James Hamilton, Director of Public Prosecutions, Ireland
October 2009

Improving judicial possibilities to exchange foreign evidence? The EEW compared to existing European instruments

Background

International cooperation in the field of criminal law is by no means a recent phenomenon. In Ireland mutual legal assistance provisions date back to the Foreign Tribunals Evidence Act, 1856 which was extended to criminal proceedings by the Extradition Act, 1870. However, the internationalisation of crime has undoubtedly increased greatly in recent times with the relaxation of border controls, the increase in international traffic and the developments of global terrorism. The beginning of the 21st century saw an increased focus on the need to strengthen international co-operation models in the field of criminal justice. The European evidence warrant is intended to be another step in the development of a comprehensive mutual recognition regime within the European Union. The recent Framework Decision on the European evidence warrant[1] must be evaluated in the context of other European Union instruments as well as the Council of Europe Convention on mutual assistance and relevant domestic legislation, if we are to determine whether this new procedure will go in improving judicial possibilities to exchange foreign evidence.

The development of mutual assistance measures in Ireland

Before the Criminal Justice (Mutual Assistance) Act 2008

Remarkably the criminal co-operation provisions contained in the 1856 and 1870 legislation remained on the Irish statute book until 1994. The first substantial measures taken in the sphere of judicial co-operation in independent Ireland were those contained in the Criminal Law (Jurisdiction) Act, 1976. These measures were enacted to allow for co-operation between the Northern Irish and Irish jurisdictions in combating terrorist violence. The measures included a harmonisation of substantive law in relation to offences commonly committed by terrorist organizations, provisions for extra-territorial jurisdiction in each part

[1] 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.

of Ireland in respect of certain offences committed in the other, including homicide, arson, kidnapping and false imprisonment, certain types of criminal damage, serious assaults, robbery, aggravated burglary, explosives and firearms offences, and the hijacking of vehicles or aircraft, as well as provisions to allow for evidence to be taken in either jurisdiction in respect of trials for those offences in the other. Although useful in a small number of cases, the provisions concerning the taking of evidence extra-territorially were not used on a widespread scale, possibly due in part to their somewhat cumbersome nature.

The next and in practice more significant piece of Irish legislation was the Criminal Justice Act, 1994 which was enacted to give effect to the Council of Europe's Convention on Mutual Assistance in Criminal Matters 1959. Part VII of the Act provided for a comprehensive framework on mutual legal assistance. This framework was replaced recently by Part V of the Criminal Justice (Mutual Assistance) Act 2008.

The Criminal Justice (Mutual Assistance) Act 2008

The Criminal Justice (Mutual Assistance) Act 2008 was enacted in order to incorporate into Irish law a number of conventions, agreements and protocols which in relation to mutual assistance had been agreed subsequent to the passing of the 1984 Act.[2] Section 62 of the

[2] These were the following:

1) The Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union done at Brussels on 29 May 2000;

2) the Protocol to that Convention done at Luxembourg on 16 October 2001;

3) the Agreement between the EU and the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the 2000 convention on Mutual Assistance in Criminal Matters and the 2001 Protocol thereto;

4) Articles 49 (excluding paragraph (a) which has been repealed) and 51 of the Convention, signed in Schengen on 19 June 1990, implementing the Schengen Agreement of 14 June 1985;

5) the Council Framework Decision of 22 July 2003 on the execution in the European Union of orders freezing property or evidence;

6) Title III of the Co-operation Agreement between the European Community and its Member States and the Swiss Confederation to combat fraud and any other illegal activity to the detriment of their financial interests, done at Luxembourg on 26 October 2004;

7) the Council Decision of 20 September 2005 on the exchange of information and co-operation concerning terrorist offences;

2008 Act lays down the procedure for Ireland to issue to a designated state (by which is meant any Member State of the European Union, Iceland or Norway, as well as any other state designated by the Minister for Foreign Affairs) letters of request seeking assistance in obtaining specified evidence from a person in that state. Section 63 sets out the procedure for giving effect to letters of request received from designated states. Both sections provide that the requested evidence may be used only for the purposes set out in the relevant international instruments or specifically set out in the letter of request, unless further consent is sought. Sections 65 and 66 deal with the transfer of prisoners to give evidence or assist criminal investigations from another state to Ireland and from Ireland to another state. Consent of the prisoner must be obtained before either procedure is followed. The mechanism for evidence to be received by Ireland through a television link is outlined in section 67. Sections 68 to 72 deal with evidence to be given in Ireland by television and telephone link for use outside the State.

