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REPORT

From : Coreper

dated : 19 May 2005

To : Council

No. prev. doc. : 8863/05 COPEN 90

No. Cion prop. : COM(2003) 688 final (15221/03 COPEN 119)

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

Coreper examined on 19 May 2005 the above draft Framework Decision on the basis of 8863/05 COPEN 90.

The text resulting from the proceedings is set out in the Annex.

Several delegations have entered general scrutiny reservations and general parliamentary scrutiny reservations on the draft.

The Council is invited to examine the following questions relating to Articles 15(2)(c), 21 and 23 with a view to reaching agreement on those questions. A number of other questions are set out in footnotes to the text.

II QUESTIONS SUBMITTED TO COUNCIL

1. Article 15(2)(c) - territoriality clause

Articles 16 and 24(2) (the list of offences, double criminality) were examined at the JHA Council on 24 February 2005. The territoriality clause (Article 15(2)(c)) was also discussed. As regards territoriality, the Presidency concluded that the wording and the scope of the territoriality clause had to be examined by the Working Party but that the principle of its inclusion was accepted.¹

The present wording of Article 15(2)(c) provides that an EEW may be refused if:

"(c) 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."

This text is based on a proposal by **DELETED**.² It applies in general. It implies, but is not limited to, a derogation from the provisions on double criminality in Article 16.

DELETED has proposed to replace Article 15(2)(c) by the following new Article 15(3):

"3. Notwithstanding Article 16, the executing judicial authority may subject the execution of EEW to the condition that acts for which the EEW has been issued constitute an offence under the law of the executing State where the offence has been committed in whole, or for an essential part, in the territory of the executing State."

¹ 6725/05 PV/CONS 10 JAI 66.

² Similar provisions are included in Article 4(7) of the Framework Decision on the European Arrest Warrant, Article 7(2)(d) of the Framework Decision on financial penalties and Article 8(2)(f) of the draft Framework Decision on confiscation orders. No such provision is included in the Framework Decision on orders freezing property or evidence.

These proposals raise two different problems. The first problem relates to the case where the executing State has criminalised or not the offence. The **DELETED** proposal aims at excluding the application of the territoriality clause for cases where the executing State has criminalised the behaviour whereas the **DELETED** proposal also encompasses such cases. The **DELETED** proposal allows that the territoriality clause may be applied for the offences of the list, if the requirement of double criminality is not fulfilled. The second problem concerns the scope of the territoriality clause and in which respect the degree of attachment to the territory of the executing state; is it enough with a low degree of attachment or should an "essential part" of the offence clause been committed in the territory?

Opinions were divided on the territoriality clause:

- 7 delegations (**DELETED**) favoured the present wording of Article 15(2)(c).
- 14 delegations (**DELETED**) and the Commission preferred the approach proposed by **DELETED**.
- **DELETED** however, entered a scrutiny reservation on "for an essential part".
- 4 delegations reserved their positions on the issue.

The Council is invited to decide whether the territoriality clause:

- *shall apply in general, irrespective of whether the double criminality requirement is met, as provided in the present Article 15(2)(c), or*
- *shall apply only where the double criminality requirement is not met, along the lines of the proposal by **DELETED**.*
- *shall require an essential part of the offence to have been committed in the territory of the executing State or a lower degree of attachment.*

2. Article 21

Article 21 provides the following:

- "1. Each Member State shall take the necessary measures to ensure that it is able to execute a European Evidence Warrant, without further formality, when:

- (a) the computer data sought is held on an information system on the territory of another Member State, but is lawfully accessible to a legal or natural person on the territory of the executing State by means of an electronic communications network; and
- (b) the computer data relates to a service provided by that legal or natural person on the territory of the executing State to a legal or natural person on the territory of the same State.

2. Each Member State shall also take the necessary measures to ensure that, with respect to computer data on its territory, its national law permits another Member State to take action in accordance with paragraph 1."¹

There was general agreement that the substance covered by Article 21 would need to be addressed at some point at EU level. However, views differed regarding how and when to do this:

- Several delegations called for the deletion of Article 21. It was argued that it would not be appropriate to address just one aspect of the broader issue of cooperation in relation to cyber-space, and that it would be preferable to opt for a separate comprehensive instrument relating to cyber-space. Having in mind the difficult negotiations at the time on the provisions on interception of telecommunications in the 2000 Convention on mutual assistance in criminal matters, it was also argued that negotiations on Article 21 could be very time-consuming and delay the adoption of the first instrument on the EEW. In addition, it was argued that before adopting EU legislation on this issue, it would be preferable to gain some experience from the application of the 2001 Council of Europe Convention on Cybercrime².
- The Commission, **DELETED** supported the provision. These delegations were not convinced that the reference to the 2001 Convention was relevant.
- Some delegations entered scrutiny reservations.

