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to : Coreper/Council

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Subject : Proposal for a Council Framework Decision on the European Evidence Warrant (EEW) for obtaining objects, documents and data for use in proceedings in criminal matters

I INTRODUCTION

The JHA Council examined at its meeting on 27 and 28 April 2006 the list of offences in Article 16(2) of the above proposal and the exclusion from the scope of the EEW of telecommunications data provided in Article 3(2)(e) of the proposal.

The Article 36 Committee examined at its meeting on 16 and 17 May 2006 outstanding questions regarding territoriality (Article 15(2)(c) and (2b)) and re-examined the issue of the list of offences.

The Presidency submits in the present document all the outstanding questions to Coreper and Council with a view to adopting a general approach on the draft (with the exception of the recitals and the certificate to be annexed to the Framework Decision) on the basis of a compromise package at the JHA Council on 1 and 2 June 2006.

The outstanding questions are set out under II below. The draft Framework Decision resulting from proceedings is set out in Annex I. Presidency proposals concerning territoriality and the list of offences are set out in Annex II. Annex III contains a proposal [REDACTED] concerning legal remedies.

The European Parliament delivered its opinion on the draft on 31 March 2004.

The draft is subject to parliamentary scrutiny reservations by some delegations.

II OUTSTANDING QUESTIONS

1. Territoriality (Article 15(2)(c))

The original proposal by the Commission did not provide for any territoriality clause. However, the Council agreed at its meeting on 24 February 2005 in principle to include a territoriality clause. This was part of an agreement to include a derogation from double criminality for the 32 categories of offences listed in Article 16(2). Discussions have since focused on the exact wording and scope of the territoriality clause.

Without prejudice to general scrutiny reservations by a number of delegations, the following conclusions were drawn at the Article 36 Committee:

- Delegations could in principle accept points 1 and 2 of item A of Annex II as a starting point. This text implies that the territoriality clause may be applied as a ground for refusal of an EEW where the offence concerned has been committed wholly or partly in the territory of the executing State, but that the decision to refuse must be taken on a case by case basis.
 - = [REDACTED] called for the addition of a text implying that the executing State may provide for automatic refusal where there is no double criminality and coercive measures would be necessary for the execution of the EEW. This addition was met with objections from some delegations (in particular [REDACTED])
- Concerning point 3 of item A, a large majority could accept the inclusion of the principle of reciprocity. The text implies that any Member State implementing the ground for refusal based on the principle of territoriality must declare that. Member States which have made no declaration may apply the principle of reciprocity in relation to Member States which have made a declaration.

- = [REDACTED] entered scrutiny reservations on the inclusion of the principle of reciprocity.
- = Based on comments made, the text now provides that Member States in order to use the principle of reciprocity would need to make a declaration to that effect (see Article 25(2b)).
- The declaration under point 4 of item A, which was proposed by [REDACTED], was generally acceptable to delegations.
- Under point 5, the Presidency has in the light of comments made by [REDACTED] proposed a recital.

Coreper/Council is invited to agree on the Presidency proposal set out under points 1 to 5 under item A of the Annex.

2. Definitions of offences (Article 16(2))

Having in mind that it had not been possible to reach agreement in the Council on the basis of the Presidency proposal for a Council statement set out in 8086/2/06 REV 2 COPEN 34 + REV 2 ADD 1, the Article 36 Committee discussed at its meeting on 16 and 17 May 2006 alternatives 1 and 2 set out under item B of Annex I.

The first alternative is based on the approach that the question of the definition of offences is a horizontal issue, which relates not only to the Framework Decision on the EEW, but also to other Framework Decisions in the field of mutual recognition of judicial decisions in criminal matters. Consequently, it should be addressed in a horizontal way, but should not delay the adoption of the EEW. Under this alternative, the Presidency proposal put to the Council would be retained (Retention of Article 16(2) and introduction of a Council statement recommending Member States as issuing States to respect certain minimum core criteria regarding 6 categories of offences). In addition, a Council statement would provide that the Council would examine the horizontal issue of the definition of offences at a later stage on the basis of a report to be prepared by the relevant bodies of the Council.

This alternative was in its present form not acceptable to [REDACTED].

The second alternative provides for the integration of the definitions of the 6 categories of offences concerned in the EEW Form. It is based on the assumption that ■ agrees that if the proposed definitions for 6 categories of offences became binding, it would still be exclusively up to the issuing State to decide whether the offence on which the EEW is based falls within the definition of the offence category concerned. If the issuing State has ticked the box for an offence category it thereby declares that the offence concerned falls under the definition of that category. The executing State can not review that.

■ would be prepared to discuss this option further. However, the other delegations could not accept it. Some delegations thought this approach could spark of a discussion on reciprocity.

In the light of discussions so far, ■ thought that a way forward to allow for the adoption of the EEW in a not too distant future could be to provide for some kind of opt out clause for ■. Having in mind that consensus could not be obtained on the basis of alternative 1 or 2, the Presidency has as a third alternative under item B of Annex II suggested such an opt out clause. The clause proposed would imply that ■, at the time of adoption of the Framework Decision, by a declaration could limit its application of Article 16(2) regarding the 6 categories of offences concerned for a period of 5 years. ■ would be able to refuse an EEW in cases involving one of the 6 categories of offences, provided that search or seizure would be necessary for the execution of the EEW and that the offence in the specific case is not punishable in ■. However, this would not apply where the issuing authority has declared that the offence concerned falls within the scope of the definition of the relevant category of offences. If this approach is retained the experts will need to look at its practical implementation.

