



**Response to the Commission Green Paper on obtaining
evidence in criminal matters from one Member State to
another and securing its admissibility**

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Introduction and Summary

1. JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is also the British section of the International Commission of Jurists.
2. The European Commission has issued a Green Paper in relation to streamlining the mechanisms of obtaining evidence and the obstacles to admissibility of that evidence in cross border criminal cases in the European Union.¹ There are a number of instruments currently in force which attempt to provide a framework for evidence gathering. These are fragmentary and repetitive. They slow the investigatory and prosecution process in confusing procedural rules. JUSTICE in a recent article² examined the differences between mutual legal assistance and mutual recognition instruments and concluded that it was necessary to produce a comprehensive, legally binding instrument which could provide the definitive framework to criminal investigation in cross border matters in the European Union.
3. As such, we welcome the identification in the Stockholm Programme of this issue,³ and the Green Paper from the Commission. However, there is a real and serious risk that any new instrument will continue the trend of previous mutual recognition and assistance instruments of inadequately considering the position of the suspect, in an effort to improve efficiency. The rights of the suspect are more important than ever if comprehensive, streamlined cross border evidence collection and usage is to be embarked upon. Equally, the impact upon complainants and witnesses of cross border law enforcement agencies must not be underestimated. There are a number of considerations to such an instrument, which we address in our answers to the questions proposed by the Commission.

¹ COM(2009) 624 final, Brussels, 11.11.09

² J Blackstock, 'Mutual legal assistance vs mutual recognition?' *JUSTICE Journal*, [2009] 2, 41

Questions posed in the Green Paper

Obtaining Evidence

(1) *Would you in principle welcome a replacement of the existing legal regime on obtaining evidence in criminal matters by a single instrument based on the principle of mutual recognition covering all types of evidence, including evidence that does not already exist or is not directly available without further investigation or examination? Why?*

4. In principle, as indicated above, we consider that a single instrument is more desirable than the current piecemeal approach. The differing instruments, produced in both the EU and Council of Europe, whilst attempting to adhere to similar standards, have advanced in different ways and are not solely focussed on evidence gathering.⁴ This makes their usage for law enforcement professionals increasingly complex. It is also problematic for individuals receiving the attention of those professionals to know whether action taken is lawful.
5. Accordingly, in our view, a comprehensive set of rules confirming the reach of mutual recognition in relation to evidence gathering and when it would be admissible in criminal proceedings would be of benefit to all practitioners concerned.
6. In relation to the evidence that would be included, we refer to our briefing on the European evidence warrant proposal, which disappointingly remains largely correct in terms of inadequate protection of the suspect concerned, notwithstanding the three years that have passed.⁵ Pragmatically, because the instrument does not cover all types of evidence that are likely to be required in the course of a cross border criminal investigation, it is necessary to send a mutual legal assistance (MLA) request for

³ *The Stockholm Programme – An open and secure Europe serving and protecting the citizens*, Council Presidency, 17024/09, Brussels, 2.12.09

⁴ Council of Europe Convention on mutual assistance in criminal matters 1959 ETS No. 030, supplemented by its additional protocol of 1978, ETS No. 099, the second additional protocol of 2001, ETS No. 182; the Benelux Treaty of 1962; the Schengen Implementing Convention of 1990 OJ L 239 of 22.9.2000; and the Convention on mutual assistance between the Member States of the EU 29.05.2000, OJ C 197 of 12.7.2000 Many provisions of the convention are similar to those included in the second additional protocol of 2001 to the 1959 convention, ETS No. 182, which some of the Member States also ratified, and the additional protocol from 2001 OJ C 326 of 21.11.2001. Bilateral treaties also exist.

⁵ A copy is annexed hereto.

those other types of evidence,⁶ rendering the effort of sending an EEW obsolete because sending an MLA request is more convenient. If resources are to be expended in the development of a new instrument, it should not add to the litany of instruments, but encompass all current conventions and repeal EU instruments.

