

INTERNATIONAL COOPERATION IN CRIMINAL MATTERS

**THE FRAMEWORK DECISIONS AS AN INSTRUMENT
FOR HANDING OVER OF PROPERTY AND EVIDENCE IN
CRIMINAL PROCEEDINGS BETWEEN THE EUROPEAN
UNION MEMBER STATES.**

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INTRODUCTION

The European Union has long ago overgrown its initial role of an economic community, to become nowadays a sui generis supranational structure, which aims, besides all its other goals, to establish an area of justice, freedom and security, integral part of which is the cooperation in criminal matters between member states.

The cornerstone of this whole process is the revolutionary principle of mutual recognition, introduced by point 33 of the Conclusions of the Tampere European Council, held on 15th and 16th October 1999, which is intended to replace the classical form of international legal cooperation ó mutual assistance, within the EU.

. FRAMEWORK DECISION on THE EUROPEAN ARREST WARRANT (FD - EAW).

1.1. History of the provision of Art. 29 FD - EAW.

The possibility for handing over and seizing property between the EU Member States for the needs of a pending criminal proceeding (when the property is required as evidence) or for the purposes of its further seizure or confiscation (in the cases when it had been acquired as a result of an offence) is set in the provision of Art. 29 FD - EAW.

The abovementioned provision has been adopted by the European Commission at the elaboration of the FD - EAW directly from Art. 20 of the European Convention on Extradition (ECE) from 1957. The main argument for the incorporation of this text from the ECE in the FD - EAW as per the Explanatory Report on the Proposal on the European Arrest Warrant Framework Decision is the preservation of the existing legal order regarding the seizing and handing over property between the Member States until the adoption of the FD in case of further similar cases. Nevertheless, after the adoption by the European Council of the European Convention on Mutual Judicial Assistance in Criminal Matters (ECMJACM) in compliance with Art. 34 from the Treaty on the European Union, the FD ó EAW shall be applied and interpreted in the light of its legal provisions.

1.2. Comparison between the legal Framework on the Handing Over of Property under the Framework Decision on the European Arrest Warrant and the European Convention on Extradition.

The differences between the provisions of Art. 29 FD ó EAW and Art. 20 ECE consist in the following:

1.2.1. In comparison with the regulated with the ECE, as per the provision of Art. 29,

Para 1 FD ó EAW a possibility exists the requested judicial authority *to seize and hand over* to the issuing one *property on its own initiative* in accordance with its national law. This property shall be considered as different from which had been requested in the EAW by the issuing MS. This new moment in the FD ó EAW empowers the executing judicial authority to protect as much as possible the rights of the issuing MS and grants a new mandate of the executing authority in comparison with ECE and represents an expression of the principle of mutual trust and understanding between the Member States.

1.2.2. Pursuant to the provision of Art. 20, Para 1 ECE *õthe property which, at the time of the arrest, is found in the possession of the person claimed or is discovered subsequentlyö* is pointed as a possible subject to seizure and handing over from the requested to the requesting MS. In Art. 29, Para 1 FD ó EAW these objects are not explicitly included. The reasons for this solution probably are, in first place, that the property found in the possession of the claimed person at the time of his/her arrest may be seized and handed over by the executing authority based on its own initiative in compliance with that new legal possibility as per the FD ó EAW. On the other hand, similar to the legal framework in the ECE in Art. 29, Para 2 FD - EAW a possibility exists to be accomplished only a seizure and handing over of property without an arrest and extradition of a suspected for committing offence person.

1.2.3. As a new moment in the FD ó EAW, in comparison with the regulation of the matter in the ECE, shall be considered the protection given of the rights of the executing the EAW MS or these of any third party in the cases when they had acquired rights over the property subject to seizure and handing over. Pursuant to the FD ó EAW as precondition that the executing MS shall hand over property to the issuing one is set that the latter shall return it without any charge payable as soon as the criminal proceeding in it had been terminated.

2. Content and Scope of Art. 29 FD ó EAW.

According to the pointed in Art. 29, Para 1 FD - EAW the issuing the EAW judicial authority can present a request regarding the seizure and handing over of property covering the criteria under Art. 29, Para 1, Points ðaö and ðbö FD ó EAW. This request ***shall not be considered as compulsory to the executing it judicial authority*** which shall have the right to revoke the execution of the warrant when there is one of *the mandatory grounds* under Art. 3 FD - EAW or one of *the optional grounds* set as per Art. 4 FD - EAW. This conclusion shall be considered as correct based on the circumstance that these provisions are situated in Chapter *šGeneral principlesö* of the FD - EAW and is a well known legal principle that the general

provision of the legal act shall be applicable to every judicial instrument regulated in it.

