CONSEJO GENERAL DEL PODER JUDICIAL
ESCUELA JUDICIAL

ejtn

Red Europea de Formación Judicial (REFJ)
European Judicial Training Network (EJTN)
Réseau Européen de Formation Judiciaire (REFJ)

CURSO VIRTUAL
COOPERACIÓN JUDICIAL PENAL EN
EUROPA
EDICIÓN 2010

MODULE IV

UNIT XI

Order Freezing Property or Evidence in Europe, confiscation and the European Evidence Warrant

AUTHOR

Andrés SALCEDO VELASCO

Senior Judge. Director of the European
EUROMED – *JUSTICIA II* projec

Con el apoyo de la Unión Europea
With the support of The European Union
Avec le soutien de l'Union Européenne

AVAILABLE LEVELS

LEVEL I: TOPIC

LEVEL II: TO LEARN MORE

NIVEL III: REFERENCE DOCUMENTS

Con el apoyo de la Unión Europea
With the support of The European Union
Avec le soutien de l'Union Européenne

LEVEL I: TOPIC

Topic 11

Orders freezing property or evidence in Europe, confiscation and the European Evidence Warrant

Module IV.

The principle of mutual recognition and its development

Online course on judicial cooperation in criminal matters in Europe

Andrés Salcedo Velasco

President of the Ninth Division of Barcelona Provincial Court[1]

[1] Currently head of the European EUROMED - JUSTICE Project.

Con el apoyo de la Unión Europea
With the support of The European Union
Avec le soutien de l'Union Européenne

SUMMARY

Con el apoyo de la Unión Europea
With the support of The European Union
Avec le soutien de l'Union Européenne

5. Competent and involved authorities.
    5.1- Issuing authorities
        5.1.1- Freezing orders
        5.1.2- Confiscation
        5.1.3- The European evidence warrant
    5.2- Executing authorities
        5.2.1- Freezing orders
        5.2.2- Confiscation
        5.2.3- The European evidence warrant
6. The active process. Issue of the order.
    6.1. Adoption in proceedings.
        6.1.1- Freezing orders
        6.1.2- Confiscation
        6.1.3- The European evidence warrant
    6.2. Generation and documentation of the order. The certificate.
        6.2.1- Freezing orders
        6.2.2- Confiscation
        6.2.3- The European evidence warrant
    6.3. Transmission of the order and incidents.
        6.3.1- Freezing orders
        6.3.2- Confiscation
        6.3.3- The European evidence warrant
7. The passive process. Receipt of the order.
    7.1. Recognition of the order.
    7.2. Non-recognition or non-execution.
        7.2.1.- On the certificate
        7.2.2.- Immunities and privileges
        7.2.3.- Dual criminality
        7.2.4.- Ne bis in idem

7.2.5.- Legal prohibition

7.2.6.- Protection of the rights of the interested parties

7.2.7.- Failure to appear in the trial resulting from the confiscation

7.2.8.- Place the deeds were committed

7.3.9.- Extended powers of confiscation

7.3.10.- Time-barring of the penalty imposed

7.3.11.- Impossibility of enforcement

7.3.12.- National security

7.3.13.- Need for search or seizure

7.2.14.- Lack of validation

7.3. Postponement of execution.

7.4. Immediate execution.

7.4.1. Competence.

7.4.2. Procedure and term

7.4.2.1. General procedure

7.4.2.1.1 – Orders freezing property or evidence

7.4.2.1.2 – Confiscation

7.4.2.1.3 – European Evidence warrant

7.4.2.2 Term.-

7.4.2.2.1 – Orders freezing property or evidence

7.4.2.2.2 – Confiscation

7.4.2.2.3 – European Evidence warrant

7.4.2.3 Execution procedure

7.4.2.3.1 – Orders freezing property or evidence

7.4.2.3.2 – Confiscation

7.4.2.3.3 – European Evidence warrant

7.4.3. Legal remedies

7.4.4. Material content of the execution

7.4.4.1 – Orders freezing property or evidence

7.4.4.2 – Confiscation

7.4.4.3 – European Evidence warrant

7.4.5. Process of execution.

7.4.5.1 – Orders freezing property or evidence

7.4.5.2 – Confiscation

7.4.5.3 – European Evidence warrant

7.4.6. Cessation of execution.

7.4.6.1 – Orders freezing property or evidence

7.4.6.2 – Confiscation

7.4.6.3 – European Evidence warrant

7.4.7. Expenses, reimbursement and losses and damages.

7.4.7.1 – Orders freezing property or evidence

7.4.7.2 – Confiscation

A/ Orders freezing property or evidence

B/ Confiscation

C/ European Evidence Warrant

1. Orders freezing property or evidence, confiscation and the European evidence warrant in the context of the principle of mutual recognition and immediate enforcement.

In this topic we will be studying

Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence and the transposition of the same.

Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders and the transposition of the same.

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.

The background can be found[i] in the Action Plan to combat organised crime adopted by the Council on 28 April 1997[ii],[iii]. In the political guidelines (no. 11) the European Council highlighted "*the importance for each Member State of having well-developed and wide ranging legislation in the field of confiscation of the proceeds from crime and the laundering of such proceeds (...) introducing special procedures for tracing, seizure and confiscation of proceeds from crime*". In recommendation 26 it asked the Member States to adopt specific measures in relation to confiscation, in particular in order to strengthen the tracing and seizure of proceeds of organised crime and to make criminalisation of laundering of the proceeds of crime as general as possible. Following the same line of action, the Council of Justice and Home Affairs adopted on 3 December 1998[iv] an Action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice. Article 31 a) of the EU Treaty, introduced by the Treaty of Amsterdam, envisaged facilitating and accelerating

cooperation between competent ministries and judicial or equivalent authorities of the Member States[v]. The "Vienna Plan" also referred to the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. Joint Action 98/699/JHA of 3 December 1998, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime was designed to implement the recommendations mentioned above[vi].

According to the Conclusion of the European Council of Tampere of 15 and 16 October 1999, which recommended and asked the Council to guarantee the adoption of specific initiatives for the tracing, seizure and confiscation of the proceeds of crime (points 51 and 55) the Council approved conclusions 33, 36 and 37, which stated:

- conclusion 33: the European Council endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters;
- conclusion 36: the European Council states 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".

This principle was to affect not only decisions issued after a criminal judgment, but also decisions issued prior to the stage at which the judgment is formed, particularly those aimed at acting rapidly to secure evidence and seize assets which are easily movable.

Finally, in conclusion 37, the European Council asks "the Council and the Commission to adopt, by December 2000, a programme of measures to implement the principle of mutual recognition"[vii]. In developing the conclusions of Tampere, the Council adopted a programme of measures at the JHA Council of 30 November and 1 December 2000 adopting the programme of measures referred to in conclusion 37 of the Presidency of the European Council of Tampere ([viii]OJ C012 dated 15 January 2001 p 10) the purpose of which was to put into practice the principle of mutual recognition in criminal matters. The priority was to adopt an instrument that applied the principle of mutual recognition to orders freezing property and evidence. Measures 6 and 7 of this programme indicated the priority of adopting an instrument to apply section 36 of the Tampere conclusions among

the Member States. The initiative behind the Framework Decisions we are studying was the result of the political will to complete these measures and put them into practice.

On 26 June 2001 the Council adopted Framework Decision 2001/500/JHA[ix], on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime[x]. The Framework Decision introduced new developments, such as the establishment of the principle of mutual recognition of national measures for the seizure or confiscation of the instrumentalities or proceeds of crime. Nevertheless, this directive proved to be insufficient, as it only set penalties in cases of serious offences, leaving considerable latitude for crimes to go unpunished[xi]. Moreover, the fact that the 1998 Joint Action was not derogated meant that this area was regulated by two acts with different legal value.

The Hague Programme approved by the European Council of Brussels of 4 and 5 November 2004 (OJ C 53/1 dated 3 March 2005) continued this process and established the priority of introducing the European evidence warrant, which materialised in 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[xii].

Then, Council Framework Decision 2009/299/JHA of 26 February 2009[xiii] amended all the previous Framework Decisions, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial[xiv], [xv]. It is necessary to define clear common grounds for refusing to recognise decisions issued in trials where the accused person was not present. The Framework Decision aims to define these common grounds, entitling the executing authority to comply with the decision, despite the absence of the person accused at the trial, his/her right to defence notwithstanding[xvi].

[xvii]In relation to the orders freezing property or evidence and evidence warrants, the Commission[xviii] published two reports after the approval of the Framework Decision describing how they had been transposed in each country and included the Commission's article-by-article evaluation of the Framework Decisions. The Commission regretted that

while the 13 EU countries that had transposed the Framework Decision up to that point had done so correctly in general terms, several had transposed certain relevant articles incorrectly. They added new grounds for refusal to those envisaged in the Framework Decision, which sometimes limited and even breached the provisions of the Framework Decision. Recognising the discretionary powers of each state to do so, and that it is not obligatory, the Commission underlined that the failure to transpose the definitions could cause a lack of security. It also observed big differences in the selection of the active-passive competent authorities and not all the states transposed the principle of direct contact between judicial authorities.

Neither Council Framework Decision 2003/577/JHA, dated 22 July 2003, on the execution in the European Union of orders freezing property or evidence nor Council Framework Decision 2006/783/JHA, of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders are isolated elements[xix]. C. MAURO[xx] states that this process of construction of criminal law by stages "is a source of complexity, as it involves both a quantitative and qualitative multiplication of the instruments" (our translation). Thus, the European Union has a convention, a framework decision for freezing property and another for regulating the search for evidence as well as at least three framework decisions regarding the confiscation or seizure of property, which, as MAURO points out, does not make it easy to identify "the possible acts, the conditions and the procedures depending on the text that is taken as reference". The Framework Decisions we are studying here are not just a step on the road to the introduction of the principle of trust and mutual recognition; both C. MAURO[xxi] and R. MORAN[xxii] highlight that they constitute a step in a more general direction that seeks to obtain direct cooperation between judicial authorities in the execution of orders for seizure, as a measure for fighting organised crime[xxiii].

We can also identify other elements that are outside the sphere of EU law, as at the time the initiatives that led to the Framework Decisions we are studying were presented there were several international instruments in relation to the recognition of final judicial decisions[xxiv].

As for the transposition of Council Framework Decision 2003/577/JHA, dated 22 July 2003, on the execution in the European Union of orders freezing property or evidence into

Spanish law, this occurred, with something of a delay, by means of Law 18/2006 of 5 June, on the effectiveness of orders freezing property or evidence in criminal proceedings in the European Union. Together with it, a supplementary instrument in the form of Organic Law 5/2006 of 5 June was approved, which amended organic law 6/1985 of 1 July on the Judiciary (Official State Gazette 6 June 2006). Council Framework Decision 2006/783/JHA, of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders was also transposed into Spanish law with a delay, by Law 4/2010 of 10 on the enforcement of judicial confiscation orders in the European Union. The transposition also entailed the approval of Organic Law 3/2010 of 10 March, amending organic law 6/1985 of 1 July on the Judiciary and which supplemented the Law on the enforcement of judicial confiscation orders in the European Union due to the commission of criminal offences (both published in the Official State Gazette of 11 March 2010).

2. The current rules: generation, characteristics and elements of implementation.

2.1.- Council Framework Decision 2003/577/JHA, dated 22 July 2003, on the execution in the European Union of orders freezing property or evidence

Framework Decision 2003/577/JHA was initially an initiative launched by Belgium, France and Sweden on 22.11.2000 and published in OJEC C 75 on 7.3.2001, page 3.

Its progress through the European institutions was relatively rapid[xxv]. The initiative was classed as revolutionary in the first report of the European Parliament. The European Parliament, in its report on the draft bill to the Council, in the corresponding Commission, proposed amendments to the text of the initiative[xxvi], centring on certain aspects[xxvii]. In view of the above, the Council presented a second version of the Framework Decision[xxviii]. The European Parliament's report on the second version, in addition to addressing some technical points, centred its amendments on three elements: the maximum term of the sentence, the dual criminality condition and jurisdictional control of the decisions. Finally, on 11 June 2002 the European Parliament approved the final report on the second Council

text by an overwhelming majority, maintaining these elements from the report from the corresponding Commission.[xxix] The Council of the European Union finally approved the framework decision on 22 July 2003.

2.2. Council Framework Decision 2006/783/JHA, of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders[xxx]. Its passage through the European institutions is also of interest[xxxi].[xxxii] .

2.3.- 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[xxxiii].

Its context is perfectly identified from the first document[xxxiv], whose depiction of the context is highly revelatory[xxxv]. In point 3.3.1, the Hague programme included in the Conclusions of the European Council of 4 and 5 November 2004 insists on the importance of the termination of the global programme of measures aimed at putting the principle of mutual recognition of judicial decisions in criminal matters into practice and makes the introduction of the European evidence warrant a priority, referred to hereinafter as “the warrant”. It is a question of surpassing the current international cooperation mechanisms for obtaining evidence[xxxvi]. The authors of the Framework Decision considered it provided the following advantages:

- a request made by a judicial decision of another Member State will be directly recognised without the need for it to be converted into a national decision (by means of the exequatur procedure) in order to be enforced.
- requests will have a single standard format.
- terms for enforcing requests will be set.
- minimum safeguards for the publication and enforcement of a request will be introduced.
- the arguments or refusing to enforce requests will be limited. In particular, dual criminality as an argument for refusal disappears except during a transitional period for those Member States that have subjected enforcement of a request for search or seizure to said condition.

The warrant has to coexist with the current judicial assistance procedures, but said coexistence must be considered transitional until such time as the means of obtaining evidence excluded from the scope of the Framework Decision are also subject to an instrument of mutual recognition, the adoption of which will give rise to a full mutual recognition regime that replaces the current judicial assistance procedures. The Framework Decision replaces the provisions existing regarding mutual assistance in the corresponding Council of Europe or European Union Conventions, provided that we are dealing with objects, documents and data that fall within the scope of said instrument. It does not affect the cooperation agreements between Member States on obtaining objects, documents and data where said agreements or conventions achieve more effective and efficient cooperation in criminal matters. Such agreements may include cooperation between police authorities regarding objects, documents and data in their possession, as well as in relation to public documents that are easily available and do not imply the use of coercive measures. The Commission and the Council must be notified of any new agreements.

Its passage through the European institutions was slow and the debate centred on a few crucial points. The first report of the European Parliament[xxxvii] centred on[xxxviii] the *justification of the request for evidence*, the procedures and guarantees on, for example, search, seizure and the interception of telecommunications and the competent bodies. It is relevant that the Committee on Legal Affairs and the Internal Market[xxxix], meeting on 27 January and 19 February 2004, examined the project and approved an amendment calling on the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs to reject the framework decision[xl]. A European Evidence Warrant may only be adopted once a European constitutional treaty has entered into force which provides effective protection of fundamental rights and provides for the European Parliament's legislative role.
The European Parliament asked the Commission to amend its proposal accordingly[xli]. After the amendments were made, it was sent to the Parliament for re-consultation and on 24.9.2008 a draft report on the proposal for a Council framework decision from the Committee on Civil Liberties, Justice and Home Affairs was tabled, whose observations centred essentially on the removal of the territoriality clause, the exclusivity of the judicial

authorities and the problems of obtaining computer and telecommunications data. It was finally approved by the Council in December 2008.

3. Orders freezing property or evidence, confiscation and the European evidence warrant: meaning and scope

3.1.- Freezing orders

As R. MORAN correctly points out, we should think of freezing as the group of measures described in the decision itself, and not in the sense of the traditional regulatory concept of each national legal system. Therefore, we tend to translate freezing in this regard as a measure adopted by a competent judicial authority in the context of criminal proceedings in the issuing state in order to provisionally prevent any operation, transformation, disposal, transferral of property that must be eligible for confiscation or seizure by the state and constitutes, in the case of securing evidence, an element of proof. They are in any event provisional measures of securing evidence, aimed at preventing the disappearance of property, whose validity and effectiveness is subject to the issuing state presenting the corresponding request for transfer of treatment either simultaneously or within a short period, as we will see later. Basically, we should get used to identifying the concept of freezing with that of seizure. Finally, there should be no doubt whatsoever that it does not include the subsequent transfer of such property, documents or elements of proof to the issuing state, or its treatment in the executing state.

3.2.- Confiscation

Confiscation was harmonised in conceptual terms in the EU via Council framework decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, article one of which defined confiscation as “a penalty or measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences, resulting in the final deprivation of property”. Article 2 c of Council Framework Decision 2006/783/JHA of 6 October 2006 defines “confiscation order” as “a final penalty or measure imposed by a court following proceedings in relation to a criminal offence or offences, resulting in the definitive deprivation of property”. It applies the principle of mutual recognition of judicial decisions that have ordered confiscation but does

not go into a common configuration of that institution.

3.3.- The European evidence warrant.

The European evidence warrant is a judicial decision making it possible to obtain objects, documents and data from another Member State for the purposes of criminal proceedings. The service of judicial documents in Europe will hereinafter be called the European evidence warrant. As the Framework Decision itself states, it will coexist, in relations between Member States, with the legal instruments in force that refer to requests for judicial assistance for obtaining evidence that falls within the scope of the Framework Decision, notwithstanding the application of said instruments in relations between Member States and third countries. As set out in the preamble, the issuing authorities will use the order when all the objects, documents or data they need to request from the executing state are included within the scope of the Framework Decision. The issuing authorities may use judicial assistance to obtain objects, documents or data that are included in the scope of this Framework Decision if they form part of a broader request for assistance or if the issuing authority considers that, in the case in question, said procedure would facilitate cooperation with the executing state.

4. Scope of application: material, procedural, temporal, spatial.

4.1. Material scope.

4.1.1.- Freezing orders

On both and active and a passive level, the Framework Decision on orders freezing property or evidence contains the judicial measures adopted in criminal proceedings prior to the judgment, whose purpose is to safeguard objects, documents or data for subsequent confiscation, or which may be used as evidence, thus preventing their disappearance or transformation as defined in Article 2.c of the Framework Decision. There are then two different categories: goods liable for seizure and elements for use as evidence.

In the first case, property eligible for freezing includes:

- property of any description, corporeal or incorporeal, movable or immovable;
- documents and instruments evidencing title to or interest in such property;
- the judicial authority issuing the freezing order considers it to be the proceedings of one of the infringements envisaged in Article 3 of the Framework Decision;
- or equivalent to either the full value or part of the value of such proceeds.

Joaquín DELGADO MARTIN[xlii] makes the point that there is nothing preventing a freezing order being issued to ensure the confiscation of property of an equivalent value stating what specific property should be frozen in this regard.

In the second case, freezing orders may affect objects, documents or data that can subsequently be used as evidence in criminal proceedings, exclusively in relation to one of the infringements listed in Article 3 of the Framework Decision. Anything that we consider to be the *corpus delicti*, the instrument of the crime or a piece of evidence can be the object of this procedure[xliii].

4.1.2.- Confiscation

As for the Framework Decision on the application of the principle of mutual recognition of confiscation orders, both actively and passively, it covers a final penalty or measure imposed by a court following proceedings in relation to a criminal offence or offences, resulting in the definitive deprivation of property, as defined in Article 2.c of the Framework Decision.

By property, we are to keep in mind what was explained in relation to the previous Framework Decision, i.e., property liable to confiscation:

- property of any description, corporeal or incorporeal, movable or immovable,
- legal documents and instruments evidencing title to or interest in such property,

which the court in the issuing State has decided are:

- proceedings of an offence included in Article 3 of the Framework Decision.

And by proceeds we are to understand any economic advantage derived from criminal offences

- or equivalent to either the full value or part of the value of such proceeds
- or that constitutes the instrumentalities of such an offence, meaning mean any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences.
- or liable to confiscation resulting from the application in the issuing State of any of the extended powers of confiscation specified in Article 3(1) and (2) of Framework Decision 2005/212/JHA
- or liable to confiscation under any other provisions relating to extended powers of confiscation under the law of the issuing State.

4.1.3.- The European evidence warrant.

We have already said that the European arrest warrant is a judicial decision for obtaining objects, documents and data from another Member State when all the objects, documents or data that are to be requested from the enforcing state fall within the scope of this Framework Decision. The warrants can be issued in order to obtain objects, documents and data from other Member States and refer to the objects, documents or data specified therein. The warrant may be used for any object, document or data for use in the criminal proceedings for which it is issued. These may be, for example: objects, documents or data of a third party; those derived from a search of the suspect's premises, including his/her home; historical data on the use of any service, including financial transactions; historical documents containing statements, interviews or questioning; and other documents, including the results of special investigation techniques.

Cooperation regarding this kind of evidence is regulated by the agreements on judicial assistance, in particular the 2000 EU Convention and its 2001 Protocol. It will be necessary, in due time, to replace these forms of cooperation with a system based on the principle of mutual recognition. It is possible to use the European warrant to obtain evidence belonging to these categories that was gathered before the warrant was issued. For example, obtaining a statement given previously by a suspect to an investigating authority in the requested state in

relation to an earlier investigation carried out by that state. It also covers historic documents from the interception of communications, surveillance or monitoring of bank accounts.

There is a general rule and exceptions, specific rules and a catalogue of prohibitions or exclusions.

General rule: the warrant may be issued to obtain the objects, documents or data indicated when already in the possession of the executing authority before the warrant was issued. This is the key point.

Exception: as the Framework Decision states, however, if the issuing authority so indicates, it may also cover any other object, document or data that is not already in the possession of the executing authority, but it is discovered when executing the warrant and, without performing complementary investigations, it is considered pertinent for the proceedings for which the warrant was issued.

Another exception: if the issuing authority so indicates, it will also cover taking statements from the persons present during the execution of the warrant who are directly related to the matter in question. The corresponding rules in the executing state applicable to national cases will also apply to taking such statements.

Specific rule: personal data obtained pursuant to the Framework Decision may be used by the issuing state for court and administrative proceedings directly related to those mentioned in letter a); preventing an immediate and serious threat to public security, for any purpose other than those set out in points (a), (b) and (c), personal data obtained under this Framework Decision may be used only with the prior consent of the executing State, unless the issuing State has obtained the consent of the data subject.

Caution or guarantee: in the context of a particular case, the executing state may instruct the Member State to which the personal data was sent to provide information on the use made of it. This article will not apply to personal data obtained by a Member State pursuant to this

Framework Decision and which originates in said Member State. This article is based on Article 23 of the 2000 EU Convention. It complements the protection offered by the 1981 Council of Europe Convention for the protection of individuals with regard to the automatic processing of personal data. The 1981 Convention, ratified by all Member States, establishes that personal data that is processed automatically will only be registered and used, among other things, for specific, legitimate purposes, except when it constitutes a necessary measure in a democratic society for protecting state security, public safety or for the repression of offences.

