



**COUNCIL OF
THE EUROPEAN UNION**

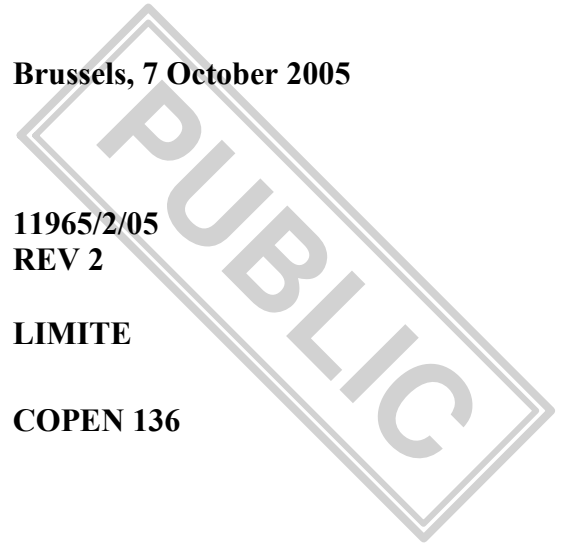
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NOTE

from : The Presidency
to : Council

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Subject : Draft Framework Decision on the European Evidence Warrant (EEW) for
obtaining objects, documents and data for use in proceedings in criminal matters
– recognition and execution of EEWs

I INTRODUCTION

During the Netherlands and Luxembourg Presidencies considerable progress was made in clarifying how the principle of mutual recognition should be applied in the case of the EEW. A broad consensus emerged that the main purpose of the EEW is to secure the recognition and enforcement of orders to obtain objects, documents or data, rather than to control the manner in which this material is obtained.

Recent discussions in the Working Party on Co-operation in Criminal Matters and the Article 36 Committee have nevertheless highlighted the need to confirm and clarify certain key principles, in particular relating to:

- the procedures by which EEWs should be executed; and
- the extent to which the mutual recognition principle should limit possibilities for refusing to execute EEWs.

II THE MEANS BY WHICH EVIDENCE WARRANTS SHOULD BE EXECUTED

A number of mutual recognition measures have included an implicit distinction between the **substance** of the decision which is to be recognized and the **procedures** by which it should be put into effect. For example, Article 5(1) of the Framework Decision on the execution in the EU of orders freezing property or evidence provides that:-

"the competent judicial authorities of the executing State shall recognize a freezing order... and shall forthwith take the necessary measures for its immediate execution in the same way as for a freezing order made by an authority of the executing State".

Article 5(2) provides that:-

"any additional coercive measures rendered necessary by the freezing order shall be taken in accordance with the applicable procedural rules of the executing State".

Similarly the Framework Decision on the European Arrest Warrant provides for many procedural measures to be taken in accordance with the national law of the executing Member State (e.g. Articles 11, 12, 13,14, 19 and 29), although other procedural measures such as time limits are laid down in detail in the Framework Decision.

The latest text of the Framework Decision on the EEW contains similar provisions. The current drafting broadly aims to ensure that the *substance* of the decision (i.e. the decision that certain evidence is needed) is enforced, but allows the executing authority to choose the *procedures* for execution.

An exception to this general principle is provided for in Article 13(1): *"The executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority unless otherwise provided in this Framework Decision and provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State"*. This provision, which is identical to Article 4(1) of the EU's MLA Convention of 2000, aims especially at ensuring that evidence is obtained in a way that ensures its admissibility in the issuing State. The Explanatory Report to the MLA Convention explains that it could for example include a request that a representative of the issuing State be permitted to attend the taking of evidence in the executing State. Article 13(1) should not however enable the issuing State to require the executing State to execute an EEW by means of coercive measures.

Beyond that exception however, **a key issue is whether recognition of an EEW could require the executing State to undertake measures that would not be taken in a similar domestic case.** For example if a Warrant can only be executed through the use of coercive means, such as search and seizure, which would not be used in a similar domestic case, should the executing State be able to refuse the Warrant? Several delegations (**DELETED**) believe that such a general right of refusal should exist. Others disagree (**DELETED**).