The provision of Art. 29, Para 2 FD - EAW regulates the so called *ôproperty extraditionö*. It allows *the surrender of the requested person* and *the handing over of the demanded property* to be accomplished independently one from another. This conclusion is based on the circumstance that the property which may be required as evidence or had been acquired as a result of a committed offence may be handed over even in the cases when the EAW cannot be executed by the respective MS regarding the demanded person due to his/her death or escape from its territory. This approach is subject to criticism by some authors and in the judicial practice may occur cases in which the person sought to be surrendered to the issuing MS may escape to different from the executing the EAW country and as per some opinions in that situation it may be considered as wiser to retain his/her property in the state of the domicile of the person - original or not.

In the regulations of the FD - EAW *no additional preconditions* are set regarding the property which may be handed over to the issuing MS. The only requirement in this regard is the property to meet one of the criteria: *property which is required as evidence by the issuing the EAW MS* or *property which was acquired as a result of an offence*. In this cases only the executing the EAW judicial authority shall have the possibility to define what property exactly shall be handed over under the procedure of the applicable domestic legislation.

As the property subject to seizure or confiscation under the jurisdiction of the executing MS may be needed for the purposes of a pending criminal proceeding in its jurisdiction, the latter shall have the following legal possibilities: ***to retain the requested property temporarily until it is needed for the purposes of the pending criminal proceeding in its territory*** or ***to hand over the demanded property to the requesting MS under the precondition that it shall be returned immediately after the termination of the criminal proceeding under its jurisdiction***.

In connection with the application of the *principle of proportionality* shall be noticed that in the FD ó EAW there is no explicit regulation of the cases when the requested property is at minimal value. It shall be considered that the executing the EAW MS ***shall search, seize and hand over*** to the issuing one ***the demanded property in every case, in spite of its value***. An argument in favour of this conclusion is the circumstance that in the FD ó EAW is not pointed nothing explicitly in this regard. Apart from it, if at the adoption of the FD the European Council have had in mind the value of the property as criteria for its seizure and handing over, it would point it in an explicit manner in order no doubts to occur in the judicial practice. In addition, the leading circumstance for the handing over of property between the

Member State is its quality of *evidence* or *such which had been acquired as a result of an offence*, which makes in all cases irrelevant its value.

3. Rights of the Surrendered Person.

The provision of Art. 29 FD ó EAW does not regulates explicitly any rights of the requested in the EAW person in connection with the handing over of property. In this regard from the practical point of view problems will occur in case of conflicts between the Member States based on claims for property in different countries in the European Union. Based on the content of Art. 29, Para 3 and Para 4 FD ó EAW a conclusion could be made that preference shall be given to the jurisdiction which retains the property at the moment of the issuance of the EAW or takes first the final judicial decision regarding the committed offence and its legal consequences.

4. The Concept of "Property". Implementation of Art. 29 FD - EAW in Bulgarian Legal System.

4.1. The Bulgarian Parliament incorporated the FD - EAW by adopting on 03.06.2005 the Law on the Extradition and the European Arrest Warrant (LEEAW), published in the "State Gazette" 46 from 03.06.2005 and in legal force since 04.07.2005, but regarding the provision of Art. 64 LEEAW in force since 01.01.2007. At first glance, may be considered that in Art. 64 LEEAW the text of Art. 29 FD ó EAW was fully transposed by the Bulgarian Parliament with no amendments or supplements.

The abovementioned circumstance and the lack of specification in the Bulgarian legal framework regarding the concept of *property which shall be handed over*, makes possible it to be interpreted by the national jurisdiction executing the EAW having in mind the content which the domestic legislation puts in it. That conclusion shall be made regarding the judicial procedure for handing over the property based on the circumstance that nor the Framework Decision in the European Arrest Warrant, neither the Law on the Extradition and the European Arrest Warrant set any standards in this regard and the general legal framework of mutual assistance in criminal matters shall be applicable.

Pursuant to the understanding of some authors, as per the regulated in the FD ó EAW the property which may be subject to handing over by the executing MS shall be understood in a rather broad sense and meaning as *something owned; any tangible or intangible possession that is owned by someone*. The lack of explicitly expressed concept regarding the notion *property* in the FD - EAW makes possible to be turned to such a general and basic definition of the concept or to the legislation in the executing the EAW MS.

In comparison with the FD - EAW, in Art. 2, Point 1 from the Freezing Property Framework Decision for its purposes was elaborated a definition of the concept *property* which *includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents and instruments evidencing title to or interest in such property, which the competent judicial authority in the issuing State considers: is the proceeds of an offence referred to in Article 3, or, equivalent to either the full value or part of the value of such proceeds, or constitutes the instrumentalities or the objects of such an offence*. Nevertheless, the circumstance that in the Freezing Property Framework Decision is explicitly pointed that the abovementioned definition of the concept of property is created only for its purposes it shall not be considered as applicable for the purposes of the FD 6 EAW. This is additional argument supporting the understanding the executing the warrant judicial authority shall be empowered to decide on the matter which property shall be handed over on the bases of the concept of property set in the domestic legislation.