Specific rule: for the purposes of the Framework Decision "search or seizure" shall include any measures under criminal procedure as a result of which a legal or natural person is required, under legal compulsion, to provide or participate in providing objects, documents or data and which, if not complied with, may be enforceable without the consent of such a person or it may result in a sanction. This is an "ad hoc" concept for this instrument and for that reason the definition of the expression "search or seizure" should not be invoked with regard to the application of any other applicable instrument between EU Member States, and in particular the Council of Europe Convention on mutual assistance in criminal matters of 20 April 1959 and the instruments that complement it.

A warrant will only be issued when the objects, documents or data requested are necessary and proportionate with relation to the purpose of the criminal proceedings and when it would have been possible to obtain them pursuant to the legislation of the issuing state in a comparable case.

The issuing authority will be responsible for guaranteeing compliance with these conditions. As a result, the grounds for refusal of recognition or execution will not deal with these matters.

Prohibitions or exclusions: The warrant shall not be issued for the purpose of requiring the executing authority 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.

4.2. Procedural scope.

4.2.1.- Freezing orders

The Framework Decision on freezing orders covers the judicial measures adopted in criminal proceedings prior to the judgment. The conditions will differ depending on the object of the criminal proceedings. If the events being investigated or prosecuted in the criminal proceedings correspond to those included in the list we will be referring to, certain conditions apply, and if they are not, others come into play. The list system is identical to the one contained in Framework Decision 2002/584/JHA, dated 13 June 2002, on the European arrest warrant. Article 3.2 of Framework Decision 2003/577/JHA, states that *"The following offences, as they are defined by the law of the issuing State, and if they are punishable in the issuing State by a custodial sentence of a maximum period of at least three years shall not be subject to verification of the double criminality of the act"* and goes on to list a series of offences that is the same as the one contained in Article 2.2 of Framework Decision 2002/584/JHA.

This list contains a wide variety of offences, including terrorism and participation in a criminal organisation, sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons, munitions and explosives, nuclear or radioactive materials, endangered animal species and in endangered plant species and varieties, human organs and tissue, cultural goods, corruption, fraud, laundering of the proceeds of crime, counterfeiting currency, different types of swindling and defrauding, murder, grievous bodily injury, organised or armed robbery, rape, arson, crimes within the jurisdiction of the International Criminal Court, and several others. This list was left open as the Council may decide, at any time, to add other categories of crimes to it (Article 3.3

Framework Decision). As for the crimes which are not included in any of the categories on the list or, where included, do not lead to sentences of imprisonment whose maximum duration is at least three years under the legislation of the issuing state, the Framework Decision establishes a different system depending on whether the purpose of the freezing order is to secure evidence or confiscate the property.

If the objective is the securing of evidence, it imposes a viability condition:

- the executing state may subject the recognition and execution of the freezing order to the condition that the acts for which the order has been issued *constitute an offence* under the legislation of said state, regardless of the elements that comprise it or the manner in which it is described in the legislation of the issuing state.

If the objective is the freezing of property, it imposes two conditions, namely that the executing state may subject recognition and execution of the order:

- to the condition that the facts in relation to which the order has been issued *constitute an offence for which*,
- the legislation of said state, *envisages freezing,* regardless of the elements that comprise it or the manner in which it is described in the legislation of the issuing state (Article 3.4 of the Framework Decision).[xliv]

4.2.2.- Confiscation.

We find a similar set-up in the Framework Decision on the application of the principle of mutual recognition to confiscation orders. It refers to any final penalty or measure imposed by a court following proceedings in relation to a criminal offence or offences, resulting in the definitive deprivation of property and it applicable “a priori” to any criminal proceedings in which a penalty or measure of this kind can be issued. We have to distinguish, as with freezing orders, depending on the events on which the criminal proceedings are based – what type of offence they constitute – as the consequences are different and they affect the applicability of the procedure of mutual recognition and the elimination of the dual criminality test.

We differentiate between criminal proceedings dealing with an offence included on the list (a list system that is identical to that contained in earlier Framework Decisions in Article 6 de the Framework Decision, punished with terms of deprivation of liberty with a maximum of at least three

If it is on the list in Article 6 of the Framework Decision, offences punished with terms of deprivation of liberty with a maximum of at least three years, the consequence is twofold: a decision from another EU state can a priori be executed and, moreover, the decision will be subject to a prior dual criminality test. The list is contained in Article 6 of Framework Decision 2006/783/JHA[xlv]," and is almost an exact reproduction of the one contained in Article 2.2 of Framework Decision 2002/584/JHA[xlvi]. This list contemplates a wide variety of punishable offences[xlvii].

If it is not on the list, each EU Member State can, when transposing the Framework Decision – although they are not obliged to – do one of two things; either not establish any conditions, and in this case all decisions from other EU states will be executable, or establish a single condition. This single condition must be (and this is the only option) that the acts that led to the confiscation order constitute an offence that allows confiscation under the legislation of the executing state, regardless what the constituent elements are or the manner in which it is described in the legislation of the issuing state. (Art 6.3 of Framework Decision 2006/783/JHA)

4.2.3.- The European evidence warrant

It can be used for these kinds of proceedings:

- criminal proceedings brought by a judicial authority or that are to be brought by a judicial authority for acts that constitute an offence under the national legislation of the issuing state;
- proceedings brought by administrative authorities for acts classified in the national legislation of the issuing state that may give rise to criminal proceedings (e.g. with a right to appeal to a criminal court);
- proceedings brought by judicial authorities for acts classified in the national legislation of the issuing state that may give rise to further criminal proceedings;
- all the above proceedings that refer to offences for which a legal person may be considered responsible or be punished in the issuing state. This helps guarantee that the proposal has the same scope as the current instruments on judicial

assistance in criminal matters in the European Union, in particular as a result of the 2000 EU Convention.

4.3- Temporal scope.

The Framework Decisions we are studying have been in force since the day after their publication in the Official Journal of the European Union.

5. Competent and involved authorities.

5.1. Issuing authorities.

5.1.1.- Freezing orders

In the Framework Decisions we are dealing with, the system is virtually identical. Indeed, according to the Framework Decision on the application of the principle of mutual recognition to orders freezing property or evidence, and the Framework Decision on the application of the principle of mutual recognition to confiscation orders, the judicial authorities responsible for criminal matters issue, decree, validate or confirm a freezing order. These authorities will be those that, pursuant to internal law, have the capacity and responsibility for performing such actions. This can be seen from the preamble and Articles 1, 2, 4 and 9 of the former Framework Decision and Article 3.1 of the latter[xlviii]. However, the Framework Decisions do not provide a common definition of what should be understood by competent authority, and do not contemplate an express mechanism for designating competent authorities that would be comparable to or fit in with the concept of judicial authority[xlix]. What the Framework Decisions do is refer to what the internal law of each state decides when transposing them. If this internal law considers a specific authority competent to issue, assess or approve an order, it is therefore considered a judicial authority for the purposes of this instrument.

5.1.2.- Confiscation.

The Framework Decision on the application of the principle of mutual recognition to confiscation orders contemplates the concept of competent authority, as we have just explained. The detail contained in a certificate annexed to the Framework Decision goes

almost unnoticed, as it is not mentioned in the articles. Section b) of the same identifies the issuing Court, but another section, section c), allows us to identify another actor, the authority competent for the execution of the confiscation order in the issuing state, if different from the Court under point b). Moreover, it envisages the possibility for each EU state, when necessary due to the organisation of its internal system, to create another entity other than the Court, the central authority responsible for the administrative transmission and receipt of the confiscation order, which will assist the competent authorities[I].

And the Framework Decision also allocates a role to another actor in the issue process: (Article 4.4. of the Framework Decision) the contact points of the European judicial network that can be used by the requesting authority to ascertain exactly which is the competent authority in order to ask it to execute the confiscation order, if in doubt. As such, another competent issuing authority is identified, which may be a Court or of another kind and a competent central authority, which is not obligatory, solely for transmission and receipt, in addition to a informative or consultative authority.

5.1.3.- The European evidence warrant

In the sphere of the European evidence warrant, “issuing authority” shall mean a judge, a court, an investigating magistrate, a public prosecutor; or 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.

The Member States will also appoint the competent authorities for the recognition and execution of the warrants and may designate a central authority or, if their legal system so envisages, more than one, in order to assist the competent authorities. If required by the organisation of their national legal system, any Member State may assign the function of administrative transmission and receipt of the warrant and official correspondence in relation to the same to its central authorities.

If the issuing authority is not a judge, a court, an investigating magistrate or a public prosecutor and the warrant has not been validated by one of those authorities in the issuing

State, the executing authority may, in the specific case, decide that no search or seizure may be carried out for the purpose of the execution of the warrant. Before so deciding, the executing authority shall consult the competent authority of the issuing State. Any Member State may, at the time of adoption of this Framework Decision, make a declaration or subsequent notification to the General Secretariat of the Council requiring such validation in all cases where the issuing authority is not a judge, a court, an investigating magistrate or a public prosecutor and where the measures necessary to execute the warrant would have to be ordered or supervised by a judge, a court, an investigating magistrate or a public prosecutor under the law of the executing State in a similar domestic case.

5.2 Executing authorities.

5.2.1.- Freezing orders

The Framework Decision does not define the executing judicial authority, unlike with the issuing state. But it does mention the judicial authority when regulating the procedure of transmission, recognition and execution or non-execution in several articles, stating the judicial authority that is competent for execution[li]. Article 4.2 will allow Ireland and the United Kingdom to state that their central authorities or others specified in the declarations made by said states will be the ones to intervene, albeit only for the purposes of the transmission of orders, not for execution[lii].

5.2.2.- Confiscation.

The Framework Decision on the application of the principle of mutual recognition to confiscation orders does not define the issuing judicial authority and merely states that each EU state will inform the General Secretariat of the Council which is the competent executing authority. It also envisages the option for any Member State to designate, if it is necessary as a result of the organisation of its internal system, one or more central authorities responsible for the administrative transmission and reception of the confiscation orders and to assist the competent authorities.

5.2.3.- The European evidence warrant.

In the sphere of the European evidence warrant, “executing authority” shall mean an authority having competence under the national law which implements this Framework Decision to recognise or execute a warrant in accordance with this Framework Decision. Each Member State shall inform the General Secretariat of the Council which authority or authorities, under its national law, are competent pursuant to Article 2(c) and (d) when that Member State is the issuing State or the executing State. Member States wishing to make use of the possibility to designate a central authority or authorities in accordance with Article 8(2) shall communicate to the General Secretariat of the Council information relating to the designated central authority(ies). These indications shall be binding upon the authorities of the issuing State.

6. The active process. Issue of the order.

6.1. Adoption in proceedings.

6.1.1.- Freezing orders

In the case of orders freezing property or evidence, adoption of the order by the competent authorities must take place in any of the criminal proceedings that justify it. The complete system envisaged in the Framework Decision is, in reality, comprised of different elements, namely:

- the decision to freeze the property or secure the evidence, which we shall call the base decision;
- the certificate, which we will come to later;
- the request for the transfer of the elements of proof to the issuing state;
- the request for confiscation of property, which requires:
    - either the execution of a confiscation order issued in the issuing state;
    - the confiscation in the executing state and the subsequent execution of the decision;
    - the instruction to include the certificate so that the property remains in the executing state awaiting either of the two types of requests to which we

have just referred.

Of these five elements, the first and second must always exist. The third and fourth, the latter with its two variants, may or may not exist at the same time as the first and the second, i.e., the base decision and the certificate. If they do not exist simultaneously, it will then be necessary for the last of the elements cited, a subsidiary one, to exist. This is set out in the provisions of Article 20 of the Framework Decision in relation to Article 6 of the same and section (h) of the certificate. What the system does not want is for a freezing order for property or the securing of evidence to be issued without, either at the same time, and in a separate decision, a decision on the request for confiscation of the property being taken or the request for transfer of the elements of evidence being issued, or a statement of when either of these decisions will be taken, with an indication of the term for the same. It is a question of avoiding freezing orders for property or the securing of evidence *sine die* at all costs[liii].

6.1.2.- Confiscation.

In the wording of the Framework Decision on the application of the principle of mutual recognition to confiscation orders, the competent authorities are the only ones that can issue the order, once the base decision in the original criminal proceedings ordering confiscation of property is final (in general it will be a conviction which, regardless of whether or not it imposes a sentence, resolves the confiscation and, if applicable, the corresponding ruling making it final and ordering execution under domestic law) sending the original of this decision or a certified copy – and always attaching the certificate included in the Annex to the Framework Decision.

The basic requirement is that the confiscation of the property have been ordered and the condition, which should in my opinion be express and reasoned, is the existence of reasonable grounds to believe that the natural or legal person against whom the confiscation order has been issued has property or income in the state to which the order is being transmitted, or, if there are no reasonable grounds which would allow the issuing State to determine the Member State, the confiscation order may be transmitted to the

competent authority of the Member State where the natural or legal person against whom the confiscation order has been issued is normally resident or has its registered seat respectively. The express grounds that justify the simultaneous transmission of a decision must also be sent where this is possible. Put another way, the grounds must also include:

- where the order is a standard one transmitted to one state, the reasonable grounds for believing the property is located there
- where the order has been transmitted to several states simultaneously: the grounds for believing the items of property – in plural form – to be confiscated are in several states, or the grounds for the intervention of several states for the execution of the same, or that the item of property – singular – is located in two or more specific states
- where the order concerns an amount of money:
- the specific grounds justifying simultaneous transmission
- and, including, but not limited to, confirmation that the property has not been frozen under a prior, sufficient freezing order,
- or the judicial estimation that the value of the property that may be confiscated will not be sufficient to cover the full amount covered by the confiscation order.

6.1.3.- The European evidence warrant.

Cautions or safeguards that may be mentioned at this stage.

As the Framework Decision itself states, a warrant should be issued only where obtaining the objects, documents or data sought is necessary and proportionate for the purpose of the criminal or other proceedings concerned. This is in order to avoid unnecessary intrusions of privacy and situations that, for example, require a disproportionate number of documents for the investigation of a simple offence. Form A annexed to the Decision envisages that the requesting body will include a description of the offence(s) investigated, the grounds for issuing the warrant and a summary of the known facts, as indicated in the explanation of the context of the initial Proposal for a Framework Decision.

The second requirement is that it could have been obtained under the legislation of the issuing state in a comparable case. Once again, in the explanation of the context of the

initial Proposal for a Framework Decision it is made clear that this is to prevent the European evidence warrant being used to circumvent the protections established in the legal system of the requesting state in relation to certain types of objects, documents and data, for example materials subject to professional secrecy. For this reason, the form contains a specific section on whether the objects, documents and data are confidential or subject to professional secrecy. However, this section does not mean that the same procedural means should apply to both the requesting and requested states. It may be necessary in the requesting state to obtain a specific warrant to search the premises of a third party in order to obtain evidence, while the requested state may have a procedure that orders a third party to disclose the elements of evidence without having to resort to a search.

Similar terms apply regarding admissibility: the objects, documents and data must be admissible in the procedures for which they are requested. This prevents the European evidence warrant being used to circumvent the protections established in the requesting state in relation to the admissibility of evidence, in particular if new measures are adopted in the future on the mutual admissibility of elements of evidence obtained under the European evidence warrant.

6.2. Generation and documentation of the order. The certificate and the warrant.

6.2.1.- Freezing orders

In the event judges and magistrates have to adopt the decision ordering the issue of the order freezing property or evidence in Europe, it must take the form of a ruling or reasoned decision. If, moreover, it has been decided that, the confiscation or transfer of the elements of evidence is to be requested, this decision will also be adopted in the same form.

Once the base decision has been adopted, in any event it must be accompanied by the certificate, which is the key element, following the model of both the Framework Decision annex and the Spanish law. The freezing order will have no effect unless accompanied by this Certificate for the execution of measures of seizure or securing of evidence in another Member State of the European Union.

Its issue and attachment to the base decision, as well as its formal correctness, is vitally important, and thus special care should be taken to ensure it is correctly filled out in its entirety. The decision does not have to be translated, although a translation does tend to help ensure the final outcome of the procedure is satisfactory.

The certificate must obligatorily be translated into the language accepted by the executing state, being drafted in the language of the issuing judicial authority, with an official translation into the official language of the executing state, or to one of its official languages or to the language accepted by that state in a declaration deposited with the Secretariat General of the Council.

It must be signed by the competent judicial authority attesting to the accuracy of its contents. In the transposition of this rule to domestic law, the majority of states affirm that they accept only their official language, while others, not many, also accept English, and a few accept several languages; some even accept any language approved by the Public Prosecutor. As the reader can see, the regime is ultimately quite diverse. The base decision, a reasoned decision, should include, as background to the proceedings and in the operative part, those elements that the certificate requires as materially significant. In this way we ensure that the base decision and the certificate are consistent, facilitating the effectiveness of the order. In particular, the content of sections e), f), g), h) and i) of the certificate should already be contained in the base decision and simply be transferred to the certificate.

We should also highlight the importance of the correct specification of what the object of the freezing order is. The certificate requires a description of the property and, if appropriate, the maximum amount that it seeks to recover via said property, as well as an exact description of the evidence and the precise location of the property or evidence, or its last known whereabouts, if the exact location is not known.

6.2.2.- Confiscation.

In the case of the transmission of a confiscation order, the original ordering the transmission – or a certified copy - should be sent together with the certificate, signed by the authority issuing it, which will attest to the accuracy of its contents in the language or one of the official languages of the addressee state or an official languages of the

Community institutions accepted by said state.

6.2.3.- The European evidence warrant.

The European evidence warrant is issued following the standard form in the annex to the Framework Decision. It must be signed and its content certified as accurate by the requesting body; it must also be translated into the official language or one of the official languages of the requested state. Any Member State may state in a declaration deposited with the General Secretariat of the Council that it will accept translations in one or more other official languages of the institutions of the Union. If the warrant is related to a previous warrant or a freezing order, this will be indicated according to the corresponding form in the annex. If the issuing authority is participating in the execution of the warrant in the executing state, it may transmit a warrant that complements the earlier one directly to the competent executing state while it is in that state.

6.3. Transmission of the order and incidents.

6.3.1.- Freezing orders

The system is one of direct communication between judicial authorities, the latter understood in the terms we explained in the previous chapter[liv]. This transmission may be made via any means that leaves a written record and that allows the judicial authority to which it is addressed to establish its authenticity. The use of a *burofax* (registered fax message) as a possible system of transmission is a matter of open debate, as is the use of Interpol.

As for who the order should be sent to, several European states, when transposing the rule to internal law, converted police authorities or authorities of an administrative nature into judicial authorities. Practically speaking, unless one has an exact list, as set out in Article 43 of the Framework Decision, there is no option but to ask the executing state for the necessary information by all necessary means, including the contact points of the European Judicial Network, if there are difficulties in ascertaining what the competent authority is, both for the issue of the certificate and for its processing in the executing state.

6.3.2.- Confiscation.

In the case of the Framework Decision on the application of the principle of mutual recognition to confiscation orders, the system is similar, but with an important qualification. The documents to be sent, which we have already mentioned, can be sent by any means that leaves a written record in conditions that allow the executing state to establish their authenticity. If done in this way, the originals, and this is the special feature, will only have to be sent to the executing state if it so requests.

The competent authority issuing the order assumes two supplementary information obligations:

- in the event of multiple transmission of a confiscation order for money to several states, it will ensure that the total value of the execution does not exceed the amount indicated in the order and, if it feels there is a risk of this total being exceeded – or if this risk disappears, it must inform the executing authority or authorities who suspended execution in order to avoid the risk of exceeding the confiscation amount in the case of confiscation of money.
- the issuing authority is obliged to inform of the amount already confiscated or in the process of being confiscated during execution, specifying the remaining value pending confiscation, as well as the voluntary payments made by the interested party in accordance with the confiscation order.

6.3.3.- The European evidence warrant.

In the case of the European evidence warrant, it may be sent to the competent authority in the Member State in which the competent authority of the issuing state has reasonable grounds for believing the corresponding objects, documents or data are located, or in the case of electronic data, that they are directly accessible pursuant to the legislation of the executing state. The warrant will be transmitted without delay by the issuing authority to the executing authority by any means that leaves a written record in conditions that enable the executing state to establish its authenticity. Any additional official communication will also be made directly between the issuing authority and the executing authority. If the issuing

authority so wishes, the transmission may be made using the protected telecommunications system of the European Judicial Network.

If the executing authority is not known, the issuing authority will make the necessary enquiries, using the contact points of the European Judicial Network if necessary, in order to obtain the information on the executing state.

When the authority of the executing state that receives a warrant has no jurisdiction to recognise it and to take the necessary measures for its execution, it shall, *ex officio*, transmit the warrant to the executing authority and so inform the issuing authority. At the request of the issuing authority, the information will be confirmed without delay by any means that leaves a written record, of the transmission of the warrant to the competent authority responsible for executing it. Any difficulties concerning the transmission or the authenticity of any document needed for the execution of the warrant shall be dealt with by direct contacts between the issuing and executing authorities involved, or, where appropriate, with the involvement of the central authorities of the Member States.

7. The passive procedure. Receipt of the order or decision.

7.1. Recognition of the order, decision or mandate.

7.1.1.- Freezing orders

When all the requirements necessary for achieving the purpose of the freezing order are fulfilled, it is immediately recognised and executed, which entails the corresponding measures for immediate execution, in the same way as a freezing order issued by an authority in the executing state. This is essentially what should be done. The dual criminality check is removed in relation to orders issued in the context of proceedings that derive from acts that may be classed as crimes. Crimes contained in the list in Article 10, section 1, of the Spanish law regarding the Framework Decision are punished with terms of imprisonment with a maximum duration of at least three years. If these two circumstances exist, the order will be recognised immediately, without further formality.

7.1.2.- Confiscation.

The competent authorities "shall without further formality recognise a confiscation order which has been transmitted (...), and shall forthwith take all the necessary measures for its execution, unless the competent authorities decide to invoke one of the grounds for non-recognition or non-execution (...), or one of the grounds for postponement of execution (...)".

7.1.3.- The European evidence warrant.

The executing authority shall recognise a warrant without any further formality being required. The executing authority shall take the necessary measures for its execution unless that authority decides to invoke one of the grounds for non-recognition or non-execution or one of the grounds for postponement.

7.2. Non-recognition or non-execution.

In relation to freezing orders, Article 7 of the Framework Decision envisages four grounds for failing to recognise or execute a freezing order. Generally speaking, the framework decision only contains specific motives for non-execution which each national system may or may not include in the state legislation for the transposition. The executing authority may refuse execution for these reasons, but does not necessarily have to do so, which is the case however in the Spanish law: the existence of immunity or a privilege that prevents execution, the infringement of rights, the existence of *non bis in idem*, and on a residual level, dual criminality. No reference is made to the other categories that would prevent execution, such as a reference to the fundamental elements of the different national legal systems, for example[lv].

In relation to the mutual recognition of confiscation orders, the Framework Decision establishes grounds for non-recognition or non-execution of the decision that are also optional and once again most of these grounds for refusal were transposed, although the Member States often transposed them as obligatory grounds, as in the case of Spain.