Provision is made for the issue of a letter of request for a search for evidence in a designated state in section 73 where it appears to a judge at a sitting of any court that evidence for the purpose of criminal proceedings which have been instituted or an ongoing investigation may be obtained at a place in that designated state. The section also provides that the Director of Public Prosecutions may issue and transmit a letter of request directly to the appropriate authority. Section 74 deals with the receipt of requests for assistance in obtaining evidence for use outside the State. This section applies only where the conduct giving rise to the request is punishable under both the law of the State and the requesting state by imprisonment for a maximum period of at least 6 months.

---

8) the Second Additional Protocol of 8 November 2001 to the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959;

9) Chapter IV of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, done at Warsaw on 16 May 2005;

10) Articles 46, 49, 50 and 54 to 57 of the United Nations Convention against Transnational Organised Crime, done at New York on 31 October 2003;

11) the 2003 Agreement on Mutual Legal Assistance between the EU and the US and the related bilateral instrument to give effect to the Treaty on Mutual Assistance in Criminal Matters between Ireland and the US.

Sections 76 to 79 deal with assistance in relation to identification evidence, defined in section 76 as a fingerprint, palm print or photograph of, or bodily sample from, a person and including any related records.

These provisions are clearly extensive as they aim to implement a considerable body of international mutual assistance law.[3] It should be noted that the 2008 Act does not contain the strict deadlines to be found in the Framework Decision on European evidence warrant. In addition, the provisions in relation to obtaining evidence are far-reaching and allow Gardaí in Ireland to seize any material found at the time of the search which is believed to be evidence of or relating to the commission of the offence concerned or other criminal activity in the designated state. [4]

European mutual assistance measures

Council of Europe Convention on Mutual Assistance in Criminal Matters, 1959

The Council of Europe agreed the first European instrument dealing with procedures in relation to mutual assistance, the Convention on Mutual Assistance in Criminal Matters, in 1959.[5] The Convention imposed a commitment on state parties to afford each other "the widest measure of mutual legal assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, fell within the jurisdiction of the judicial authorities of the requesting party". The Convention's main instrument is a rogatory letter or letter of request which is used to request the procuring of evidence or transmission of articles.

Under the Convention as it originally stood rogatory letters were to be executed by the requested party in accordance with its own laws. The Convention provides that assistance may be refused where the request concerns an offence which the requested party considers to

[3] See footnote 2 above

[4] Section 74(9)(c) Criminal Justice (Mutual Assistance) Act 2008

[5] European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 20.IV.1959 ETS 30

be a "political offence, an offence connected with a political offence, or a fiscal offence"[6] or prejudicial to "sovereignty, security, *ordre public*, or other essential interests of its country".[7]

The Convention further provides for the summoning of witnesses to the requesting state, the transfer of persons in custody upon their consent in order to give evidence and the communication of judicial records to the extent that such records would be available to the requested parties' own judicial authorities. It is interesting to note that under Article 8 of the Convention a witness or expert who has failed to answer such a summons may not be subjected to any punishment or measure of restraint unless he voluntarily enters the territory of the requesting party and is duly summoned there.

The First Additional Protocol to the 1959 Convention, signed in 1978, removed the fiscal offence exception. The Second Additional Protocol, signed in 2001, provided for further methods of co-operation including the hearing of evidence by video or telephone conference, assistance in covert operations, the possibility of entering into agreements to transfer detained persons, as well as to permit cross-border observation, controlled delivery and joint investigation teams. Article 11 of the Convention which allows for a request for the transfer of a prisoner for "personal appearance as a witness or for purposes of confrontation" was amended to provide instead that such a request may be made where a "personal appearance for evidentiary purposes other than standing trial" is required. Such persons must consent to the transfer. Article 13 of the Second Protocol outlines further provisions for the transfer of detained persons. Subsection (7) states that Contracting States may declare, before an agreement to transfer a prisoner is made, whether consent of the detained person will be required. This would suggest that consent is not automatically required for requests under this Article where states otherwise provide.