In this regard shall be pointed out that the Bulgarian implementing law refers to the property which may be requested as evidence or as acquired as a result of an offence using the concept of *objects* or *things* which shall be considered as more narrow in comparison with the concept of *property* in the view of the domestic legislation. That makes reasonable the conclusion that the FD - EAW was transposed in Bulgarian legislation implementing the idea that *subject to seizure and handing over by the Bulgarian judicial authorities on the bases of the EAW may only be a movable object* covering the criteria set in Art. 29, Para 1 FD 6 EAW, but not, assets in bank accounts or immovable property, for instance. In the judicial practice discussions and problems may arise with respect to the handing over of *all kind of documentation*, inclusively investment securities. It is more likely to be considered that this kind of documents by its nature of movable object *shall be handed over to the issuing MS*. Regarding *the assets in the bank accounts* in their quality of receivables from the Bank where they had been deposited is reasonable they *not be considered* as possible subject to seizure and handing over between the Member States as per the Bulgarian legislation.

In comparison with other EU Member States such as Sweden, Cyprus, Denmark and Belgium, in the Bulgarian legislation *is not set as a precondition* for the handing over the property *the existence of link between it and the person claimed for having committed the offence*, for instance: the property which had been acquired as a result of the offence and was found in possession of the person claimed at the time of his/her arrest or was discovered subsequently or objects which are not directly associated with the offence against the person.

4.2. Pursuant to Art. 64, Para 1 LEEAW *at the request of the issuing judicial authority*

or the relevant District court *ex officio* may demand as per the Bulgarian legislation the seizure and the handing over of objects which : 1. may be requested as evidence or 2. had been acquired by the requested person as a result of the offence. The possible problems in the practice of the Bulgarian judicial authorities which may arise are connected with the interpretation which may be given of the notions *objects which may be requested as evidence* and *objects acquired by the requested person as a result of the offence*.

Regarding the notion *objects which may be requested as evidence* problem shall provoke the question which shall be the applicable legislation to the clarification of abovementioned concept: that of the issuing the EAW Member State or that of the executing it judicial authority. In each particular case in consideration shall be had *the manner* which the issuing the EAW MS *had used for demanding the property for handing over*, namely:

4.2.1. In the cases when the issuing the EAW judicial authority *points out explicitly the objects* which shall be handed over from the executing MS the relevant Bulgarian District court *shall not be obliged to meditate on the matter* is the requested property evidence under the domestic Criminal Procedural Code (CPC) or not. That conclusion is based on the circumstance that the objects dedicated for handing over to the issuing MS shall be pointed in details in the EAW and the executing it MS shall not have any discretion regarding the matter which of them shall be handed over if there are no obstacles under Art. 64, Para 3 and Para 4 LEEAW, respectively as per Art. 29, Para 3 and Para 4 FD ó EAW.

4.2.2. When the seizure and the handing over of the property shall be accomplished *ex officio* by the relevant Bulgarian District court and *the objects of the transfer* between the Member States *are not pointed explicitly* in the EAW, is reasonable the opinion that *the decision which object may be considered as evidence and are useful for the pending criminal procedure* in the issuing the EAW MS *shall be made in compliance with the Bulgarian legal framework*. In these cases Art. 104 from the Criminal Procedural Code (CPC) which gives legal definition of the concept of *evidence* shall be applicable. According to this provision *evidence is factual data connected with the circumstances of the offence, help for its clarification and is arranged as the stated in the present code*. The Bulgarian CPC also uses the concept of the so called *material evidences* which are regulated as *objects, which have been dedicated or used for committing the offence or which have been an object of the offence, as well as any other objects, which may be used for making clear the circumstances under the criminal proceeding*.

In the context of Art. 64, Para 1 LEEAW *the seizure and handing over* of the objects between the Member States shall be accomplished in compliance with the Bulgarian

legislation. Based on the systematical interpretation of the provisions of Art. 64, Para 1 LEEAW and Art. 163, Para 2 CPC, during the search and seizure of the property in execution of the EAW, the Bulgarian judicial authority may search and seize *objects, papers and computer information systems, where computer information data is kept*. The provision of Art. 163, Para 2 CPC gives reason to the opinion that these objects may be considered as subject to the handing over of property as per the LEEAW, respectively pursuant to the FD ó EAW.

4.3. According to Art. 64, Para 2 LEEAW, the EAW issued in compliance with the provision of Art. 64, Para 1 LEEAW shall be executed even in the cases when the requested person by the issuing MS could not be surrendered to it based on *his/her death or escape and hiding in third country*. There is possibility to be issued an EAW only for handing over and seizure of property which meet the criteria under Art. 64, Para 1 LEEAW apart from the surrendering a person for the purposes of the pending criminal procedure in the issuing the EAW MS. This conclusion is based on the circumstance that in spite of the death of the person committed an offence or his/her escape, the requested objects may still be ***subject to seizure for evidence purposes*** under the legislation of the issuing MS in case of criminal procedure held against other persons which took part in the offence after the death of the suspect or after his/her escape as well as ***subject to confiscation or seizure in favour of the state*** in the cases when the requested person had passed away after the imposition of the punishment by the competent judicial authority.