We can essentially establish the following system:

7.2.1.- On the certificate.

This is regulated in the same way for freezing orders, the execution of confiscation orders and in the sphere of the European evidence warrant, although the latter case involves a form rather than a certificate. If the certificate is missing, incomplete, or clearly fails to correspond to the freezing order, or is manifestly incorrect, the executing judicial authority may refuse or reject the certificate. Before deciding to refuse recognition or execution of a warrant, in full or in part, the competent authority of the executing state will consult the competent authority in the issuing state via the appropriate channels and, if applicable, ask it to supply the necessary supplementary information forthwith.

As for scenarios where it is clear that the certificate does not correspond to the freezing order, the discrepancy should refer to the operative part of the base or initial decision that ordered the measure, or when there is a discrepancy between the different essential fields of the certificate. It is therefore necessary to assess the relationship between the base decision and the certificate and, as the former does not have to be translated, the "correspondence" must be deduced from the content of the certificate itself, on the understanding. This was how the REJUE (Spanish Judicial Network) 2007 meeting of experts saw it, that the measure refers to the operative part of the decision contained in the certificate.

7.2.2.- Immunities or privileges.

This area is regulated homogenously in relation to orders freezing property or evidence, the execution of confiscation orders and the European evidence warrant. Execution or recognition may be refused in the event there is an immunity or privilege in the executing state that prevents execution of the decision. The issuing authority may be consulted before deciding not to recognise or execute. There is no common definition of what an immunity or privilege is in the EU and, as a result, it is for national rules to establish the exact definition of these terms, which may include protection applicable to the medical and legal professions, but they should not be interpreted in the sense that they oppose the obligation to eliminate certain grounds for refusal that appear in Article 7 of the Council Act of 16 October 2001 establishing, in accordance with Article 34 of the Treaty

on European Union, the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union.

7.2.3.- Dual criminality.

Checking the dual criminality of behaviour is, as we know, the requirement that the acts in relation which judicial assistance for the persecution or trial is requested be classed as an offence which is punishable not only in the law of the state requesting the assistance, but also in that of the requested state. The regime for this reason for non-execution is also the same in the case of freezing orders, confiscation and the European evidence warrant:

- a general rule establishing that dual criminality is not necessary;
- a general exception making dual criminality obligatory; and
- an exception to the exception.

General rule.

The execution of freezing orders from an issuing state will not be subject to a dual criminality check when they refer to acts which are being prosecuted as some of the crimes contained in the list in Article 10.1 of the Spanish law, correlative to Article 3.2 of the Framework Decision, provided that they are punished in said state with maximum terms of imprisonment of at least three years.

In the context of the European arrest warrant, a refusal to execute such a warrant because the act on which it is based does not constitute an offence pursuant to the national legal system of the requested state (dual criminality) is contrary to the principle of mutual recognition of a judicial decision. It should not therefore be possible to refuse execution on such grounds. However, in order to facilitate the passage of the current rules to the new regime of mutual recognition of the European evidence warrant, a progressive focus is proposed.

The general rule is broader: recognition or execution of the warrant will not be subject to the verification of the dual criminality, unless it is necessary to carry out a search or seizure and provided that it is not related to the list of offences contained in the Framework Decision.

According to the 1959 Council of Europe Convention, dual criminality can only be imposed as a condition for cooperation for obtaining evidence by means of search and seizure. This was restricted even further by Article 51 of the 1990 Schengen Convention, which addressed the problem of administrative procedures in criminal matters. Dual criminality cannot be imposed as a condition for execution when the objects, documents or data are already under the control of the requested body. The position of the existing instruments is followed, whereby dual criminality is excluded except where the requested state considers it necessary for a seizure or search of premises. It even goes one step further by eliminating the possibility of rejecting cooperation on the grounds of dual criminality when:

(a) it is not necessary to carry out a search of private premises to execute the warrant, which reflects the sensitive nature of this kind of action; or

(b) the offence is on the list of included in this article. The list of offences in this article is copied from Article 2 of the Project for a Framework Decision on the application of the principle of mutual recognition to financial penalties. It is based on the list of offences in Article 2 of the Framework Decision on the European arrest warrant, also included in Article 3 of the Framework Decision on orders freezing property or evidence.

General exception.

If the crime is not one of the ones included in the list in Article 3.2 of the Framework Decision, the states have the power to reject execution if there is no dual criminality. That is, if the acts on which the freezing order is based do not constitute an infringement pursuant to the law of the executing state, each state can maintain or remove the dual criminality check for these cases.

With regard to the European evidence warrant, the exception is not exactly the same: if the warrant is not related to any of the offences included on the list and execution of the same requires a search or seizure, the recognition or execution of the warrant may – optionally – be subject to the dual criminality condition, thus depending on the option in the transposition law. And the exception to the exception: when it is necessary to perform a search or seizure in order to execute the warrant, the offences included on the list in the Framework Decision will never be subject to the dual criminality requirement if they are

punished in the issuing state with a deprivation of liberty of a maximum of at least three years according to the legislation of said state[lvi].

Exception to the exception.

In all three cases we are studying, the only exception (contained in Article 10.3 of the Spanish law and Article 7.1.d. of the Framework Decision) indicates that, in relation to taxes or duties, customs or exchange, execution of the freezing order will not be refused on the grounds that the legislation of the executing state does not impose the same taxes or rights or does not have the same regulations as the issuing state, or if its tax, customs or exchange regulations are different to that of the issuing state.

7.2.4. *Ne bis in idem*.

In general and for those spheres we are studying, execution may be refused if it infringes the principle of *ne bis in idem*; before deciding to refuse full or partial recognition or execution of a warrant, the competent authority of the executing state will consult with the competent authority of the issuing state via the appropriate channels and, if applicable, request that it supply the necessary complementary information forthwith.

The case law interpretation offered by the Court of Justice in relation to Articles 54 and 58 of the Convention on the Application of the Schengen Agreement should be taken into account. These articles establish exceptions to the effectiveness of the *ne bis in idem* principle, as under Article 23.2.c) of the Spanish law of the judiciary. Doubts arise when we ask what scope should be give to the *res judicata* so that a failure to consider it infringes *ne bis in idem*. Article 8.1.c) of the Framework Decision is not explicit.

In relation to the execution of confiscation orders, the Framework Decision and Spanish law contain the same exception: non-recognition or non-execution of orders if issued in Spain or another state other than the issuing state if a final decision has been rendered convicting or acquitting the same person for the same offence and execution would infringe the principle of *non bis in idem* in the terms envisaged in the laws and treaties ratified by Spain, even if there were a subsequent pardon. Prior consultation of the foreign judge is obligatory

in this case.

7.2.5. Legal prohibition

The Framework Decision does not expressly contemplate this circumstance, to which we will now refer, as a cause for refusing recognition or execution.

7.2.6.-Protection of the rights of the interested parties.

In relation to the execution of confiscation orders, the Framework Decision allows non-recognition or non-execution if the rights of the interested parties, including bona fide third parties acting in good faith, prevent it.

7.2.7.- Failure to appear at the trial from which the confiscation is derived.

This is a ground for non-execution of confiscation orders unless the certificate makes it possible to establish that:

- the accused person was aware of the venue and date of the trial and was informed that a decision could be rendered in his absence; or
- aware of the scheduled trial, he sent a defence lawyer who defended him; or
- that after being notified of the confiscation order and being expressly informed of his right to a new trial or to appeal with the possibility of a new trial, and of obtaining a decision contrary to the initial one, he expressly declared that he did not challenge the decision or ask for a new trial or file an appeal by the corresponding deadline. In these cases the foreign authority must obligatorily be consulted in advance.

7.2.8.- Place where the offence took place.-

We differentiate between cases where the offences were committed entirely or partially in the executing state or committed entirely outside the executing state.

If the confiscation order refers to offences that the law of the executing state considers to have been committed entirely or partially in its territory (or wholly or for a major or essential part within its territory, or in a place equivalent to its territory, according to the Framework Decision on the European evidence warrant) this can be an obstacle to

execution.

In the specific case of the European evidence warrant, under these circumstances refusal is only possible in exceptional circumstances and on a case-by-case basis, taking into account:

- the circumstances of that particular case;
- if a major or essential part of the offence in question was committed in the issuing state; and
- if the warrant refers to an act that does not constitute an offence pursuant to the law of the executing state and it were necessary to perform a search and seizure operation for the execution of said warrant.

In any event, when a competent authority is considering the possibility of invoking this ground for refusal, it will consult Eurojust before issuing a decision. In the event that the competent authority disagrees with the opinion of Eurojust, the Member States will ensure that any decision is reasoned and the Council is informed. Confiscation orders and European evidence warrants may also be refused or not executed if they refer to acts that the executing state considers were committed outside the issuing state if criminal action in respect of said offences is not permitted when committed outside the territory of said state.

7.2.9.- Extended powers of confiscation.

The Framework Decision considers that it is optional to refuse execution or recognition of the decision ordering it when dealing with extended powers of confiscation.

Spanish law is more categorical, on the one hand: the non-recognition of execution is obligatory; and stricter on the other, as it states that it is not sufficient for it to be case of extended powers of confiscation unless the judge considers it incompatible with fundamental rights and freedoms recognised in the constitution, after obligatory consultation with the issuing authority.

7.2.10.- Time-barring of the penalty imposed.

The Framework Decision established an optional ground of non-execution if the penalty is barred by statutory time limitations in the executing State, provided that the acts fall within the jurisdiction of that State under its own criminal law.

The transposition law puts things somewhat differently: it requires that the decision refer to offences that the Spanish authorities are competent to try and that if a Spanish court had issued a conviction the penalty imposed would have been time-barred. Consultation is optional in this case.

7.2.11.- Impossibility of execution.

It is impossible to execute the confiscation order where the property to be confiscated has already been confiscated, has disappeared, has been destroyed, cannot be found in the location indicated in the certificate or the location of the property has not been indicated in a sufficiently precise manner, even after consultation with the issuing State. In these cases the competent authority of the issuing State shall be notified forthwith, and it is not possible to execute alternative measures not envisaged in Spanish law, which leaves the door open for the unclear option of applying alternative measures not requested in the confiscation order. By the way, the reference here is to property that has already been confiscated, not property that has previously been detained.

The European evidence warrant states expressly that there are grounds for non-execution if it is not possible to execute the warrant using any of the measures at the disposal of the executing authority in that particular case. This impossibility may be material or legal. We are also told that the decision to refuse recognition or execution must be taken as soon as possible and no later than 30 days after receipt of the warrant by the competent executing authority. When, in a particular case, the competent executing authority cannot respect the term set, it will inform the competent authority of the executing state forthwith using any means and explain the reasons for the delay and inform it of the estimated period necessary. The Member States will adopt the measures necessary to ensure the deadlines set are met. When the issuing authority has indicated

in the warrant that, due to procedural terms or other particularly urgent circumstances, a shorter term is required, the executing authority will take account of this requirement if possible.

7.2.12.- National security

There is a specific, unique reason in the legal regime of the European evidence warrant for full or partial refusal of recognition or execution if, in a particular case, execution could:

- harm essential national security interests,
- jeopardise the source of the information, or
- involve the use of classified information relating to specific intelligence activities.

Before deciding to wholly or partially refuse to recognise or execute a warrant, the competent authority of the executing state will consult the competent authority of the issuing state by the appropriate channels and, if applicable, ask it to supply the necessary complementary information forthwith. Nevertheless, it is accepted that said grounds for non-recognition or non-execution will only apply when, and to the extent that, the objects, documents or data are not used for these reasons as evidence in a comparable national case.

7.2.13.- Need for search or seizure.

Once again, the legal regime of the European evidence warrant regulates another specific, unique reason: if the warrant is not related to any of the offences listed in section 2 and execution requires a search or seizure, recognition or execution of the warrant may be subject to the dual criminality condition and it may be decided not to execute it if it refers to acts that do not constitute an offence under national legislation.

7.2.14.- Absence of validation.

Once again, the legal regime of the European evidence warrant regulates another specific, unique reason: if, after being asked to do so, the warrant has not been validated by a judge, court, investigating magistrate or public prosecutor in the issuing State. Indeed, in the event the issuing authority is not a judge, court, investigating magistrate or

public prosecutor and the warrant has not been validated by one of said authorities in the issuing state, the executing authority may decide, in the case in question, not to carry out the search or seizure measures for execution of the warrant. Before adopting the decision, the executing authority will consult with the competent authority of the issuing state. Any Member State may make a declaration or subsequent notification to the General Secretariat of the Council requiring such validation in all cases where the issuing authority is not a judge, a court, an investigating magistrate or a public prosecutor and where the measures necessary to execute the warrant would have to be ordered or supervised by a judge, a court, an investigating magistrate or a public prosecutor under the law of the executing State in a similar domestic case.

7.3. Postponement of execution.

Once the freezing order has been recognised by the judicial authorities that are to execute it, we must now analyse the postponement scenarios. It is not the recognition that is postponed; were this the case, it would lead to the corresponding investigation proceedings regarding the freezing order. What is postponed is the execution of what was requested. In general, in the case of freezing orders, confiscation or the European evidence warrant, the issuing authority should be notified forthwith of the postponement of the execution or recognition of the warrant, the reasons for the postponement and, if possible, the probable duration of the same. As soon as the reasons for the postponement cease to exist, the executing authority will adopt the necessary measures for the execution of the warrant and again notify the competent authority in the issuing state forthwith by any means that leaves a written record of the execution or resumption of execution. Although some grounds for suspension are contained, even in similar terms, in the three spheres we are studying, they are not identical and for that reason we will be treating them individually.

7.3.1. Freezing orders

Here the Framework Decision on freezing orders, in Article 8, establishes three grounds for suspension.

- The need to avoid damage to an ongoing criminal investigation in the executing

state, for the time considered reasonable. If this reason for postponement is upheld, the hypothesis of damage to an ongoing criminal investigation will have to be duly reasoned and justified. In relation to the grounds for postponement in Article 15.1[lvii],

- The need to avoid the measure requested coinciding with others already adopted in the executing state regarding the same property or evidence, until the first measures are lifted. This is set out in Article 8 of the Framework Decision. Depending on how it is interpreted, this ground has not been included in the Spanish transposition law. That is, the defining characteristic of this scenario is that another EU state, under this procedure, has managed to secure the same element of evidence or freeze the same property. Interpreted in this manner, the Spanish law is somewhat unclear on this point. The Framework Decision seems to refer to cases in which the property to be frozen is the object of another order of the same kind sent by Spain to another European state and already accepted at the execution stage. That is, what is characteristic of this case is that another EU state, under this procedure, has already managed to freeze the same element of evidence or impose a preventative embargo on the same property. Understood thus, this ground is not clearly contained in the Spanish law.

- The third scenario in Article 8 of the Framework Decision refers to cases in which the property or evidence is already subject to measures ordered in the executing state and until the measures are lifted. The difference with the former case would seem to be that, here, the origin of the freezing is an internal action on the part of the domestic courts of the executing state. In this case, postponement will only apply if the initial measure, adopted pursuant to the internal law of the executing state, should take priority over those that may be adopted subsequently. If, due to its nature or characteristics, it should not have that priority, recognition and, if applicable, execution of the freezing order will not be postponed.

7.3.2.- Confiscation.

In the case of the Framework Decision on confiscation orders, Article 10 contains the following grounds for postponement:

- excess of simultaneous confiscation of an amount of money.
- postponement of confiscation of an amount of money if there is a risk that the total value derived from its execution may exceed the amount specified in the confiscation order because of simultaneous execution of the confiscation order in more than one Member State. The issuer will be informed by any means leaving a written record
- in these cases, the issuer will be informed of the postponement, the grounds for the same and the expected duration
- where the execution of the confiscation order might damage an ongoing criminal investigation or proceedings, until such time as it deems reasonable. Keep in mind the comments of the EJN in relation to this term
- where the property is already the subject of confiscation proceedings in the executing State
- it is postponed if the property was already the object of confiscation as a result of a previous execution of confiscation adopted in the executing state on the same property or evidence, until the former is cancelled. This is set out in Article 8 of the Framework Decision.
- translation of the confiscation order, if considered necessary.

7.3.3.- European evidence warrant.

The Framework Decision on the European evidence warrant contains the following grounds for postponement:

- the form provided for in the Annex is incomplete or manifestly incorrect, until such time as the form has been completed or corrected, in one of the cases where validation is required, the warrant has not been validated, until such time as the validation has been given.
- its execution might prejudice an ongoing criminal investigation or prosecution, until such time as the executing State deems reasonable
- the objects, documents or data concerned are already being used in other proceedings until such time as they are no longer required for this purpose.

7.4. Immediate execution.

7.4.1. Competence.

The transposition rules will be defined by the authorities responsible for execution.

We have already stated that in the case of the Framework Decision on confiscation orders, the examining magistrate is the executing authority.

7.4.2. Procedure and term

7.4.2.1. General Procedure.

7.4.2.1.1.- Freezing orders

In the Framework Decision, the method of execution can be classed as immediate execution. Thus, Article 4.1 indicates that the competent authorities of the executing state will recognise, without further ado, any freezing order and will immediately take the corresponding steps to immediately execute it, generally speaking[lviii]. Not only do the measures have to be adopted immediately, but the decision on recognition must be notified without delay. In the Framework Decision, this notification of execution to the requesting authority takes the form of a report to the issuing authority.

7.4.2.1.2.- Confiscation

The Framework Decision on confiscation orders obliges the executing authority to recognise all confiscation orders without further formality and forthwith take all the necessary measures for its execution, unless the competent authorities decide to invoke one of the grounds for non-recognition, non-execution or postponement.

7.4.2.1.3.- European evidence warrant.

In the Framework Decision on the European evidence warrant, the general criterion is also action taken forthwith unless there are grounds for postponement or if the executing authority is already in possession of the objects, documents or data required.

7.4.2.2.2 Term.

7.4.2.2.2.1.- Freezing orders

As for the term for adopting the order and executing it, the Framework Decision indicates that the executing authorities will have to both adopt and notify the decision on a freezing order as soon as possible and, where viable, within 24 hours of receipt of the order.

7.4.2.2.2.- Confiscation.

In relation to confiscation orders, we have already said that the Spanish transposition law requires a preliminary report from the Public Prosecutor's Office that should be issued within 7 days of being notified. We will not be repeating the contents of the foregoing paragraph.

7.4.2.2.2.1- European evidence warrant

In the case of the European evidence warrant, unless either grounds for postponement exist or the executing authority has the objects, documents or data sought already in its possession, the executing authority shall take possession of the objects, documents or data without delay and no later than 60 days after the receipt of the warrant by the competent executing authority. When it is not practicable in a specific case for the competent executing authority to meet the deadline, it shall without delay inform the competent authority of the issuing State by any means, giving the reasons for the delay and the estimated time needed for the action to be taken

7.4.2.2.3. Procedures.

7.4.3.2.2.1 Procedure for execution of the freezing order

In relation to the Framework Decision on freezing orders, we must distinguish between the aspects of the procedure that are determined by the judge issuing the order and the aspects that are not determined by the order. As is natural, the execution procedure will in principle be that of the executing state. However, pursuant to Article 5 of the Framework Decision, and in the event it is necessary to guarantee the validity of the evidence admitted, and provided there is no contradiction with the fundamental principles of law of the executing state, the authority issuing the order may indicate to the judicial authority responsible for executing the order the express formalities and procedures that are to be

followed when it comes to executing the order. We should also refer to the procedure for the execution of supplementary coercive measures which can be adopted pursuant to the procedural rules of the executing state, provided that they are required by the freezing order, which should not be interpreted as meaning that they must be expressly requested, but that they are inherent to the effectiveness of the securing of evidence. These coercive measures will always be governed by the law of the requested state. In these cases it will not be possible to observe or submit to the formalities and procedures indicated by the issuing judicial authority, which does not have the option of requesting that a different procedure to the one used in the executing state be employed in the case of coercive measures.

7.4.2.3.2.- Confiscation.

The Framework Decision on confiscation orders states that execution will be governed by the law of the executing state, even against legal persons, even if this kind of liability is not recognised in the executing state.

The rules for the European evidence warrant state that the issuing state will have the possibility, if envisaged in the national legislation of the issuing state (for which reason Article 12 of the Framework Decision is included) to ask the issuing authority to comply with formalities and procedures in relation to legal or administrative process that may contribute to the evidence requested being admissible in the issuing state, such as providing an official stamp for a document, the presence of a representative of the issuing state or recording times and dates with a view to establishing a chain of evidence. These formalities and procedures shall not create an obligation to take coercive measures. The executing authority will inform the issuing authority forthwith, by any means, if the competent authority of the executing state determines that the warrant has not been executed in accordance with the law of the executing state; in any event, such formalities may not be contrary to the fundamental legal principles of the executing state.

7.4.2.3.3- European evidence warrant

The regulations on the European evidence warrant also provide specific rules of execution

that seek to establish a compromise between limiting the actions of the executing authority in terms of the warrant issued (limiting extraordinary investigations, limiting intrusive measures, limiting coercive measures) and a natural degree of latitude (announcement of unplanned investigative measures, availability of search and seizure measures in certain cases). Thus[lix]:

- the execution of the warrant will be performed, to the extent possible and notwithstanding the fundamental principles of national law, in accordance with the formalities and procedures expressly indicated by the issuing authority
- The executing authority should use the least intrusive means to obtain the objects, documents or data sought
- the warrant shall not create an obligation to take coercive measures
- the executing authority will inform the issuing authority forthwith, by any means, if it considers that, during the execution of the warrant and without having made further enquiries, it may be advisable to use investigative measures that were not initially envisaged or that could not have been specified when the warrant was issued, so that the issuing authority can adopt new measures in the case in question.
- the executing authority will only be obliged to execute a warrant in search of electronic data that is not located in the executing state insofar as it is permitted by its legislation
- Each Member State shall ensure that any measures which would be available in a similar domestic case in the executing State are also available for the purpose of the execution of the warrant.
- Each Member State shall ensure that measures, including search or seizure, are available for the purpose of the execution of the warrant where it is related to any of the offences as set out in Article 14(2).

7.4.3. Legal remedies

In general terms, the regime set out in the Framework Decisions is uniform. It can be summarised with the following common elements:

- Member States shall put in place the necessary arrangements to ensure that any interested party, including bona fide third parties, have legal remedies against the

recognition and execution of a transnational order freezing property or evidence, a confiscation order or a European evidence warrant in order to preserve their legitimate interests.

- The substantive reasons for issuing the order or warrant can be challenged only in an action brought before a court in the issuing State.
- The issuing State shall ensure the applicability of legal remedies which are available in a comparable domestic case.
- The issuing State shall ensure that any time limits for bringing an action are applied in a way that guarantees the possibility of an effective legal remedy for the interested parties.
- If the action is brought in the executing State, the judicial authority of the issuing State shall be informed thereof and of the grounds of the action, so that it can submit the arguments that it deems necessary. It shall be informed of the outcome of the action.
- The issuing and executing authorities shall take the necessary measures to facilitate the exercise of the right to bring actions, in particular by providing interested parties with relevant and adequate information. Amnesty and pardon may be granted by the issuing State and also by the executing State. Only the issuing State may determine any application for review of the confiscation order.