[6] *ibid*. Article 2a.

[7] *ibid*. Article 2b.

Co-operation on criminal justice within the European Union

It is perhaps not surprising that it was only recently that the European Union turned its focus to mutual assistance measures, as criminal law was originally considered exclusively the responsibility of the Member States. The principal instruments of international co-operation in the fields of extradition and mutual assistance were developed in the Council of Europe. Conway explains the reasons behind the time delays between the two systems of co-operation that have developed in Europe as follows:

> "Criminal law is of more central relevance to the Council of Europe and its primary legal instrument, the European Convention on Human Rights (ECHR) – which being concerned with individual rights, is of particular relevance to the exercise of coercive and punitive state powers through the application of criminal law…In the EU, cooperation in criminal matters developed as more of an offshoot of a primary concern with economic freedom of trade and the free movement of economic actors."[8]

The development of EU criminal law arose both from the observation that the absence of cooperation in the sphere of criminal law was hindering the Union's primary aims and potentially created a threat to the financial interests of the EU, and also as a response to the fact that free movement of goods, services, capital and people was facilitating the commission of trans-frontier crime in ways which national governments acting on their own were powerless to prevent. The Pillar system of the Maastricht Treaty[9] allowed for greater co-operation in the field of Justice and Home Affairs, which is considered the Third Pillar of the European Union. However, such cooperation had to be based on unanimous agreement and was not enforceable in the manner of conventional Community obligations. It was not until the Amsterdam Treaty[10] that more binding measures were introduced. These measures were in the form of Framework Decisions which carried more binding force than the Joint Actions of the previous system. The Lisbon Treaty will abolish the Pillar structure and allow a full range of legislation to be adopted in this area: regulations, directives, decisions,

[8] Conway, *The Council of Europe as a normative backdrop to potential European integration in the sphere of criminal law*, (2007) Denning Law Journal Vol 19 pp 123-124

[9] Treaty on the European Union, 92/C 191/01

[10] Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts

recommendations and opinions. This will clearly further develop and strengthen the EU's role in the sphere of criminal law.

The need for criminal sanctions to protect Community interests also became an issue of concern. Fraud against the Community budget was considered in the Greek maize case[11] where the European Court of Justice held that Member States were obliged to apply their criminal law to protect the EC budget in the same way it would apply its criminal law to national criminal offences. This requirement was subsequently incorporated into the Treaty of the European Union originally as Article 209a and subsequently Article 280 under the Treaty of Amsterdam. In 1995 the Council established a Convention on the protection of the European Communities' financial interests[12], generally referred to as the "PIF Convention". The PIF Convention requires Member States to ensure that offences relating to fraud affecting expenditure and Community revenue are punishable by "effective, proportionate and dissuasive criminal penalties".[13] The Convention came into force on 17 October 2002.

The "Corpus Juris" and the European Public Prosecutor

In the mid-nineties the European Commission, concerned with whether the arrangements in place at the time were adequate to investigate and prosecute cases of fraud on the European budget, sought the opinion of a group of experts composed of academics and practitioners. The group published their report entitled Corpus Juris in 1997 along with a revised version in 2001. The report proposed a comprehensive criminal code for eight offences which were identified as relevant to the question of fraud on the European budget. The "mixed regime" proposed by the report was based on a model of criminal law which rested on European territoriality. This meant that the code would operate in a separate legal space. However, the offences would be processed through national courts rather than through the creation of European Criminal Court. In order for this system to work the report proposed the creation of

[11] Commission v. Greece [1989] ECR 723

[12] 1995 OJ C 316

[13] Article 2 of the Convention

a European Public Prosecutor. The report rejected the traditional model of co-operation in favour of this more radical model.