4.4. As per the regulation of Art. 64, Para 3 LEEAW *šwhere the objects under Para 1 shall be a subject to seizure or confiscation on the territory of the Republic of Bulgaria, if they are needed in relation to a pending criminal proceeding in the issuing Member State, the competent Bulgarian court may take a decision for their temporary detention in the Republic of Bulgaria or to deliver them temporary to the issuing Member State under the condition they shall be returnedō*. From this provision could be made the conclusion that it regulates the cases when *the objects dedicated to be handed over* to the issuing the EAW MS *are needed* in Bulgaria *as evidence* in the meaning of this concept under Art. 29, Para 1, Point 1 FD ó EAW, respectively Art. 64, Para 1, Point 1 LEEAW but not as objects acquired as a result of the offence. The conclusion above shall be considered as reasonable on the ground of the grammatical interpretation of this legal text and its requirement the objects described in the EAW to be handed over to the issuing MS under the precondition that they shall be delivered back to the executing judicial authority. The legal nature of the *confiscation* as punishment and the *seizure* in favour of the state of the objects acquired as a result of an offence has as a consequence the acquisition by the state of the right of ownership over the

property demanded by the issuing MS. This deprives from any legal sense the handing over the requested property under the precondition of its delivery to the executing the EAW MS.

4.5. In the judicial practice at the application of Art. 64, Para 3 LEEAW difficulties may occur to the Bulgarian judicial authorities and they are based on the literal implementation by the Bulgarian Parliament of the provision of Art. 29, Para 3 FD ó EAW regarding the interpretation of the word *š seizureö*.

According to the Bulgarian Criminal Procedural Code *öthe seizureö* represents one of the methods for collection and check up of evidences under a pending criminal procedure and in most cases is connected with *öthe searchö* as such method. Shall be considered as true the conclusion that some objects may be seized as evidences during the pending criminal proceeding and in this aspect they are *ösubject to seizureö* as per the Bulgarian criminal procedure. Nevertheless, the systematic interpretation of Para 3 and Para 4 from Art. 64 makes reasonable the conclusion that in these cases the LEEAW does not mean *öseizureö* in the concept of *öresearch and seizureö* as per the understanding of the CPC but *öseizureö* as it is understood under Art. 53 from the Criminal Code (CC) or as the measure regulated by the Law on the Seizure in Favour of the State of the Property Acquired by Criminal Activity (LSFSPACA).

On one hand, if the Bulgarian legislation authority had in mind that the seizure of property under the LEEAW is the same as precondition and methods as the regulated in the CPC it would point it explicitly. This approach was adopted in Art. 64, Para 1 LEEAW where is set in undoubted manner that the seizure and handing over of the requested property shall be accomplished in compliance with the domestic legislation.

The provision of Art. 64, Para 3 and Para 4 LEEAW shall be interpreted in the sense that the objects which may be considered as evidence or acquired as a result of the offence shall be subject to seizure in favour of the Bulgarian State under the preconditions set in Art. 53 CC. The main argument for this conclusion is that this type of seizure is applicable independently from the criminal responsibility of the suspected person and from the imposing a confiscation as punishment by the relevant judicial authority. According to the provision of Art. 53, Para 1 CC ***regardless the criminal responsibility*** in favour of the State ***shall be seized the objects belonging to the suspected person and used for committing deliberate offence and the objects belonging to the suspected person and subject to deliberate offence when it is explicitly regulated in the Special Part of the Criminal Code.*** In favour of the Bulgarian State shall also be seized *the objects or means of the offence the possession of which is prohibited under the Bulgarian legislation and the acquisitions of the suspected person through the*

offence, if they are not subject to return or recovery.

4.6. As per Art. 64, Para 4 LEEAW *the rights acquired by the Republic of Bulgaria or by third persons on the envisaged property shall be preserved. If such rights appear, the objects shall be returned in the executing Member State immediately after the termination of the criminal proceeding*. The interpretation of this provision gives reason to the conclusion that in these cases shall be handed over ***property which is considered as evidence*** and ***it shall not be possible subject to confiscation in the issuing the EAW Member State***. Nevertheless, from the provision it results unclear which rights of the Bulgarian state or of the third party shall be preserved as acquired over the objects dedicated to be handed over or rights arising from agreement concluded between the Bulgarian State, respectively the third party and another physical person or legal entity, right over the object such as property right. It shall be considered that the rights of the Bulgarian state and these of the third party over the property had been acquired in the period since the date of the offence until the receipt of the EAW from the executing judicial authority. On that basis, the relevant Bulgarian court when enacting its decision regarding the execution of the EAW shall be obliged to consider these rights as they exist at that moment of the judicial decision.