Coreper/Council is invited to examine if one of the above proposed solutions may form the basis for a compromise.

3. Telecommunications and electronic data (Article 3(2)(e))

■ maintained at the meeting of the JHA Council on 27 and 28 April 2006 its proposal for the deletion of Article 3(2)(e), and thereby the inclusion of telecommunications data in the scope of the EEW.

Coreper/Council is invited to agree on the text as set out in Article 3(2)(e) in Annex I.

4. Legal remedies (Article 19 - Article 6)

■ has maintained a reservation on the provisions on legal remedies in Article 19.

■ has argued that there must be a guarantee for the availability in the issuing State of legal remedies against the substantive reasons for issuing an EEW.

Regarding legal remedies against the substantive reasons for issuing an EEW in the executing State, ■ believed that the applicability in the executing State of fundamental rights and principles as enshrined in Article 6 TEU should be made explicit in Articles 6 and 19(2) by the introduction in these provisions of a reference to Article 1(3). Finally, ■ thought that legal remedies in the executing State against the substantive reasons for issuing the EEW should not be excluded in relation to bona fide third parties ■ has on these issues made the proposals set out in Annex III.

Concerning legal remedies in the issuing State, the majority of delegations agreed that existing legal remedies against national decisions for obtaining evidence should apply also in relation to EEW's (the principle of assimilation). However, the majority of delegations could not accept to create new legal remedies specific to the issuing of an EEW. This has been reflected in the following Recital:

"Each Member State has in its law legal remedies available against the substantive reasons underlying decisions for obtaining evidence, including whether the decision is necessary and proportionate, although those remedies may differ between Member States and may apply at different stages of proceedings."

Coreper/Council is invited to agree on Articles 6 and 19 as set out in Annex I and the above Recital.

5. Essential national security interests (Article 15(2)(e))

The Presidency proposes the following revised Recital in relation to Article 15(2)(e):

"It should be possible to refuse to recognize or execute an EEW to the extent that execution would harm essential national security interests, jeopardise the source of the information or involve the use of classified information relating to specific intelligence activities; however, it is accepted that such a ground for non-recognition or non-execution would be applied only where, and to the extent that, the objects, documents or data would not be used for those reasons as evidence in a similar domestic case".

■ has maintained a scrutiny reservation on Article 15(2)(e) and the Recital.

Coreper/Council is invited to agree on Article 15(2)(e) as set out in Annex I and the above Recital.

6. Other outstanding questions

Some delegations have entered parliamentary scrutiny reservations on the draft.

The following points set out in footnotes in Annex I and not dealt with under points 1-5 above have been maintained

- ■ scrutiny reservation on Article 2(d)
- ■ waiting reservation on Article 3
- ■ suggestions in relation to Article 7(1)
- ■ scrutiny reservation on Title III
- ■ proposal on Article 13
- ■ reservation in relation to on Article 15(2)(a) - ne bis in idem
- ■ scrutiny reservation on Article 15(3)
- ■ reservation on the deletion of Article 21.

Delegations are invited to lift the above reservations.

TITLE I – THE EUROPEAN EVIDENCE WARRANT¹²*Article 1**Definition of the European Evidence Warrant and obligation to execute it*

1. The European Evidence Warrant is a judicial decision issued by a competent authority of a Member State with a view to obtaining objects, documents and data from another Member State for use in proceedings referred to in Article 4.
2. Member States shall execute any European Evidence Warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.
3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union, and any obligations incumbent on judicial authorities in this respect shall remain unaffected.

*Article 2**Definitions*

For the purposes of this Framework Decision,

- (a) "issuing State" shall mean the Member State in which the European Evidence Warrant has been issued.
- (b) "executing State" shall mean the Member State in whose territory the objects, documents or data are located or, in the case of electronic data, directly accessible under the law of the executing State.

¹ The preamble and the Form annexed to the draft have not been reproduced and will be examined at a later stage. It has been agreed that the preamble will include a Recital corresponding to Recital 6 of the Framework Decision on the execution in the European Union of orders freezing property or evidence (fundamental rights etc.).

² Changes to the text are underlined or otherwise indicated as compared with previous texts.

- (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 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.
- (d) "executing authority" shall mean an authority with competence under the national law which implements this Framework Decision¹ to recognise or execute a European Evidence Warrant.
- (dd) ² "search or seizure" shall include any measures under criminal procedure as a result of which a legal or natural person is required, under legal compulsion, to provide or participate in providing objects, documents or data and, if not complied with, may be enforceable without the consent of the such a person or it may result in a sanction.

Article 2a

Determination of the competent authorities

1. Each Member State shall inform the General Secretariat of the Council which authority or authorities, under its national law, are competent according to Article 2(c) and (d) when that Member State is the issuing State or the executing State.
- 1a. Member States wishing to make use of the possibility to designate a central authority or authorities in accordance with Article 7(1a) shall communicate to the General Secretariat of the Council information relating to the designated central authority(ies). These indications shall be binding upon the authorities of the issuing State.

¹ ■ scrutiny reservation. ■ believe that the text should not require a distinction in national law between authorities competent to execute national and international decisions for obtaining evidence.