(2) *In your opinion, would it be necessary to include specific rules for some types of evidence in the instrument? If so, which? Why?*

7. It is inevitable that different types of evidence will require different rules. The instruments ought to consider:

- The evidence envisaged in the EEW framework decision⁷ – *‘objects documents and data from a third party, from a search of premises, historical data on the use of any services, historical records of statements, interview and hearings*
- The evidence excluded from the EEW framework decision.⁸ We set out the necessary rules that would be necessitated by this inclusion below under each excluded area:

(a) to conduct interviews, take statements or initiate other types of hearings involving suspects, witnesses, experts, or any other party;

8. The member states will have to decide how witness evidence is to be taken. A first account in the UK is usually taken by police officers. However, MLA largely expects depositions to be taken by a court in cross border matters. In our view, this is the most transparent approach, but will require provision of resources. An initial account would allow an assessment of whether the evidence is necessary⁹. In any case, the interviewer must be required to clearly identify the purposes of the statement and

⁶ Article 21(3) Council Framework Decision 2008/978/JHA of 18th 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 of 30.12.2008, p. 72 (EEW)

⁷ See Recital 7 EEW

⁸ Article 4(2) EEW

⁹ Which is a current requirement under the EEW Framework Decision, art. 7.

obtain confirmation that evidence is given voluntarily and is truthful. A witness must have the assistance of an interpreter where this is necessary.¹⁰

9. In our view, a European arrest warrant (EAW) should not be used to request the taking of evidence from a suspect. Article 1(1) of the Framework Decision¹¹ states that:

*The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purpose of conducting a criminal **prosecution or executing a custodial sentence or detention order.***

The instrument clearly envisages preliminary and preparatory investigation to have taken place in order for a prosecution to commence. In order to conclude that there is evidence upon which a prosecution could be mounted most jurisdictions require interview of the accused person. Otherwise the request for surrender is mounted on mere suspicion.¹²

10. A request to take evidence from a suspect would mean conducting an interrogation. This would have to adhere to the requirements of Articles 5 and 6 of the European Convention on Human Rights and Fundamental Freedoms 1950 (ECHR). Article 5(2) provides that anyone arrested 'shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.' Art 6(1) taken with 6(3)(c) (as to legal representation) and (e) (interpretation and translation) have been interpreted to apply to pre-trial proceedings.¹³ There would also be implications for length of detention for the purposes of interview, to accord with Art 5(3), namely being taken promptly before a judge and to trial within a reasonable period, or release pending trial.

¹⁰ Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA), OJ L 82, 22.3.2001, p. 1–4 is helpful, in particular art. 5 where member states must take measures to minimise communication difficulties where victims of crime are witnesses.

¹¹ Council Framework Decision (2002/584/JHA) on the European arrest warrant and surrender procedures between Member States, OJ L 190, 18.7.2002, pp.1 – 18 at 2.

¹² See the opinions of the judges at the appellate High Court of England and Wales in *Vey v Office of the Public Prosecutor*, Montluon, France [2006] EWHC 760 (Admin); *Trenk v District Court of Plzen-Mesto, Czech Republic* [2009] EWHC 1132 (Admin), both available at <http://www.bailii.org>.

¹³ See recent cases of *Salduz v Turkey* (app. no. 36391/02), judgment of 27 November 2008; *Panovitz v Cyprus* (app. no. 4268/04), judgment of 11 December 2008; *Pishchalnikov v Russia* (app. no. 7025/04), judgment of 24 September 2009.

11. In relation to hearing of witnesses in court, where a witness cannot attend a trial in the requesting member state, provision for video or audio transmission of the evidence will no doubt be considered. In our view, this type of evidence is not an adequate substitute for the examination of a witness in the courtroom and should only be used as a last resort where the witness is unable to travel through illness or fear, both having been satisfactorily established on evidence. Teleconference evidence is particularly unreliable because it is very difficult to assess the credibility of the witness without seeing them.¹⁴ For this reason, it should be limited to experts who are unable to use a video link, whose veracity is not in question, and who agree to such a process.
12. The Convention on mutual assistance between the Member States of the EU (the EU Convention) already sets out rules which could be adopted and expanded in this regard, at Articles 10 and 11 (which are largely replicated in Articles 9 and 10 of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters). Its use must not be contrary to fundamental principles of national law,¹⁵ and requests must clearly state why it is necessary and who will be conducting the hearing. Particular rules are set out for the conduct of the hearing at Article 10(5), which we would endorse:

5. With reference to hearing by videoconference, the following rules shall apply:

(a) a judicial authority of the requested Member State shall be present during the hearing, where necessary assisted by an interpreter, and shall also be responsible for ensuring both the identification of the person to be heard and respect for the fundamental principles of the law of the requested Member State. If the judicial authority of the requested Member State is of the view that during the hearing the fundamental principles of the law of the requested Member State are being infringed, it shall immediately take the necessary measures to ensure that the hearing continues in accordance with the said principles;