4.5. In Art. 64, Para 4 LEEAW *is not explicitly pointed out* in which manner the rights over the objects demanded in the EAW shall be proven in the executing MS. In Bulgaria, on the ground of Art. 66 LEEAW a conclusion could be made that these rights *may be proven with all possible evidence means*.

4.6. In the context of Art. 64, Para 3 and Para 4 LEEAW ***a problem with no solution*** shall arise in the judicial practice. Pursuant to Art. 111, Para 2 CPC *the objects which had been seized as material evidence under a pending criminal proceeding may be returned to the person having rights over them with an explicit prosecutor's permission before its termination of the criminal proceeding* only when this will not mislead the clarification of the circumstances under it or the object is not such of administrative offence.

On the other hand, in the cases when *the material evidences shall be preserved until the final termination of the criminal proceeding* no problems for handing over of property shall occur when the objects requested by the issuing MS and representing material evidence under the Bulgarian legislation because they shall be available to the judicial authorities before the termination of the criminal proceeding.

5. Conclusion.

Based on the analysis above the following conclusions could be made:

5.1. On the ground of the incorrect translation of the Framework Decision of the

European Arrest Warrant in the Bulgarian Law on the Extradition and the European Arrest Warrant the concept of property is transposed in the domestic legislation in a more narrow meaning in comparison with the original text. Thus it is recommendable that amendments of Art. 64 LEEAW should be made in respect to explicitly pointing out that only movables, documentation and securities may be subject to handing over to the included the documentation, but not receivables over the Bank accounts and immovable property.

5.2. In order to be facilitated the legal practice of the matter is recommendable to be decided on the introduction in the Bulgarian legal framework of the link between the demanded property and the suspected for the committing an offence person.

5.3. It shall be considered as reasonable in the legal framework to be explicitly regulated if the issuing of the European Arrest Warrant of the executing it shall be empowered to decide on the which property shall be handed over between the European Union Member State.

5.4. Is recommendable in the provision of Art. 64 LEEAW to be regulated that as "seizure" under the legal framework of the handing over of property shall be understood the seizure as per it is set in the Criminal Code and the Law on the Seizure in Favour of the State of the Property Acquired by Criminal Activity. In that method of judicial technique shall be avoided any problems regarding the interpretation of that concept and the probability it to be considered as method for search and collection of evidences under the Criminal Procedural Code.

5.5. It shall be useful for the judicial practice of the matter in Art. 64, Para 4 LEEAW to be regulated in explicit manner which rights of the Bulgarian State and the third parties shall be preserved or that arising from a contractual relationship, ownership or possession rights or any other.

5.6. It is of crucial importance to be created legal regulation of the cases when based on request of the person having rights over the objects, the latter had been delivered back before the termination of the criminal proceeding by the prosecutor based on his/her explicit consent and after that the property was demanded by the issuing the European Arrest Warrant MS.

II. FRAMEWORK DECISION on EUROPEAN EVIDENCE WARRANT

1. General aspects

The European evidence warrant (EEW), introduced by **Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose**

of obtaining objects, documents and data for use in proceedings in criminal matters (OJ L 350, 30.12.2008, p.72), is an even greater step towards the substitution of mutual assistance with mutual recognition in the field of criminal cooperation between Member States. It is the third instrument, following the European arrest warrant and the Orders freezing property and evidence, which implements the principle of mutual recognition to pre-trial orders issued in criminal proceedings, as stated in point 36 of the Tampere Conclusions 1999 and aims at completing measures 5 and 6 of the Programme for implementation of the said principle, adopted by the Council on 29 November 2000.

Council Framework Decision 2008/978/JHA is the first step towards a common European investigation procedure, based on mutual recognition, which shall secure the ability of Member States to counteract cross-border and domestic crime in a European space with little or no restrictions on free movement of suspects, defendants, witnesses, victims, objects, documents, data, evidence. Until then however the introduction of the EEW does not affect in any way the existence and use of other forms and instruments for cooperation in criminal cases. Simultaneously, pursuant to article 21, paragraph 2 the member states undertake the obligation to use the EEW, in case all the evidence in question falls within its scope. Should however the collection of objects, documents or data be a part of a wider assistance request, which presupposes additional actions of the executing state, or should the issuing authority considers it more effective, it shall use mutual legal assistance.

The EEW, is a judicial request for obtaining objects, documents and data, issued by a judge, court, investigating magistrate, public prosecutor or another judicial authority of one member state in the standardized form attached in the annex of the Framework Decision, and addressed to an executing authority in another member state, which obliges the latter to forward the requested evidence, shall the warrant comply with the formal requirements and unless a ground for non-recognition or non-execution is invoked on.

2. Scope of application of the European Evidence Warrant

2.1. Material scope

The material scope of the EEW, outlined in article 4, is quite limited as it only applies to evidence that already exist, regardless of the fact whether they have been duly collected by the executing authority prior to the issuing of the EEW or are about to be collected as a result of it.