The report was the subject of extensive debate. In 2001 the Commission presented a Green Paper on criminal-law protection of the financial interests of the Community and proposed the establishment of a European Public Prosecutor.[14] This Green Paper broadly followed the recommendations of the Corpus Juris study. Many objections were raised not just to the model outlined but to the very concept of an EPP. The creation of such an Office and other models involving harmonisation have proven politically sensitive in some Member States. However the concept has by no means been abandoned. Article 69E of the Lisbon Treaty empowers the Council, in order to combat crimes affecting the financial interests of the Union, to establish a European Public Prosecutor's Office "from Eurojust". It is possible, given the lack of progress thus far, that any negotiations in relation to the establishment of such an Office will not be straightforward.

Mutual recognition measures have proven to be a somewhat less controversial approach than harmonisation. Belfiore notes:

> "All in all, it must be borne in mind that mutual recognition has been promoted precisely with the purpose to save the State's sovereignty and to avoid more penetrating measures of harmonization in criminal law."[15]

Although state sovereignty is still being cautiously guarded in relation to mutual recognition regimes, some such measures have been successfully adopted. It is to these that I will now turn.

The Tampere Conclusions

In October 1999 the European Council convened a special meeting in Tampere, Finland, dedicated solely to the consideration of the creation of an area of freedom, security and justice

[14] COM (2001) 715 final

[15] Belfiore, *Movement of Evidence in the EU: The Present Scenario and Possible Future Developments*, (2009) 17 European Journal of Crime, Criminal Law and Criminal Justice 1, pp. 8-9

in the European Union. The Tampere Council agreed a number of areas of specific concern to the workings of the Union, highlighting the dangers of crimes such as money-laundering and the need for greater co-operation in the area of asylum and migration. The Council agreed that mutual recognition should become the "cornerstone of judicial co-operation" within the Union. It was felt that that principle should apply to judgments and other decisions of judicial authorities. In addition it was concluded that:

> "The principle of mutual recognition should also apply to pre-trial orders, in particular to those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable; evidence lawfully gathered by one Member State's authorities should be admissible before the courts of other Member States, taking into account standards that apply there."[16]

The Council also agreed that a unit should be set up to facilitate the co-ordination of national prosecuting authorities, to support criminal investigations in organised crime cases, and to co-operate with the European Judicial Network in particular to simplify the execution of letters rogatory. Eurojust was thus established to fulfil this role.[17] Eurojust is composed of representatives from each Member State, who may be police officers, judges or prosecutors. Although its role is facilitative it has proved invaluable for assisting co-operation, particularly in cases of urgency. The Irish member of Eurojust retains the status of a professional officer of the Director of Public Prosecutions.

EU Convention on Mutual Assistance in Criminal Matters

The identification of mutual recognition as the cornerstone of judicial co-operation provided the basis for a number of subsequent EU legislative measures. The EU Convention on Mutual Assistance in Criminal Matters[18] was the first major mutual assistance instrument. The aim of the EU Convention was merely to supplement the provisions and to facilitate the application of the Council of Europe Convention on Mutual Assistance. Perhaps the most interesting feature of the EU Convention is the fact that it dictated that the request for mutual

[16] Point 33, Tampere European Council, Presidency Conclusions, 15 – 16 October 1999

[17] Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 63/1

[18] Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between Member States of the European Union, 29 May 2000, OJ C 197

assistance should be complied with, as regards formalities and procedures, in the manner outlined by the requesting Member State, provided such formalities and procedures were not contrary to the fundamental principles of the requested Member State. This differs from the original Council of Europe Convention which dictated that the procedures of the requested State would be followed. Article 8 of the Second Additional Protocol to the Council of Europe Convention, adopted in 2001, contains a similar provision. The EU Convention also laid down rules in relation to specific forms of mutual assistance, in particular with regard to stolen objects; transfer of prisoners; giving of evidence by videoconference; controlled deliveries; joint investigation teams and covert investigations. There are no additional grounds of refusal in the EU Convention and so the Council of Europe Convention and the 1990 Schengen Convention must be referred to for this purpose. The Protocol[19] to the EU Convention further developed these procedures and provided for requests for information in relation to bank accounts. The ability to suggest the procedures for the execution of requests under this EU Convention has been particularly useful to my Office in securing evidence that will be admissible in the Irish Courts.