(b) measures for the protection of the person to be heard shall be agreed, where necessary, between the competent authorities of the requesting and the requested Member States;

(c) the hearing shall be conducted directly by, or under the direction of, the judicial authority of the requesting Member State in accordance with its own laws;

(d) at the request of the requesting Member State or the person to be heard the requested Member State shall ensure that the person to be heard is assisted by an interpreter, if necessary;

(e) the person to be heard may claim the right not to testify which would accrue to him or her under the law of either the requested or the requesting Member State.

¹⁴ Dr. Arkadiusz Lach, Researcher in the Department of Criminal Procedure, Faculty of Law and Administration, Nicolas Copernicus University, Torun, Poland, 'Transnational Gathering of Evidence in Criminal Cases in the EU de lege lata and de lege ferenda', *Eucrim* 3/2009, 107 – 110 at 108.

¹⁵ Such fundamental principles would have to include the right to an interpreter, in accordance with the commitment under the Stockholm Programme and Initiative presented by the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Republic of Estonia, the Republic of Hungary, the Italian Republic, the Grand-Duchy of Luxembourg, the Republic of Austria, the Republic of Portugal, Romania, the Republic of Finland and the Kingdom of Sweden for a Directive of the European Parliament and of the Council on the rights to interpretation and to translation in criminal proceedings, set out in 16801/09 DROIPEN 164 COPEN 238 + COR 1 + ADD 1 + ADD 2 + ADD 3.

13. With respect to hearing the accused, the European Court of Human Rights (ECtHR) has confirmed that Article 6 ECHR, read as a whole, guarantees the right of an accused to participate effectively in a criminal trial. In order to ensure that their rights pursuant to Article 6(3) are protected, namely the right “to defend himself in person”, “to examine or have examined witnesses” and “to have the free assistance of an interpreter if he cannot understand or speak the language used in court”, he has a right to be present, and also to hear and follow the proceedings.¹⁶ Article 10(9) EU Convention extends the provision of the videoconference to the accused, subject to national law and the ECHR. In particular, hearings are only to be carried out with the consent of the accused person.

14. The European Committee for the Prevention of Torture (CPT) has expressed concerns about the use of videoconferencing. The risk inherent in these proceedings is that ill-treatment, misconduct by public officials or other issues such as self-harm, illness, fitness to plead etc will not be noted by the court or lawyer and/or that the detainee may feel inhibited from confiding in the court or lawyer as to such matters. In its report on the 2007 visit to the UK, the CPT made the following comment regarding pre-charge detention in terrorism offence cases and standard use of videoconferencing:¹⁷

As the Committee has emphasised on previous occasions, one of the purposes of the judicial hearing should be to monitor the manner in which the detained person is being treated. From the point of view of making an accurate assessment of the physical and psychological state of a detainee, nothing can replace bringing the person concerned into the direct physical presence of the judge. Further, it will be more difficult to conduct a hearing in such a way that a person who may have been the victim of ill-treatment feels free to disclose this fact if the contact between the judge and the detained person is via a video conferencing link.

In their response to the report on the CPT's November 2005 visit, the United Kingdom authorities stated inter alia that the judicial authority concerned “has ultimate responsibility for deciding whether the physical presence of a detainee at a hearing is necessary”. The CPT cannot agree with such an approach; the physical presence of the detainee should be seen as an obligation, not as an option open to the judicial authority¹⁷. As regards more particularly the first possible extension of detention beyond 48 hours, the physical presence of the detained person at the judicial hearing would also appear to be a requirement by virtue of Article 5,

¹⁶ *Marcello Viola v Italy* (Application no. 45106/04), Third Section, judgment 5 October 2006, paras. 49-53, applying *Colozza v Italy*, 12 February 1985, § 27, Series A no. 89 and see *Stanford v the United Kingdom*, 23 February 1994, § 26, Series A no. 282-A.

¹⁷ CPT/Inf (2008) 27, paras 9-10.

paragraph 3, of the European Convention of Human Rights. In the Grand Chamber judgment of 12 May 2005 in the case of Öcalan against Turkey, the Court stated that the purpose of Article 5(3) is to ensure that “arrested persons are physically brought before a judicial authority promptly”. The Court went on to comment that “Such automatic expedited judicial scrutiny provides an important measure of protection against arbitrary behaviour, incommunicado detention and ill-treatment”.