First of all these might be various objects, which may be of any use in an ongoing criminal investigation in the issuing state. For instance these might be objects which have been designated or used for committing an offence, or which might bear traces thereof, or

which have been used to cover the offence. However the EEW is designed to facilitate the procedure of transferring evidence in existence, which have to be described in details in section K of the unified form, thus it can not include a request to conduct analysis for the purpose of discovering traces, such as fingerprints, footprints, biological material, etc. of the objects in question, as specifically provided in art.4, par.2 (d) of the Framework decision. Secondly, the warrant might concern documents i.e. written evidence of any kind except criminal records, which are subject to Council Decision 2005/876/JHA of 21 November 2005 on the exchange of information extracted from the criminal record (OJ L 322, 9.12.2005, p.33) and thirdly any other data such as computer information, audio or video records, including records, containing the results of special investigative techniques, records of financial transactions, etc.

Generally, art.4, par.2 prohibits the issuing of an EEW that would require for the executing authority to carry out any evidential methods, aimed at the future gathering of the objects, documents or data which might be subject to a warrant. Should however the evidence in question be collected prior to the EEW, there are no restrictions on obtaining it regardless of the evidential method used. For example an EEW can not be issued for the interrogation of a witness, but it can be used to take possession of the protocol of such interrogation, it can not require obtaining fingerprints directly from an individual, but can grant access to the fingerprint database of the executing authority.

The EEW should not only specify which of the three types of evidence, are being sought through it, but also include a full description of the object, document or data in question. This should be as detailed as necessary to allow identification of the evidence, subject to the warrant, including their current location or last known one.

2.2. Discretion of the executing authority

Notwithstanding, should the issuing authority has expressly so requested, the EEW can serve as legal ground for obtaining objects, documents or data, not listed in section K thereof, but discovered during its execution. Article 1, paragraph 5 of the Framework Decision provides that no further enquiries are to be conducted, which means that it is entirely upon the discretion of the executing authority to evaluate the relevancy of the said evidence to the criminal proceedings in the requesting state. Thus, it is crucial for the obtaining of all relevant evidential materials, that section I of the EEW contains a full description of the facts and circumstances of the offence. Beyond doubt the direct communication between the two authorities, which results from the mutual recognition, allows for further explanations and clarifications to be given by the issuing authority. However one of the criteria for

admissibility of the evidence so collected by the national courts of the requesting state would be whether it has been obtained through an EEW, issued for the same act or omission, which is subject of the judicial trial pending before it.

The said procedure, which includes not only the mere transfer of objects, documents or data, designated in advance, but which also gives the executing authority an active role in gathering and evaluating evidence, can be defined as a form of joint investigation. The requested state is involved in the very process of investigation, rather than simply supplying logistic assistance in discovering the location and obtaining the evidence.

2.3. Exceptions of the *non-interrogation* rule

Moreover, article 1 paragraph 6 of Council Framework Decision 2008/978/JHA, contains an exception from the general prohibition to issue an EEW for conducting interviews or taking statements from the any parties involved. As every exception this shall be strictly interpreted, for not-complying with the prerequisites of the provision might make the collected statements inadmissible on purely procedural grounds. First of all there should be an explicit request by the issuing authority, included in section L of the EEW. Secondly the exclusion covers only taking of statements of individuals that are present at the place and time of the actions undertaken for executing the EEW, which means that summoning anyone for the purpose of obtaining his or her statement in regard to the evidence, subject to the EEW is impossible. Another requirement is that the persons are directly related to the objects, documents or data for example they are in their possession, or bear their names, etc. It is however irrelevant what their procedural capacity is- suspect, defendant, witness, victim, or whether they have one, whether they have been mentioned in section K 3 of the EEW or not. Typically that would be the persons, who voluntarily hand over the evidence or who are present in the premises, subject to search and seizure. What is important to notice here is that these statements are regulated by the procedural rules of the executing state, in contrast to obtaining the evidence, subject to the EEW, where the executing authority shall comply with any special procedural requirements of the requesting state.

2.4. The EEW is a pre-trial cooperation instrument in the field of criminal proceedings, which determines its sphere of application. It might be issued in respect to criminal offences, infringements of the law, punishable with administrative sanctions imposed either in an administrative or judicial authority, including on legal persons.

3. Procedure

The procedure under Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and

data for use in proceedings in criminal matters consists of three sub-procedures: 1. issuing an EEW; 2. transmitting the EEW; 3. executing the EEW.

3.1. Issuing of an EEW

The EEW might affect fundamental human rights, subject to guarantees by numerous international acts. Therefore the Framework Decision contains a number of safeguards for their protection, one of them concerning the capacity of the issuing authority. Given that and with regards to the mutual recognition requirements, the EEW shall be issued by a judge, court panel, investigating magistrate or a public prosecutor. These might be defined as authorities with general capacity to issue EEW. Besides this, article 2, c(ii), enables other judicial authorities of the requesting state to issue an EEW, provided that in the case concerned they act as criminal investigating authorities, with powers in cross-border cases i.e.- issuing authorities ad hoc. Both have to be included in the list of authorities provided by each member state to the General Secretariat in pursuance of article 3, paragraph 1.