Despite the above commitments to mutual assistance and recognition, before the terrorist attacks of 11 September 2001 progress was very slow. Following the attacks there was a new sense of urgency and a realisation of the necessity for such measures. This was demonstrated in particular by the speed with which the Framework Decision on the European arrest warrant and the surrender procedures between Member States[20] was got ready for presentation to the European Council after the destruction of the twin towers in New York.

The Framework Decision on European arrest warrants

The fundamental rule of the EAW Framework Decision is contained in Article 1(2) which states that European arrest warrants must be executed "on the basis of the principle of mutual recognition and in accordance with the provisions of [the] Framework Decision". Article 2

[19] Protocol established by the Council in accordance with Article 34 of the Treaty on European Union to the Convention on Mutual Assistance in Criminal Matters between Member States of the European Union, 16th October 2001, OJ C 326

[20] Council Framework Decision 2002/584/JHA

outlines the scope of the European arrest warrant; it states that the warrant may be issued for acts punishable in the issuing Member State by a custodial sentence of a maximum of 12 months, or where sentence has already been passed, four months. The rule of double criminality is abolished for a list of 32 offences, outlined in Article 2(1). Mandatory grounds of refusal of execution are outlined in Article 3. They include amnesty by the requested State where it had jurisdiction to prosecute and double jeopardy and inability to hold the requested person liable under the law of the requested State due to age. Seven optional grounds of refusal are contained in Article 4 which relate mainly to incompatibility with ongoing proceedings in the executing State or with the law of the executing State.

The Framework Decision also contains a provision in relation to the exchange of evidence. Article 29 states that at the request of the issuing judicial authority or on the initiative of the executing authority, the executing authority shall seize and hand over property which "(a) may be required as evidence or (b) has been acquired by the requested person as a result of the offence." Such property may be handed over even where the European arrest warrant cannot be carried out owing to the death or escape of the requested person.

The European arrest warrant measures have so far been highly effective in Ireland. Their success has illustrated that co-operation in criminal matters is workable and possible particularly when we focus on the similarities in systems instead of focusing on the differences. As a result of the frenzied political backdrop created by the 11 September attacks the Framework Decision was incorporated with great speed and Member States were obliged to apply it by 31 December 2003.

Implementation of subsequent mutual recognition measures has not been so impressive. Discussing the implementation of three other key mutual recognition measures: the Framework Decision on the execution in the European Union of orders freezing property or evidence[21]; the Framework Decision on the application of the principle of mutual recognition

[21] Council Framework Decision 2003/577/JHA

to financial penalties[22]; and the Framework Decision on the application of the principle of mutual recognition to confiscation orders,[23] Mitsilegas notes:

> "… the implementation of the other three Framework Decisions leaves much to be desired. Although deadlines for their implementation have passed (for the freezing orders and financial penalties instruments this happened quite some time ago), not all Member States have implemented them. In cases where they have been implemented, mutual recognition has been watered down by the addition of further requirements for and limits to recognition, including in particular further grounds for refusal. Member States and practitioners appear to have had difficulties with implementing these instruments in light of their perceived complexity and the challenges they pose to domestic criminal justice systems and fundamental rights."[24]

The Framework Decision on freezing orders

The Framework Decision on freezing orders is of notable significance. The objective of this measure is to establish the rules under which Member States will recognise freezing orders issued for the purpose of securing evidence or the subsequent confiscation of property in the framework of criminal proceedings. "Property" is defined under Article 2(d) as including property of any description:

> "[W]hether 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."

The Framework Decision provides that the freezing order shall be executed "forthwith" and in the same way as a freezing order would be executed had it been made by the judicial authority in the executing State. Where possible the formalities and procedures of the issuing State should be observed and such coercive measures as allowed by the executing State may be utilised. The rule of double criminality is abolished for listed offences. There are limited grounds for non-recognition outlined in Article 7 namely, where the certificate under the

[22] Council Framework Decision 2005/214/JHA

[23] Council Framework Decision 2006/783/JHA

[24] Mitsilegas, *The third wave of third pillar law: which direction for EU criminal justice?*, (2009) 34 E.L. Rev 523, Page 528.