The Framework Decision on the European evidence warrant contains a singularity in that it states that the Member States may limit the legal remedies provided for in this paragraph to cases in which the warrant is executed using coercive measures. The executing State may suspend the transfer of objects, documents and data pending the outcome of a legal remedy.

7.4.4. Material content of the execution

7.4.4.1.- Freezing orders

Once the freezing order has been acknowledged, the material content of the execution will depend, as we have seen, on whether only the order itself is to be executed, in which case the measures will be adopted as requested, and exclusively in relation to the

property or means of evidence referred to in the European order. In any event, what is resolved should be sufficient to avoid, on a provisional and interim basis, the destruction, transformation, movement, transfer or removal of property that could be subsequently confiscated, or which may constitute means of evidence. The circumstances of each case will specifically indicate the most effective way of achieving this objective.

After consulting the issuing State, the executing State may in accordance with its national law and practices lay down appropriate conditions in the light of the circumstances of the case in order to limit the period or amend the measures in question, including destruction and bringing forward the judicial effects. If, in accordance with those conditions, it envisages lifting the measure, it shall inform the issuing State, which shall be given the opportunity to submit its comments.

There are therefore three possible actions: aimed at modifying the period, modifying the measures and cancelling the measures. The Spanish law does not specify whether this refers to freezing property or securing evidence. We can ultimately affirm that there is a range of six possibilities.

The Framework Decision only contemplates two actions, those that limit the term and those that render the provisions of the freezing order null and void – rather than modifying it – and moreover only in relation to the case of freezing property, not securing evidence; such possibilities are not contemplated in Article 6.2 of the Framework Decision, although the connection between Articles 6.2 and 6.1 of the Framework Decision could be interpreted to mean that the term freezing also refers to the securing of evidence. For this reason, it will be necessary to consider that these actions contemplated in Article 6.2 must refer to the freezing of property and it cannot be debated whether they include the securing of evidence; this matter should be interpreted in a highly restrictive manner when it is a case of modifying the measure in question, particularly if the issuing authority is not in agreement.

7.4.4.2.- Confiscation.

In the case of the rules on the recognition of confiscation orders, Spanish law distinguishes

between the confiscation of a specific item of property, an amount of money and multiple confiscations.

The singularity in the case of the confiscation of a specific item is that if it is not possible to confiscate the specific item, the criminal judge may, without the need for a mandatory prosecutor's report or informing the issuer, order that the confiscation take the form of the obligation to pay an equivalent sum. In the same way, when it is impossible to execute the confiscation of money, it can be applied to any available property and the amount of money can be transformed into the official currency of the executing state in this regard. The execution of multiple decisions by a single judge in relation to the same natural or legal person without sufficient economic capacity, or in relation to the same item of property or sum of money, obliges the judge to take all circumstances into consideration when deciding on execution. The judge must take into account the existence, in this order, of previous freezing orders, relative seriousness, place of infringement, dates of the decision and its transfer, notifying the issuer of his/her decision forthwith.

Compensation of value in confiscation makes it possible, where the convicted person has shown that part of the value has already been confiscated abroad, for the criminal judge to consult the issuer. In any event, the portion of the value of the proceeds of crime recovered by confiscation abroad will be deducted from the value of the property to be confiscated in Spain.

7.4.4.2- Confiscation.

In relation to the European evidence warrant, in the absence of a cause for postponement or if the executing authority is already in possession of the objects, documents or data requested, the executing authority will take possession of the objects, documents or data forthwith. This is what the material execution of the warrant consists of, as a preliminary step to the development of the execution which will take the form of the transfer of what was seized.

7.4.5. Development of execution of the freezing order and disposal of the confiscated property.

7.4.5.1.- Freezing orders

Once it has been resolved to freeze property or secure evidence, the measure will be maintained until the executing state has responded or finally sent the transfer requests for the property or evidence or until the final execution of the same, or until the term announced for transferring them elapses without the transfer having taken place. In this case, before the interim measure is lifted, the issuing authority must be notified.

7.4.5.2.- Confiscation.

Once the property has been seized, the initial rule is that the disposal of the property will be performed in the manner agreed by the issuing and executing states. In the absence of such agreement, we have to distinguish between whether the confiscated property is in monetary or other form.

if the amount obtained from the execution of the confiscation order is below EUR 10000, or the equivalent to that amount, the amount shall accrue to the executing State. in all other cases, 50% of the amount which has been obtained from the execution of the confiscation order shall be transferred by the executing State to the issuing State.

If the property is not money, it may be sold and the rules of the foregoing paragraph will apply to the proceeds. Alternatively, it may be sent to the issuing state, with its consent, if the property is a substitute for money. When it is not possible to apply either option, the property may be disposed of in another way in accordance with the law of the executing State. The executing State shall not be required to sell or return specific items covered by the confiscation order which constitute cultural objects forming part of the national heritage of that State.

7.4.5.3.- European evidence warrant

In the case of the European evidence warrant, unless a legal remedy is or grounds for postponement exist, the executing State shall without undue delay transfer the objects, documents or data obtained under the warrant to the issuing State and the executing authority shall indicate whether it requires them to be returned to the executing State as soon as they are no longer required by the issuing State.

7.4.6. Lifting of execution.

7.4.6.1.- Freezing orders

In relation to the Framework Decision on freezing orders, “The property shall remain frozen in the executing State until that State has responded definitively to any request made under Article 10(1)(a) or (b)”. The majority of Member States also envisage the possibility of limiting the period for which the property is frozen so that it is not indefinite. The lifting of the execution of the mandate contained in the order on the freezing of property or securing of evidence will take place when requested by the issuing judicial authority that directly lifts the measure, or when this occurs due to the destruction or natural disappearance of the property affected by the measure. In the case of means of evidence, this occurs when the judgment is prepared.

In relation to the freezing of property with a view to confiscation, we may find ourselves facing different scenarios depending on whether or not the issuing authority has requested subsequent treatment of the frozen property. It may be the case that the certificate contains an instruction for the property to remain in the executing state awaiting the request for subsequent confiscation. If this occurs, there are two possible scenarios, depending on whether or not the executing judge has imposed conditions appropriate to the case in order to limit the period of time the property is frozen.

If conditions have been imposed, it will be necessary to wait until the term indicated for the receipt of the request for subsequent treatment is received. If nothing has been received at the end of that term, in any event, when it is proposed that the measure be cancelled, the issuing state must duly inform the judge, giving him/her the possibility to make allegations.

If a supplementary request for treatment of the frozen property has been received, it may be the case that it contains a request for transfer of the means of evidence from the issuing state or that it contains a request for the confiscation of the property.

In the first case it will be necessary to decide on the transfer and, if granted, the order to secure evidence may be considered executed.

In the second case, if the request for subsequent treatment of the frozen property consists of a request for the confiscation of the property, the order will be executed by the executing state.

We now come to the adoption of measures; this will depend on the content of the order, one of the two we have just referred to.

7.4.6.3.- European evidence warrant.

The Framework Decision on confiscation states that the competent authority of the issuing State shall forthwith inform the competent authority of the executing State of any decision or measure as a result of which the order ceases to be enforceable or shall be withdrawn from the executing State for any other reason. The executing State shall terminate execution of the order as soon as it is informed by the competent authority of the issuing State of that decision or measure. The transposition law contains the same provision.

7.4.7. Expenses, reimbursement and losses and damages.

7.4.6.1.- Freezing orders.

With regard to orders freezing property or evidence,the issuing state will reimburse the executing state to which the order was transmitted for compensation of any losses and damages caused to the holders of legitimate rights and interests, provided they are not due exclusively to the activity of said state. The requested state will claim reimbursement from the state of the issuing judicial authority of amounts paid in compensation of any losses and damages caused to the holders of legitimate rights and interests, provided they are not exclusively the result of the abnormal operation of the Justice System or a judicial error. However, the Framework Decision does not affect domestic law in each Member State in relation to claims for losses and damages by individuals or legal entities.

7.4.6.2.- Confiscation.

In relation to the execution of confiscation orders, states will not claim expenses from each other unless the execution has entailed substantial or exceptional expenses. In such cases the executing state will propose sharing the expenses and the Framework Decision invites the issuer to consider any proposal of this kind.

Barcelona September 2010

FOOTNOTES

[i] 24 years have passed since the President of the French Republic, Valery Giscard d'Estaing, launched the idea of creating a "European judicial area", during the European Council held on 6 December 1977. It was included in the final declarations of the European Council held on 7 and 8 April 1978 and taken up again during the Council of Ministers of Justice held on 10 October 1978; subsequently the European Council of Cardiff, 15 and 16 June 1998, stated in conclusion 39:

"The European Council underlines the importance of effective judicial cooperation in the fight against cross-border crime. It recognises the need to enhance the ability of national legal systems to work closely together and asks the Council to identify the scope for greater mutual recognition of decisions of each others' courts".

[ii] OJ C 251, 15.8.1997, p1-16.

[iii] Approved by the European Council of Amsterdam in June 1997 and included in the European Council of Vienna of December 1998.

[iv] (OJ C 19 - 23 January 1999, p. 1.)

[v] The "Vienna Plan" was subsequently approved by the Council of Europe held in Vienna on 11 and 12 December 1998, in conclusion 83 of the Presidency.

[vi] However, as the Orlando report from the European Parliament of 4 June 1998 A4-0222/98 stated, the Joint Action merely requested cooperation between Member States, favouring the request for judicial assistance, but did not contain any specific proposals to improve the legal provisions of the Member States for confiscating the proceeds of crime, nor any practical proposals to introduce special procedures for confiscation, meaning that it did not meet any of the Action Plan's requirements.

[vii] The Commission, in its communication to the Council and the European Parliament (COM (2000) 495, Brussels, 26 July 2000), states that mutual recognition means that once a judge adopts a decision in the exercise of his/her official powers in a Member State, insofar as it has extra-national implications, it will automatically be accepted in all other Member States.

[viii] OJ C012, 15 January 2001, p 10.

[ix] OJ L 182 dated 5.7.2001, p. 1-2.

[x] Based on a French initiative, which derogated some articles of the 1998 Joint Action.

[xi] As the Marinho report, A5-0313/2000, highlighted.

[xii] OJ L 350, 30.12.08. It entered into force on 19.01.2009 and the term for transposition ended on 10.01.2011.

[xiii] OJEU N 81, 27.3.2009.

[xiv] Although the term for entry into force and transposition is 2011, according to the Council of State there is no reason not to take the restated text of Framework Decision 2006/783, which enhances the rights of defence of persons affected by trials where they are not present, into account at this time and it is indeed correct to do so.

[xv] As indicated in their grounds, the different Framework Decisions that implement the principle of mutual recognition of final judicial decisions issued in trials where the accused was not present do not offer satisfactory solutions for those cases in which it was impossible to inform the accused person of the proceedings.

[xvi] The Framework Decision aims to define this common grounds, entitling the executing authority to comply with the decision, despite the absence of the person accused at the trial, his/her right to defence notwithstanding. Recognition or enforcement of decisions issued in trials where the accused person was absent will not be refused when said person was summoned in person and informed of the date and venue set for the trial that issued the decision, or when the accused person received official information of the date and venue of the trial by other means, in such a way that it can be established without any doubt that he/she was aware the trial was to be held.

In this regard, the accused person must have received the information "in good time", i.e. with sufficient time to allow him/her to participate in the trial and effectively exercise his/her right of defence. The common solutions regarding the grounds for non-recognition in the corresponding Framework Decisions should take into account the different situations in relation to the right of the accused person to a new trial or to file an appeal. Any new trial or appeal would be designed to guarantee his/her right of defence and would be characterised by the following elements: the accused person would be entitled to appear, the arguments presented would be re-examined, including possible new elements of evidence, and the trial could lead to a different decision to the initial one. The right to a new trial or an appeal will have to be guaranteed when the decision has already been issued.

[xvii] In relation to freezing property or evidence, evidence warrants and confiscation, since the approval of the Framework Decision the Commission has issued two reports that show us how transposition has been performed in each country and, article by article of the Framework Decision, what the Commission's evaluation of said national transposition has been. We should highlight how the Commission regrets that while the 13 EU countries that had transposed the Framework Decision up to that point had done so correctly in general terms, several had transposed certain relevant articles incorrectly. They added new grounds for refusal to those envisaged in the Framework Decision, which sometimes limited and even breached the provisions of the Framework Decision. Recognising the discretionary powers of each state to do so, and that it is not obligatory, the Commission underlined that the failure to transpose the definitions could cause a lack of security. It also observed big differences in the selection of the active-passive competent authorities and not all the states transposed the principle of direct contact between judicial authorities.

[xviii] The Commission report of 22.12.2008 based on Article 14 of Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (COM/2008/0885 final) which reflected the situation in November 2008, and Report from the Commission to the European Parliament and the Council of 23 August 2010 based on

Article 22 of the Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders (COM/2010/428 final) depicted the situation in February 2010.

[xix] [...]

[xx] ROSA Ana MORAN MARTINEZ *op. cit.*, pp. 78 - 79.

[xxi] MAURO, Cristina - La Decisión marco de 22 de julio de 2003 relativa a la ejecución en la Unión Europea de las resoluciones de embargo preventivo de bienes y aseguramiento de pruebas.
In: *La Prueba en el EspacioEuropeo de Libertad, Seguridad y Justicia Penal.* Centro de Estudios Jurídicos del Ministerio de Justicia. Publisher: Thomson-Aranzadi, Madrid 2006, pp 75 - 78).

[xxii] MORÁN MARTÍNEZ, Rosa Ana
Decisión Marco de 22 de julio de 2003, relativa a la ejecución en la Unión Europea de las resoluciones de embargo preventivo de bienes y aseguramiento de pruebas
In: La nueva Ley para la eficacia en la Unión Europea de las resoluciones de embargo y aseguramiento de pruebas en procedimientos penales / editor, Jesús María Barrientos Pacho. -- Madrid : Consejo General del Poder Judicial (Estudios de derecho judicial. 2007 ; 117). – p. 177 *et seq*.

[xxiii] We will conclude this section by stating that, as Fernando IRURZUN MONTORO has quite rightly pointed out, the Framework Decision represents an improvement on its regulatory forbearers, introducing a model that he describes as agile and without excessive formalities, virtually granting the judicial authorities an exclusive leading role. These are positive, favourable characteristics that have not been fully confirmed in subsequent rules that intend to fulfil the same principle of mutual recognition. In his opinion, this can be explained by the fact that our framework decision benefitted from the impact of the September 11th attacks, and subsequent rules have been prepared in the context of an enlarged Europe, with less trust between its members, in which the inexperience of new negotiators in the context of mutual recognition cannot be ruled out either. All of this at a time when the definition of the concept and content of a common European public policy is pending, as the final obstacle for the recognition and execution of decisions issued by the judicial authority of each state all over the European Union.

[xxiv] We can mention:

- The Hague Convention of 1970 on the international validity of criminal judgments, the Convention of 13 November 1991 between the Member States on the enforcement of foreign criminal sentences, the 1998 European Union Convention on driving disqualifications, adopted pursuant to the Treaty of Maastricht. It is true that not all the states have ratified said instruments. Moreover, their contents would not be sufficient for establishing a full regime of mutual recognition.
- The European convention on judicial assistance in criminal matters of 1959, which imposed specific restrictions on cooperation and assistance in relation to seizures.
- The Convention on the Application of the Schengen Agreement of 14 June 1985, Article 51 of which limited the possibility of refusing to execute letters rogatory for search and seizure to certain conditions.
- The Vienna Convention of 1988 in the field of the fight against drug trafficking.
- The Strasbourg Convention of the Council of Europe on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime dated 8 November 1990, Article 18 of which regulated different grounds for rejecting requests for mutual assistance and confiscation, in addition to the provisions contained in Articles 8, 9 and 11.
- The Criminal Law Convention on Corruption, Council of Europe, 27 January 1999.
- The United Nations Palermo Convention against transnational organised crime, 12 to 20 December 2000.
- The United Nations Convention against Corruption, 11 November 2003.

[xxv] The process was: a) Presentation of the initiative and publication in OJEC C 75 dated 7.3.2001 page 3. b) In a letter dated 9 February 2001, the Council consulted the Parliament, in accordance with section 1 of Article 39 of the Treaty on European Union, on an Initiative from the Governments of the French Republic, the Kingdom of Sweden and the Kingdom of Belgium aimed at having the Council adopt a framework decision regarding the execution in the European Union of orders freezing property or evidence (5126/2001 - 2001/0803(CNS)). At the sitting of 15 February 2001, the President of the Parliament announced that the Initiative had been sent to the Committee on Civil Liberties, Justice and Home Affairs for a more in-depth study (C5-0055/2001). At the meeting on 27 February 2001, the Committee on Civil Liberties, Justice and Home Affairs appointed Mr Luís Marinho as rapporteur. At the meetings of 20 March, 19 June and 11 July 2001, the committee examined the Initiative from the Governments of the French Republic, the Kingdom of Sweden and the Kingdom of Belgium and the draft report. (5126/2001 C5-0055/2001 2001/0803(CNS)) (A5-0274/2001).

[xxvi] See foregoing note to obtain the text.

[xxvii] subjectively, limiting the power to issue an order freezing property or evidence to the judicial authority in criminal proceedings, strictly speaking; objectively, extending its scope beyond the list of Europol's powers, to all kinds of crimes; use of the language of the executing state and, with the same value for transfer purposes, any of the most commonly used languages in Europe; support for urgent transmission between Justice Ministries; non-imposition of conditions for compliance, on the part of the executing state; opposition to the presentation of appeals with suspensive effect in the executing state.

[xxviii] By means of a letter dated 3 April 2002, the Council re-consulted the Parliament, in accordance with section 1 of Article 39 of the Treaty on European Union on a draft framework decision from the Council regarding the execution in the European Union of orders freezing property and securing evidence (6980/2002 – 2001/0803 (CNS)). At the sitting on 8 April 2002, the President of the Parliament announced that this draft framework decision had been sent to the Committee on Civil Liberties, Justice and

Home Affairs for a more in-depth study, (C5-0152/2002). At the meeting on 27 February 2002, the Committee on Civil Liberties, Justice and Home Affairs appointed Mr Luís Marinho as rapporteur. At the meeting on 14 May 2002, the commission examined the draft framework decision of the Council and the draft report, having seen the report of the Committee on Civil Liberties, Justice and Home Affairs (A5-0172/2002). At the latter meeting, the commission approved the draft bill by 33 votes in favour, 2 against and 6 abstentions OJEC C 261 dated 11 June 2002.

[xxix] It stated as follows: *En adoptant par 431 voix pour, 45 contre et 55 abstentions le rapport de M. Luis MARINHO (PSE, P), le Parlement européen approuve sans débat le projet de décision-cadre sur le gel de biens ou d'éléments de preuve, dans le cadre d'une reconsultation. Le Parlement réinsère également l'ensembe de la décision-cadre dans un cadre plus strictement pénal : ainsi, il estime que les décisions de gel doivent être prises par les autorités compétentes des États membres dans le cadre d'une procédure pénale.*

Pour l'Assemblée, les décisions de gel doivent être soumises à des contrôles suffisants et être adoptées par les autorités judiciaires compétentes.

[xxx] It was a Danish initiative dated 2.7.2002 and published in DOC C 184 DE 2.8.2002, p. 8.

[xxxi] By letter of 1 August 2002 the Council consulted Parliament, pursuant to Article 39(1) of the EU Treaty, on the initiative of the Kingdom of Denmark with a view to the adoption of a Council Framework Decision on the execution in the European Union of confiscation orders (10701/2002 – 2002/0816(CNS)). At the sitting of 2 September 2002 the President of Parliament announced that he had referred this proposal to the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs as the committee responsible (C5-0377/2002). The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs appointed Giuseppe Di Lello Finuoli rapporteur at its meeting of 11 September 2002. The committee considered the initiative of the Kingdom of Denmark and the draft report at its meetings of 11 September 2002, 8 October 2002 and 5 November 2002. At the meeting of 5 November 2002 the committee adopted, together with the draft we are dealing with, the draft legislative resolution on the initiative of the Kingdom of Denmark with a view to the adoption of a Council Framework Decision on confiscation of crime-related proceeds, instrumentalities and property (2002/0818(CNS)) by 26 votes to 1, with 0 abstentions.

At the meeting of 5 November 2002 the committee adopted, together with the project we are dealing with, the draft legislative resolution on the initiative of the Kingdom of Denmark with a view to the adoption of a Council Framework Decision on the execution in the European Union of confiscation orders (2002/0816(CNS)) by 23 votes to 2, with 2 abstentions. The report was tabled on 7 November 2002. On 5.11. 2002, with the procedure underway, la Committee on Citizens' Freedoms and Rights, Justice and Home Affairs of the European Parliament adopted the draft report on the initiative of the Kingdom of Denmark with a view to the adoption of a Council Framework Decision on the execution in the European Union of confiscation orders (10701/2002 – C5 0377/2002 – 2002/0816(CNS)) by Giuseppe DI LELLO FINUOLI, approving the proposal in general terms, reserving the right to make minor amendments affecting the wording.

[xxxii] The Parliaments observations centred on:

The use of the term judge instead of court in some precepts, Article 1-4.

The introduction of a proportionality rule in line with the offence committed in the definition of confiscation (Amendment 2 to Article 2)

The connection to crimes derived from organised crime (amendment 3)

The need to prove the fictitious transfer of assets (amendment 4)

The inclusion of the fictitious use of an intermediary to control assets via legal persons who hold the assets and that are controlled by said intermediary (amendment 5)

The substitution of confiscation: the report also objected (amendment 10) to the executing state or the issuing state being able to substitute confiscation of property with a custodial sentence because this would be contrary to the constitutional rules of certain Member States.

The insistence that Member States shall adopt all the necessary measures to ensure that the onus of proof in respect of the unlawful origin of the property lies with the prosecution and not with the defence. The aim of this amendment (amendment 6) is to emphasise that the unlawful origin of the property must always be proved by the entities prosecuting a case. Otherwise, the unlawful origins of the property could only be argued on the basis of mere suppositions or suspicions. In practice, this would result in the onus of proof being inverted and it becoming the duty of the defence to show that the property was of lawful origin. Rules which have mere suspicion as their basis are incompatible with every modern system of criminal law, which draw on the principles of an offence having had to be committed, safeguards and the assumption of innocence. The rapporteur basically considered the Danish proposal excessive and considered that it was more appropriate to lighten the burden of proof by having the prosecution demonstrate the disproportion existing between the property possessed and the declared income or activity performed, while the accused person must prove the legitimate origin of the property. As for the confiscation of property transferred by the person in question to his/her spouse or cohabitee or to a legal person, the rapporteur maintains that the same principle must apply: it must be proven that the property belongs to the person in question and that the spouse or cohabitee has fictitious access or title to it. However, these third parties, who have not committed any offence, cannot be required to prove the legitimate origin of the property when there is no evidence that the property belongs to the accused person and that the third parties have fictitious access or title to it. The Council of the European Union was to finally approve the framework decision at its meeting of 5 October 2006, meeting 2752.