¹ In the Working Party on 12 and 13 April 2005, **DELETED** informed on similar provisions in its national law.

² Council of Europe, ETS No 185. The Convention is an open Convention. It has been ratified by some Member States. Others are in the process of ratifying or adopting it.

The Council is invited to consider the following options:

- *Article 21 is deleted, with the understanding that the subject covered by the provision may be further considered in a broader context in the future, or*
- *Article 21 is retained but must be further developed, implying a risk for time-consuming negotiations on that provision in the context of the present draft.*

III OTHER QUESTIONS

The Article 36 Committee discussed at its meeting on 10 and 11 May 2005 Article 23 and the possible coexistence of the EEW with the existing mutual assistance system. It was concluded that with the exception of COM and **DELETED**, delegations could in principle agree to providing for a transitional period of coexistence between the EEW and the present system of mutual assistance. The Working Party on cooperation in criminal matters was instructed to explore this possibility. It should in this context be considered how the use of the EEW rather than the traditional system may be promoted in the transitional period, for instance through a system of giving priority to EEW.

Certain other questions are set out in footnotes in the Annex and will be examined further by the experts.

The Working Party on cooperation in criminal matters examined on 4 and 5 May 2005 certain questions on Articles 2(c) and 15. The results thereof will be circulated in a separate document.

COM stated in Coreper on 19 May 2005 that it would like to further discuss the reference to a maximum period of at least 3 years provided in Article 16(2).

IV CONCLUSION

The Council is invited to examine the questions set out under II above.

TITLE I – THE EUROPEAN EVIDENCE WARRANT¹

Article 1^{2 3}

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.

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 available.

¹ The preamble has not been included. Changes to the text are underlined or otherwise indicated as compared with 7828/05 COPEN 68.

² Scrutiny reservations by some delegations (**DELETED**) on Article 1.

³ **DELETED** considered that the text of Article 1(2) of the Framework Decision on confiscation orders should be added to Article 1.

The said Article 1(2) reads as follows:

"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."

- (c) "issuing authority" shall mean a judge, a court, an investigating magistrate, a public prosecutor or a police authority insofar as they act in their capacity of preliminary criminal investigation authorities in criminal proceedings, and provided that they are entitled to order the measure requested in the European evidence warrant pursuant to their national legislation.¹
- (d) "executing authority" shall mean an authority with competence under national law to execute a European Evidence Warrant.
- [(e)² "information system" means any device or group of inter-connected or related devices, one or more of which, pursuant to a program, performs automatic processing of computer data, as well as computer data stored, processed, retrieved or transmitted by them for the purposes of their operation, use, protection and maintenance.
- (f) "computer data" means any representation of facts, information or concepts in a form suitable for processing in an information system, including a program suitable for causing an information system to perform a function.
- (g) "electronic communications network" means transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed.]
- (h)³ (...)

¹ Presidency proposal in light of the discussions of the Working Party. The Certificate will indicate that the authority issuing the EEW has pursuant to its national legislation the power to order the measure requested in a similar national case.

² Scrutiny reservations by several delegations on points (e), (f) and (g). It was agreed that these provisions depend on the decision adopted in relation to article 21.

³ Scrutiny reservation by COM/**DELETED** on the deletion of the text.

Article 3

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 State¹ 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 :
 - (a) conducting interviews, taking statements or initiating other types of hearings involving suspects, witnesses, experts or any other party;
 - (b) obtaining bodily material directly³ from the body of any person, including DNA samples;
 - (c) obtaining information in real-time such as through the interception of communications, covert surveillance or monitoring of bank accounts; and
 - (d) conducting enquiries concerning existing objects, documents or data by means of *inter alia* as forensic analysis or systematic compilation.⁴

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.

¹ Scrutiny reservation by COM on "executing State" in relation to Article 21.

² Scrutiny reservation by **DELETED**.