Framework Decision is not produced, is incomplete, or manifestly does not correspond to the freezing order, where an immunity or privilege makes execution impossible, double jeopardy, or double criminality for non-listed offences.

The European evidence warrant

I now turn to the Framework Decision on the European evidence warrant. In 2003 the Commission proposed a Framework Decision establishing a European evidence warrant.[25] The text on the proposal was not agreed until 2006 and the Framework Decision was finally published on 30 December 2008, some would say following a narrowing of the original scope. The Explanatory Memorandum which accompanied the original proposal for a Framework Decision on the EEW made it clear that this proposal was seen only as a first step (paragraphs 38 and 39).[26] In particular, it was envisaged that two further types of evidence would be provided for: firstly, evidence which does not already exist but which is directly available, such as the taking of statements, monitoring phone calls or banking transactions, and secondly evidence which does exist but is not directly available without further investigation or analysis, such as DNA samples.[27] Given the time lapse between the first

[25] COM (2003) 688, 14 Nov 2003

[26] ibid.

[27] "39. It is therefore necessary to make clear that the European evidence warrant is, in the Commission's view, the first step towards a single mutual recognition instrument that would in due course replace all of the existing mutual assistance regime. The steps towards a single instrument could be as follows:

- The first step would be the proposed European evidence warrant, which provides for the obtaining of evidence that already exists and that is directly available.
- The next stage would be to provide for the mutual recognition of orders for the obtaining of other types of evidence. These can be divided into two categories.
  - First, there is evidence that does not already exist but which is directly available. This includes the taking of evidence in the form of interviews of suspects, witnesses or experts, and the taking of evidence through the monitoring of telephone calls or banking transactions.
  - Secondly there is evidence which, although already existing, is not directly available without further investigation or analysis. This includes the taking of evidence from the body of a person (such as DNA samples). This category also includes situations where further inquiries need to be made, in particular by compiling or analysing existing objects, documents or data. An example is the commissioning of an expert's report.
- In a final stage these separate instruments could be brought together into a single consolidated instrument which would include a general part containing provisions applicable to all co-operation".

Proposal and the final Framework Decision it is unclear whether in practice such intentions will be fulfilled. However, the 25th recital in the Preamble to the Framework Decision expressly envisages a further "mutual recognition instrument, the adoption of which would provide a complete mutual recognition regime".

The European evidence warrant is described in Article 1 as "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 5". Article 4 of the Framework Decision outlines the scope of the EEW, highlighting that the executing authority shall not be required to:

> (a) conduct interviews, take statements or initiate other types of hearings involving suspects, witnesses, experts or any other party;
>
> (b) carry out bodily examinations or obtain bodily material or biometric data directly from the body of any person, including DNA samples or fingerprints;
>
> (c) obtain information in real time such as through the interception of communications, covert surveillance or monitoring of bank accounts;
>
> (d) conduct analysis of existing objects, documents or data; and
>
> (e) obtain communications data retained by providers of a publicly available electronic communications service or a public communications network.

However, Article 4(4) contains a saver for the material outlined above stating that it may be requested where the objects, documents of data are already in the possession of the executing authority before the EEW is issued. In addition the EEW may cover taking statements from persons present during the execution of the EEW and directly related to the subject of the EEW.

Recognition of EEWs must be undertaken without any further formalities and the executing authority must take the necessary steps towards execution "forthwith" and in the same manner as would be undertaken where the authority of the executing State sought to obtain the requested items. The executing State is responsible for choosing the methods for the provision of the items in question in accordance with its own laws. In addition it is up to the

executing State also to decide whether coercive measures are necessary to provide assistance. Article 11(2) provides that "Any measures rendered necessary by the EEW shall be taken in accordance with the applicable procedural rules of the executing State". However, Article 12 provides that the issuing authority may lay down formalities and procedures to be followed in the execution of the EEW. It states:

> "The executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority unless otherwise provided in this Framework Decision and provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State. This Article shall not create an obligation to take coercive measures."