² The following Recital related to Article 2(dd) is introduced:
"The definition of the term "search or seizure" in Article 2(dd) has been introduced only for the purpose of the present Framework Decision and shall not be invoked for the application of any other instrument applicable between Member States of the European Union, in particular the Council of European Convention on mutual assistance in criminal matters of 20 April 1959, and the instruments which supplement it."

2. The General Secretariat of the Council shall make the information received available to all Member States and the Commission.

Article 3¹

Scope of the European Evidence Warrant

1. Without prejudice to paragraph 2, the European Evidence Warrant may be issued under the conditions referred to in Article 6 with a view to obtaining in the executing State objects, documents or data needed in the issuing State for the purpose of proceedings referred to in Article 4. The European Evidence Warrant covers the objects, documents and data specified therein.
- 2.² The European Evidence Warrant shall not be issued for the purpose of requiring the executing authority to:
- (a) conduct interviews, taking statements or initiating other types of hearings involving suspects, witnesses, experts or any other party;
 - (b) carry out bodily examinations or obtain bodily material or biometric data directly from the body of any person, including DNA samples or fingerprints;
 - (c) obtain information in real-time such as through the interception of communications, covert surveillance or monitoring of bank accounts; and
 - (d) conduct analysis of existing objects, documents or data.
 - (e) obtain communications data retained by providers of a publicly available electronic communications service or a public communications network.³
- 2a. Exchange of information on criminal convictions extracted from the criminal record shall be carried out in accordance with Council Decision [2005/x/JHA] and other relevant instruments.

¹ Waiting reservation by [REDACTED] (linked with discussions on Article 15).

² The introduction of the following recital in relation to Article 3(2) has been agreed:
"This Framework Decision is adopted under Article 31 TEU and therefore concerns judicial co-operation within the context of that provision, aiming to assist the collection of evidence for proceedings as defined in Article 4. Although authorities other than judges, courts, magistrates and public prosecutors may have a role in the collection of this evidence according to the second indent of Article 2(c), the scope of this instrument does not cover police, customs, border and administrative co-operation which are regulated by other provisions of the Treaties."

³ See point II.3 of the cover note.

3. The European Evidence Warrant may be issued with a view to obtaining objects, documents or data falling within paragraph 2, where the objects, documents or data are already in the possession of the executing authority prior to the issuing of the warrant.
- 4a. Notwithstanding paragraph 1, the European Evidence Warrant shall if so indicated by the issuing authority, also cover any other object, document or data, which the executing authority discovers during the execution of the warrant and without further enquiries considers to be relevant to the proceedings for the purpose of which the warrant was issued.
- 4b. Notwithstanding paragraph 2, the European Evidence Warrant may, if requested by the issuing authority, also cover taking statements of persons present during the execution of the European Evidence Warrant and directly related to the subject of the European Evidence Warrant. The relevant rules of the executing State applicable to national cases shall also be applicable in respect of the taking of such statements.

Article 4

Type of proceedings for which the European Evidence Warrant may be issued

The European Evidence Warrant may be issued:

- (a) with respect to criminal proceedings brought by, or to be brought before, a judicial authority in respect of a criminal offence under the national law of the issuing State; and
- (b) in proceedings brought by administrative authorities in respect of acts which are punishable under the national law of the issuing 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) in proceedings brought by judicial authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law, and where the decision may give rise to further proceedings before a court having jurisdiction in particular in criminal matters; and
- (d) in connection with proceedings referred to in paragraphs (a), (b) and (c) which relate to offences or infringements for which a legal person may be held liable or sanctioned in the issuing State.

Article 5¹

Content and form of the European Evidence Warrant

1. The European Evidence Warrant set out in Form A in the Annex must be completed, signed, and its contents certified as accurate, by the issuing authority.
2. The European Evidence Warrant shall be put in, or translated by the issuing State into, the official language or one of the official languages of the executing State.

Any Member State may, when this Framework Decision is adopted or at a later date, state in a declaration deposited with the General Secretariat of the Council that it will accept Warrants or a translation of a Warrant in one or more other official languages of the Institutions of the European Communities.

TITLE II – PROCEDURES AND SAFEGUARDS FOR THE ISSUING STATE

Article 6

Conditions for issuing the European Evidence Warrant

Each Member State shall take the necessary measures to ensure that the European Evidence Warrant is issued only when the issuing authority is satisfied that the following conditions have been met:

- (a) the objects, documents or data sought are necessary and proportionate for the purpose of proceedings in Article 4.
- (b) the objects, documents or data 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.

¹ To be accompanied by a Council Declaration to read: "The Council declares that for the purpose of the operation of the EEW, Member States shall consider making declarations under Article 5(2) at least reflecting existing agreements on translations of requests for mutual assistance in criminal matters". The Presidency notes that this is not an obligation but a strong recommendation to make a declaration.

These conditions shall be assessed only in the issuing State in each case.^{1 2}

Article 7

Transmission of the European Evidence Warrant

- 1 The European Evidence Warrant may be transmitted to the competent authority of a Member State in which the competent authority of the issuing State has reasonable grounds to believe that relevant objects, documents or data are located or, in the case of electronic data, directly accessible under the law of the executing State³. It shall be transmitted without delay from the issuing authority to the executing authority by any means capable of producing a written record under conditions allowing the executing State to establish authenticity. All further official communications shall be made directly between the issuing authority and the executing authority.
- 1a. 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 European Evidence Warrant as well as for other official correspondence relating thereto.