[xxxiii] OJ L 350 of 30.12.08.

[xxxiv] COM (2003) 688 final 2003/0270/CNS Proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters

[xxxv] COM (2003) 688 final 2003/0270/CNS Proposal for a Council Framework Decision on the European Evidence Warrant for

obtaining objects, documents and data for use in proceedings in criminal matters whose preamble states:

Member States' legal systems use a variety of procedural measures during the process of collecting evidence for proceedings in criminal matters. These include:

1.1.1. Preservation powers.

5. At an international level, the Council of Europe 2001 Convention on Cybercrime1 has introduced a distinction between "preservation orders" and "seizure" orders. Preservation orders apply only to third parties, and require them to preserve evidence without handing it over to the competent investigating authorities. A separate order is then required for the disclosure or production of the evidence.

1.1.2. Seizure powers.

6. Seizure goes beyond mere preservation of the evidence by involving (where necessary) the temporary possession of the evidence by the competent investigating authorities. It applies to evidence under the control of suspects as well as third parties.

7. Seizure is a commonly accepted notion in national and international criminal law, although its scope and modalities may vary. All Member States have given their police and judicial authorities powers to seize evidence. Seizure powers can be exercised by judicial authorities and, in certain circumstances, by law enforcement authorities under their own powers.

1.1.2. Powers to require production / disclosure of evidence.

8. In some Member States, judicial authorities have general powers to require third parties to disclose evidence. These powers rely on the co-operation of the third party. Where such co-operation is lacking, the judicial authority can use a search order to seize the evidence.

9. Other Member States have a specific investigative power known as a "production order" used for obtaining evidence (in particular documents) from a third party. These powers can be limited to serious offences and to specific categories of evidence (such as documents held in confidence), or they can be a more general power. "Production orders" are coercive since they place the third party under an obligation to hand over the evidence. Sanctions – including criminal sanctions – are used to ensure co-operation. Nevertheless, production orders are less intrusive than search and seizure powers.

10. Production orders can be useful when a third party is content to co-operate but, for legal reasons such as liability issues associated with breaching the confidentiality of its customers, it would rather be forced to disclose evidence than to co-operate voluntarily with the competent investigating authority. In other circumstances, however, it may be necessary to search the premises of a third party to obtain the evidence. This includes the situation where there is a real risk that the third party might destroy the evidence.

11. All these production powers apply only to material that already exists. Separate powers are used for "real-time" disclosure of information, such as orders for the interception of communications or the monitoring of bank account transactions.

1.1.4. Search & seizure orders

12. Member States' legislation on entering and searching premises contain significant differences. In some Member States, the power is limited only to serious offences. Other Member States have a much wider power available for the investigation of all offences.

13. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) provides the minimum standard for safeguards for search and seizure. However, within this framework, there are significant variations in the safeguards. These include: the level of certainty that evidence is on the premises to
be searched; the time of day when search powers can be used; notification of the person whose premises have been searched; the rules applicable when the occupier of premises is absent; and the need for independent third parties to be present at the search.

1.2. Existing international co-operation mechanisms to obtain evidence

14. The Council of Europe 1959 Convention on Mutual Assistance in Criminal Matters provides the basic framework for co-operation on obtaining evidence. This provides for the execution of requests for mutual assistance to be executed in accordance with the law of the requested State, and provides a number of grounds of refusal for mutual legal assistance. The 1959 Convention has been supplemented in order to improve co-operation by its additional protocols of 1978 and 2001. Within the EU, the 1959 Convention has been supplemented by the 1990 Schengen Convention, the EU Convention of May 2000 on

Mutual Assistance in Criminal Matters and its 2001 Protocol. The EU 2000 Convention and its 2001 Protocol have not yet entered into
force.

15. Despite the improvements introduced by these instruments, co-operation on obtaining evidence is nevertheless still carried out using traditional mutual assistance procedures. This can be slow and inefficient. Moreover, differences in national laws (as described in section 1.1) result in barriers to co-operation.

16. The variation in national laws on search and seizure is mirrored by differences in the extent to which Member States are able to provide mutual assistance. Under Article 5 of the 1959 Convention, each Contracting Party may declare that the execution of letters rogatory for search or seizure of property may be made dependent on one or more of the following conditions: dual criminality exists; the offence is extraditable in the requested Party; or the execution must be consistent with the law of the requested Party.

17. Article 51 of the 1990 Schengen Convention, however, limits the possibility for Member States to make use of such reservations under the 1959 Convention: Member States may not, according to Article 51, make the admissibility of letters rogatory for search and seizure dependent on conditions other than the following. First, that the offence is punishable under the law of both Member States by a custodial sentence of a maximum of at least six months, or is punishable under the law of one of the two Member States by an equivalent penalty and under the law of the other as an infringement which is prosecuted by administrative authorities where the decision may give rise to proceedings before a criminal court. The second condition is that the execution is otherwise consistent with the law of the requested Member State.

18. Under this proposal, these existing mutual assistance procedures would be replaced by a European Evidence Warrant based on the principle of mutual recognition. The following benefits would result.
– A request made by judicial decision from another Member State will be directly recognised without the need for its transformation into a national decision (by way of an exequatur procedure) before it can be enforced.
– Requests will be standardised by the use of a single form.
– Deadlines will be laid down for the execution of requests.
– Minimum safeguards will be introduced both for the issuing of a request and for its execution.
– The grounds for refusing to execute requests will be limited. In particular, dual criminality will not be a ground of refusal except for a transitional period for those Member States that have already made execution of a request for search and seizure dependent on the condition of dual criminality."

[xxxvi] The Council of Europe 1959 Convention on Mutual Assistance in Criminal Matters provides the basic framework for co-operation on obtaining evidence and it has been supplemented in order to improve co-operation by its additional protocols of 1978 and 2001. Within the EU, the 1959 Convention has been supplemented by the 1990 Schengen Convention, the EU Convention of May 2000 on Mutual Assistance in Criminal Matters and its 2001 Protocol. Under Article 5 of the 1959 Convention, each Contracting Party may declare that the execution of letters rogatory for search or seizure of property may be made dependent on one or more of the following conditions: dual criminality exists; the offence is extraditable in the requested Party; or the execution must be consistent with the law of the requested Party. Article 51 of the 1990 Schengen Convention, however, limits the possibility for Member States to make use of such reservations under the 1959 Convention: Member States may not, according to Article 51, make the admissibility of letters rogatory for search and seizure dependent on conditions other than the following. First, that the offence is punishable under the law of both Member States by a custodial sentence of a maximum of at least six months, or is punishable under the law of one of the two Member States by an equivalent penalty and under the law of the other as an infringement which is prosecuted by administrative authorities where the decision may give rise to proceedings before a criminal court. The second condition is that the execution is otherwise consistent with the law of the requested Member State.

[xxxvii] By letter of 4 December 2003 the Council consulted Parliament, pursuant to Article 39(1) of the EC Treaty, on the proposal for a Council framework decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters (COM(2003) 688 – 2003/0270(CNS)). At the sitting of 15 December 2003 the President of Parliament announced that he had referred the proposal to the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs as the committee responsible and the Committee on Legal Affairs and the Internal Market for its opinion (C5-0609/2003). The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs had appointed Elena Ornella Paciotti rapporteur at its meeting of 25 November 2003. The committee considered the Commission proposal and draft report at its meetings of 21 January, 19 February and 18 March 2004. At the last meeting it adopted the draft legislative resolution by 25 votes to 4, with 0 abstentions. The report was tabled on 22 March 2004.

[xxxviii] The justification of requests for evidence insisting on a statement of reasons on the form for a request for evidence under the European evidence warrant. New evidence not originally requested should be tested against the same criteria as original evidence under the warrant - the procedures and guarantees on, for example, search, seizure and the interception of telecommunications. The European Evidence Warrant in combination with the lack of European procedural safeguards may thus create legal uncertainty for defendants and third parties involved in criminal cases. For example, the executing state can be

required by the issuing state to use coercive measures (search, seizure) to execute the warrant (Article 13). And though the evidence warrant cannot be used to order the interception of telecommunications, it can be issued to obtain existing evidence which has been gathered through interception prior to the issuing of the warrant (Article 3(3)).

[xxxix] The Committee on Legal Affairs and the Internal Market appointed Giuseppe Gargani draftsman. It considered the draft opinion at its meetings of 27 January and 19 February 2004. At the latter meeting it adopted, by 15 votes to 11, with no abstentions, an amendment calling on the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs to reject the framework decision.

[xl] The Committee was extremely clear: Since the European Union's system as a whole does not provide effective legal protection of fundamental rights, we may state without fear of contradiction that the proposal for a decision is premature. Moreover, the European Parliament does not have legislative powers in respect of criminal law or criminal procedural law, which form part of the proposal under review. It is only being consulted. It maintained that approving this proposal for a framework decision would, therefore, openly contravene the fundamental principle of every democratic system, under which restrictions on freedoms may only be imposed by virtue of a legislative act approved by Parliament, which is the sole democratically representative organ. And any restriction must be imposed within limits which are clearly defined in the constitution .

[xli] After the amendments were made, it was sent to the Parliament for re-consultation and on 24.9.2008 a draft report on the proposal for a Council framework decision on the European Evidence Warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters (13076/2007 – C6 0293/2008 – 2003/0270(CNS)) from the Committee on Civil Liberties, Justice and Home Affairs was tabled. Rapporteur: Gérard Deprez, whose observations centred essentially on the removal of the territoriality clause, the exclusivity of the judicial authorities, the problems of obtaining computer and telecommunications data. On 21 October 2008 the Parliament adopted the legislative resolution asking the Commission to modify its proposal accordingly, pursuant to Article 250, section 2 of the EC Treaty. It was finally approved by the Council in December 2008.

[xlii] DELGADO MARTÍN, Joaquín
Emisión de una Decisión de embargo preventivo de bienes o aseguramiento de pruebas en el ámbito de la Unión Europea
Referencias bibliográficas
In: La nueva Ley para la eficacia en la Unión Europea de las resoluciones de embargo y aseguramiento de pruebas en procedimientos penales / director, Jesús María Barrientos Pacho. -- Madrid : Consejo General del Poder Judicial (Estudios de derecho judicial. 2007 ; 117). -- pp. 253-297 p. 271,

[xliii] J. Delgado draws attention to the fact that it is impossible to issue an order whose object is, or requires, a human body, although there is no problem when the object to be secured is an element of a human body that has already been obtained, and that is already in the possession of an authority in another state, such as a biological sample or similar items. It could nevertheless be maintained that elements of a human body, as they are neither objects, documents or data, should not be included in the scope of application of the framework decision, unless they have already been removed from the human body and can be considered objects.

[xliv] F I.RURZUN MONOTORO op cit p. 159, "*this provision, while also an example of the mistrust, reveals a tremendously diverse panorama, as there are numerous kinds of seizure envisaged in the legal systems of the countries of the European Union, such as specific confiscation, or by equivalence, of the value, or only of the proceeds of a crime, extended to the illicit estate of the criminal, or linked with a greater or lesser degree of proportionality to more serious crimes or even trifling crimes*".

[xlv] **Offences**

1. If the acts giving rise to the confiscation order constitute one or more of the following offences, as defined by the law of the issuing State, and are punishable in the issuing State by a custodial sentence of a maximum of at least three years, the confiscation order shall give rise to execution without verification of the double criminality of the acts:
- participation in a criminal organisation,
- terrorism,
- trafficking in human beings,
- sexual exploitation of children and child pornography,
- illicit trafficking in narcotic drugs and psychotropic substances,
- illicit trafficking in weapons, munitions and explosives,
- corruption,
- fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests,
- laundering of the proceeds of crime,
- counterfeiting currency, including of the euro,
- computer-related crime,
- environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties,
- facilitation of unauthorised entry and residence,
- murder, grievous bodily injury,

- illicit trade in human organs and tissue

[xlvi] There are differences and a reference to "high-technology" offences has been added, murder is included in place of manslaughter and now kidnapping is mentioned where before only illegal restraint was included.
[xlvii] It covers, among others, participation in a criminal organisation, terrorism, sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs, illicit trafficking in weapons, munitions and explosives, illicit trafficking in nuclear or radioactive materials including illicit trafficking in endangered animal species and in endangered plant species and varieties, corruption, fraud, different types of fraud and forgery, murder, grievous bodily injury, laundering of the proceeds of crime, counterfeiting currency, arson, organised or armed robbery, crimes within the jurisdiction of the International Criminal Court and many more. Here too the Council will be able to decide, by unanimity and after consulting the European Parliament in the conditions envisaged in Article 39.1 TEU, to add other categories of offences to the list (Article 3.3 Framework Decision).
[xlviii] This can be seen from the preamble and Articles 1, 2, 4 and 9 of the former Framework Decision and Article 3.1 of the latter
[xlix] For example, a list of the authorities designated as such pursuant to the declarations corresponding to the European Convention on mutual assistance in criminal matters between Member States of the EU of 29 May 2000 can be seen in Jose María Barrientos Pacho, *op cit*.

[l] We can consult what countries have opted for this system in the report of the Commission to the European Parliament and to the Council of 23.08.2010, based on Article 22 of Council Framework Decision 2006/783/JHA of 6 October 2006, on the application of the principle of mutual recognition to confiscation orders (COM/2010/428 final) which shows the situation in February 2010
[li] Article 4.2 allows Ireland and the United Kingdom to state that a central authority or authorities specified by it in the declaration made by said states be used, but only for the purposes of the transmission of orders, not execution.
[lii] Article 4.2 allows Ireland and the United Kingdom to state that a central authority or authorities specified by it in the declaration made by said states be used, but only for the purposes of the transmission of orders, not execution
[liii] In order to conclude this section, we should recall a highly important aspect: the request for confiscation of property or for transfer of elements of evidence, when it is agreed to issue them, will be presented and executed – outside the sphere of the EU or in the absence of transposition, notwithstanding the application of the principle of interpreting national law in conformity with Community law - pursuant to the general rules on judicial cooperation in criminal matters (in general the 2000 Convention), Article 10.2 of the Framework Decision and Article 12.2 of the Spanish law, but with the vital particularity contained in both rules that, in the case of crimes not included on the initial list, but which are punished in the issuing state with terms of at least three years of imprisonment, they cannot be rejected by the executing state alleging the absence of the requirement of dual criminality.
[liv] With the permitted exception in the case of the United Kingdom and Ireland, who can request and demand that the freezing orders be sent via a central authority or the authority specified in their declaration; the Framework Decision specifically states that it is applicable to the territory of Gibraltar
[lv] It is important to point out that in the Commission's first report on transposition, referring to the situation in November 2008, it highlighted "In addition to the grounds for non-recognition or non-execution listed in the Framework Decision, fourteen Member States (BE, BG, CY, CZ, DK, ES, FI, FR, HU, LT, NL, SE, SK, UK) introduced additional grounds for refusal in their national legislation. This is clearly not in compliance with the Framework Decision. The additional grounds concern mainly human rights issues (BE, DK, FR), conflict with general principles of Member States (CY, CZ), or situations where a measure is prohibited by national law or execution is impossible according to national law (ES, HU, NL, UK). There were also grounds related to language regime and to national public order, security and justice interests".
[lvi] - participation in a criminal organisation, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons, munitions and explosives, corruption, fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests [9], laundering of the proceeds of crime, counterfeiting currency, including of the euro, computer-related crime, environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties, facilitation of unauthorised entry and residence, murder, grievous bodily injury, illicit trade in human organs and tissue, kidnapping, illegal restraint and hostage-taking, racism and xenophobia, organised or armed robbery, illicit trafficking in cultural goods, including antiques and works of art, swindling, racketeering and extortion, counterfeiting and piracy of products, forgery of administrative documents and trafficking therein, forgery of means of payment, illicit trafficking in hormonal substances and other growth promoters, illicit trafficking in nuclear or radioactive materials, trafficking in stolen vehicles, rape, arson, crimes within the jurisdiction of the International Criminal Court, unlawful seizure of aircraft/ships, sabotage.
[lvii] The REJUE group of experts at their 2007 meeting considered that criminal investigation referred exclusively to criminal proceedings falling within the competence of judicial authorities as we have explained, not covering merely police investigations in relation to which the Public Prosecutor has not yet opened criminal proceedings or investigation. The "proper development of the investigation" should be understood in terms of a timeframe, running from the start of the proceedings until the end of the hearing.
[lviii] As F. IRURZUN points out, we are dealing with a procedure that does not require a further declaratory decision in the executing state, and so the principle of immediacy, of assimilation of the judicial decision of the issuing state by the executing state and the principle of equal treatment, which prevents a freezing order being treated differently due to its origin, are those

that must guide the interpretation and application of the rule

[lix] This is the explanation of context that was included in the initial proposal for the Framework Decision in this regard:

Formalities to be followed in the executing State

99. This Article allows the issuing authority to require that the executing authority follows certain formalities for the execution of the warrant. Four specific formalities are mentioned:

(a) where, in the opinion of the issuing authority, there is a significant risk that the objects, documents or data sought might be altered, moved or destroyed, the issuing authority may require that the executing authority uses coercive measures to execute the warrant. This is designed to ensure that the executing authority obtains the objects, documents and data in a way that ensures that they will not be altered or destroyed, for example by avoiding any reliance on the voluntary co-operation of the party in control of them. Any such requirement must be justified in Form A in the Annex.

(b) the fact that an investigation is being carried out, and the substance of the investigation, shall be kept confidential except to the extent necessary for the execution of the European Evidence Warrant. Similar obligations of confidentiality can be found in Article 4 of the 2001 Protocol to the EU 2000 Convention in respect of monitoring and information on banking transactions, and in Article 33 of the 1990 European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.

(c) the executing State should allow a competent authority of the issuing State, or an interested party nominated by the issuing authority, to be present during the execution of the warrant. This is based on Article 4 of the 1959 Convention. However, unlike the 1959 Convention, it is proposed that the executing State could not refuse to accept the presence of such parties. Moreover, the executing State should allow the authority from the issuing State that is present to have the same access as the executing authority to any object, document or data obtained as a result of the execution of the warrant. This is in order to ensure that the presence of the issuing authority has some practical value notably with a view to issuing a warrant for additional evidence in accordance with Article 9(3).

(d) the issuing authority should be able to require the executing authority to keep a record of who has handled the evidence from the execution of the warrant to the transfer of the evidence to the issuing State. This should help to demonstrate the integrity of the "chain of evidence".

100. Subparagraph (e) follows the approach of Article 4 of the EU 2000 Convention. It allows the issuing authority to require that the executing authority complies with other specified formalities and procedures expressly indicated by it, unless such formalities and procedures are contrary to the fundamental principles of law in the executing State. For example, an issuing authority seeking the seizure and transfer of computer data will need to consider indicating formalities and procedures that will ensure the security and integrity of the computer data.

CONSEJO GENERAL DEL PODER JUDICIAL
ESCUELA JUDICIAL

ejtn

Red Europea de Formación Judicial (REFJ)
European Judicial Training Network (EJTN)
Réseau Européen de Formation Judiciaire (REFJ)

LEVEL II: TO LEARN MORE

Topic 11

Orders freezing property or evidence in Europe, confiscation and the European Evidence Warrant

Module IV.

The principle of mutual recognition and its development

Online course on judicial cooperation in criminal matters in Europe

Andrés Salcedo Velasco

President of the Ninth Division of Barcelona Provincial Court[1]

[1] Currently head of the European EUROMED - JUSTICE Project

Con el apoyo de la Unión Europea
With the support of The European Union
Avec le soutien de l'Union Européenne

SUMMARY

5. Competent and involved authorities.
    5.1- Issuing authorities
        5.1.1- Freezing orders
        5.1.2- Confiscation
        5.1.3- The European evidence warrant
    5.2- Executing authorities
        5.2.1- Freezing orders
        5.2.2- Confiscation
        5.2.3- The European evidence warrant
6. The active process. Issue of the order.
    6.1. Adoption in proceedings.
        6.1.1- Freezing orders
        6.1.2- Confiscation
        6.1.3- The European evidence warrant
    6.2. Generation and documentation of the order. The certificate.
        6.2.1- Freezing orders
        6.2.2- Confiscation
        6.2.3- The European evidence warrant
    6.3. Transmission of the order and incidents.
        6.3.1- Freezing orders
        6.3.2- Confiscation
        6.3.3- The European evidence warrant
7. The passive process. Receipt of the order.
    7.1. Recognition of the order.
    7.2. Non-recognition or non-execution.
        7.2.1.- On the certificate
        7.2.2.- Immunities and privileges
        7.2.3.- Dual criminality
        7.2.4.- Ne bis in idem
        7.2.5.- Legal prohibition
        7.2.6.- Protection of the rights of the interested parties

7.4.6. Cessation of execution.

7.4.6.1 – Orders freezing property or evidence

7.4.6.2 – Confiscation

7.4.6.3 – European Evidence warrant

7.4.7. Expenses, reimbursement and losses and damages.

7.4.7.1 – Orders freezing property or evidence

7.4.7.2 – Confiscation

1. Orders freezing property or evidence, confiscation and the European evidence warrant in the context of the principle of mutual recognition and immediate enforcement.

However, as the Orlando report from the European Parliament of 4 June 1998 A4-0222/98 stated, the Joint Action merely requested cooperation between Member States, favouring the request for judicial assistance, but did not contain any specific proposals to improve the legal provisions of the Member States for confiscating the proceeds of crime, nor any practical proposals to introduce special procedures for confiscation, meaning that it did not meet any of the Action Plan's requirements.

The Commission, in its communication to the Council and the European Parliament (COM (2000) 495, Brussels, 26 July 2000), states that mutual recognition means that once a judge adopts a decision in the exercise of his/her official powers in a Member State, insofar as it has extra-national implications, it will automatically be accepted in all other Member States.

Although the term for entry into force and transposition is 2011, according to the Council of State there is no reason not to take the restated text of Framework Decision 2006/783, which enhances the rights of defence of persons affected by trials where they are not present, into account at this time and it is indeed correct to do so.

As indicated in their grounds, the different Framework Decisions that implement the principle of mutual recognition of final judicial decisions issued in trials where the accused was not present do not offer satisfactory solutions for those cases in which it was impossible to inform the accused person of the proceedings.

Framework Decision 2006/783 enhances the right to defence of persons in trials held in their absence.