³ The wording "obtaining directly from the body" ("Entnahme"- DE) should make clear that bodily material as such is not excluded from the scope of the EEW.

⁴ Proposal of the former Netherlands Presidency.

4.¹ Without prejudice to paragraph 2, the European Evidence Warrant also covers:

- (a) 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.
- (b) taking statements of persons² with whom the executing authority is confronted during the execution of a European Evidence Warrant. [The statements should be limited to information concerning the identity of the person and may include spontaneous remarks made by him which should reasonably be considered relevant to the proceedings for the purpose of which the warrant was issued.]³

¹ Article 3(4) had been proposed by the former Netherlands Presidency on the basis of proceedings in the Article 36 Committee in October 2004, where it was agreed that as a starting point the Framework Decision should cover existing directly available evidence, with the possible addition of hearing of persons, and in the Article 36 Committee in November 2004, where there was general support for a limited provision on the hearing of persons.

² **DELETED** proposed to add: "taking statements of persons directly related to the subject of the European Evidence Warrant..."

DELETED thought the provision should be limited to "taking statements of persons present during the execution of the European Evidence Warrant and directly related to the subject of the European Evidence Warrant".

³ Several delegations thought that the second sentence of point (b) should be deleted.

Article 4¹

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 a judicial authority in respect of a criminal offence under the national law of the issuing State; and
- (b) in proceedings brought by administrative authorities² 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 authorities³ 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 criminal proceedings and proceedings referred to in paragraphs (b) and (c) which relate to offences or infringements for which a legal person may be held liable or sanctioned in the issuing State.⁴

¹ Scrutiny reservations on Article 4 by some delegations.

² The wording is closely linked to Article 49(a) of the 1990 Schengen Convention and Article 3(1) of the 2000 Convention.

³ The new point (c) has been inserted to address comments made by **DELETED** (see paper from **DELETED** in 16148/04 COPEN 150). Scrutiny reservations by several delegations.

⁴ Point (d) (former point (c)) has been slightly revised in the light of comments made by **DELETED** (see paper from **DELETED** in 16148/04 COPEN 150). Scrutiny reservations by some delegations.

Article 5

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.¹

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.

¹ **DELETED** thought that there should be no obligation to translate the EEW. Alternatively, **DELETED** proposed that there should only be an obligation to translate the EEW into one basic language (EN) or into one of a limited number of basic languages (EN/FR/DE). Several delegations entered reservations (**DELETED**) or scrutiny reservations on these suggestions, and many delegations considered the issue to be highly political. It was also mentioned that it could be difficult for the executing State to respect the deadlines in Article 17(2) if that State needed to translate the EEW.

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: ¹

- (a)² 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.
- (c)³ (...)
- (d)⁴ (...)

¹ **DELETED** thought the introduction of a threshold (minimum level for the maximum sanction for the offence concerned) should be considered.

² Reservations by **DELETED** on point (a).

³ Reservation by COM on the deletion of point (c).

⁴ Point (d) has been transferred to Article 7.

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][available].¹ It shall be transmitted by the issuing authority² directly to the competent authority for execution by any means capable of producing a written record under conditions allowing the executing State to establish authenticity.³ All official communications shall also be made directly between the said competent authorities.⁴
- 1a. 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. Member States wishing to make use of this possibility 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.⁵

¹ The new wording of the first sentence contains the substance of the earlier Article 6(d) and needs further examination.

² **DELETED** thought that it should be possible for an authority other than the issuing authority to transmit the EEW. It was agreed to come back to this issue when discussing the EEW form set out in the Annex. The possibility of the introduction of a definition of "issuing authority" in Article 2 was mentioned. Reference was also made to point (b) of the Certificate in the Framework Decision on freezing orders.

³ **DELETED** thought it should be provided that the original of the EEW should be sent to the executing State if it so requires, and referred to the Framework Decision on financial penalties (article 4, par. 3) and the Framework Decision on confiscation orders (article 4, par. 2), which read as follows:

"The original of the decision/confiscation order, or a certified copy thereof, and the original of the certificate shall be transmitted to the executing State if it so requires."

⁴ The last sentence is proposed by the Presidency in the light of comments made by **DELETED**. It corresponds to Article 4(1) of the Framework Decision on financial penalties.