¹ The last subparagraph of Article 6 will be accompanied by a Recital to read as follows: "An EEW should only be issued where the objects, documents or data sought are necessary and proportionate for the purpose of the criminal or other proceedings concerned. In addition, an EEW should only be issued where the object, documents or data concerned could be obtained under the national law of the issuing State in a comparable case. The responsibility for ensuring compliance with these conditions should lie with the issuing authority. The grounds for non-recognition or non-execution should therefore not cover these matters".

² See point II.4 of the cover note.

³ Text agreed at the Article 36 Committee on 15-16 November 2005 with a recital to state that the executing State would only have to execute the EEW for data not located in the executing State to the extent possible under its law.

■ has proposed a Recital to read: "Article 7 does not prejudice the extent to which a Member State, considering the principle of sovereignty, is entitled to provide electronic data stored in the territory of another Member State."

- 1b. If the issuing authority so wishes, transmission may be effected via the secure telecommunications system of the European Judicial Network.
2. If the executing authority is unknown, the issuing authority shall make all necessary inquiries, including via the contact points of the European Judicial Network, in order to obtain the information from the executing State.
3. When the authority in the executing State which receives the European Evidence Warrant has no jurisdiction to recognise it and to take the necessary measures for its execution, it shall, *ex officio*, transmit the European Evidence Warrant to the executing authority and shall so inform the issuing authority.
4. All difficulties concerning the transmission or the authenticity of any document needed for the execution of the European Evidence Warrant shall be dealt with by direct contacts between the issuing and executing authorities involved, or, where appropriate, with the involvement of the central authorities of the Member States.

Article 8
*[deleted]*¹

¹ Article 8 concerned the designation by each Member State of a central criminal records authority. The provision has been deleted in the light of the proposal of the Commission for a Council Decision on the exchange of information extracted from the criminal record.

Article 9¹

European Evidence Warrant related to an earlier warrant or a freezing order

1. Where the issuing authority issues a European Evidence Warrant which supplements an earlier European Evidence Warrant or which is a follow up to a freezing order transmitted under the Framework Decision on the execution of orders freezing property or evidence, it shall indicate this fact in the European Evidence Warrant in accordance with the Form referred to in Article 5(1).
2. Where, in accordance with the provisions in force, the issuing authority participates in the execution of the warrant in the executing State, it may without prejudice to declarations made under Article 2a(1a) address a European Evidence Warrant which supplements the earlier warrant directly to the competent executing authority while present in that State.

Article 10²

Conditions on the use of personal data

1. Personal data obtained under this Framework Decision may be used by the issuing State for the purpose of:
 - (a) proceedings for which the European Evidence Warrant 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.

¹ The Form referred to in Article 5(1) shall provide an appropriate box for indicating that the EEW was a follow-up to an earlier EEW or to a freezing order.

² Article 10(1), (3) and (4) have been based on Article 23 of the 2000 Convention.

For any purpose other than those set out in points (a), (b) and (c), personal data obtained under this Framework Decision can be used only with the prior consent of the executing State, unless the issuing State has obtained the consent of the data subject.

2. (...) ¹
3. In the circumstances of the particular case, the executing State may require the Member State to which the personal data have been transferred to give information on the use made of the data.
4. This Article does not apply to personal data obtained by a Member State under this Framework Decision and originating from that Member State.

TITLE III – PROCEDURES AND SAFEGUARDS FOR THE EXECUTING STATE ²

Article 11

Recognition and execution

1. The executing authority shall recognise a European Evidence Warrant, transmitted in accordance with Article 7, without any further formality being required and shall forthwith take the necessary measures for its execution in the same way as the objects, documents or data would be obtained by an authority of the executing State, unless that authority decides to invoke one of the grounds for non-recognition or non-execution provided for in Article 15 or one of the grounds for postponement provided for in Article 18.

¹ The following Council Declaration has been agreed: "The Council declares that upon the entry into force of a future Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters, the Council will consider whether that Framework Decision should replace Article 10 of the current Framework Decision establishing the European Evidence Warrant. Article 10 therefore includes only those provisions of the original text submitted by the Commission that repeat existing provisions in Article 23 of the EU 2000 Convention on Mutual Assistance in Criminal Matters."

² General scrutiny reservations by [REDACTED] on Title III.

- 1a. The executing State shall be responsible for choosing the measures which under its national law will ensure the provision of the objects, documents or data sought by a Warrant and deciding whether it is necessary to use coercive measures to provide that assistance. Any measures rendered necessary by the European Evidence Warrant shall be taken in accordance with the applicable procedural rules of the executing State.
- 1b. Each Member State shall ensure:
- that any measures which would be available in a similar domestic case in the executing State are also available for the purpose of the execution of the EEW;
and
 - that measures, including search or seizure are available for the purpose of the execution of the EEW where it is related to any of the offences as set out in Article 16(2).
2. If the issuing authority is not a judge, a court, an investigating magistrate or a public prosecutor and the European Evidence Warrant has not been validated by one of the said 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 European Evidence Warrant. Before so deciding the executing authority shall consult the competent authority of the issuing State.
3. A Member State may, at the time of adoption of the 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.

Article 12¹

[Deleted]

Article 13

Formalities to be followed in the executing State

The executing authority shall comply with the formalities and procedures² 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 law³ of the executing State. This Article shall not create an obligation to take coercive measures.