The grounds for non-recognition and non-execution are set out in Article 13. Notable grounds are: double jeopardy, dual criminality (aside from those listed in Article 14 for which the rule of double criminality has been abolished), privilege or immunity, and national security interests. Article 15 lays down deadlines for the execution of EEWs. It states that any decision to refuse recognition or execution must be taken within 30 days of receipt of the EEW by the competent authority. Subject to the postponement provisions laid down in Article 16, possession of the requested materials should be taken no later than 60 days after the receipt of the EEW by the executing authority.

In addition, the 27th recital in the Preamble envisages refusal to execute an EEW which "has been issued for the purpose of prosecuting or punishing a person on account of his or her sex, racial or ethnic origin, religion, sexual orientation, nationality, language, or political opinions or [where] that person's position may be prejudiced for any of these reasons."

The development of this Framework Decision involved lengthy political negotiations. It would seem that some level of compromise was necessary as is evident from the provisions in relation to the scope of the EEW and also the grounds for refusal. In addition the provision in Article 23 that Germany may by declaration reserve its right to make execution of an EEW subject to verification of double criminality in relation to certain offences which fall under the list for which such a requirement has been abolished under Article 14 shows the reluctance on the part of some Member States in relation to the development of this mechanism. It would seem, therefore, that this Framework Decision is still considered a step in the process towards

a more succinct mutual recognition regime. The Preamble to the Framework Decision states that:

> "The EEW should coexist with existing mutual assistance procedures, but such coexistence should be considered transitional until, in accordance with the Hague Programme, the types of evidence-gathering excluded from the scope of this Framework Decision are also the subject of a mutual recognition instrument, the adoption of which would provide a complete mutual recognition regime to replace mutual assistance procedures."[28]

As a result the Framework Decision does not introduce any significantly radical new reforms as regards the exchange of evidence. From an Irish perspective all of the mechanisms were previously available under domestic legislation and other international agreements. The only significant difference is the establishment of time limits. It remains to be seen to what extent, if any, this will lead to an improvement in the functioning of mutual assistance. The principle drawback is that we will now have two separate mutual assistance systems operating side by side, the very limited EU Framework Decision and the more extensive Council of Europe system.

Belfiore highlights the difficulties which co-existence creates; she notes (prior to the adoption of the Framework Decision), that with this coexistence, until a complete mutual recognition regime is adopted:

> "[T]he serious problem of multiplication of different types of requests for the same pieces of evidence would arise. The result would be the application of a variety of relevant instruments which originate from different legal contexts (the Council of Europe and the EU) in the same proceedings. This outcome is certainly not satisfactory; in fact, it reveals all the contradiction that the EEW would bring about."[29]

The practical effects of the EEW in Ireland

It is not possible to say for definite what difference the introduction of the EEW will make for the prosecutor and the investigator until the draft legislation is ready. It seems clear the setting of time limits is intended to speed up mutual assistance, although whether it will have

[28] Preamble, 25th Recital

[29] Belfiore, *Movement of Evidence in the EU: The Present Scenario and Possible Future Developments*, (2009) 17 European Journal of Crime, Criminal Law and Criminal Justice 1, pp. 10-11

this effect in practice may be doubted. On the negative side, a number of problems are already apparent. Overall it is difficult to see any real advantage in the new procedures over the existing ones.

It seems possible that the implementation of the current Framework Decision in Ireland will do little to simplify the current mutual assistance regime, and may even complicate it for the reasons already referred to in discussing the difficulties potentially created by the multiplication of overlapping instruments.

Firstly, the current Framework deals only with physical objects, documents and data already in being. Until a further instrument or instruments deals with the taking of statements, the taking of samples or fingerprints or the carrying out of examinations, obtaining of intercepts, covert surveillance or monitoring of bank accounts, the analysis of existing evidence, and the obtaining of communications data retained by service providers, all of which are now excluded, the system remains incomplete and the more difficult areas are not dealt with. Requests for assistance in these areas will continue to be governed by the Council of Europe Conventions. Where evidence not covered by the EEW is required then Article 21 of the Framework Decision envisages the existing mutual legal assistance provisions continuing to be used. But it is not difficult to envisage cases where it will be necessary to issue both an EEW and a letter of request.