The Framework Decision aims to define these common grounds, entitling the executing authority to comply with the decision, despite the absence of the person accused at the trial, his/her right to defence notwithstanding. Recognition or enforcement of decisions issued in trials where the accused person was absent will not be refused when said person was summoned in person and informed of the date and venue set for the trial that issued the decision, or when the accused person received official information of the date and venue of the trial by other means, in such a way that it can be established without any doubt that he/she was aware the trial was to be held.

In this regard, the accused person must have received the information "in good time", i.e. with sufficient time to allow him/her to participate in the trial and effectively exercise his/her right of defence. The common solutions regarding the grounds for non-recognition in the corresponding Framework Decisions should take into account the different situations in relation to the right of the accused person to a new trial or to file an appeal. Any new trial or appeal would be designed to guarantee his/her right of defence and would be characterised by the following elements: the accused person would be entitled to appear, the arguments presented would be re-examined, including possible new elements of evidence, and the trial could lead to a different decision to the initial one. The right to a new trial or an appeal will have to be guaranteed when the decision has already been issued.

In relation to freezing property or evidence, evidence warrants and confiscation, since the approval of the Framework Decision, two reports have been issued: the Commission report of 22.12.2008, based on Article 14 of Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (COM/2008/0885 final), which reflected the situation in November 2008, and Report from the Commission to the European Parliament and the Council of 23 August 2010 based on Article 22 of the Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders (COM/2010/428 final) depicted the situation in February 2010. They show us how transposition has been performed in each country and, article by article of the Framework Decision, what

the Commission's evaluation of said national transposition has been. We should highlight how the Commission regrets that, while the 13 EU countries that had transposed the Framework Decision up to that point had done so correctly in general terms, several had transposed certain relevant articles incorrectly. They added new grounds for refusal to those envisaged in the Framework Decision, which sometimes limited and even breached the provisions of the Framework Decision. Recognising the discretionary powers of each state to do so, and that it is not obligatory, the Commission underlined that the failure to transpose the definitions could cause a lack of security. It also observed big differences in the selection of the active-passive competent authorities and the fact that not all the states transposed the principle of direct contact between judicial authorities.

As Fernando IRURZUN MONTORO has quite rightly pointed out, the Framework Decision represents an improvement on its regulatory forbearers, introducing a model that he describes as agile and without excessive formalities, virtually granting the judicial authorities an exclusive leading role. These are positive, favourable characteristics that have not been fully confirmed in subsequent rules that intend to fulfil the same principle of mutual recognition. In his opinion, this can be explained by the fact that our framework decision benefitted from the impact of the September 11th attacks, and subsequent rules have been prepared in the context of an enlarged Europe, with less trust between its members, in which the inexperience of new negotiators in the context of mutual recognition cannot be ruled out either. All of this at a time when the definition of the concept and content of a common European public policy is pending, as the final obstacle for the recognition and execution of decisions issued by the judicial authority of each state all over the European Union.

We can mention the following complementary instruments:

- The Hague Convention of 1970 on the international validity of criminal judgments, the Convention of 13 November 1991 between the Member States on the enforcement of foreign criminal sentences, the 1998 European Union Convention on driving disqualifications, adopted pursuant to the Treaty of Maastricht. It is true that not all the states have ratified said instruments.

Moreover, their contents would not be sufficient for establishing a full regime of mutual recognition.

- The European convention on judicial assistance in criminal matters of 1959, which imposed specific restrictions on cooperation and assistance in relation to seizures.
- The Convention on the Application of the Schengen Agreement of 14 June 1985, Article 51 of which limited the possibility of refusing to execute letters rogatory for search and seizure to certain conditions.
- The Vienna Convention of 1988 in the field of the fight against drug trafficking.
- The Strasbourg Convention of the Council of Europe on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime dated 8 November 1990, Article 18 of which regulated different grounds for rejecting requests for mutual assistance and confiscation, in addition to the provisions contained in Articles 8, 9 and 11.
- The Criminal Law Convention on Corruption, Council of Europe, 27 January 1999.
- The United Nations Palermo Convention against transnational organised crime, 12 to 20 December 2000.
- The United Nations Convention against Corruption, 11 November 2003.

2. The current rules: generation, characteristics and elements of implementation.

2.1.- Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence and the transposition of the same.

Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence came into being as follows: a) Presentation of the initiative and publication in OJEC C 75 dated 7.3.2001 page 3. b) In a letter dated 9 February 2001, the Council consulted the Parliament, in accordance with section 1 of Article 39 of the Treaty on European Union, on an Initiative from the Governments of the French Republic, the Kingdom of Sweden and the Kingdom of Belgium aimed at having the Council adopt a framework decision regarding the execution in the European Union of orders freezing property

or evidence (5126/2001 - 2001/0803(CNS)). At the sitting of 15 February 2001, the President of the Parliament announced that the Initiative had been sent to the Committee on Civil Liberties, Justice and Home Affairs for a more in-depth study (C5-0055/2001). At the meeting on 27 February 2001, the Committee on Civil Liberties, Justice and Home Affairs appointed Mr Luís Marinho as rapporteur. At the meetings of 20 March, 19 June and 11 July 2001, the committee examined the Initiative from the Governments of the French Republic, the Kingdom of Sweden and the Kingdom of Belgium and the draft report. (5126/2001 C5-0055/2001 2001/0803(CNS)) (A5-0274/2001)

The report of the European Parliament focused on the following: subjectively, limiting the power to issue an order freezing property or evidence to the judicial authority in criminal proceedings, strictly speaking; objectively, extending its scope beyond the list of Europol's powers, to all kinds of crimes; use of the language of the executing state and, with the same value for transfer purposes, any of the most commonly used languages in Europe; support for urgent transmission between Justice Ministries; non-imposition of conditions for compliance, on the part of the executing state; opposition to the presentation of appeals with suspensive effect in the executing state.

By means of a letter dated 3 April 2002, the Council reconsulted the Parliament, in accordance with section 1 of Article 39 of the Treaty on European Union on a draft framework decision from the Council regarding the execution in the European Union of orders freezing property and securing evidence (6980/2002 – 2001/0803 (CNS)). At the sitting on 8 April 2002, the President of the Parliament announced that this draft framework decision had been sent to the Committee on Civil Liberties, Justice and Home Affairs for a more in-depth study, (C5-0152/2002). At the meeting on 27 February 2002, the Committee on Civil Liberties, Justice and Home Affairs appointed Mr Luís Marinho as rapporteur. At the meeting on 14 May 2002, the commission examined the draft framework decision of the Council and the draft report, having seen the report of the Committee on Civil Liberties, Justice and Home Affairs (A5-0172/2002). At the latter meeting, the commission approved the draft bill by 33 votes in favour, 2 against and 6 abstentions OJEC C 261 dated 11 June 2002.

It stated as follows: *En adoptant par 431 voix pour, 45 contre et 55 abstentions le*

rapport de M. Luis MARINHO (PSE, P), le Parlement européen approuve sans débat le projet de décision-cadre sur le gel de biens ou d'éléments de preuve, dans le cadre d'une reconsultation. Le Parlement réinsère également l'ensembe de la décision-cadre dans un cadre plus strictement pénal: ainsi, il estime que les décisions de gel doivent être prises par les autorités compétentes des États membres dans le cadre d'une procédure pénale.

Pour l'Assemblée, les décisions de gel doivent être soumises à des contrôles suffisants et être adoptées par les autorités judiciaires compétentes.

2.2. **Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders and the transposition of the same.**

It was a Danish initiative dated 2.7.2002 and published in DOC C 184 DE 2.8.2002, p. 8. By letter of 1 August 2002 the Council consulted Parliament, pursuant to Article 39(1) of the EU Treaty, on the initiative of the Kingdom of Denmark, and modified initiative, with a view to the adoption of a Council Framework Decision on the execution in the European Union of confiscation orders (10701/2002 – 2002/0816(CNS)). At the sitting of 2 September 2002 the President of Parliament announced that he had referred this proposal to the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs as the committee responsible (C5-0377/2002). The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs appointed Giuseppe Di Lello Finuoli rapporteur at its meeting of 11 September 2002. The committee considered the initiative of the Kingdom of Denmark and the draft report at its meetings of 11 September 2002, 8 October 2002 and 5 November 2002. At the meeting of 5 November 2002 the committee adopted, together with the draft we are dealing with, the draft legislative resolution on the initiative of the Kingdom of Denmark with a view to the adoption of a Council Framework Decision on confiscation of crime-related proceeds, instrumentalities and property (2002/0818(CNS)) by 26 votes to 1, with 0 abstentions.

At the meeting of 4 November 2002 the committee adopted: 2. the draft legislative resolution on the initiative of the Kingdom of Denmark with a view to the adoption of a Council Framework Decision on the execution in the European Union of confiscation orders (2002/0816(CNS)) by 23 votes to 2, with 2 abstentions. The report was tabled on 7 November 2002. On 5.11. 2002, with the procedure underway, la Committee on

Citizens' Freedoms and Rights, Justice and Home Affairs of the European Parliament adopted the draft report on the initiative of the Kingdom of Denmark with a view to the adoption of a Council Framework Decision on the execution in the European Union of confiscation orders (10701/2002 – C5 0377/2002 – 2002/0816(CNS)) by Giuseppe DI LELLO FINUOLI, approving the proposal in general terms, reserving the right to make minor amendments affecting the wording.

The Parliament's observations centred on:

The use of the term judge instead of court in some precepts, Article 1-4.

The introduction of a proportionality rule in line with the offence committed in the definition of confiscation (Amendment 2 to Article 2)

The connection to crimes derived from organised crime (amendment 3)

The need to prove the fictitious transfer of assets (amendment 4)

The inclusion of the fictitious use of an intermediary to control assets via legal persons who hold the assets and that are controlled by said intermediary (amendment 5)

The substitution of confiscation: the report also objected (amendment 10) to the executing state or the issuing state being able to substitute confiscation of property with a custodial sentence because this would be contrary to the constitutional rules of certain Member States.

The insistence that Member States shall adopt all the necessary measures to ensure that the onus of proof in respect of the unlawful origin of the property lies with the prosecution and not with the defence. The aim of this amendment (amendment 6) is to emphasise that the unlawful origin of the property must always be proved by the entities prosecuting a case. Otherwise, the unlawful origins of the property could only be argued on the basis of mere suppositions or suspicions. In practice, this would result in the onus of proof being inverted and it becoming the duty of the defence to show that the property was of lawful origin. Rules which have mere suspicion as their basis are incompatible with every modern system of criminal law, which draw on the principles of an offence having had to be committed, safeguards and the assumption of innocence. The rapporteur basically considered the Danish proposal excessive and considered that it was more appropriate to lighten the burden of proof by having the prosecution demonstrate the disproportion existing between the property possessed

and the declared income or activity performed, while the accused person must prove the legitimate origin of the property. As for the confiscation of property transferred by the person in question to his/her spouse or cohabitee or to a legal person, the rapporteur maintains that the same principle must apply: it must be proven that the property belongs to the person in question and that the spouse or cohabitee has fictitious access or title to it. However, these third parties, who have not committed any offence, cannot be required to prove the legitimate origin of the property when there is no evidence that the property belongs to the accused person and that the third parties have fictitious access or title to it. The Council of the European Union was to finally approve the framework decision at its meeting of 5 October 2006, meeting 2752.

The report from the office of the Spanish Attorney General on the Spanish transposition project lamented the absence in the draft bills of coordination between the final confiscation order when a freezing order had already been sent because, both actively and passively, even though the certificate is to mention this aspect, point f) of the order, the report considered it necessary to establish what action the Judge should take.

- it placed great emphasis on the need to exactly coordinate the definitions of confiscation of property and items liable for confiscation with the European rules without using the regulation contained in the Spanish Criminal Code which at the time was pending adaptation to the European instrument (Framework Decision 2005/212/JHA)
- it expressed its concern regarding the possibilities for execution of confiscation because it was actively limited by Spanish domestic criminal law and in passive terms its scope was broader than that envisaged in the Spanish legal framework at that time
- it expressed reservations regarding the regulation of confiscation extended to the assets of third parties related to the sentenced person in a special way and that Article 3.3 of the 2005 Framework Decision included as an option for each state.
- detected the incongruence of including cases contained in the definition of Article 3.2.d) of the draft bill among the grounds for refusal (Article 18.g) of the same text.
- unlike the CGPJ (Spanish General Council of the Judiciary) in its report,

it considered the use of terminology such as judicial authority (*autoridad judicial*) appropriate.

- it called for regulation for confiscation orders sent successively.
- it requested greater clarity in the regulation of simultaneous confiscation of money and in the regulation of the transformation of the execution of confiscation.
- it called attention to the excess authority where the judge decides to share the expenses generated with the requesting state, without coordination with the Ministry of Justice, as with the sharing of confiscated property with other states.
- for passive execution it proposed hierarchical priority criteria for concurrent confiscation orders.
- it called for the Prosecutor to be given the authority to appeal and make notification of the confiscation orders obligatory.
- it also clearly requested a procedure for reaching an agreement on the sharing of confiscations in excess of 10000 euros with foreign authorities.
- finally, it maintained that it should be the Ministry of Justice that claims expenses.

The Report from the General Council of the Spanish Judiciary, Plenary Session of 15 October 2008, on the draft bill of both instruments. After considering that the draft bill correctly addressed the following subject matter:

.it criticised the use of “Community” terms instead of the language of Spanish procedural legislation (preferring judges and courts *jueces y tribunals* to judicial authorities or judgments *sentencias* to decisions *resoluciones*)

.it called for stricter regulation, which would be mandatory and not optional, regarding the refusal to recognise execution of an order sent when a final decision, not subject to appeal, of conviction or acquittal, had already been handed down regarding the same facts and person, strictly applying *ne bis in idem*.

.it concluded by asking the Government to include a prior step of sending the order to the Office of the Attorney General so that it could issue a report prior to the adoption of a judicial decision in accordance with the duties of said office and its responsibilities in international judicial assistance

The reports attached to the draft bill criticised the reference to legal persons in several

precepts

- with regard to the list in Article 13, it stated that the offence of corruption did not exist as such in the Spanish legal system
- it considered the reference to "including the euro" in the offences of counterfeiting to be redundant,
- it proposed replacing the term kidnapping, illegal restraint and hostage-taking (*secuestro, retención ilegal y toma de rehenes)* with illegal detention and kidnapping (detenciones ilegales y secuestros)
- it criticised the generic reference to racism and xenophobia, as well as to kinds of "organised or armed robbery"
- it considered the reference to counterfeiting goods unnecessary,
- it proposed expressly including offences against the public treasury and exchange controls in Article 13
- moreover, it suggested establishing the possibility of making a plea of jurisdiction in Article 14,
- it criticised the reference to the principle of *res judicata* instead of *non bis in idem* in Article 18.1 a)
- it proposed unifying the system of communication between the jurisdictional bodies of the different Member States. Finally, it presented proposals for improving the wording of Articles 13.1,181 h) and 20.2.

The Spanish Ministry of Health and Consumer Affairs issued a favourable opinion of the draft bill due to its compliance with Community rules, although

- it recommended including a reference to Article 374 of the Spanish Criminal Code in section 1 of Article 3,
- in Article 22.1, first paragraph, after the word "money", it specified that it must be "cash or other bearer payment instruments", apart from calling for the second paragraph to of Article 22.1 b). to be clarified.

The report from the Technical General Secretariat of the Spanish Ministry of Justice, which sets out the object and content of the regulation to be approved, indicated that the draft bill included a series of changes to its initial version, suggested mainly by the Spanish Prosecutorial Council, as well as some technical improvements in Articles 3,

4.2, 6.1, 8, 10, 11, 12, 14, 15, 16, 18, 20 and 23, adding a new Article 21 to allow for the notification of the decisions of the Criminal Judge to the Public Prosecutor's Office General and it did not make comments on the final draft of the text.

While the Report from the Spanish Council of State was being prepared, a new version of the draft bill was released, dated 27 May 2009, which changed the wording of letter g) of number 1 of Article 18, in relation to the failure by the accused person to appear at the trial from which the confiscation order derived, adding three provisos to the new wording of that section, as well as a new wording of section j) of the text of the certificate that appears in the Annex. In this regard, it took into account the specific amendment of Framework Decision 2006/783/JHA by Council Framework Decision 2009/299/JHA of 26 February 2009, enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, according to a new paragraph included in the preamble.

The most noticeable were those regarding the comments already mentioned on calling for regulation of a possible conflict of jurisdiction arising in the case of the criminal judge receiving the execution not being competent (CIU, *Convergència i Unió*), containing the same requests regarding the terminology as in the CGPJ report (PP, *Partido Popular*) and dealing more effectively with the question of the effectiveness of the principle of *res judicata*. The report (1 December 2009, Official Gazette of the Spanish Parliament, Series A no. 35-10) accepted some of the minor amendments and was approved by the Justice Commission with full legislative powers – it was discussed on the same day as the entry into force of the Treaty of Lisbon – and the parliamentary spokespersons announced a general consensus on the rule that they considered went further than their minor amendments, as well as the odd reproof due to the delay in transposition, reasonable and necessary (Official Gazette of the Spanish Parliament, 10 December 2009 no. 35-11). It was sent to the Senate in December 2009 where the PP insisted on the terminological amendment and on the elimination of Article 13. Little else happened in its passage through the Senate (it was passed on 22 February 2010) until its final approval.

2.3- 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

The context of this instrument is identified perfectly from the first document,[i] where the description of the context is very clear, Document COM (2003) 688 final 2003/0270/CNS - Proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters, whose preamble states:

"Member States' legal systems use a variety of procedural measures during the process of collecting evidence for proceedings in criminal matters. These include:

1.1.1. Preservation powers.

5. At an international level, the Council of Europe 2001 Convention on Cybercrime1 has introduced a distinction between "preservation orders" and "seizure" orders. Preservation orders apply only to third parties, and require them to preserve evidence without handing it over to the competent investigating authorities. A separate order is then required for the disclosure or production of the evidence.

1.1.2. Seizure powers.

6. Seizure goes beyond mere preservation of the evidence by involving (where necessary) the temporary possession of the evidence by the competent investigating authorities. It applies to evidence under the control of suspects as well as third parties.

7. Seizure is a commonly accepted notion in national and international criminal law, although its scope and modalities may vary. All Member States have given their police and judicial authorities powers to seize evidence. Seizure powers

can be exercised by judicial authorities and, in certain circumstances, by law enforcement authorities under their own powers.

1.1.2. Powers to require production / disclosure of evidence.

8. In some Member States, judicial authorities have general powers to require third parties to disclose evidence. These powers rely on the co-operation of the third party. Where such co-operation is lacking, the judicial authority can use a search order to seize the evidence.

9. Other Member States have a specific investigative power known as a "production order" used for obtaining evidence (in particular documents) from a third party. These powers can be limited to serious offences and to specific categories of evidence (such as documents held in confidence), or they can be a more general power. "Production orders" are coercive since they place the third party under an obligation to hand over the evidence. Sanctions – including criminal sanctions – are used to ensure co-operation. Nevertheless, production orders are less intrusive than search and seizure powers.

10. Production orders can be useful when a third party is content to co-operate but, for legal reasons such as liability issues associated with breaching the confidentiality of its customers, it would rather be forced to disclose evidence than to co-operate voluntarily with the competent investigating authority. In other circumstances, however, it may be necessary to search the premises of a third party to obtain the evidence. This includes the situation where there is a real risk that the third party might destroy the evidence.

11. All these production powers apply only to material that already exists. Separate powers are used for "real-time" disclosure of information, such as orders for the interception of communications or the monitoring of bank account transactions.

1.1.4. Search & seizure orders

12. Member States' legislation on entering and searching premises contain significant differences. In some Member States, the power is limited only to serious offences. Other Member States have a much wider power available for the investigation of all offences.

13. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) provides the minimum standard for safeguards for search and seizure. However, within this framework, there are significant variations in the safeguards. These include: the level of certainty that evidence is on the premises to be searched; the time of day when search powers can be used; notification of the person whose premises have been searched; the rules applicable when the occupier of premises is absent; and the need for independent third parties to be present at the search.

1.2. Existing international co-operation mechanisms to obtain evidence

14. The Council of Europe 1959 Convention on Mutual Assistance in Criminal Matters provides the basic framework for co-operation on obtaining evidence. This provides for the execution of requests for mutual assistance to be executed in accordance with the law of the requested State, and provides a number of grounds of refusal for mutual legal assistance. The 1959 Convention has been supplemented in order to improve co-operation by its additional protocols of 1978 and 2001. Within the EU, the 1959 Convention has been supplemented by the 1990 Schengen Convention, the EU Convention of May 2000 on Mutual Assistance in Criminal Matters and its 2001 Protocol. The EU 2000 Convention and its 2001 Protocol have not yet entered into force.

15. Despite the improvements introduced by these instruments, co-operation on obtaining evidence is nevertheless still carried out using traditional mutual assistance procedures. This can be slow and inefficient. Moreover, differences in national laws (as described in section 1.1) result in barriers to co-operation.

16. The variation in national laws on search and seizure is mirrored by differences

in the extent to which Member States are able to provide mutual assistance. Under Article 5 of the 1959 Convention, each Contracting Party may declare that the execution of letters rogatory for search or seizure of property may be made dependent on one or more of the following conditions: dual criminality exists; the offence is extraditable in the requested Party; or the execution must be consistent with the law of the requested Party.

17. Article 51 of the 1990 Schengen Convention, however, limits the possibility for Member States to make use of such reservations under the 1959 Convention: Member States may not, according to Article 51, make the admissibility of letters rogatory for search and seizure dependent on conditions other than the following. First, that the offence is punishable under the law of both Member States by a custodial sentence of a maximum of at least six months, or is punishable under the law of one of the two Member States by an equivalent penalty and under the law of the other as an infringement which is prosecuted by administrative authorities where the decision may give rise to proceedings before a criminal court. The second condition is that the execution is otherwise consistent with the law of the requested Member State.

18. Under this proposal, these existing mutual assistance procedures would be replaced by a European Evidence Warrant based on the principle of mutual recognition. The following benefits would result:

– A request made by judicial decision from another Member State will be directly recognised without the need for its transformation into a national decision (by way of an exequatur procedure) before it can be enforced.

– Requests will be standardised by the use of a single form.

– Deadlines will be laid down for the execution of requests.

– Minimum safeguards will be introduced both for the issuing of a request and for its execution.

– The grounds for refusing to execute requests will be limited. In particular, dual criminality will not be a ground of refusal except for a transitional period for those Member States that have already made execution of a request for search and seizure dependent on the condition of dual criminality."