Article 14

[Deleted]

Article 15

Grounds for non-recognition or non-execution

1. (...) ⁴.

¹ The content of Article 12(1)(a) (an executing authority shall use the least intrusive means necessary to obtain the objects, documents or data") shall be included in a Recital.

² The following Recital will accompany this provision:
"It should be possible, if its national law so provides in transposing Article 13, for the issuing State to ask the executing State to follow specified formalities and procedures in respect of legal or administrative processes which might assist in making the evidence sought admissible in the issuing State, for example the official stamping of a document, the presence of a representative from the issuing State, or the recording of times and dates to create a chain of evidence. Such formalities and procedures should not encompass coercive measures."

³ ■ proposed to word the texts as follows: "...fundamental principles of law and procedural guarantees in the national law of the executing State..."

⁴ ■ agreed to the deletion of the reference to the draft Framework Decision on ne bis in idem as that instrument was unlikely to be adopted before the adoption of the EEW. But ■ pointed out that paragraph 2, point (a), only gave a possibility to refuse, and entered a reservation as it thought that there should be an obligation to refuse in case of ne bis in idem with respect to proceedings in another EU Member State.

2. The recognition or execution of the EEW may be refused in the executing State:

- (a) if its execution would infringe the *ne bis in idem* principle; or
- (aa) if, in cases referred to in Article 16(3), the EEW relates to acts which would not constitute an offence under the law of the executing State; or
- (aaa) if it is not possible to execute the EEW by any of the measures available to the executing authority in the specific case in accordance with Article 11(1b); or
- (b) if there is an immunity or privilege under the law of the executing State which makes it impossible to execute the European Evidence Warrant¹; or
- (bb) if, in one of the cases referred to in Article 11(2) or (3), the European Evidence Warrant has not been validated; or
- (c)² if the European Evidence Warrant relates to criminal offences which:
 - under the law of the executing State are regarded as having been committed wholly or partly within its territory, or in a place equivalent to its territory, or
 - 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; or

¹ The following Recital related to Article 15(2)(b) is introduced:

"It should be possible to refuse an EEW where the recognition or execution of it in the executing State would involve breaching an immunity or privilege in that State. There is no common definition of what constitutes an immunity or privilege in the EU and the precise definition of these terms is therefore left with national law, which may include protections which apply to medical and legal professions, but should not be interpreted in a way which would be in contradiction with the obligation to abolish certain grounds for refusal in Article 7 of the 2001 Protocol to the 2000 Convention on mutual assistance in criminal matters between the Member States of the European Union."

² See point II.1 of the cover note.

- (d) (...)
- (e) if in a specific case its execution would harm essential national security interests; jeopardize the source of the information; or involve the use of classified information relating to specific intelligence activities.¹
- (f) if the form provided for in the Annex is incomplete or manifestly incorrect and has not been completed or corrected within a [reasonable] deadline set by the executing authority.
- 2a. The decision to refuse the execution or recognition of the EEW pursuant to paragraph 2 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), second indent, 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.
3. In cases referred to in paragraph 2(a), (e)² and (f), before deciding not to recognize or not to execute an EEW, 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.

Article 16³

Double criminality

1. The recognition or execution of the European Evidence Warrant shall not be subject to verification of double criminality unless it is necessary to carry out a search or seizure.

¹ See point II.5 of the cover note.

² Scrutiny reservation [REDACTED] on the reference to paragraph 2(e).

³ See point II.2 of the cover note.

2. If it is necessary to carry out a search or seizure for the execution of the warrant, the following offences, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and¹ as they are defined by the law of that State, shall not be subject to verification of double criminality under any circumstances:

- participation in a criminal organisation,
- terrorism,
- trafficking in human beings,
- sexual exploitation of children and child pornography,
- illicit trafficking in narcotic drugs and psychotropic substances,
- illicit trafficking in weapons, munitions and explosives,
- corruption,
- fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests,
- laundering of the proceeds of crime,
- counterfeiting currency, including of the euro,
- computer-related crime,
- environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties,
- facilitation of unauthorised entry and residence,
- murder, grievous bodily injury,
- illicit trade in human organs and tissue,
- kidnapping, illegal restraint and hostage-taking,
- racism and xenophobia,
- organised or armed robbery,
- illicit trafficking in cultural goods, including antiques and works of art,
- swindling,

¹ Penalty threshold adopted by the JHA Council on February 24, 2005.

- racketeering and extortion,
- counterfeiting and piracy of products,
- forgery of administrative documents and trafficking therein,
- forgery of means of payment,
- illicit trafficking in hormonal substances and other growth promoters,
- illicit trafficking in nuclear or radioactive materials,
- trafficking in stolen vehicles,
- rape,
- arson,
- crimes within the jurisdiction of the International Criminal Court,
- unlawful seizure of aircraft/ships,
- sabotage.

3. If the European Evidence Warrant is not related to any of the offences as set out in Article 16(2) and its execution would require a search or seizure recognition or execution of the European Evidence Warrant may be subject to the condition of double criminality.

In relation to offences in connection with taxes or duties, customs and exchange, recognition or execution may not be opposed on the ground that the law of the executing State does not impose the same kind of tax or duty or does not contain a tax, duty, customs and exchange regulation of the same kind as the law of the issuing State.