In this respect, the Presidency recalls that the February JHA Council has already decided¹ that it should be possible to execute an EEW under certain circumstances in cases where the conduct would not be an offence in the executing State (and therefore by implication would not be possible in a similar domestic case). This obligation is subject to two conditions: that the conduct as defined in the issuing State falls into one of the offences listed in Article 16(2) and that it is punishable by at least 3 years' imprisonment in the issuing State.

A related issue has arisen in connection with Article 12 of the EEW, which proposes safeguards, in the form of common **procedural rules**, for the execution of EEWs. Most Member States consider that this Article is unnecessary as it sets out measures which are matters for national law. Many Member States could not agree to adopt different procedural safeguards for executing EEWs from those that apply to domestic investigations and considered that the provisions of Articles 11 and 13 and the inclusion of an agreed human rights clause (now added to Article 1) adequately covered the issues raised in Article 12. The Commission disagrees. **DELETED** also has a scrutiny reserve on the deletion of Article 12.

III EXTENT TO WHICH THE MUTUAL RECOGNITION PRINCIPLE SHOULD LIMIT THE POSSIBILITIES FOR REFUSING TO EXECUTE AN EVIDENCE WARRANT

In keeping with the principle of mutual recognition, the grounds of refusal set out in Article 15 should be as few and as specific as possible. Safeguards built in at the beginning of the process enable the executing State to be certain that the Warrant is "necessary and proportionate" (Article 6a). This would ensure that the Warrant itself can be accepted provided it does not fall within the limited grounds for refusal set out in Article 15. Some Member States however have proposed that Article 15 should contain a ground of refusal based on lack of **proportionality**.

¹ See document 6725/05 PV CONS 10 JAI 66 and 6142/05 COPEN 30.

The Presidency notes however that such a ground of refusal might significantly delay the execution of EEWs by obliging executing authorities to seek additional information in order to examine the issue of proportionality, resulting also in an assessment of the merits of the Warrant in the executing State. Such an assessment would run contrary to the principles of mutual recognition. The Presidency concludes therefore that this should be a matter which is assessed by the issuing State in each case.

IV CONCLUSION

On the basis of which the Presidency:

- 1) **invites the JHA COUNCIL to agree that the European Evidence Warrant shall be drafted to reflect the following:**
 - (i) **the executing State is responsible for choosing the procedures 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, but;**
 - (a) **for all cases, there shall be an obligation to undertake formalities and procedures¹ requested by the issuing State unless to do so would be contrary to the fundamental principles of law of the executing State²; and**

¹ where formalities and procedures are regarded as those legal or administrative processes that might assist in making evidence collected in one State admissible in another and could for example involve 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, but would not encompass coercive measures.

² **DELETED** scrutiny reserve.

(b) the issuing State shall be obliged to ensure¹ that the Warrant in a specific case is "necessary and proportionate"; the proportionality of the Warrant should not therefore be a ground for refusal²;

(ii) individual rights shall be protected by the human rights clause now added to Article 1(3) and procedural safeguards shall be left to Member States. Legal remedies for third parties should however be addressed separately in the EEW.

2) invites the JHA COUNCIL to address the following question: Under what circumstances shall an executing State be obliged to provide coercive measures that it had decided were needed to execute a Warrant in a specific case but which would not be possible in a similar domestic case?

In particular, as a minimum, the Council is asked to agree that, if the offence is one of those listed in Article 16(2) punishable by 3 years' imprisonment in the issuing State, execution of a Warrant should not be refused on the basis that a coercive measure would not be available in a similar domestic case.

¹ An assurance that this obligation has been fulfilled shall be provided to the executing State by including in the Form annexed to the EEW a box certifying that such a test has been carried out in the issuing State.

² DELETED suggests that this would nonetheless be subject to the application of Article 1(3) (see conclusion 1.ii). The Presidency notes that, if accepted, Article 1(3) would apply to the operation of the Warrant as a whole.

DELETED reserves the right to return to the principle of proportionality pending the outcome of negotiations on who should be competent to issue an EEW, believing that an EEW must be issued or validated by a judicial authority in the strictest sense.