15. Assistance can also be found in Articles 11 and 12 of Council Regulation 1206/2001 on cooperation between the courts of the member states in the taking of evidence in civil or commercial matters,¹⁸ in which member states agreed that where the law of the requesting state allows, the parties and their representatives, or representatives of the requesting court, may be present for the questioning, who may also seek to participate in accordance with Article 10. This ensures that the mechanism used for the taking of evidence will enable its admissibility in the courts of the requesting state.

(b) to carry out bodily examinations or obtain bodily material or biometric data directly from the body of any person, including DNA samples or fingerprints;

16. A request for evidence which has to be obtained will necessitate consideration of data protection, storage and retention. There are a number of Council of Europe and EU instruments in relation to the collection of personal and automated data.¹⁹

Recommendation No. R(87)15 specifically provides at paragraph 5.4:

Communication of data to foreign authorities should be restricted to police bodies. It should only be permissible:

a. if there exists a clear legal provision under national or international law,

b. in the absence of such a provision, if the communication is necessary for the prevention of a serious and imminent danger or is necessary for the suppression of a serious criminal offence under ordinary law, and provided that domestic regulations for the protection of the person are not prejudiced.

¹⁸ OJ L 174 of 27.6.2001, p. 1

¹⁹ Council of Europe Convention of 1981 for the protection of individuals with regard to automatic processing of personal data, ETS No. 108; Council of Europe Recommendation to the Committee of Ministers Recommendation No. R(87)15 regulating the use of personal data in the police sector (adopted on 17 September 1987); The Prüm Convention, Brussels, 6 December 2006, now included in the *aquis* by way of Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, OJ L 210, 6.8.2008, p. 1 (the Prüm Council Decision); Council framework decision of 24 June 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, OJ L 350, 30.12.2008, p. 60–71, Council of Europe Convention of 2001 on cybercrime, ETS No. 185.

17. In the particular area of police and judicial cooperation, rules covering all aspects of data protection that govern the functioning of Europol, Eurojust, the Schengen Information System, the Customs Information System, and the European Criminal Records Information System (once it is effective), will have to be considered when those organisations and data systems are engaged. This will of course be inevitable with a wider instrument. A future evidence instrument will need to adhere carefully to these rules and consider whether they ought to be more extensive. The same applies in respect of the data protection provisions governing the interaction of national database systems and automated transfer between Member States of DNA profiles, dactyloscopic data and national vehicle registration data pursuant to the Prüm Council Decision²⁰ for which anonymised data must remain the starting point. The data protection provisions are set out in Articles 24 to 32. The Framework Decision on protection of personal data (the Framework Decision) must be implemented domestically by the 27 November 2010. Any future instrument should ensure that the requirements for protection of the individual and consent to the use of data contained in the Decision are rigorously adhered whenever it is decided that data can be transferred.²¹
18. The Commission has recently received responses to its consultation on the legal framework for the fundamental right to protection of personal data.²² It is clear from this consultation process that the current collection of data protection instruments in the EU is inadequate. The Article 29 Data Protection Working Party responded to the consultation with an extensive document setting out the current framework and proposals for the future.²³ The Working Party points out that the Framework Decision only applies to cross border cases. There is accordingly a gap in the requirements for data protection at a domestic level. Investigation techniques have evolved considerably with advances in technology, and authorities without a crime detection purpose now have access to interoperable data stores. It is possible to obtain large amounts of information about a suspect without their knowledge. How member states obtain and retain that information in the course of domestic investigation varies

²⁰ *Supra*.

²¹ *Id.*

²² The consultation and responses are available at

http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_0003_en.htm, accessed on 19.01.2010

²³ Article 29 Data Protection Working Party, Working Party on Police and Justice, 'The Future of Privacy: Joint contribution to the Consultation of the European Commission on the legal framework for the fundamental right to protection of personal data', 02356/09/EN WP168, 1.12.09, available at http://ec.europa.eu/justice_home/news/consulting_public/0003/contributions/public_authorities/art29_wp_and_wppi_en.pdf

widely, yet the evidence warrant will rely heavily upon the national law of the requested member state to obtain requested information. Transparency and democratic control are necessary.