⁵ The new paragraph 1a has been inserted to meet concerns expressed by **DELETED**. It is based on Article 7 of the Framework Decision on the European Arrest Warrant. Scrutiny reservations by some delegations.

- 1b. If the issuing authority so wishes, transmission may be effected via the secure telecommunications system of the European Judicial Network.¹
2. If the competent authority for execution 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 competent authority for execution and shall so inform the issuing authority.

Article 8
*[deleted]*²

¹ Paragraph 1b corresponds to Article 10(2) of the Framework Decision on the European Arrest Warrant and has been inserted on proposal by **DELETED**. Scrutiny reservation by some delegations.

² 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 9^{1 2}

Warrant for additional evidence

1. Where the issuing authority requires objects, documents or data which are additional to an earlier European Evidence Warrant issued for the purpose of the same proceedings, and the content of the original warrant remains accurate, it shall not be required to issue a new European Evidence Warrant. In such circumstances, it shall issue a warrant for additional evidence containing the information set out in Form B in the Annex.
2. The executing State shall comply with any additional requirements under paragraph 1 in the same way as for the original European Evidence Warrant.
3. Where, in accordance with the provisions in force, the competent authority which has issued a European Evidence Warrant participates in the execution of the warrant in the executing State, it may address the warrant for additional evidence directly to the competent executing authority while present in that State.

¹ Scrutiny reservations by several delegations. Some delegations thought Article 9 could be deleted. Certain delegations thought it could be considered to replace the text with a provision addressing the case where the evidence concerned has been frozen in advance. Other delegations were not convinced that this was necessary and thought that the EEW would replace rather than supplement the Framework Decision on freezing regarding freezing of evidence.

² **DELETED** had in 16243/05 COPEN 151 proposed the addition of a new paragraph 3 of Article 9 providing that a EEW shall cease to be enforceable 6 months after its date of issue. Several delegations were against that proposal.

Article 10¹

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.For any purpose other than those set out in the first subparagraph 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. Personal data obtained under this Framework Decision shall remain confidential except in so far as it is necessary to disclose it for the purposes specified in paragraph 1 or for other reasons specified in national law.
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.

¹ Article 10 has been based on Article 23 of the 2000 Convention. Scrutiny reservation by **DELETED**.

TITLE III – PROCEDURES AND SAFEGUARDS FOR THE EXECUTING STATE¹

Article 11²

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.

2. Any additional coercive measures rendered necessary by the European Evidence Warrant shall be taken in accordance with the applicable procedural rules of the executing State.³

¹ General scrutiny reservations by most delegations on Title III. Some delegations have asked for the introduction of a human rights clause.

² The Presidency proposes this revised version of Article 11 in the light of discussions on Articles 11 and 12.

³ The new Article 11(2) has been introduced in connection with the deletion of the former Article 13(a), and corresponds to Article 5(2) of the Framework Decision on freezing orders.

[Article 12¹
Safeguards for execution

1. Each Member State shall take the necessary measures to ensure that the European Evidence Warrant is executed in accordance with the following minimum conditions:
 - (a) the executing authority shall use the least intrusive means necessary to obtain the objects, documents or data;
 - (b) a natural person shall not be required to produce objects, documents or data which may result in self-incrimination; and
 - (c) the issuing authority shall be informed immediately if the executing authority discovers that the warrant was executed in a manner contrary to the law of the executing State.

2. Each Member State shall take the necessary measures to ensure that, where a search and seizure is considered necessary in order to obtain objects, documents or data, the following minimum safeguards shall apply:
 - (a) a search of premises shall not start at night, unless this is exceptionally necessary due to the particular circumstances of the case;
 - (b) a person whose premises have been searched shall be entitled to receive written notification of the search. This shall state, as a minimum, the reason for the search, the objects, documents or data seized, and the legal remedies available; and
 - (c) in the absence of the person whose premises are being searched, the notification described in point (b) shall be provided to that person by leaving the notification on the premises or by other suitable means.]

¹ The Presidency submits the following for consideration in the light of comments made: Article 12 concerns procedural and human rights. In general, Article 12 could be replaced by a human rights clause. The draft Framework Decision on procedural rights should be kept in mind. However, the content of Article 12(1)(a) could possibly be included in Article 11. The content of Article 12(1)(c) has been included in Article 14. Reservation by COM and scrutiny reservations by some delegations on the possible deletion of Article 12.