4. The condition of double criminality set forth in paragraph 3 shall be further examined by the Council five years after the entry into force of this Framework Decision in the light of any information transmitted to the Council.
5. The Council may decide, acting unanimously, after consultation of the European Parliament under the conditions laid down in Art. 39 (1) of the TUE, to add other categories of offences to the list contained in paragraph 2.

Article 17

Deadlines for recognition, execution and transfer

1. Each Member State shall take the necessary measures to ensure compliance with the deadlines provided for in this Article. Where the issuing authority has indicated in the European Evidence Warrant that, due to procedural deadlines or other particularly urgent circumstances, a shorter deadline is necessary, the executing authority shall take as full account as possible of this requirement.
2. Any decision to refuse recognition or execution must be taken as soon as possible and, without prejudice to paragraph 3bis, no later than 30 days after the receipt of the European Evidence Warrant by the competent executing authority.
3. Unless either grounds for postponement under Article 18 exist 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 without delay and, without prejudice to paragraph 3bis, no later than 60 days after the receipt of the European Evidence Warrant by the competent executing authority.
- 3bis. When it is not practicable in a specific case for the competent executing authority to meet the deadline in paragraph 2 or paragraph 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.
4. Unless a legal remedy is underway in accordance with Article 19 or grounds for postponement under Article 18 exist, the executing State shall without undue delay transfer the objects, documents or data obtained under the European Evidence Warrant to the issuing State.
5. When transferring the objects, documents or data obtained, the executing authority shall indicate whether it requires that they shall be returned to the executing State as soon as they are no longer required by the issuing State.

Article 18

Grounds for postponement of recognition or execution

1. The recognition of the EEW may be postponed in the executing State where:
 - (a) the form provided for in the Annex is incomplete or manifestly incorrect, until such time as the form has been completed or corrected; or
 - (b) in one of the cases referred to in Article 11(2) or (3), the European Evidence Warrant has not been validated, until such time as the validation has been given;
2. The execution of the EEW may be postponed in the executing State where:
 - (a) its execution might prejudice an ongoing criminal investigation or prosecution, until such time as it deems reasonable; or
 - (b) the objects, documents or data concerned are already being used in other proceedings until such time as they are no longer required for this purpose.
3. The decision to postpone recognition or execution of the EEW pursuant to paragraphs 1 or 2 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), second indent, 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.
4. As soon as the ground for postponement has ceased to exist, the executing authority shall forthwith take the necessary measures for the execution of the European Evidence Warrant and inform the relevant competent authority in the issuing State thereof by any means capable of producing a written record.

Article 18bis
Obligation to inform

The executing authority shall inform the issuing authority:

(1) immediately by any means:

- (a) if the executing authority, in the course of the execution of the European Evidence Warrant, considers without further enquiries that it may be appropriate to undertake investigative measures not initially foreseen, or which could not be specified when the warrant was issued, in order to enable the issuing authority to take further action in the specific case;
- (b) if the competent authority of the executing State establishes that the warrant was not executed in a manner consistent with the law of the executing State;
- (c) if the executing authority establishes that, in the specific case, it cannot comply with formalities and procedures expressly indicated by the issuing authority in accordance with Article 13.

Upon request by the issuing authority, the information shall be confirmed without delay by any means capable of producing a written record.

(2) without delay by any means capable of producing a written record:

- (a) of the transmission of the European Evidence Warrant to the competent authority responsible for its execution, according to Article 7(3);
- (b) of any decision taken in accordance with Article 17(2) to refuse recognition or execution of the European Evidence Warrant, together with the reasons for the decision;
- (c) of the postponement of the execution or recognition of the European Evidence Warrant, the underlying reasons and, if possible, the expected duration of the postponement;
- (d) of the impossibility to execute the European Evidence Warrant for the reason that the objects, documents or data have disappeared, have been destroyed, cannot be found in the location indicated in the warrant or of the fact that the location of the objects, documents or data has not been indicated in a sufficiently precise manner, even after consultation with the competent authority of the issuing State.
- (e)

Article 19¹
Legal remedies

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 a European Evidence Warrant 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 European Evidence Warrant 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.
2. The substantive reasons for issuing the European Evidence Warrant, including whether the criteria in Article 6 have been met, may be challenged only in an action brought before a court in the issuing State. The issuing State shall ensure the applicability of legal remedies which are available in a comparable domestic case.
3. Member States shall ensure that any time limits for bringing an action mentioned in paragraphs 1 and 2 are applied in a way that guarantees the possibility of an effective legal remedy for interested parties.
4. If the action is brought in the executing State, the judicial authority of the issuing State shall be informed thereof and of the grounds of the action, so that it can submit the arguments that it deems necessary. It shall be informed of the outcome of the action.
5. The issuing and executing authorities shall take the necessary measures to facilitate the exercise of the right to bring actions mentioned in paragraphs 1 and 2, in particular by providing relevant and adequate information to interested parties.
6. The executing State may suspend the transfer of objects, documents and data pending the outcome of a legal remedy.

¹ See point II.4 of the cover note.

Article 20
Reimbursement

1. Without prejudice to Article 19(2), where the executing State under its law is responsible for injury caused to one of the parties mentioned in Article 19 by the execution of a European Evidence Warrant transmitted to it pursuant to Article 7, the issuing State shall reimburse to the executing State any sums paid in damages by virtue of that responsibility to the said party except if, and to the extent that, the injury or any part of it is due to the conduct of the executing State.
2. Paragraph 1 is without prejudice to the national law of the Member States on claims by natural or legal persons for compensation of damage.