19. The ECtHR in *S and Marper v UK*²⁴ recalled that the right to private life enshrined in Article 8 of the Convention is a broad term not susceptible to exhaustive definition. In principle, multiple aspects of a person's physical and social identity and elements such as gender identification, name, sexual orientation, sexual and ethnic identity fall within the personal sphere protected by Article 8. As such, storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8. Retention of cellular samples, DNA and fingerprinting also amounts to interference. Due regard must be given to the specific context in which the information at issue has been recorded and retained, the nature of the records, the way in which these records are used and processed and the results that may be obtained. There is a legitimate aim in the prevention of crime, but retention must be proportionate with the purpose of the collection and for limited periods. The potential benefit of such evidence must therefore be carefully balanced against important private life interests.

(c) *to obtain information in real-time, such as through the interception of communications, covert surveillance, or the monitoring of bank accounts;*

20. Title III of the EU Convention sets out specific rules for intercept evidence. This in itself is a complex and somewhat controversial area. JUSTICE has long been concerned with these issues with respect to the refusal of the UK Government to allow the use of intercept evidence in criminal trials.²⁵ The use of intercept evidence raises a number of human rights issues, chiefly the right to a fair trial and the right to privacy, protected under Articles 6 and 8 ECHR respectively. The way in which interceptions are regulated, and the extent to which any unused intercept material is disclosable to defendants, both impact on fundamental rights. But the failure to allow intercept evidence also raises human rights issues. There is the public interest in ensuring that interception capabilities are not compromised, so that intercepted

²⁴ Application nos. 30562/04 and 30566/04, judgment of 4 December 2008; (2008) ECHR 1581.

²⁵ See *Under Surveillance: Covert policing and human rights standards* (JUSTICE, 1998) and *Intercept Evidence: Lifting the ban* (JUSTICE, 2006) as well as numerous briefings on legislative proposals.

communications continue to be of value in detecting and preventing serious crime and acts of terrorism. Most of all, there is the public interest in the fair administration of justice: ensuring that the criminal process works effectively to protect fundamental rights, convict the guilty and acquit the innocent.

21. The ECtHR has noted that covert interception of communications by law enforcement or intelligence services can 'only be regarded as 'necessary in a democratic society' if the particular system of secret surveillance adopted contains adequate guarantees against abuse.'²⁶ Equally, 'the domestic law must provide some protection to the individual against arbitrary interference with Article 8 rights. Thus, the domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in and conditions on which public authorities are empowered to resort to any such secret measures.'²⁷

22. However, decisions such as *Schenk v Switzerland*²⁸ are concerning when applied in cross border mutual recognition instruments. Here the ECtHR found that even though the interception was unlawful under Swiss law, the rules governing the admissibility of evidence were a matter for national law and that it could not therefore 'exclude as a matter of principle and in the abstract that unlawfully obtained evidence of this kind may be admissible.'²⁹ The ramifications of 'forum shopping' for a less regulated country to obtain such evidence in cross border matters clearly requires robust regulation within the EU as to how this evidence might be obtained and used.

(e) *to obtain communications data retained by providers of a publicly available electronic communications service or a public communications network.*

23. Where third parties are requested to assist the police, Article 8 ECHR privacy rights may be engaged and the third party may hold a duty of confidentiality to the person in respect of whom the information relates. When this occurs in the UK, a witness summons must be sought to obligate the attendance of the data holder at a court hearing before a judge where they will be able to make representations as to whether

²⁶ *Malone v United Kingdom* (1984) 7 EHRR 14, para 81.

²⁷ *Halford v United Kingdom* (1997) 24 EHRR 523, para. 49.

²⁸ (1988) 13 EHRR 242.

²⁹ *Ibid* at para. 46.

the evidence is material in the case and whether there is a public interest immunity preventing its disclosure.³⁰ Provision will have to be made for such hearings to take place in accordance with national law where a request of a third party is made in a cross border case.

3) In your opinion, would it be inappropriate to apply the characteristics of mutual recognition instruments to all types of evidence, including evidence that does not already exist or is not directly available without further investigation or examination? If so, which types of evidence would deserve a specific treatment? Why?