Article 13¹

Formalities to be followed in the executing State

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.

[2. The issuing authority may require that the executing authority keeps the fact that an investigation is being carried out, and the substance of the investigation, confidential except to the extent necessary for the execution of the European Evidence Warrant.]

¹ The Presidency has reworded Article 13 in the light of comments made. The former Article 13(a) has been replaced by the new Article 11(2). The former Article 13(e) has been replaced by the new Article 13(1). The former Article 13(c) and (d) have been deleted. Some delegations entered scrutiny reservations on the deletion of the former Article 13(b), which has been reproduced in square brackets as Article 13(2).

Article 14¹
Obligation to inform

The competent authority of the executing State shall inform the competent authority of the issuing State:

- (1) immediately
 - (a) if the executing authority, in the course of the execution of the European Evidence Warrant, considers that it may be appropriate to undertake investigations not initially foreseen, or² which could not be specified when the warrant was issued, in order to enable the issuing authority to take further action. This provision shall be without prejudice to Article 3(4).³
 - (b) if the executing authority discovers that the warrant was executed in a manner contrary to the law of the executing State.⁴

Where applicable, the information shall be confirmed without delay by any means capable of producing a written record.

- (2)⁵ without delay by any means capable of producing a written record:
 - (a) of the transmission of the European Evidence Warrant to the competent authority, according to Article 7(3);
 - (b) of any decision not to recognise the European Evidence Warrant, together with the reasons for the decision. Such information shall be provided no later than [10] days after the receipt of the European Evidence Warrant by the competent authority of the executing State;
 - (c) of the postponement of the execution 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.⁶

¹ Revised text proposed by the Presidency for further consideration.

² Scrutiny reservation by COM.

³ The second sentence of point (1)(a) has been added in the light of comments made by **DELETED**.

⁴ Point (1)(b) replaces the former Article 12(1)(c).

⁵ Point (2) is based on the proposal by **DELETED** in 6910/05 COPEN 46. Scrutiny reservations by some delegations in particular on the deadline to be inserted in point (b).

⁶ Article 17(8) has been transferred to Article 14(2)(d).

Article 15^{1 2}

Grounds for non-recognition or non-execution

1. A judge, investigating magistrate or prosecutor in the executing State shall oppose the recognition or execution of the European Evidence Warrant if this would infringe the *ne bis in idem* principle [according to the Framework Decision 2003/.../JHA on the application of the principle of *ne bis in idem*³].

2. A judge, investigating magistrate or prosecutor in the executing State may also oppose the recognition or execution of the European Evidence Warrant if:
 - (a) its execution would infringe the *ne bis in idem* principle with respect to proceedings in a third State; or
 - (b) there is an immunity or privilege under the law of the executing State which makes it impossible to execute the European Evidence Warrant; or

¹ Revised Articles 15, 16 and 24 in the light of the discussions on the EEW at the JHA Council on 24 February 2004 (See 6725/05 PV/CONS 10 JAI 66 + COR 1).

² Several delegations entered scrutiny reservations on Article 15. Written contributions on the Article have been made by **DELETED** in 16243/04 COPEN 151, **DELETED** in 5153/05 COPEN 2 and **DELETED** in 5154/05 COPEN 3. Certain delegations expressed their support for these proposals. Others entered scrutiny reservations. Some delegations thought it should be possible to refuse to execute an EEW where the measure would not have been possible in a similar domestic case. Some delegations referred to provisions on refusal in other mutual recognition instruments. **DELETED**, supported by other delegations, entered a reservation and thought that the text should not specify which authority was competent to refuse, but just refer to "the competent authority". **DELETED** needed a reference which in addition to the present text would cover customs and coast guards.

³ OJ L ...

(c)¹ 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.

(d) It appears after consultation that the issuing authority is not an authority included in the list of authorities referred to in Article 2(c) acting in its capacity of preliminary criminal investigation authority in criminal proceedings, or is not entitled to order the measure requested in the European Evidence Warrant pursuant to its legislation.²

¹ See point II.1 of the cover note.

² Presidency proposal in light of the discussions of the working group concerning article 1 c).

*Article 16*¹
Double criminality

1. The recognition or execution of the European Evidence Warrant shall not be subject to verification of double criminality if it is not necessary to carry out a search or seizure² for the execution of the warrant.