TITLE IV – JURISDICTION OVER ELECTRONIC COMMUNICATIONS NETWORKS

Article 21¹

Jurisdiction for computer data held on an information system on the territory of another Member State

¹ The following Declaration is introduced in relation to the deletion of Article 21 of the original Commission proposal:

"Being aware of the growing importance of new information technology, and of the need to equip the courts and Law enforcement authorities with investigative tools which are in keeping with these new developments, the Council undertakes to consider shortly whether an appropriate legal framework should be adopted, taking into account the 2001 Cybercrime Convention, in order to improve judicial co-operation in regard to investigations into transnational information networks".

██████ has maintained a reservation on the deletion of Article 21.

TITLE V – FINAL PROVISIONS

Article 22

Monitoring the effectiveness of the Framework Decision

1. A Member State which has experienced repeated problems which it had not been possible to solve by consultation on the part of another Member State in the execution of European Evidence Warrants shall inform the Council to assist its evaluation of the implementation of this Framework Decision at Member State level.
2. The Council shall conduct a review, in particular of the practical application, of the provisions of this Framework Decision by the Member States.

Article 23

Relation to other legal instruments

1. Subject to paragraph 2a and without prejudice to their application in relations between Member States and third countries, this Framework Decision shall coexist with existing legal instruments in relations between the Member States in so far as these instruments concern mutual assistance requests for evidence falling within the scope of this Framework Decision.¹
2. (...)
- 2a. Without prejudice to paragraphs 2b and 4, issuing authorities shall rely on the European Evidence Warrant when all of the objects documents or data required from the executing State fall within the scope of this Framework Decision.

¹ Recital to accompany the provision to read: "The European Evidence Warrant 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 would also be the subject of a mutual recognition instrument, the adoption of which would provide a complete mutual recognition regime to replace mutual assistance procedures". The second sentence of Recital (5) of the Commission's original proposals would correspondingly be deleted.

- 2b. Issuing authorities may use mutual legal assistance to obtain objects, documents or data falling within the scope of this Framework Decision if they form part of a wider request for assistance or the issuing authority considers in the specific case that this would facilitate co-operation with the executing State.
3. (...)
4. Member States may conclude bilateral or multilateral agreements or arrangements after this Framework Decision has come into force in so far as such agreements or arrangements allow the objectives of this Framework Decision to be extended or enlarged and help to simplify or facilitate further the procedures for obtaining evidence falling within the scope of this Framework Decision.
5. The agreements and arrangements referred to in paragraph 4 may in no case affect relations with Member States which are not parties to them.
6. (...)
7. Member States shall notify the Council and the Commission of any new agreement or arrangement as referred to in paragraph 4, within three months of signing it.

Article 24

Transitional arrangements

1. Mutual assistance requests received before [...] will continue to be governed by existing instruments relating to mutual assistance in criminal matters.

Article 25
Implementation

1. Member States shall take the necessary measures to comply with the provisions of this Framework Decision by [...].
2. By the same date Member States shall transmit to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision¹.
3. The Commission shall, by [...], submit a report to the European Parliament and to the Council, assessing the extent to which the Member States have taken the necessary measures in order to comply with this Framework Decision, accompanied, if necessary, by legislative proposals.
4. The General Secretariat of the Council shall notify Member States, the Commission and Eurojust of the declarations made pursuant to Articles 5 and 8.

Article 26
Entry into force

This Framework Decision shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Done at Brussels, [...]

For the Council
The President
[...]

¹ A recital along the lines of Paragraph 34 of the Interinstitutional Agreement on better law-making (OJ C 321, 31.12.2003, page 1) will be introduced.

PRESIDENCY PROPOSALS

A. TERRITORIALITY

1. Articles 15(2)(c) and 15(2a) remain unchanged as set out in Annex I of 8086/2/06 REV 2 COPEN 34.

2. The following new paragraph 2b is inserted in Article 15:

“Any decision under the first indent of paragraph 2(c) of this Article 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 2a 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.”¹

3. Article 25 is worded as follows²:

"Article 25
Implementation

1. Member States shall take the necessary measures to comply with the provisions of this Framework Decision by [...].
2. By the same date, Member States shall transmit to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision.

¹ ■ called for the addition of a text along the following lines: "However, this paragraph does not apply if the EEW relates to an act which is not a criminal offence under the law of the executing State and where it would be necessary to carry out a search and seizure for the execution of the EEW."

² Text based on the proposal by ■ in 8018/06 COPEN 33.

- 2a. By the same time, any Member State which has transposed the ground for refusal in Article 15(2)(c) into its national law shall notify the General Secretariat of the Council and the Commission of this by making a declaration.
- 2b. Any Member State which has not made a declaration pursuant to the preceding paragraph may decide to apply the provision of Article 15(2)(c) in its relations with those Member States which have made such a declaration. Any Member State who decides so, shall notify the General Secretariat of the Council of this by making a declaration.
3. The Commission shall, by [...], submit a report to the European Parliament and to the Council, assessing the extent to which the Member States have taken the necessary measures in order to comply with this Framework Decision, accompanied, if necessary, by legislative proposals.
4. The General Secretariat of the Council shall notify Member States, the Commission and Eurojust of the declarations made pursuant to Articles 5 and 8 and to this Article."
4. **The following declaration is introduced¹:**

"The Council declares that Articles 15(2b) and 25(2a) and (2b) of the Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters are without prejudice to existing or future instruments of the European Union on mutual recognition of judicial decisions in criminal matters and cannot be invoked to interpret such instruments."