The Council Framework Decision does not explicitly provide the defense with the option to seek issuance of an EEW, thus leaving the answer to the implementation acts of each member state. However if the procedure is reserved only for the accusatory authorities, this shall constitute a breach of article 6 of the ECHR and more specifically the principle of equality of arms. Therefore it is highly advisable that the national procedure includes a right of the defense to seek collection of evidence via an EEW.

Prior to issuing the EEW, the authority of the requesting state shall ascertain that the conditions of article 7 have been met, as these are absolute prerequisites for the validity of the EEW and a guarantee for the rights of third persons. First of all the objects, documents or data must be necessary for the purpose of the proceedings. This requires the issuing authority to evaluate their relativity to the case subject, their importance for establishing the facts and for the process of evidencing. Then there is a requirement for proportionality between the aim and character of the proceedings and the effect, which the execution of the EEW might have on individuals and legal persons. Some of the criteria might be the nature of the offence-crime or and an infringement of the law with administrative character, the severity of the offence, the punishment prescribed, etc. Furthermore the evidence subject to the warrant shall be obtainable by the issuing authority, according to the rules and restrictions of its domestic procedure, if they were on its territory. Otherwise the EEW might be used by the issuing authority as a way to evade certain legal provisions, which are usually laid down to protect human and civil rights of the individuals.

It is within the exclusive powers of the issuing authority to decide whether the above

listed conditions have been met and neither the executing authority may invoke such ground for non-recognition of the EEW, nor can an individual or a legal person bring an action in the executing state based on infringement of article 7. This is a direct result from the principle of mutual recognition, which requires the requested state to rely on the estimation of the issuing authority and to execute the EEW, as if it were an act of its domestic authorities, without further verifications. On the other hand this might deprive individuals and businesses from a legal remedy against disproportionate or evasive actions of the issuing authority.

The issuing authority has to clarify a number of questions of procedural nature, prior to completing the form for an EEW, such as: what are the facts of the case; are there reasonable grounds to believe that the requested evidence are on the territory of the requested state; to what extent can the objects, documents or data be identified; do they already exist or would it be necessary to collect them subsequently, as the latter would make the EEW inapplicable; is there a freezing order in the requested state, concerning the evidence in question; is the double criminality rule applicable; who are the persons that might possibly be affected by the EEW (This includes two groups- persons directly connected to the offence- defendants, victims, who have possession over the evidence, and persons not directly connected to the offence, but whose rights might be affected. For example the co-owner of a defendant, whose motor vehicle is being requested for the investigation of a road-traffic accident.); should the executing authority be requested to comply with any formalities; what are the deadlines of the investigation in the issuing state, in case they are shorter than the ones laid down in article 15; which is the executing authority in charge and its contact details; whether the EEW is being issued in connection to a freezing order under Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (OJ L 196, 2.8.2003, p. 45) or a preceding EEW, etc.

Once the above listed issues have been clarified the issuance of an European evidence warrant should not cause any trouble, as it is done by filling in and signing a standardized form, contained in the Annex of Framework Decision.

The EEW shall be issued in a written form and translated in one of the official languages of the executing state or another official language of the European Union, which it has declared acceptable before the General Secretariat.

3.2. Transmitting an EEW

Once the EEW form has been completed it has to be transmitted to the competent authority of the executing state. This is the authority of the member state, on whose territory the issuing authority has reasonable grounds to believe the evidence is located. In case of

electronic data, this is the competent authority of a member state, which has access to that data, according to its national law. Council Framework Decision 2008/978/JHA does not give direct answer to the question, whether it is possible to transmit one and the same EEW to multiple member states simultaneously or consecutively. However the interpretation of its provisions and especially article 17, paragraph 2 d and section K-2 of the form, presupposes the exact location of the required objects, documents or data, as a condition for issuing the warrant, which excludes the possibility of multiple locations.

The EEW shall be transmitted directly from the issuing to the authority that is capable under the provisions of the national law of the requested state to collect the evidence, which is again a manifestation of the mutual recognition principle. The Framework Decision allows member states to designate a central authority to assist the competent authorities in the administrative work, but not to substitute them in the issuing and executing of the EEW. Transmission of the EEW might be accomplished through any means of communication, which allows the requested state to verify its authenticity and provides a written record. In respect to reducing the degree of formality, a supplementary EEW may be handed directly to the executing authority by a representative of the issuing authority, who participates in the execution of the first one.

One of the basic features of the principle of mutual recognition in pre-trial orders, applied for the first time in Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant (OJ L 190, 18.7.2002, p.1) and further developed by Council Framework Decision 2008/978/JHA is that of direct contact between the issuing and the executing authority. This greatly improves communication between the parties involved in the process of evidencing in criminal proceedings, thus enabling a timely conducted investigation, which is of great importance in criminal law.