- ³2. 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 and⁴ 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,

¹ Scrutiny reservation by **DELETED**.

² The words "search or seizure" have been inserted following the request of a majority of delegations. The Presidency indicated that article 5 of the 1959 Convention also refers to the words "search or seizure". **DELETED** thought that "search or seizure" should be replaced by "coercive measures".

³ **DELETED** suggested to change the wording of par. 2 in order to follow more closely Article 4(1) of the Framework-Decision on confiscation orders.

⁴ Penalty threshold adopted by the JHA Council on February 24, 2005.

- 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,
- 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 neither of the conditions of paragraphs 1 and 2 are met, recognition or execution of the European Evidence Warrant may be subject to the condition of double criminality.¹

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.

¹ Scrutiny reservation by **DELETED**.

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 Decision¹ 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 17²

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 and communicated as soon as possible to the relevant competent authority³ of the issuing State by any means capable of producing a written record. Such communication shall take place no later than 20 working days wherever practicable⁴ after the receipt of the European Evidence Warrant by the competent executing authority.
3. Unless either a ground for postponement is justified in accordance with Article 18 or the executing authority has already the objects, documents or data sought in its possession, the executing authority shall take possession of the objects, documents or data without delay and, wherever practicable, within 60 days of its receipt by the competent executing authority.

¹ **DELETED** suggested that the examination by the Council should take place 5 years after the date referred to in article 25, par. 1. Scrutiny reservation by COM on the **DELETED** proposal.

² Scrutiny reservation by some delegations (**DELETED**).

³ **DELETED** asked whether the authority referred to in par. 2 is different from the authority issuing the EEW.

⁴ Presidency proposal following the reservation by several delegations on the deadline of 10 days. Most delegations could accept the Presidency proposal. **DELETED** thought that the deadline should be shorter than 10 days. Reservation by COM on the deadline of 20 days.

4. Unless a legal remedy is underway in accordance with Article 19 or grounds for postponement under article 18 exist, the executing State shall transfer the objects, documents or data obtained under the European Evidence Warrant to the issuing State:
 - (a) immediately where the objects, documents or data sought by the issuing authority are already in the possession of the executing authority, (...) or, in other circumstances,
 - (b) without delay and, wherever practicable, within 30 days of its execution.
5. The executing authority may require that the objects, documents or data shall be returned to the executing State as soon as they are no longer required by the issuing State.¹
6. (...) ²
7. (...) ³
8. (...) ⁴
9. (...) ⁵

¹ Some delegations (**DELETED**) indicated that they preferred the wording of Article 6(2) of the 1959 Convention.

² Deleted in the light of discussions of the working party. Scrutiny reserve by COM on the deletion of par. 6.

³ Deleted since par. 7 is already covered by Article 14(2)(b).

⁴ Deleted since delegations thought that par. 8 should be moved to Article 14.

⁵ Deleted in the light of discussions of the Working Party. Scrutiny reserve by COM on the deletion of par. 9.

Article 18
Grounds for postponement of execution

1. The executing authority¹ may postpone the execution of the European Evidence Warrant where:
 - (a) the form provided for in the Annex is incomplete, until such time as the form has been completed [or corrected];
 - (b) its execution might prejudice an ongoing criminal investigation or prosecution, until such time as it deems reasonable; or
 - (c) the objects, documents or data concerned are already being used in other proceedings (...)², until such time as they are no longer required for this purpose.
2. (...)³
3. (...)⁴
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.

¹ **DELETED** considered that the postponement should be ordered by a judge, investigating magistrate or prosecutor in the executing State, in conformity with the provision set out in Article 15 (grounds for non-recognition or non-execution).

² Deleted in the light of discussions of the working party.

³ Deleted since par. 2 has been moved to par. 1.

⁴ Deleted since article 14, 2 (c) contains already a similar provision.

Article 19¹

Legal remedies for coercive measures

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 a European Evidence Warrant executed pursuant to Article 11 using coercive measures², in order to preserve their legitimate interests.
2. The action shall be brought before a court in the issuing State³ or in the executing State in accordance with the national law of each. However, the substantial 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.⁴
3. The issuing State 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.

