state regarding blocking, correction, deletion, access to the data transmitted as s/he would have under the law of the executing state;**
- (c) at least the legal rules relating to a criminal record in the executing state, for instance rehabilitation of offenders rules, shall apply in the issuing member state.**

Double Criminality

44. Removal of the double criminality requirement for requests for mutual assistance mirrors developments in extradition with the advent of the European arrest warrant. It is premised on trust in the equivalence of member states' criminal justice systems and assumes a common approach to the basic elements of criminality. JUSTICE's concerns outlined above in relation to the underlying premise of mutual recognition therefore apply with full force here. JUSTICE continues to have concerns about the removal of the double criminality requirement for a list of offences that are described in generic terms rather than being precisely defined and agreed by all member states. Legal certainty is damaged by member states' lack of knowledge of eachothers' laws and practices. This

uncertainty extends to the potential scope of what is being agreed each time the double criminality requirement is eroded. Moreover, the EEW proposal seeks to go further than the framework decisions on the arrest warrant, confiscation orders and freezing orders in relation to double criminality by (i) expanding the list of offences for which double criminality will be removed initially; (ii) dispensing with the three year penalty threshold; and (iii) proposing to abolish double criminality entirely after a maximum transitional period of five years.

45. Article 16(1) of the EEW abolishes the double criminality requirement where:
- (a) it is not necessary to carry out a search of private premises for the execution of the warrant; or
 - (b) the offence is included in the article 16(2) list
46. Article 16(a) reflects the present position under the 1959 COE Convention, and further restricted by article 51 Schengen, under which double criminality can only be imposed as a condition for co-operation with respect to search and seizure powers. JUSTICE is however concerned that the addition of the term 'private premises' could exclude searches of premises belonging to legal persons from this safeguard. A warrant requesting the search of such premises would not therefore be subject to the double criminality requirement, even where the search does not relate to an offence in the article 16(2) list. **Legal persons should not be excluded from the protection of the double criminality verification where coercive measures such as search and seizure are requested by a EEW, particularly where the concept of corporate liability could apply so that an individual could be prosecuted in criminal proceedings as a result of the search. JUSTICE therefore proposes that the words 'of private premises' be deleted from article 16(1)(a).**
47. The article 16(2) list covers the 39 types of offence listed in the draft framework decision on financial penalties. This, without explanation, extends the 32 offences agreed in article 2(2) of the European arrest warrant and reproduced in article 3(2) of the framework decision on freezing orders and article 5(1) of the framework decision on confiscation orders. **If double criminality is to be removed at all, a principled argument must be made for using the extended list in the framework decision on financial penalties along with the abolition of the sentencing threshold, rather than the rules of the other three measures agreed in this field.** This is reinforced by the relationship between the framework decision on freezing orders and the EEW, which makes it the most obvious model.

48. Given that the list identifies types of offence that will not be defined in the same way in all EU member states, and that an action challenging the substance of the warrant may only be brought in the issuing state, **the EEW form should include a full description of the nature and legal classification of any offence(s) for which the warrant is issued where the offence is classified as being within the list.** This will enable the executing authority to verify the issuing authority's classification and ensure the request is not fundamentally flawed or arbitrary in breach of the ECHR. At present, such description is only required for offences not covered by the list. Section B4 of Form A should be amended accordingly.
49. Penalty thresholds help to ensure that requests and orders are issued for similar – and serious - categories of offence across the EU. This is particularly important where requests and orders issued by 25 member states, all with vastly different criminal laws and procedures, are executed on the basis of mutual recognition. The double criminality safeguard is seen by the Commission as being incompatible with mutual recognition. The EEW carries previous inroads to this principle a step further by removing the obligation to meet any penalty threshold before the double criminality requirement is lifted.
50. JUSTICE is, however, concerned that at such an early stage in the development of the mutual recognition programme, before its implications are truly known, it is proposed to discard the three year penalty threshold considered essential in the context of the framework decisions on the arrest warrant, confiscation orders and freezing orders. Given the vast disparities in criminal law across the EU, a penalty threshold increases the likelihood that such offences are sufficiently seriously punished to warrant the removal of double criminality in all member states. **JUSTICE therefore considers that a three-year penalty threshold should be a pre-condition for removal of the double criminality requirement in respect of the EEW.**
51. Finally, JUSTICE questions the need to abolish the double criminality requirement entirely after a maximum transition period of five years, as proposed by the EEW. **This is not envisaged by any of the other framework decisions in this field and JUSTICE considers such a move premature.**

Legal remedies

52. Article 19(1) requires member states to

make the necessary arrangements to ensure that any interested party, including bona fide third parties, have legal remedies against a European Evidence Warrant executed pursuant to article 11 using coercive measures, in order to preserve their legitimate interests.