3.3. Execution of an EEW.

Should the EEW be transmitted in accordance with the aforesaid rules, the executing authority shall recognize it without any formalities whatsoever and proceed to the necessary actions. This rule, laid down in article 11, paragraph 1 of Council Framework Decision 2008/978/JHA, represents the principle of mutual recognition in its purest form. Notwithstanding, the recognition and execution of an EEW is based on the two fundamental principles of criminal procedure- the non bis in idem rule and sovereignty of the executing state over its territory, as well as the requirement for compliance with and application of its domestic law, on which basis eight grounds for non-recognition or non-execution are formulated in article 13. Executing authorities should be very careful in invoking any of these

and where possible endeavor to eliminate them. For instance article 13, paragraph 4 obliges the competent authority to consult Eurojust, whenever the ground for non-recognition is conflict of jurisdictions.

Separate grounds exist for postponing the recognition or execution of an EEW. These are objective circumstances, related either to the issuing- grounds concerning recognition, or to the executing state- grounds delaying execution.

4. Evolution of the double criminality rule

A great step towards mutual recognition is the provision of article 14 of Council Framework Decision 2008/978/JHA, which deals with the requirement of double criminality, traditional for cooperation based on mutual assistance. Neither the recognition, nor the execution of the EEW are dependant on the dual criminality of the conduct both in the issuing and the executing state, which is a result of the increased confidence between the criminal systems of member states. It is arguable that this affects the substantial criminal law of member states by obliging their authorities to collect evidence for acts and omissions, which might not be considered punishable under their national law. Furthermore this might be considered to infringe one of the fundamental principles of criminal law- *nullum crimen, nulla poena sine lege*, enshrined in art. 7, par.1 of the European Convention of Human Rights and it is for the ECJ to decide on the validity of that provision.

Nevertheless if the EEW requires search or seizure to be carried out the dual criminality may be invoked as ground for non-execution pursuant to art.13, par. 1(b) in connection to art.14, par.3. Obviously human rights guarantees prevail when such intense coercive measures like search and seizure are being used. This shows also in the requirement for EEWs, which request these actions, to be issued or approved by a magistrate.

The balance between human rights of the individual and the security of the society has been shifted in favor of the latter as far as severe crimes are concerned. Therefore the list of 32 offences from article 2, par.2 of Council Framework Decision on the European arrest warrant, for which dual criminality does not apply under any circumstances has been replicated in article 14, paragraph 2 of Council Framework Decision 2008/978/JHA. This obliges the executing authority to carry out search or seizure if necessary, without being able to resort to the dual criminality exception. The initial proposal contained some additions to the list, namely infringements of road traffic regulations, smuggling, intellectual property offences, threats and acts of violence against persons, criminal damage and theft, but the negotiations on the adoption of the Framework left them outside the list the present moment.

5. Applicable law

Execution of the EEW is based upon the well established principle of international judicial cooperation- *locus regit actum*, i.e. the procedural law applicable is that of the requested state. The executing authority has full discretion in choosing which measures to apply and whether or not to use coercive measures, as long as it ensures the obtaining of objects, documents or data. However Council Framework Decision 2008/978/JHA obliges the executing authority, at obtaining the evidence, to comply with any formalities and procedures, requested by the issuing authority, unless they contradict its fundamental principles of law. For instance, if the law of the issuing state prohibits search or seizure to be carried out during the night, the executing state shall observe these restrictions, regardless of its domestic rules. The enforcement of article 12 establishes a dynamic hybrid panel of rules, which combines procedures from two national law systems and differs from case to case, thus going one step forward towards a common procedure for evidence gathering between member states. Furthermore this shall greatly enhance the admissibility of the collected evidence by the national courts, for the application of the safeguards granted by the domestic law of the issuing state shall limit options for objection on procedural grounds.

The Framework Decision sets relatively short deadlines ó the evidence shall be obtained within 60 days from the receipt of the EEW by the competent executing authority and immediately transferred to the issuing authority. Taking in account the nature of criminal investigations, there is an option to shorten the deadlines set in article 15 in case of procedural time limits or urgency of the situation.

6. Conclusion

Member states should have had Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters implemented by 19th January 2011. Despite this, very few of them have adopted the necessary domestic acts, which prevents us from having much examples of its application or related cases before the ECJ.

It took more than five years, many hours of negotiations and some vital compromises for the proposal of the European Commission for a Council Framework decision on the European Evidence Warrant to become a reality. But now the future of a union-wide judicial procedure, based entirely on the principle of mutual recognition, is brighter then ever with the joint proposal of few member states, including Bulgaria for Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters in the way.

Bibliography.

Sabine Gless and Daniel Schaffner ó *The European Arrest Warrant in Practice*, 2009,
T ó M- C Asser Press, The Hague, the Netherlands and the Authors, 297 ó 315 p.

The European Evidence Warrant: An Introduction- Gavin Irwin at the ECBA
conference in Potsdam