¹ In the light of discussions of the Working Party, the Presidency proposes to replace Article 19 by the following wording:

"1. Each Member State shall put in place the necessary arrangements to ensure that any interested party, including bona fide third parties, has legal remedies against the recognition and execution of a European Evidence Warrant pursuant to Article 11, in order to preserve his or her rights. The action shall be brought before a court in the executing State in accordance with the law of that State. The action may have suspensive effect under the law of the executing State.

2. The substantial reasons for issuing the European Evidence Warrant cannot be challenged before a court in the executing State.

3. If action is brought before a court in the executing State, the competent authority of the issuing State shall be informed thereof."

The proposed wording is identical to the wording of Article 9 of the Framework Decision on confiscation orders.

² **DELETED**, thought the reference to "coercive measures" was too narrow.

³ **DELETED** called for the deletion of "issuing State or" and referred to the draft Framework Decision on confiscation orders.

⁴ Scrutiny reservation by **DELETED**.

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 an action mentioned in paragraph 1, 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.

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 exclusively 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. Each Member State shall take the necessary measures to ensure that it is able to execute a European Evidence Warrant, without further formality, when:
 - (a) the computer data sought is held on an information system on the territory of another Member State, but is lawfully accessible to a legal or natural person on the territory of the executing State by means of an electronic communications network; and
 - (b) the computer data relates to a service provided by that legal or natural person on the territory of the executing State to a legal or natural person on the territory of the same State.

2. Each Member State shall also take the necessary measures to ensure that, with respect to computer data on its territory, its national law permits another Member State to take action in accordance with paragraph 1.

¹ See cover note, point II.2.

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 Council¹ to assist its evaluation of the implementation of this Framework Decision at Member State level.
2. The Council shall in (...) conduct a review, in particular of the practical application, of the provisions of this Framework Decision by the Member States.²
3. (...)
4. (...).

¹ Scrutiny reserve by COM.

² Presidency proposal in light of the discussions of the Working Party.

Article 23

Relation to other legal instruments

1. Without prejudice to their application in relations between Member States and third countries, this Framework Decision shall, from 1 January 2005, coexist with¹ [existing] [the following] 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:
 - [(a) the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959², and its additional protocols of 17 March 1978³ and 8 November 2001⁴.
 - (b) the European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 8 November 1990⁵.
 - (c) the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders (hereinafter referred to as the "Schengen Implementation Convention").
 - (d) the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000⁶ and its Protocol of 16 October 2001⁷.]
2. (...)

¹ See cover note, point III.

² Council of Europe, European Treaty Series No 30.

³ Council of Europe, European Treaty Series No 99.

⁴ Council of Europe, European Treaty Series No 182.

⁵ Council of Europe, European Treaty Series No 141.

⁶ OJ C 197, 12.7.2000, p. 1.

⁷ OJ C 326, 21.11.2001, p. 1.

- [3. Member States may continue to apply bilateral or multilateral agreements or arrangements in force when this Framework Decision is adopted 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.
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 paragraphs 3 and 4 may in no case affect relations with Member States which are not parties to them.
6. Member States shall, within three months from the entry into force of this Framework Decision, notify the Council and the Commission of the existing agreements and arrangements referred to in paragraph 3 which they wish to continue applying.
7. Member States shall also notify the Council and the Commission of any new agreement or arrangement as referred to in paragraph 4, within three months of signing it.
8. Where the conventions or agreements referred to in paragraph 1 apply to the territories of Member States or to the territories for whose external relations a Member State is responsible to which this Framework Decision does not apply, those instruments shall continue to govern the relations existing between those territories and the other Member States.]¹

¹ The question whether to keep paragraphs 3 to 8 will depend on the decision concerning paragraph 1.

Article 24¹
Transitional arrangements

- [1. Mutual assistance requests received before (...) will continue to be governed by existing instruments relating to mutual assistance in criminal matters. Requests received on or after that date for evidence falling within the scope of this Framework Decision will be governed by the rules adopted by Member States pursuant to this Framework Decision.]²
2. (...) ³
3. (...) ⁴

¹ See 6142/05 COPEN 30 + COR 1.

² The question whether to keep such provision will depend on the decision concerning article 23.

³ The "sunset clause" in Article 24(2) has been replaced by the review clause in Article 16(4).

⁴ Deleted since par. 3 has been moved to article 16.

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.
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 Decision¹, 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.

¹ COM proposed to add: "and a correlative table between these provisions and the Framework Decision".

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
[...]