53. As a preliminary point, JUSTICE opposes the limitation in article 19 EEW of legal remedies to coercive measures. A EEW may be used to obtain property and personal data, even where it is not executed by coercive means. These decisions may nonetheless infringe individual rights and may be challenged under the ECHR and the 1981 Data Protection Convention. **References to 'coercive measures' in article 19 should be deleted so that its provisions will apply to all measures executed pursuant to a EEW.**
54. Article 19(3) requires the issuing state to ensure that time limits for bringing an action envisaged under paragraphs (1) and (2) are applied in a way that guarantees an effective legal remedy for interested parties. Article 19(5) requires the issuing and executing authorities to facilitate actions under paragraph (1), in particular by providing relevant and adequate information to interested parties. **Access to such information will be vital in order to bring an effective legal action under both paragraphs (1) and (2). Article 19(5) must not therefore be limited in this way to paragraph (1) only.**
55. Actions brought under article 19 will be carried out in accordance with the national law of the member state where the legal remedy is sought. Under article 19(2), however, the substantial reasons for issuing the EEW, including whether the criteria in article 6 have been met, namely (a) whether it meets the conditions of necessity and proportionality; (b) that the objects, data or documents could be obtained in similar circumstances in the issuing state even though different procedural measures might be used; and (c) that the objects, data or documents are likely to be admissible in the issuing state, may only be challenged in the issuing state. This will exclude the executing authority from considering factors that will often be determinative of whether the ECHR has been complied with. **Scrutiny of article 6 EEW will therefore be vital to fulfil the human rights clauses proposed by JUSTICE in paragraphs 17, 33 and 37 above.**
56. Persons affected by a EEW are likely to face substantial financial, linguistic and technical difficulties in challenging a EEW abroad. This is precisely an area where rapid application of the mutual recognition principle before common safeguards have been

developed may prejudice the rights of the defence. To ensure these rights are safeguarded and do not suffer from mutual recognition, JUSTICE recommends the insertion of the following clauses into article 19, based substantially on article 11 of the European arrest warrant:

5A. A person whose legitimate interests are affected by the execution of a European evidence warrant shall have a right to be assisted by a legal counsel and by an interpreter.

5B. Legal aid shall be made available in accordance with the national law of the executing member state for any legal action brought under article 19.

57. Where a legal remedy is being pursued, article 19(6) permits the executing state to suspend the transfer of objects, data or documents pending the outcome of that legal remedy. However, the issuing state may require the executing state to transfer the documents, data or objects 60 days after the execution of the EEW despite the existence of a legal remedy. The transfer of documents or objects may affect legitimate commercial interests for example which would not be adequately protected by this provision. **JUSTICE proposes that the latter part of article 19 be deleted so that transfer would be suspended until the legal remedy is complete.**

Equality of arms

58. Given that significant barriers to prosecution are removed by measures such as the EEW, on the basis of mutual recognition, JUSTICE is concerned to protect the principle of equality of arms. As presently drafted, it is not clear whether a defendant could apply to a competent judicial authority asking him/her to issue a EEW. If there is to be no procedure by which a defence team could obtain evidence as effectively as could a prosecutor under the EEW, then the principle of equality of arms will clearly be breached. What, for example, will be the position where a defendant wishes to obtain evidence from a member state in order to rebut evidence that has been obtained by the prosecution under the EEW? Whilst (presumably) the existing mutual legal assistance provisions would still be open to the defence, these are much less effective and expeditious than the procedure under the EEW. As presently worded, the EEW does not prevent the defence from applying for a EEW. However, JUSTICE would amend the text of the EEW proposal to ensure member states' implementing legislation includes provisions according to which the defence can make an application to a judicial authority. An appropriate amendment could be made to article 1 as follows:

1. The European evidence warrant is a judicial decision issued by a competent authority of a Member State *on behalf of either the prosecution or the*

defence with a view to obtaining objects, documents and data from another Member State for use in proceedings referred to in Article 4.

59. Under article 17, unless a legal remedy is underway in accordance with Article 19, the executing state is obliged to transfer the documents, data or objects to the issuing state immediately, or within 30 days of the execution of the EEW. Under article 19(6), even when a legal remedy is being pursued in the executing state the issuing authority may require the executing state to transfer the objects, documents or data within 60 days. These provisions do not adequately deal with the position where the defence need to have access to the objects etc before they are returned (for example to have them examined by a defence forensic scientist). At present there is no provision in the EEW to allow the executing state to suspend transfer until this has been done.

Record keeping

60. Keeping a detailed and accurate record of who has handled documents, data or objects obtained pursuant to a EEW is essential to protect the right to challenge the way in which such evidence was obtained. It will also be vital where documents, data or objects have been illegally transferred and must be returned or deleted. The EEW presently allows the issuing state to request that a record of who has handled the evidence be kept by the executing state. **JUSTICE considers this should be compulsory every time a EEW is executed and would insert such a requirement into article 12(1).**

Jurisdiction issues associated with computer data

61. Documents and data held electronically are likely to account for a large proportion of cases. Jurisdictional issues may occur where a request is made to a member state where the customer is located but the information is held on a server in a third member state¹⁴. The framework decision proposes to allow requested states to execute a EEW in this situation without the need to obtain agreement from the third member state¹⁵.

62. That this will permit data and other human rights protections in the third member state to be circumvented. In the absence of harmonisation of data protection laws to a high standard, such a proposal is premature and may also infringe article 8 ECHR. **JUSTICE would therefore urge that further consideration be given to the harmonisation of**

¹⁴ Para 13 and article 21 EEW.

¹⁵ This goes further than article 18 of the Council of Europe Cybercrime Convention 2001.

such laws and to common rules establishing jurisdiction before applying the principle of mutual recognition to this field.

JUSTICE

March 2004 (updated July 2004)