Secondly, the current arrangements for mutual assistance in Ireland involve a large number of agencies. The central authority is located in the Department of Justice which, however, although responsible for policy in the area of criminal justice, has no responsibility for prosecution and no day-to-day operational responsibility for investigations, although the Garda Commissioner is answerable for his overall performance to the Minister for Justice. The Director of Public Prosecutions has responsibility for sending outgoing requests, or for making applications to court, but has no responsibility for investigations prior to the decision to prosecute, except where the Garda Síochána seek legal advice. Advice in relation to incoming requests is handled by the Attorney General who is, however, with some limited

exceptions, no longer a prosecutor. The courts are responsible for issuing letters of request in certain cases even though the judges are neither investigators nor prosecutors. The adoption of the EEW contains nothing which would require us to simplify these procedures although I believe its implementation provides an opportunity to do so.

Thirdly, European instruments are frequently drafted with a different system than ours in mind. Reading the Framework Decision, for example, one is struck by the obvious fact that the draft reflects systems where the public prosecutor is a member of the judicial branch who supervises the investigation. This is not to say that European instruments could not be drafted in such a way as to reflect the different systems – they could. An example of an instrument which was drafted with proper respect for the diversity of prosecution agencies is Recommendation Rec (2000)19 of the Committee of the Council of Europe on the role of public prosecution in the criminal justice system. Drafters of EU legal instruments could learn much from this approach. While the Department of Justice in Ireland frequently seeks the practical advice of prosecutors, there is still lacking a formal mechanism to seek the advice of the EU general prosecutors as a body. It is to be hoped that the proposal to formally establish a consultative group of EU level Member States' Prosecutors General and Directors of Prosecuting Authorities will help to remedy this problem.

Fourthly, there is a need to retain a provision similar to that in section 62, 73 and 77 of the 2008 Act which allows the DPP to issue a letter of request directly. If an application to court is required in relation to every outgoing request, the whole aim of simplifying the system will be defeated and the system will be slower, less efficient and more expensive. At present, for example, where physical evidence is in the hands of a foreign state authority, the Director of Public Prosecutions can issue a request to the state concerned. It is difficult to see that the intervention of a judicial figure in the issuing state should be necessary where no question of search or seizure is involved, and indeed the Framework Decision leaves open the possibility for the public prosecutor to issue evidence warrants. However, the Framework Decision is drafted in such a way as to assume that the public prosecutor is a judicial authority, which in many Member States is not the case. Presumably it was not intended to confine the power to

issue EEWs only to public prosecutors who are also magistrates. If this was the case the Framework Decision would function effectively only in some Member States. It is a pity, however, that the opportunity was lost to clarify expressly in the Framework Directive that a public prosecutor who is a member of the executive rather than the judiciary, as is the case not only in the common law world but in other states including Germany, Denmark, Sweden, Finland and Austria, may be an "issuing authority" within the meaning of Article 2 of the Framework Decision, as I believe must have been the intention of its framers. Another example of drafting with one particular system in mind and not taking proper account of the diversity of arrangements in the Member States.

Conclusion

In conclusion, there are many provisions in existence to provide for the exchange of information on a European level. Implementation of such measures has been varied, reducing the efficacy of co-operation procedures. The European evidence warrant clearly shows a commitment to bringing co-operation a step further. However, it remains to be seen how its implementation will be effected. The coexistence of a number of related mechanisms for the transfer of evidence is likely to create operational difficulties and unfortunately until the EEW provides a comprehensive regime it will merely add to rather than replace the multiplicity of instruments. Concerns regarding sovereignty could mean that the development of a complete mutual assistance regime could be a politically challenging process. However, there seems to be no real advantage in the piecemeal approach now adopted, and many disadvantages. It is unfortunate that implementation of the EEW was not left to await agreement on a comprehensive regime. It is to be hoped that the original intention to extend the scope of the EEW to the areas outlined in the explanatory memorandum, discussed above, will not be abandoned. Developments in relation to witness statements would be welcome. In particular it would be hoped that greater powers to compel witnesses to give evidence would be afforded. Assuming the Lisbon Treaty finally completes the ratification process it is likely that it will go some way in assisting this process, but for the moment the future process remains uncertain.