5. **The following recital is introduced:**

"(x) The specific provisions in Article 15(2b) in relation to Article 15(2)(c) do not prejudice how and to which extent the other grounds for refusal in Article 15(2) are implemented."

¹ Text based on a proposal made by ■.

B. LIST OF OFFENCES

Alternative 1:

1. The Presidency proposal in Annex III of 8086/2/06 REV 2 COPEN 34 + REV 2 ADD 1 is retained.
2. The Council makes the following statement to be included in the minutes of the Council on 1-2 June 2006 and made available to the public:

"The Council notes that one Member State has made proposals relating to core elements as regards certain categories of the 32 offences contained on the list in Article 16 of the draft on the European Evidence Warrant. The Council further notes that the issue is of a horizontal character.

The Council agrees that this horizontal issue should not delay the adoption of the Framework Decision on the European Evidence Warrant. The Council will examine the matter further on the basis of a report to be prepared by the relevant bodies of the Council."

Alternative 2:

1. Article 16(2) with a list of 32 offences as set out in Annex I of 8086/2/06 REV 2 COPEN 34 is retained.
2. Form A for the EEW, to be attached to the Framework Decision, will provide that the issuing authority, if applicable, shall tick one or more of the 32 offences to which the proceedings concerned relate as defined by the law of the issuing State.

Regarding terrorism, computer related crime, racism and xenophobia, sabotage, racketeering and extortion and swindling, the headings of the offences to tick are supplemented by further qualifications. The intention is to cover at least all relevant offences under present national law but neither the less have an indication of the scope of the offences covered. The following text, based on the former draft Council statement (the text on terrorism is based on the DE proposal, the rest on the Presidency proposal, in 8086/2/06 REV 2 COPEN 34 + REV 2 ADD 1), could be a starting point for developing the text to include in Form A:

☐ **Terrorism**

- an act which constitutes an offence within the scope of and as defined in the International Convention for the Suppression of Acts of Nuclear Terrorism of 13 April 2005 and the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999 or one of the treaties listed in the annex thereto, or
- an act punishable under the Council Framework Decision of 13 June 2002, or
- an act to be prohibited under Security Council Resolution 1624 (2005) of 14 September 2005.

☐ **Computer related crime**

Offences as defined in the Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems.

☐ **Racism and xenophobia**

Offences as defined in the Joint Action of 15 July 1996 (96/443/JAI).

☐ **Sabotage:**

Acts unlawfully and intentionally causes large-scale damage to a government installation, another public installation, a public transport system or other infrastructure which entails or is likely to entail considerable economic loss.

☐ **Racketeering and extortion:**

Demanding by threats, use of force or by any other form of intimidation goods, promises, receipts or the signing of any document containing or resulting in an obligation, alienation or discharge.

☐ **Swindling:**

The concept of swindling referred to in Article 16(2) encompasses the following constituent elements inter alia: using false names or claiming a false position or using fraudulent means to abuse people's confidence or credulity with the aim of appropriating something belonging to another person."

Alternative 3:

The following paragraph 2c is introduced in Article 25:

"Any Member State¹ may, for a period of up to 5 years from the date referred to in paragraph 1, 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 16(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 the following criteria:

¹ This possibility would only be used by [REDACTED]

Terrorism:

- an act which constitutes an offence within the scope of and as defined in the International Convention for the Suppression of Acts of Nuclear Terrorism of 13 April 2005 and the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999 or one of the treaties listed in the annex thereto, or
- an act punishable under the Council Framework Decision of 13 June 2002, or
- an act to be prohibited under Security Council Resolution 1624 (2005) of 14 September 2005.

Computer related crime:

Offences as defined in the Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems.

Racism and xenophobia:

Offences as defined in the Joint Action of 15 July 1996 (96/443/JAI).

Sabotage:

Acts unlawfully and intentionally causes large-scale damage to a government installation, another public installation, a public transport system or other infrastructure which entails or is likely to entail considerable economic loss.

Racketeering and extortion:

Demanding by threats, use of force or by any other form of intimidation goods, promises, receipts or the signing of any document containing or resulting in an obligation, alienation or discharge.

Swindling:

The concept of swindling referred to in Article 16(2) encompasses the following constituent elements *inter alia*: using false names or claiming a false position or using fraudulent means to abuse people's confidence or credulity with the aim of appropriating something belonging to another person.

If a Member State wants 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."

Proposal by ■ on Article 19:

1. Art. 19 (2) first sentence reads:

"Without prejudice to Article 1(3), the substantive reasons for issuing the European Evidence Warrant, including whether the criteria in Article 6 have been met, may be challenged only in an action brought before a court in the issuing State."

(Equivalent wording for Art. 6, last sentence, necessary).

2. Art. 19 (2) second sentence reads:

"The issuing State shall ensure the applicability of legal remedies (...)"

3. New Art. 19 (3) second sentence:

"Paragraph 2 does not affect the rights of bona fide third parties."