The Council of Europe 1959 Convention on Mutual Assistance in Criminal Matters provides the basic framework for co-operation on obtaining evidence and it has been supplemented in order to improve co-operation by its additional protocols of 1978 and 2001. Within the EU, the 1959 Convention has been supplemented by the 1990 Schengen Convention, the EU Convention of May 2000 on Mutual Assistance in Criminal Matters and its 2001 Protocol. Under Article 5 of the 1959 Convention, each Contracting Party may declare that the execution of letters rogatory for search or seizure of property may be made dependent on one or more of the following conditions: dual criminality exists; the offence is extraditable in the requested Party; or the execution must be consistent with the law of the requested Party. Article 51 of the 1990 Schengen Convention, however, limits the possibility for Member States to make use of such reservations under the 1959 Convention: Member States may not, according to Article 51, make the admissibility of letters rogatory for search and seizure dependent on conditions other than the following. First, that the offence is punishable under the law of both Member States by a custodial sentence of a maximum of at least six months, or is punishable under the law of one of the two Member States by an equivalent penalty and under the law of the other as an infringement which is prosecuted by administrative authorities where the decision may give rise to proceedings before a criminal court. The second condition is that the execution is otherwise consistent with the law of the requested Member State.

By letter of 4 December 2003 the Council consulted Parliament, pursuant to Article 39(1) of the EC Treaty, on the proposal for a Council framework decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters (COM(2003) 688 – 2003/0270(CNS)). At the sitting of 15 December 2003 the President of Parliament announced that he had referred the proposal to the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs as the committee responsible and the Committee on Legal Affairs and the Internal Market for its opinion (C5-0609/2003). The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs had appointed Elena Ornella Paciotti rapporteur at its meeting of 25 November 2003. The committee considered the Commission proposal and draft report at its meetings of 21 January, 19 February and 18 March 2004. At the

last meeting it adopted the draft legislative resolution by 25 votes to 4, with 0 abstentions. The report was tabled on 22 March 2004.

The justification of requests for evidence insisting on a statement of reasons on the form for a request for evidence under the European evidence warrant. New evidence not originally requested should be tested against the same criteria as original evidence under the warrant the procedures and guarantees on, for example, search, seizure and the interception of telecommunications. The European Evidence Warrant in combination with the lack of European procedural safeguards may thus create legal uncertainty for defendants and third parties involved in criminal cases. For example, the executing state can be required by the issuing state to use coercive measures (search, seizure) to execute the warrant (Article 13). And though the evidence warrant cannot be used to order the interception of telecommunications, it can be issued to obtain existing evidence which has been gathered through interception prior to the issuing of the warrant (Article 3(3)).

The Committee on Legal Affairs and the Internal Market appointed Giuseppe Gargani draftsman. It considered the draft opinion at its meetings of 27 January and 19 February 2004. At the latter meeting it adopted, by 15 votes to 11, with no abstentions, an amendment calling on the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs to reject the framework decision.

The Committee was extremely clear: Since the European Union's system as a whole does not provide effective legal protection of fundamental rights, we may state without fear of contradiction that the proposal for a decision is premature. Moreover, the European Parliament does not have legislative powers in respect of criminal law or criminal procedural law, which form part of the proposal under review. It is only being consulted. It maintained that approving this proposal for a framework decision would, therefore, openly contravene the fundamental principle of every democratic system, under which restrictions on freedoms may only be imposed by virtue of a legislative act approved by Parliament, which is the sole democratically representative organ. And any restriction must be imposed within limits which are clearly defined in the constitution.

After the amendments were made, it was sent to the Parliament for re-consultation and on 24.9.2008 a draft report on the proposal for a Council framework decision on the European Evidence Warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters (13076/2007 – C6 0293/2008 – 2003/0270(CNS)) from the Committee on Civil Liberties, Justice and Home Affairs was tabled. Rapporteur: Gérard Deprez, whose observations centred essentially on the removal of the territoriality clause, the exclusivity of the judicial authorities, the problems of obtaining computer and telecommunications data. On 21 October 2008 the Parliament adopted the legislative resolution asking the Commission to modify its proposal accordingly, pursuant to Article 250, section 2 of the EC Treaty. It was finally approved by the Council in December 2008.

3. Orders freezing property or evidence, confiscation and the European evidence warrant: meaning and scope

3.1- Freezing orders

3.2- Confiscation

3.3- The European evidence warrant

4. Scope of application: material, procedural, temporal, spatial.

4.1- Material scope

4.1.1- Freezing orders

4.1.2- Confiscation

4.1.3- The European evidence warrant

4.2- Procedural scope

4.2.1- Freezing orders

4.2.2- Confiscation

4.2.3- The European evidence warrant

4.3- Temporal scope

5. Competent and involved authorities.

5.1- Issuing authorities

As we already know, since the 1959 Council of Europe Convention on judicial assistance in criminal matters, Spain has been stating that the Prosecutor is an actor

in international cooperation in criminal matters, within the sphere of his competence, like the Judge is in his, and the appropriate statements have been made to the Conventions that have envisaged that possibility. Article 3.15 and 2.16 of the Organic Statute of the Public Prosecutor's Office, in the wording approved by Law 24/2007, of 9 October, which amends Law 50/1981, of 30 December, regulating the Organic Statute of the Public Prosecutor's Office. Official State Gazette, 10 October 2007 (no. 243), stated that the Prosecutor could seek or, if applicable, provide international judicial assistance as envisaged in international law, treaties and conventions and exercise those other functions attributed to him in the state legal system and Article 5.2. "in fine" complements this possibility by stating that the Prosecutor can also adopt pre-trial measures aimed at facilitating the exercise of the other functions that the legal system attributes to him. These tasks are complemented by Instructions from the Public Prosecutor's office on this matter. Said competence must also be recognised in the cases where the Public Prosecutor is bringing the case pursuant to the procedure envisaged in the Organic Law on the Responsibility of Minors.

It is worth recalling that, as F.IRURZUN MONTORO *op cit*. p 158, highlighted, it should not be the case that via said referral to domestic law, they become the judicial authorities for the purposes of the framework decision, when they cannot be considered as such even approximately, and therefore, implementing the inclusion of the prosecutor's office would naturally lead to the debate as to the extent to which those three positions of other domestic laws of EU states who extended the concept of judicial authority to encompass police activities, are adapted to the framework decision. In a similar vein to the points made in the Report from the General Council of the Spanish Judiciary (CGPJ), we can read the following in the opinion from the Council of State: "On a similar point, it should also be highlighted that the Community texts are drawn up with the objective of being used for several states who have different languages, conceptual structures and cultural traditions, meaning that the terms that are valid in texts with a common scope may need to be translated or formulated differently when incorporated into domestic law, which makes it advisable to avoid being excessively literal when transposing them and to carry out a "prior legal translation" (opinion in file no. 1.568/2005.(...) It insists on avoiding references to the Spanish judicial bodies by using terms that are alien to Spanish legal tradition, such as

"competent criminal judicial authority" (*autoridad judicial penal competente)*, which is used repeatedly in Articles 6 to 10 to refer to the Spanish Judges and Courts that have to ask a judicial body of another Member State of the European Union to execute a final court judgment or confiscation order, which is in contrast to the reference to the Spanish Criminal Judge (*Juez de lo Penal español*).

5.1.1- Freezing orders

5.1.2- Confiscation

5.1.3- The European evidence warrant

5.2- Executing authorities

5.2.1- Freezing orders

The CGPJ's report on the draft bill of the transposition law was critical of the way passive competence was dispersed among the Courts of the territory, as opposed to the unified competence model of the National Court (*Audiencia Nacional*) in the transposition of the European arrest warrant. Although referring in particular to unique aspects, it highlighted that "indeed, unlike in the case of Article 2.2 of Law 3/2003, of 14 March, which charges the Central Criminal Courts (*Juzgados Centrales de Instrucción)* and the Criminal Chamber of the National Court (*Sala de lo Penal de la Audiencia Nacional)* with execution of the European arrest warrant, bodies that have nationwide jurisdiction (Articles 62 and 88 of the Organic Law of the Judiciary), which are perfectly positioned to create unified doctrine on the subject matter, equipped with the characteristics of foreseeability and security vis-à-vis the remaining Member States of the European Union, the draft bill in question opted in Article 3.2 to attribute competence for executing a freezing order to the examining magistrates at the place where the property to be frozen or the evidence to be secured was located, meaning that it is foreseeable that differing decisions may be handed down in identical cases in relation to the requirement of dual criminality." Nevertheless, it also recognised that it had "no objections, in principle, to the legislative decision to grant the examining magistrates the competence to recognise and execute foreign freezing orders because, in the first place, they are the judges who are closest to the property and sources of evidence that constitute the object of the same and are therefore in the best position to adopt the measure necessary to secure it; and secondly because such measures are a

relevant part of their natural competence in the Spanish procedural system, one that they should not be deprived of just because in this case they are not acting on their own initiative, but in fulfilment of what was ordered by a foreign judicial authority. The risk of a disparity of criteria, however, cannot be set aside, as it affects a matter that is tremendously sensitive in the field of judicial cooperation, affecting the degree of Spain's commitment to judicial cooperation in criminal matters".

5.2.2- Confiscation

5.2.3- The European evidence warrant

6. The active process. Issue of the order.

6.1. Adoption in proceedings.

6.1.1- Freezing orders

6.1.2- Confiscation

Article 990 of the Spanish Criminal Procedure Act states that it is for the Court Secretary to promote the Judgment execution process, adopting to that end all the necessary measures, notwithstanding the competence of the judge or court for enforcing the sentence. It can be interpreted that the promotion of the execution – not of the sentence but of the accessory consequences thereof – could fall within the sphere of the Secretary once the judgment is final. Although it is easier to maintain that in any event, the provisions of Article 4.1 of the Spanish law, the competence of the judge or court – not the judicial secretary – is a special rule with preferential application. However, we have already seen how the template for the certificate contains a section – section c- in the Spanish law too, which mentions the competent authority, if different to the court. I feel that a certain degree of confusion could arise by clearly differentiating, even for the purposes of properly completing the certificate, between the jurisdictional body that imposed the confiscation (sentencing judge or court in any event) and the jurisdictional body that issued the confiscation order (which may be a different example of a Criminal Court specialised in processing final judgments) with the competent authority for execution of the decision to impose the confiscation order in the issuing state, if different from the jurisdictional body designated previously (section c) in the certificate, with the ordinary competences and new functions of the judicial secretary, depending on how they are interpreted.

In any event, the Secretary will have to participate to attest to the content of the certificate (section n of the certificate). Note that the Framework Decision states – Article 4.3 – that the certificate will be signed by the competent authority in the issuing state, who will also attest therein to the accuracy of its contents. Only the judicial secretary is entitled to give such an attestation, not the judge or the court that we have identified as the issuing authority. Note that in section n) of the certificate the signature of the authority issuing the certificate, or its representative, is required, attesting to the content of the certificate.

6.1.3- The European evidence warrant

6.2. Generation and documentation of the order. The certificate.

6.2.1- Freezing orders

6.2.2- Confiscation

6.2.3- The European evidence warrant

6.3. Transmission of the order and incidents.

6.3.1- Freezing orders

6.3.2- Confiscation

6.3.3- The European evidence warrant

7. The passive process. Receipt of the order.

7.1. Recognition of the order.

7.2. Non-recognition or non-execution.

7.2.1.- On the certificate

7.2.2.- Immunities and privileges

7.2.3.- Dual criminality

7.2.4.- Ne bis in idem

7.2.5.- Legal prohibition

7.2.6.- Protection of the rights of the interested parties

7.2.7.- Failure to appear in the trial resulting from the confiscation

7.2.8.- Place the deeds were committed

7.3.9.- Extended powers of confiscation

7.3.10.- Time-barring of the penalty imposed

7.3.11.- Impossibility of enforcement

7.3.12.- National security

7.3.13.- Need for search or seizure

7.2.14.- Lack of validation

7.3. Postponement of execution.

7.4. Immediate execution.

7.4.1. Competence.

7.4.2. Procedure and term

7.4.2.1. General procedure

7.4.2.1.1 – Orders freezing property or evidence

7.4.2.1.2 – Confiscation

7.4.2.1.3 – European Evidence warrant

7.4.2.2 Term.-

7.4.2.2.1 – Orders freezing property or evidence

7.4.2.2.2 – Confiscation

7.4.2.2.3 – European Evidence warrant

7.4.2.3 Execution procedure

7.4.2.3.1 – Orders freezing property or evidence

7.4.2.3.2 – Confiscation

7.4.2.3.3 – European Evidence warrant

7.4.3. Legal remedies

7.4.4. Material content of the execution

7.4.4.1 – Orders freezing property or evidence

7.4.4.2 – Confiscation

7.4.4.3 – European Evidence warrant

7.4.5. Process of execution.

7.4.5.1 – Orders freezing property or evidence

7.4.5.2 – Confiscation

7.4.5.3 – European Evidence warrant

This is the explanation of the context that accompanied the initial proposal for a Framework Decision on this matter:

Formalities to be followed in the executing State

99. This Article allows the issuing authority to require that the executing authority follows certain formalities for the execution of the warrant. Four specific formalities are mentioned:

(a) where, in the opinion of the issuing authority, there is a significant risk that the objects, documents or data sought might be altered, moved or destroyed, the issuing authority may require that the executing authority uses coercive measures to execute the warrant. This is designed to ensure that the executing authority obtains the objects, documents and data in a way that ensures that they will not be altered or destroyed, for example by avoiding any reliance on the voluntary co-operation of the party in control of them. Any such requirement must be justified in Form A in the Annex.

(b) the fact that an investigation is being carried out, and the substance of the investigation, shall be kept confidential except to the extent necessary for the execution of the European Evidence Warrant. Similar obligations of confidentiality can be found in Article 4 of the 2001 Protocol to the EU 2000 Convention in respect of monitoring and information on banking transactions, and in Article 33 of the 1990 European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.

(c) the executing State should allow a competent authority of the issuing State, or an interested party nominated by the issuing authority, to be present during the execution of the warrant. This is based on Article 4 of the 1959 Convention. However, unlike the 1959 Convention, it is proposed that the executing State could not refuse to accept the presence of such parties. Moreover, the executing State should allow the authority from the issuing State that is present to have the same access as the executing authority to any object, document or data obtained as a result of the execution of the warrant. This is in order to ensure that the

presence of the issuing authority has some practical value notably with a view to issuing a warrant for additional evidence in accordance with Article 9(3).

(d) the issuing authority should be able to require the executing authority to keep a record of who has handled the evidence from the execution of the warrant to the transfer of the evidence to the issuing State. This should help to demonstrate the integrity of the "chain of evidence".

100. Subparagraph (e) follows the approach of Article 4 of the EU 2000 Convention. It allows the issuing authority to require that the executing authority complies with other specified formalities and procedures expressly indicated by it, unless such formalities and procedures are contrary to the fundamental principles of law in the executing State. For example, an issuing authority seeking the seizure and transfer of computer data will need to consider indicating formalities and procedures that will ensure the security and integrity of the computer data.

7.4.6. Cessation of execution.

7.4.6.1 – Orders freezing property or evidence

7.4.6.2 – Confiscation

7.4.6.3 – European Evidence warrant

7.4.7. Expenses, reimbursement and losses and damages.

7.4.7.1 – Orders freezing property or evidence

7.4.7.2 – Confiscation

Bibliography

A/ ORDERS FREEZING PROPERTY OR EVIDENCE

B/ CONFISCATION

C/ THE EUROPEAN EVIDENCE WARRANT

……..

A/ ORDERS FREEZING PROPERTY OR EVIDENCE

ALGUNAS cuestiones suscitadas en torno a la aplicación de la Ley 18/2006, para la eficacia en la UE de las resoluciones de embargo de bienes y aseguramiento de prueba en el proceso penal
In: La nueva Ley para la eficacia en la Unión Europea de las resoluciones de embargo y aseguramiento de pruebas en procedimientos penales / director, Jesús María Barrientos Pacho. -- Madrid: Consejo General del Poder Judicial (Estudios de derecho judicial. 2007 ; 117). -- p. 323-333

ARIAS RODRÍGUEZ, José Manuel
La cooperación judicial penal y policial
In: La nueva Ley para la eficacia en la Unión Europea de las resoluciones de embargo y aseguramiento de pruebas en procedimientos penales / director, Jesús María Barrientos Pacho. -- Madrid: Consejo General del Poder Judicial (Estudios de derecho judicial. 2007 ; 117). -- p. 15-144

BAILLO Y MORALES-ARCE, Jaime
Decisión marco europea en cuanto a la ejecución de resoluciones de embargo preventivo y de aseguramiento de pruebas.
In: Revista de Derecho Bancario y Bursátil, 82, April-June 2001

BARRIENTOS PACHO, Jesús María
Ley 18/2006, de 5 de junio, para la eficacia en la Unión Europea de las resoluciones de embargo y aseguramiento de pruebas en procedimientos penales. Bibliografía: pp. 250-252
In: La nueva Ley para la eficacia en la Unión Europea de las resoluciones de embargo y aseguramiento de pruebas en procedimientos penales / director, Jesús María Barrientos Pacho. -- Madrid: Consejo General del Poder Judicial (Estudios de derecho judicial. 2007 ; 117). -- p. 205-252

BUJOSA VADELL, Lorenzo M.
Ejecución en la Unión Europea de las resoluciones de embargo preventivo de bienes y de aseguramiento de pruebas. Comentario a la Decisión marco 2003/577/JAI, del Consejo, de 22 de julio de 2003
In: Revista General de Derecho Europeo, no. 3, January 2004

CEREIJO SOTO, Antonio
Efectos judiciales, instrumentos del delito y piezas de convicción (Nuevas perspectivas a partir de la Ley 18/2006, de 5 de junio, para la eficacia en la Unión Europea de las resoluciones de embargo y de aseguramiento de pruebas en procedimientos penales)
10 bibliographical references
In: La Ley. -- N. 6596 - November 2006 -- p. [1]-5

CONSEJO GENERAL DEL PODER JUDICIAL
Acuerdo del Pleno de 20 de julio de 2005, de aprobación del "Informe al Anteproyecto de Ley para la eficacia en la Unión Europea de las resoluciones de embargo y aseguramiento de pruebas en procedimientos penales"
Edit.: www.poderjudicial.es Madrid 2005.

DELGADO MARTÍN, Joaquín
Emisión de una Decisión de embargo preventivo de bienes o aseguramiento de pruebas en el ámbito de la Unión Europea
Bibliographical references
In: La nueva Ley para la eficacia en la Unión Europea de las resoluciones de embargo y aseguramiento de pruebas en procedimientos penales / director, Jesús María Barrientos Pacho. -- Madrid: Consejo General del Poder Judicial (Estudios de derecho judicial. 2007 ; 117). -- p. 253-297

IRURZUN MONTORO, Fernando
Principio de confianza y reconocimiento mutuo: su reflejo en la ejecución de resoluciones de embargo preventivo y aseguramiento de pruebas en la Unión Europea
Bibliography: pp. 164-165
In: La nueva Ley para la eficacia en la Unión Europea de las resoluciones de embargo y aseguramiento de pruebas en procedimientos penales / director, Jesús María Barrientos Pacho. -- Madrid: Consejo General del Poder Judicial (Estudios de derecho judicial. 2007 ; 117). -- p. 145-165

LORANCA RUILÓPEZ, Asunción
Aseguramiento del objeto civil del proceso penal. Concepto y naturaleza. Exámen del procedimiento ordinario: fianzas y embargos. Tramitación de la pieza de responsabilidad civil
Jornadas sobre medidas cautelares sobre personas y bienes en el proceso penal
Bibliography
In: Estudios Jurídicos: Cuerpo de Secretarios Judiciales.- No. II - 1998.- p. 115 - 164

MAGRO SERVET, Vicente
La eficacia en la Unión Europea de las resoluciones de embargo y aseguramiento de pruebas en procedimientos penales
In: La Ley penal: revista de derecho penal, procesal y penitenciario. -- No. 28 - June - 2006. -- p. 5-22

MAGRO SERVET, Vicente
Requisitos a seguir para proceder a la destrucción de la droga aprehendida incluida en el nuevo art. 367 ter de la LECrim. incluído en la Ley 18/2006, de 5 de junio para la eficacia en la unión europea de las resoluciones de embargo y de aseguramiento de pruebas en procedimientos penales
In: La Ley Penal, 38, May 2007

MAURO, Cristina
La Decisión marco de 22 de julio de 2003relativa a la ejecución en la Unión Europea de las resoluciones de embargo preventivo de bienes y aseguramiento de pruebas
In: *La Prueba en el EspacioEuropeo de Libertad, Seguridad y Justicia Penal.* Centro de Estudios Jurídicos del Ministerio de Justicia. Edit. Tomson-Aranzadi, Madrid 2006.

MORÁN MARTÍNEZ, Rosa Ana
Decisión Marco de 22 de julio de 2003, relativa a la ejecución en la Unión Europea de las resoluciones de embargo preventivo de bienes y aseguramiento de pruebas
In: La nueva Ley para la eficacia en la Unión Europea de las resoluciones de embargo y aseguramiento de pruebas en procedimientos penales / director, Jesús María Barrientos Pacho. -- Madrid: Consejo General del Poder Judicial (Estudios de derecho judicial. 2007 ; 117). -- p. 167-203

MORÁN MARTÍNEZ, Rosa Ana
El embargo preventivo y aseguramiento de pruebas, la ejecución de sanciones pecuniarias y el comiso: las decisiones marco
Monographical issue on "Derecho penal supranacional y cooperación jurídica internacional"
17 Bibliographical references
In: Cuadernos de Derecho Judicial. -- No. XIII - 2003. -- p. 381 - 416

MORÁN MARTÍNEZ, Rosa Ana
La Decisión marco de 22 de julio de 2003 relativa a la ejecución en la Unión Europea
de las resoluciones de embargo preventivo de bienes y aseguramiento de pruebas
In: *La Prueba en el Espacio Europeo de Libertad, Seguridad y Justicia Penal.* Centro de Estudios Jurídicos del Ministerio de Justicia. Edit.Thomson-Aranzadi, Madrid 2006.