24. Mutual recognition is far better suited to the obtaining of evidence than admissibility of evidence. However, strict mutual recognition is not in practice possible in most areas of evidence collection. There will be instances where it is not possible for a requested state to simply go and obtain the information requested. This is clear from the types of evidence included above which we suggest require particular rules. Evidence requests will necessitate far more interaction between the member states involved and detailed explanation of the information sought in the requesting warrant, which will have to accommodate the different types of evidence. The European evidence warrant will have to be far more extensive, or accompanied by supplemental forms depending upon the type of evidence requested. Where it is necessary to intrude upon a person's Article 8 ECHR privacy rights, which will occur in almost all evidence requests, as the ECtHR cases indicate, the justification for doing so must be clearly spelt out.
25. Because much more is required of the requested member state in the sorts of requests for evidence that will be made, unlike under other standard mutual recognition instruments such as criminal records exchange, most activities will be more akin to mutual legal assistance than recognition. For this reason, we think that it may be appropriate to proceed under this construct, allowing for more dialogue between states, rather than the confines of the recognition regime. This is particularly

³⁰ See Criminal Procedure (Attendance of Witnesses) Act 1965, ss 2, 2A and 2B for the Crown Court procedure and Magistrates Courts Act 1980, section 97 for the lower court's equivalent. A common procedure which came into effect in 2007 is set out in part 28 of the Criminal Procedure Rules. Bank records can be inspected by the prosecution or the defence pursuant to a court application made under the Bankers' Books Evidence Act 1879.

so where evidence has to be taken from witnesses or requested from non-investigatory agencies.

4) In your opinion, would it be useful to supplement the instrument with non-legislative measures? If so, which? Why?

26. Non legislative measures can prove very useful for adding best practice and practical suggestions in the form of hand books for investigatory authorities. The *European Handbook on how to issue a European Arrest Warrant*³¹ provides information on the law and practice of the member states and the assistance of Eurojust. A similar mechanism would be sensible for investigative and prosecution agencies for this instrument, particularly if it is to be extensive. Equally, regular monitoring by suitably qualified rapporteurs is an effective follow up to how an instrument is being deployed.³² Training of the professionals involved continues to be key, so that not only the complex interaction of member states' national laws is fully understood by the personnel seeking evidence, but also the rights of the suspects they are investigating.

5. In your opinion, are there any other issues which should be addressed? If so, which? Why?

27. We continue to consider it imperative that the procedural safeguards under consideration in the Swedish Presidency's Roadmap³³ come to fruition before any further integration of prosecution mechanisms. This is of particular importance where statements of suspects are to be requested. These must be obtained in circumstances where the suspect is aware of their rights and the nature of the case against them, has the representation of a lawyer and assistance of an interpreter and/or translator where required, to be provided free of charge where necessary.

³¹ Council of the European Union, (Brussels) 8216/2/08 REV 2.

³² Hence the roles of the UN High Commissioner for Human Rights, the UN Human Rights Committee, the Council of Europe Commissioner for Human Rights and Council of Europe Committees, and closer to home, the Fundamental Rights Agency, LIBE, DROI and other European parliamentary committee reports, and the reviews that the Commission and the Council carry out on implementation of legislation.

³³ *Resolution of the Council on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings*, Council of the European Union, 15434/09 (Brussels, 24 November 2009).

Equally, the continuing work in relation to victims and witnesses³⁴ must have progressed to a satisfactory stage before witness statements are requested through mutual recognition arrangements.

Admissibility of Evidence

6) Would you in principle welcome common standards for gathering evidence? Why?

28. We would propose focus upon minimum standards as opposed to common standards, which are more likely to reflect harmonisation than the treaty base of cooperation. There are a number of quite different legal systems within the EU, each having developed a mechanism for evidence gathering which they will be reluctant to compromise. Such a process could prove disproportionately complex. As set out above, we consider that there are areas where this process is necessary. However in relation to general standards, our proposal is, rather than adopting common standards about the mechanism of gathering evidence, agreeing binding procedural rules about recording the method used and judicial intervention. This way it will be possible for other member states to effectively consider admissibility and propose on an *ad hoc* basis mechanisms which would enable the evidence to comply with the requesting state's law.

7) Would you prefer to adopt general standards applying to all types of evidence or to adopt more specific standards accommodated to the different types of evidence? Why?

29. A number of general standards for uniform procedure could be adopted. We consider that there is a need, as indicated above, for detailed information to be communicated for most types of evidence request.

³⁴ See *Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings* (2001/220/JHA), OJ L 82, 22.3.2001, p. 1–4 which is disappointingly still not implemented in all member states, see Commission report pursuant to Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA), COM(2009) 166 final of 20 April 2009

30. We firmly believe that to ensure requests are adhered to in accordance with the ECHR, EU Charter and in particular the fundamental rights of a fair trial, it is necessary for all requests to be granted by a judicial authority in the form of a warrant, akin to the European arrest warrant procedure. An independent and impartial judge can verify that a request complies with national law and ECHR obligations. This is already required at the issuing stage pursuant to Article 7 EEW where the issuing authority³⁵ may only issue a European evidence warrant when:

(a) obtaining the objects, documents or data is necessary and proportionate for the purpose of proceedings referred to in Article 5;

(b) the objects, documents or data can be obtained under the law of the issuing State in a comparable case if they were available on the territory of the issuing State, even though different procedural measure might be used.

In order to satisfy the executing state that these conditions have been met, detailed information about the nature of the investigation, relevance of the information and admissibility of that type of evidence must be required. A recital at minimum should indicate this requirement.

31. There is no requirement under Article 5 EEW for the issuing judicial authority to verify whether there are reasonable grounds for believing that an offence (of the necessary seriousness for an EEW) has been committed. This is a necessary check in England and Wales prior to a warrant being issued,³⁶ and a similar test must be required in most member states. The judicial authority should be satisfied by evidence establishing this suspicion, and record as such on the requesting warrant to an appropriate level of detail.

32. The executing authority is only defined as ‘an authority having competence under the national law which implements this Framework Decision to recognise or execute an EEW in accordance with this Framework Decision’³⁷, though Article 13(2) does

³⁵ Art 2(c) ‘issuing authority’ shall mean (i) a judge, a court, an investigating magistrate, a public prosecutor, or (ii) any other judicial authority as defined by the issuing state and, in the specific case, acting in its capacity as an investigating authority in criminal proceedings with competence to order the obtaining of evidence in cross-border cases in accordance with national law.

³⁶ Police and Criminal Evidence Act 1984, s8.

³⁷ Art 2(d).

envisage a decision to refuse to execute a warrant being taken by a judge, court, investigating magistrate or public prosecutor. Although Article 18 requires a legal remedy to be made available to any interested party to 'preserve their legitimate interests', there is no indication as to how that might be provided.

33. In our view, it is necessary to have a hearing in the requested member state before a judicial authority before the evidence is released to the requesting member state, akin to the European arrest warrant procedure. In order to give effect to Article 13(2) this must practically be so, yet it is not satisfactorily clarified in the EEW framework decision.
34. If it is necessary to coerce a party to give evidence, a judicial authority should decide at a hearing, where representations can be made by all interested parties, whether this process should take place, in accordance with the requirements of national law and the protection of fundamental rights set out in the ECHR and Charter. If objects or data are requested, these may be seized where there are no grounds for non-execution,³⁸ to ensure that the investigation is not jeopardised by an advance hearing, forewarning a suspect and allowing disposal of material. We consider that the material seized must however be held pending a judicial hearing in the requested state prior to the release of the material to the requesting state. This codified process will allow the affected parties to make representations about the release of the material where it might affect their fundamental rights.
35. The instrument must allow for legal representation and interpretation/translation assistance at such a hearing.
36. With respect to use in the requesting member state, in order to ensure that the material will be admissible an essential requirement is the recording of the collection procedure. Where objects and data are obtained from a search, a statement from the seizing officer should accompany the material confirming how this was obtained. Equally, where the evidence requires a statement or sample to be taken from a person, a record should be kept in which the person concerned can verify (by way of statement of truth and signature) that the sample was taken voluntarily. A chain of custody where data is collected should be produced with the evidence to verify the accuracy of its source.

³⁸ That would reflect those set out in Article 13 EEW or additional specific rules for specific types of evidence.