NOVALES BILBAO, Hugo
Ley 18/2006 de 5 de junio para la eficacia en la Unión Europea de las resoluciones de embargo y aseguramiento de pruebas en procedimientos penales: Ejecución en España de órdenes emitidas por otros Estados de la UE: Reconocimiento y ejecución inmediata
In: La nueva Ley para la eficacia en la Unión Europea de las resoluciones de embargo y aseguramiento de pruebas en procedimientos penales / director, Jesús María Barrientos Pacho. -- Madrid: Consejo General del Poder Judicial (Estudios de derecho judicial. 2007 ; 117). -- p. 299-321

La NUEVA Ley para la eficacia en la Unión Europea de las resoluciones de embargo y aseguramiento de pruebas en procedimientos penales / director, Jesús María Barrientos Pacho. -- Madrid: Consejo General del Poder Judicial, D.L. 2007. -- 333 p. ; 22 cm. -- (Estudios de derecho judicial. 2007; 117)

OCAÑA RODRÍGUEZ, Antonio
Introducción y análisis de la circular 1/2001. Incidencia de la LEC en el aseguramiento y ejecución de sentencias penales
Jornadas sobre experiencias en la aplicación de la Ley de Enjuiciamiento Civil
In: En Estudios Jurídicos: Ministerio Fiscal. -- No. II - 2002.-- p. 165 - 211

La PRUEBA en el espacio europeo de libertad, seguridad y justicia penal / prologue by Víctor Moreno Catena, Luis Arroyo Zapatero ; Joaquín Delgado Martín... [*et al*.]. -- Cizur Menor (Navarra): Thomson-Aranzadi, 2006. -- 423 p. ; 24 cm

B/ CONFISCATION

AGUADO CORREA, T.,
La regulación del comiso en el proyecto de modificación del Código Penal»
In: Revista electrónica de ciencia penal y criminología, no. 05-04, 2003, p. 04:1-04:24 (Internet, last accessed 25 April 2010).
http://criminet.ugr.es/recpc/05/recpc05-04.pdf

La ARMONIZACIÓN del derecho penal español: una evaluación legislativa / Coordinators: Luis Arroyo Zapatero, Adán Nieto Martín, Pedro Crespo Barquero. -- Madrid: Ministerio de Justicia, Secretaría General Técnica, Centro de Publicaciones, 2006. -- 250 p. ; 24 cm. -- (Boletín de información del Ministerio de Justicia ; Year LX (supplement to no. 2015 of 15 June 2006))

BUJOSA VADELL, Lorenzo M
El reconocimiento mutuo y la ejecución de las resoluciones de decomiso en la Unión Europea. Comentario a la Decisión Marco 2006/783/JAI del Consejo, de 6 de octubre de 2006
In: Revista General de Derecho Europeo no. 13 (May 2007)

CAMPOS NAVAS, Daniel
El comiso y el blanqueo de capitales [recurso electrónico]
Curso monográfico sobre "Aproximación al derecho penal económico y financiero (2008). Segundo Módulo"/ directors, Alejandro Luzón Cánovas, Gonzalo Gómez de Liaño Polo, Miguel Ángel Gimeno Jubero
In: Cuadernos Digitales de Formación no. 8-2008. -- Madrid: Consejo General del Poder Judicial, 2009. -- p 13.

CEREIJO SOTO, Antonio
Nuevos instrumentos para el decomiso a partir de la Ley 4/2010, de 10 de marzo, para la ejecución en la Unión Europea de las resoluciones judiciales de decomiso
20 bibliographical references
In: La Ley. -- N. 7457- July 2010 -- p. [1]-8

La COOPERACIÓN judicial civil y penal en el ámbito de la Unión Europea: instrumentos procesales / Mar Jimeno Bulnes, coordinator. -- Barcelona: Bosch, 2007. -- 416 p. ; 23 cm + CD-ROM

El DERECHO procesal penal en la Unión Europea: tendencias actuales y perspectivas de futuro / Teresa Armenta Deu, Fernando Gascón Inchausti (coordinadores) ; Lorena Bachmaier Winter... [*et al*.]. -- 1ª ed.. -- Madrid: Colex, 2006. -- 334 p. ; 24 cm

ESPACIO europeo de libertad, seguridad y justicia: últimos avances en cooperación judicial penal / editor, Coral Arangüena Fanego. -- Valladolid: Lex Nova, 2010. -- 410 p. ; 24 cm

GASCÓN INCHAUSTI, Fernando
Cooperación judicial y decomiso de bienes en la Unión Europea
In: El derecho procesal penal en la Unión Europea: tendencias actuales y perspectivas de futuro. -- Madrid: Colex. 2006. -- p. 209-258

GASCÓN INCHAUSTI, Fernando
El decomiso transfronterizo de bienes / Fernando Gascón Inchausti. -- [Madrid]: Colex, 2007. -- 324 p.; 24 cm. Bibliography pp. 233-237

GONZÁLEZ CUSSAC, José Luis
Decisión Marco 2005/212 relativa al decomiso de los productos, instrumentos y bienes relacionados con el delito (DO L 68 de 15 de marzo de 2005)
In: Boletín de información del Ministerio de Justicia. – Supplement to no. 2015 - June 2006 -- p. 13-19

GONZÁLEZ LÓPEZ, Juan José
Ejecución de resoluciones de decomiso
In: La cooperación judicial civil y penal en el ámbito de la Unión Europea: instrumentos procesales / coordinated by Mar Jimeno Bulnes, 2007, ISBN 978-84-7698-796-4, p. 371-394

MANTECA VALDELANDE, Víctor
Ley para la eficacia judicial de embargos y pruebas del procedimiento penal.
In: Actualidad Jurídica Aranzadi no. 712/2006. BIB 2006\1219

MOLINA MANSILLA, Carmen
Instrumentos y estructuras de cooperación penal europea / Mª del Carmen Molina Mansilla. -- Barcelona: Bosch, 2008. -- 94 p. ; 22 cm + 1 CD-Rom. -- (Biblioteca básica de práctica procesal. Acciones penales ; 256)

MUÑOZ CUESTA, Francisco Javier
El comiso: aspectos novedosos introducidos en su regulación por la LO 15/2003, de 25 de noviembre.
In: Repertorio de Jurisprudencia no. 23/2004. BIB 2004\1737

OCAÑA RODRÍGUEZ, Antonio
Una propuesta de regulación del comiso
20 notas con bibliografía.
In: Revista de derecho y proceso penal Aranzadi. -- No. 14 - 2005/2. -- p. 73-101

PALOMO DEL ARCO, Andrés
Reconocimiento y ejecución de sentencias penales dictadas en el otro Estado europeo
In: Revista Jurídica de Castilla y León, 2010, (21): 115-184

PÉREZ CEBADERA, María Angeles
Presunción de inocencia y decomiso: ¿es necesario establecer una presunción legal para probar el origen ilícito de los bienes?
In: La justicia y la carta de derechos fundamentales de la Unión Europea / coord. por Andrés de la Oliva Santos, Marien Aguilera Morales, Ignacio Cubillo López, 2008, ISBN 9788483421147, p. 71-80

POZUELO PÉREZ, Laura
Demolición o comiso
31 bibliographical references
In: La Ley. -- N. 6948- May 2008 -- p. [1]-8

REYES LÓPEZ, Javier Ignacio
Del aseguramiento, destrucción y realización anticipada de efectos judiciales en el orden penal
In: La Ley Penal. Revista de Derecho Penal, Procesal y Penitenciario, 2009, 6(57): 75-86

QUINTERO OLIVARES, G.
Sobre la ampliación del comiso y el blanqueo, y la incidencia en la receptación civil
In: Revista electrónica de ciencia penal y criminología, no. 12, 2010
http://criminet.ugr.es/recpc/12/recpc12-r2.pdf

RUEDA GARCÍA, Luis
La reforma del comiso y su adaptación al Derecho europeo
25 Bibliographical references

VIDALES RODRIGUEZ, Catalina
El comiso ampliado: consideraciones constitucionales / Caty Vidales Rodriguez
45 Bibliographical references
In: Constitución, derechos fundamentales y sistema penal: (semblanzas y estudios con motivo del setenta aniversario del Profesor Tomás Salvador Vives Antón). -- Valencia: Tirant lo Blanch, 2009. -- V. II., p. 1991-2006

VIZUETA FERNÁNDEZ, Jorge
El comiso de las ganancias provenientes del delito y el de otros bienes equivalentes a éstas
Bibliografía p. 175-177
In: Revista penal. -- No. 19 - 2007 -- p. [163]-177

VIZUETA FERNÁNDEZ, J.,
El comiso: ¿consecuencia accesoria de una pena?»
In: Diario LA LEY of 2 February 2007, año XXVIII, no. 6643 (LA LEY 262/2007).

VIZUETA FERNÁNDEZ, Jorge
El decomiso: ¿consecuencia accesoria de una pena?
51 bibliographical references
In: La Ley. -- N. 6643- February 2007 -- p. [1]-5

ZARAGOZA AGUADO, Javier Alberto
La nueva regulación del comiso de bienes en el código penal y en el derecho comparado
Número monográfico sobre "Las últimas reformas penales II"
15 Bibliographical references
In: Cuadernos de Derecho Judicial. -- No. X - 2006.-- p. 11 - 61

C/ THE EUROPEAN ARREST WARRANT

ADAM MUÑOZ, María Dolores
El Reglamento 1206/2001 de 28 de mayo de 2001 del Consejo relativo a la cooperación entre los órganos jurisdiccionales de los estados miembros en el ámbito de la obtención de pruebas en materia civil y mercantil
In: La libre circulación de resoluciones judiciales en la Unión Europea. -- Sevilla: Centro de Documentación Europea de la Universidad de Sevilla, 2005. -- p.: 121-137

ALGUNAS cuestiones suscitadas en torno a la aplicación de la Ley 18/2006, para la eficacia en la UE de las resoluciones de embargo de bienes y aseguramiento de prueba en el proceso penal
In: La nueva Ley para la eficacia en la Unión Europea de las resoluciones de embargo y aseguramiento de pruebas en procedimientos penales / director, Jesús María Barrientos Pacho. -- Madrid: Consejo General del Poder Judicial (Estudios de derecho judicial. 2007 ; 117). -- p. 323-333

ARIAS RODRÍGUEZ, José Manuel
La cooperación judicial penal y policial
In: La nueva Ley para la eficacia en la Unión Europea de las resoluciones de embargo y aseguramiento de pruebas en procedimientos penales / director, Jesús María Barrientos Pacho. -- Madrid: Consejo General del Poder Judicial (Estudios de derecho judicial. 2007 ; 117). -- p. 15-144

BACHMAIER WINTER, Lorena
El exhorto europeo de obtención de pruebas en el proceso penal: estudio y perspectivas de la propuesta de decisión marco
In: El derecho procesal penal en la Unión Europea: tendencias actuales y perspectivas de futuro. -- Madrid: Colex. 2006. -- p. 131-178

BARRIENTOS PACHO, Jesús María
Ley 18/2006, de 5 de junio, para la eficacia en la Unión Europea de las resoluciones de embargo y aseguramiento de pruebas en procedimientos penales
In: La nueva Ley para la eficacia en la Unión Europea de las resoluciones de embargo y aseguramiento de pruebas en procedimientos penales / director, Jesús María Barrientos Pacho. -- Madrid: Consejo General del Poder Judicial (Estudios de derecho judicial. 2007 ; 117). -- p. 205-252 --

CASTILLEJO MANZANARES, Raquel
Exhorto europeo de medios de prueba
In: La Ley. -- N. 6684- April 2007 -- p. [1]-4

CEREIJO SOTO, Antonio
Efectos judiciales, instrumentos del delito y piezas de convicción (Nuevas perspectivas a partir de la Ley 18/2006, de 5 de junio, para la eficacia en la Unión Europea de las resoluciones de embargo y de aseguramiento de pruebas en procedimientos penales)
In: La Ley. -- N. 6596 - November 2006 -- p. [1]-5

La COOPERACIÓN en materia civil en la Unión Europea: textos y comentarios / Alegría Borrás, coordinator ; Ana Fernández-Tresguerres, Francisco J. Garcimartín, Rafael Gil Nievas; prólogo Julio Pérez Hernández. -- Cizur Menor (Navarra): Thomson Aranzadi, 2009. -- 712 p. ; 24 cm. -- (Monografías Aranzadi ; 554)

La COOPERACIÓN judicial civil y penal en el ámbito de la Unión Europea: instrumentos procesales / Mar Jimeno Bulnes, coordinadora. -- Barcelona: Bosch, 2007. -- 416 p. ; 23 cm + CD-ROM

DELGADO MARTÍN, Joaquín
Emisión de una Decisión de embargo preventivo de bienes o aseguramiento de pruebas en el ámbito de la Unión Europea

In: La nueva Ley para la eficacia en la Unión Europea de las resoluciones de embargo y aseguramiento de pruebas en procedimientos penales / director, Jesús María Barrientos Pacho. -- Madrid: Consejo General del Poder Judicial (Estudios de derecho judicial. 2007 ; 117). -- p. 253-297 --

El DERECHO procesal penal en la Unión Europea: tendencias actuales y perspectivas de futuro / Teresa Armenta Deu, Fernando Gascón Inchausti (coordinators) ; Lorena Bachmaier Winter... [*et al*.]. – 1st ed. -- Madrid: Colex, 2006. -- 334 p. ; 24 cm

DIAGO DIAGO, María del Pilar
La obtención de pruebas en la Unión Europea / Mª del Pilar Diago Diago. -- Cizur Menor (Navarra): Aranzadi, 2003. -- 137 p. ; 24 cm. -- (Monografías Aranzadi. Derecho procesal ; 279)
BEJ S 341.983 DIA obt

GLESS, Sabine
Free movement of evidence in Europe
In: El derecho procesal penal en la Unión Europea: tendencias actuales y perspectivas de futuro. -- Madrid: Colex. 2006. -- p. 121-130

GUÍA práctica para la aplicación del Reglamento relativo a las diligencias de obtención de pruebas. -- Bruselas: Comunidades Europeas, 2006. -- 27 p. ; 15 x 21 cm

IRURZUN MONTORO, Fernando
Principio de confianza y reconocimiento mutuo: su reflejo en la ejecución de resoluciones de embargo preventivo y aseguramiento de pruebas en la Unión Europea
In: La nueva Ley para la eficacia en la Unión Europea de las resoluciones de embargo y aseguramiento de pruebas en procedimientos penales / director, Jesús María Barrientos Pacho. -- Madrid: Consejo General del Poder Judicial (Estudios de derecho judicial. Año 2007 ; 117). -- p. 145-165 --

MAGRO SERVET, Vicente
La eficacia en la Unión Europea de las resoluciones de embargo y aseguramiento de pruebas en procedimientos penales
In: La Ley penal: revista de derecho penal, procesal y penitenciario. -- No. 28 - June - 2006. -- p. 5-22

MANTECA VALDELANDE, Víctor
Eficacia de embargos y pruebas del proceso penal en el ámbito europeo
In: La Ley. -- N. 6592 - November 2006 -- p. [1]-3

MOLINA MANSILLA, Carmen
Instrumentos y estructuras de cooperación penal europea / Mª del Carmen Molina Mansilla. -- Barcelona: Bosch, 2008. -- 94 p. ; 22 cm + 1 CD-Rom. -- (Biblioteca básica de práctica procesal. Acciones penales ; 256)
BEJ S 341.49 MOL ins
BEJ D 341.49 MOL ins

MORÁN MARTÍNEZ, Rosa Ana
El embargo preventivo y aseguramiento de pruebas, la ejecución de sanciones pecuniarias y el comiso: las decisiones marco
In: Cuadernos de Derecho Judicial. -- No. XIII - 2003. -- p. 381 – 416

NOVALES BILBAO, Hugo
Ley 18/2006 de 5 de junio para la eficacia en la Unión Europea de las resoluciones de embargo y aseguramiento de pruebas en procedimientos penales: Ejecución en España de órdenes emitidas por otros Estados de la UE: Reconocimiento y ejecución inmediata
In: La nueva Ley para la eficacia en la Unión Europea de las resoluciones de embargo y aseguramiento de pruebas en procedimientos penales / director, Jesús María Barrientos Pacho. -- Madrid: Consejo General del Poder Judicial (Estudios de derecho judicial. 2007 ; 117). -- p. 299-321 --

La NUEVA Ley para la eficacia en la Unión Europea de las resoluciones de embargo y aseguramiento de pruebas en procedimientos penales / director, Jesús María Barrientos Pacho. -- Madrid: Consejo General del Poder Judicial, D.L. 2007. -- 333 p. ; 22 cm. -- (Estudios de derecho judicial. 2007 ; 117)

ORMAZABAL SÁNCHEZ, Guillermo
Espacio penal europeo y mutuo reconocimiento: (perspectivas alemana y española) / Guillermo Ormazábal Sánchez. – 1st ed. -- Madrid ; Barcelona: Marcial Pons, 2006. -- 238 p ; 21 cm

ORMAZABAL SÁNCHEZ, Guillermo
La formación del espacio judicial europeo en materia penal y el principio de mutuo reconocimiento: especial referencia a la extradición y al mútuo reconocimiento de pruebas
In: El derecho procesal penal en la Unión Europea: tendencias actuales y perspectivas de futuro. -- Madrid: Colex. 2006. -- p. 37-73

ORMAZABAL SÁNCHEZ, Guillermo
La prueba penal en el espacio judicial europeo. Asistencia judicial y mutuo reconocimiento.
In: La Ley Penal, No. 74, September 2010

PRESENTE y futuro de la e-Justicia en España y la Unión Europea / Carmen Senés Motilla, coordinadora. -- Cizur Menor (Navarra): Aranzadi, 2010. -- 641 p. ; 23 cm. -- (Derecho Comunitario ; 622)

El PROCESO penal en la Unión Europea: garantías esenciales: = Criminal proceedings in the European Union: essential safeguards / coordinator: Montserrat Hoyos Sancho ; introduction: Kai Ambos. -- Valladolid: Lex Nova, 2008. -- 423, 431 p. ; 24 cm + CD-Rom

La PRUEBA en el espacio europeo de libertad, seguridad y justicia penal / prologue, Víctor Moreno Catena, Luis Arroyo Zapatero; Joaquín Delgado Martín... [*et al*.]. -- Cizur Menor (Navarra): Thomson-Aranzadi, 2006. -- 423 p. ; 24 cm

RODRÍGUEZ BAHAMONDE, Rosa
El exhorto de obtención de pruebas para recabar objetos, documentos y datos destinados a procedimientos en materia penal. Comentario a la Decisión Marco 2008/978/JAI del Consejo, de 18 de diciembre de 2008
In: Revista: Revista General de Derecho Europeo, no. 19, October 2009

RODRÍGUEZ LAINZ, José Luis
Secreto de las comunicaciones e intervención judicial de comunicaciones electrónicas en el marco de la Unión Europea: Derecho derivado
In: Diario La Ley, N. 7373, Año XXXI, 31 March 2010

[i] Document COM (2003) 688 final 2003/0270 (CNS) Proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters presented by the Commission

Con el apoyo de la Unión Europea
With the support of The European Union
Avec le soutien de l'Union Européenne

NIVEL III: REFERENCE DOCUMENTS

Official text: Council Framework Decision 2003/577/JHA, dated 22 July 2003, on the execution in the European Union of orders freezing property or evidence (OJ L 196 dated 2.8.2003, p. 45/55 Corrigendum OJ L 374 dated 27.12.2006, p. 20/20)

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:196:0045:0055:EN:PDF

EUR-Lex bibliographical reference for Council Framework Decision 2003/577/JHA, dated 22 July 2003, on the execution in the European Union of orders freezing property or evidence (OJ L 196 dated 2.8.2003, p. 45/55 Corrigendum OJ L 374 dated 27.12.2006, p. 20/20)

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003F0577:EN:NOT

EUR-Lex bibliographical reference for the Corrigendum.

http://eur-lex.europa.eu/Notice.do?val=438374:cs&lang=en&list=438374:cs,&pos=1&page=1&nbl=1&pgs=10&hwords=

EU summary

http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_criminal_matters/l16009_en.htm

***Related acts**: Report from the Commission based on Article 14 of the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence [**COM(2008) 885** final – not published in the Official Journal].*

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008DC0885:EN:NOT

EUR-Lex bibliographical reference for the related act: Report from the Commission based on Article 14 of the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence [**COM(2008) 885** final – not published in the Official Journal].

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008DC0885:EN:NOT

Con el apoyo de la Unión Europea
With the support of The European Union
Avec le soutien de l'Union Européenne

Preparatory work. Original Initiative. Initiative by the Governments of the French Republic, the Kingdom of Sweden and the Kingdom of Belgium for the adoption by the Council of a Framework Decision on the execution in the European Union of orders freezing assets or evidence.

http://eur-lex.europa.eu/Notice.do?val=256933:cs&lang=es&list=485458:cs,461676:cs,438374:cs,420474:cs,256933:cs,&pos=5&page=1&nbl=5&pgs=10&hwords=&checktexte=checkbox&visu=#texte

Preparatory work. European Parliament procedure file. Passage of the initiative and documents.

http://www.europarl.europa.eu/oeil/file.jsp?id=205832&noticeType=null&language=en

Spanish transposition legislation. Law 18/2006, dated 5 June, on the effectiveness in the European Union of orders freezing property or evidence in criminal proceedings.

http://www.congreso.es/constitucion/ficheros/leyes_espa/l_018_2006.pdf

Spanish transposition legislation. Second transposition law. ORGANIC LAW 5/2006, dated 5 June, supplementary to the Law on the effectiveness in the European Union of orders freezing property or evidence in criminal proceedings, amending the Spanish Law of the Judiciary 6/1985, dated 1 July.

http://www.congreso.es/constitucion/ficheros/leyes_espa/lo_005_2006.pdf

Preparatory work. Parliamentary passage of the draft bill on the effectiveness in the European Union of orders freezing property or evidence in criminal proceedings.

http://www.congreso.es/portal/page/portal/Congreso/Congreso/Iniciativas/ProydeLey?_piref73_1335538_73_1335535_1335535.next_page=/wc/servidorCGI&CMD=VERLST&BASE=IWI8&PIECE=IWI8&FMT=INITXD1S.fmt&FORM1=INITXLBA.fmt&DOCS=61-61&QUERY=121.cini.

Preparatory work. Parliamentary passage of the draft bill supplementary to the Law on the effectiveness in the European Union of orders freezing property or evidence in criminal proceedings, amending the Spanish Law of the Judiciary 6/1985, dated 1 July

http://www.congreso.es/portal/page/portal/Congreso/Congreso/Iniciativas/ProydeLey?_piref73_1335538_73_1335535_1335535.next_page=/wc/servidorCGI&CMD=VERLST&BASE=IWI8&PIECE=IWI8&FMT=INITXD1S.fmt&FORM1=INITXLBA.fmt&DOCS=62-62&QUERY=121.cini.

***Preparatory work. REPORT ON THE DRAFT BILL ON THE EFFECTIVENESS IN THE EUROPEAN UNION OF ORDERS FREEZING PROPERTY OR EVIDENCE IN CRIMINAL PROCEEDINGS AND THE SUPPLEMENTARY LAW TO THE SAME, WITH THE FOLLOWING WORDING*:**

http://www.poderjudicial.es/eversuite/GetRecords?Template=cgpj/cgpj/principal.htm

Preparatory work. Report from the Spanish Council of State on the draft bill on the effectiveness in the European Union of orders freezing property or evidence in criminal proceedings and its supplementary organic law.

http://www.boe.es/aeboe/consultas/bases_datos_ce/doc.php?coleccion=ce&id=2005-1568

Preparatory work of the Council of Prosecutors on the draft bill on the effectiveness in the European Union of orders freezing property or evidence in criminal proceedings and its supplementary organic law.

http://www.fiscal.es/csblob/acuerdos%2013-07-05.doc?blobcol=urldata&blobheader=application%2Fmsword&blobkey=id&blobtable=MungoBlobs&blobwhere=1109247779688&ssbinary=true

Con el apoyo de la Unión Europea
With the support of The European Union
Avec le soutien de l'Union Européenne