37. The best mechanism to ensure the admissibility of any evidence is through the electronic recording of the procedure. It is becoming increasingly regular for police officers in UK constabularies to use ‘body-worn video’ cameras when they are policing incidents, to provide verification of the initial account of evidence.³⁹ It is a requirement of interviews with suspects in England and Wales to audio record their accounts⁴⁰ Where a vulnerable suspect is giving an interview, a visual recording can be made.⁴¹ A vulnerable or intimidated witness can also give their initial evidence by way of visual recording. In practice, this is usual for children or witnesses requiring an appropriate adult.⁴² Article 10(6) of the EU Convention in relation to evidence of witnesses being taken by videoconference requires the judicial authority of the requested Member State to draw up minutes indicating the date and place of the hearing, the identity of the person heard, the identities and functions of all other persons in the requested Member State participating in the hearing, any oaths taken and the technical conditions under which the hearing took place.
38. As per the EEW, the rules of the executing state will apply, but the issuing member state should be able to request that evidence is collected in accordance with certain conditions to ensure admissibility in its courts.
39. The opportunity to challenge the admissibility and the substance of the evidence obtained from the other member state during the course of any criminal proceedings and trial in the requesting state must be provided in the instrument. Article 18 EEW provides for a challenge to the substantive reasons for issuing the warrant, but not the material that is returned on it. Again, this should also assert the right of the suspect to legal representation and to interpretation/translation.
40. The grounds for refusal should replicate those in the EEW, but include an operative article and not just a recital that ECHR/Charter rights constitute a refusal ground.

³⁹ For an explanation of how this works in practice and the regulatory regime see *Guidance for the Police Use of Body-Worn Video Devices*, Police and Crime Standards Directorate, (Home Office, London) July 2007, available at <http://Police.Homeoffice.Gov.Uk/Publications/Operational-Policing/Guidance-Body-Worn-Devices2835.Pdf?View=Binary>

⁴⁰ Save for where this is not practicable because equipment has failed or the suspect refuses to go to an equipped interview room, and the interview cannot be delayed. See Police and Criminal Evidence Act 1984 (PACE) Codes, Code E.

⁴¹ See Pace Code F.

⁴² Youth Justice and Criminal Evidence Act 1999, ss 16 – 33 and ss 27 to 29 in particular.

41. The existing rules on double criminality must at least be met. The Green Paper provides the opportunity to review the 32 offences included in the framework list exempted from the double criminality requirement. The Final Report of the Fourth Round Working Group on the EAW⁴³ confirmed that there was a proportionality problem with the issuance of warrants.⁴⁴ This same problem must not be replicated in the evidence warrant. In our view, it is still appropriate to exercise cross border action only in the most serious of cases, in order to ensure that the Article 8 ECHR family and private life rights of all potential parties are not disproportionately affected by the issuance of a warrant for a minor offence. The allocation of resources for the requested member state actioning these requests will also be of concern. The definitions of offences and the sentencing requirements could be defined more closely to alleviate this. A simple measure for ensuring requests remain proportionate would be for the costs of the operation to be borne by the requesting state. This is already the case for video conferencing under the EU Convention.⁴⁵
42. Equality of arms must be ensured so that the trial is fair pursuant to Article 6 ECHR. The instrument must clarify that a suspect is entitled to apply for a warrant from a judicial authority as well as the prosecuting agencies in order to support their defence. There must be time allowed in the trial timetable to enable this line of enquiry to be made.
43. Time limitation for responding to requests is a feature of mutual recognition instruments. Because this instrument is likely to cover a range of investigatory techniques, it would be more appropriate to require a timescale to be agreed between the member states on an *ad hoc* basis. Where there are difficulties in complying with the proposed deadline, provision must be made for an extension of time and resort to Eurojust if a disagreement arises.⁴⁶ Member states should allow time for suspects to make representations about the use of the requested material.

⁴³ Justice and Home Affairs (JHA) Working Group Final report on the fourth round of mutual evaluations –The practical application of the European Arrest Warrant and corresponding surrender procedures between Member States, COPEN 9 68, 8302/2/09, 18.05.2009

⁴⁴ at page 15. See also our report on the EAW, *The European Arrest Warrant: Briefing and Suggested Amendments* (JUSTICE, 2009) available at <http://www.justice.org.uk/images/pdfs/European%20Arrest%20Warrant%20Briefing.pdf>

⁴⁵ Art. 10(7).

⁴⁶ This would reflect the procedure set out in Art. 17 EAW,

44. We propose specific rules for the areas discussed under question 2 and in the manner suggested there.

8) If common standards should be adopted, which would you envisage? Why?

45. Our answer is given in response to questions 2 and 7 above.

9) In your opinion, are there any other issues which should be addressed? If so, which? Why?

46. At this stage we do not propose any further issues for consideration in addition to those set out above. This should not be taken as an endorsement of existing techniques or alternative proposals that we have not mentioned.

JUSTICE, January 2010