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Harmonisation of law by the back door: the European Evidence Warrant

Sally Ramage

The European Evidence Warrant has been in force since December 2009. [1] The EEW was in response to the call by the European Council in Tampere in 1999 for the mutual recognition of pre-trial orders in criminal investigations. The Council of the European Union adopted at its meeting on 1-2 June 2006 a general approach on the proposal for a Framework Decision on the EEW.

EEW applicable offences

The offences are as follows: -
Arson; computer-related crime; corruption; counterfeiting; counterfeiting and piracy of products; crimes within the jurisdiction of the International Criminal Court; drug trafficking; environmental crime, including trafficking in endangered animal / plant species; facilitation of unauthorised entry and residence; forgery of administrative documents and trafficking therein; forgery of means of payment; fraud, including that affecting the financial interests of the European Communities; grievous bodily injury; Human trafficking; illegal restraint and hostage-taking; illicit trade in human organs and tissue; illicit trafficking in cultural goods; illicit trafficking in hormonal substances / growth promoters; illicit trafficking in nuclear or radioactive materials kidnapping; Laundering proceeds of crime; murder; organised or armed robbery; participation in a criminal organisation; racism and xenophobia; racketeering and extortion rape; sabotage; sexual exploitation of children / child pornography; swindling; terrorism; trafficking in stolen vehicles; unlawful seizure of aircraft/ships; and weapons trafficking. The European Scrutiny Committee , had since 2005, sought to replace the traditional arrangements for mutual legal assistance in the gathering of evidence with the EEW whereby member states recognise and enforce, without any further internal review, orders such as search warrants issued in other member states because under mutual legal assistance agreements, such evidence would be obtained on the basis of a request by a state which is party to an international agreement and it would be executed in the other party state using its own national law. The main objective was to remove obstacles to successful prosecution without removing the safeguards that protect the rights of individuals. The rights of the individual subjected to investigations ordered by foreign authorities must be taken into account and the principle of double criminality should apply in all circumstances.

Mutual recognition

In the English Sale of Goods Act, the principle of mutual recognition would mean the acceptance by one member state of goods that conform with an equivalent standard of another member state without modification, testing, certification, renaming, or

[1] See Anand Doobay, "The European Evidence Warrant", *The Criminal Lawyer*, Tottel, October 2007, pages 1-3.

undergoing any other duplicative conformity-assessment procedure. The principle of mutual recognition cannot be fairly applied to orders which are made without the person affected being given an opportunity to be heard in his defence, to avoid miscarriages of justice.

Double criminality

The condition of double criminality means that, at the time of the issue of an evidence warrant, the offence to which the warrant relates must still be an offence in the issuing state and must also be an offence in the executing state. The principle gives protection to British citizens against being investigated in Britain for something that it is not a crime in this country. The condition of double criminality may now be applied regarding a search or seizure order for a crime that does not attract a custodial sentence of three years or more and that does not fall within one of the categories set out in Article 16(2). Foreseeable problems will arise because, for instance, member states have different interpretations of corruption. They also have very different approaches to racism and xenophobia, particularly with regard to freedom of speech. Computer-related crime seems to be an extremely broad category. Also, there are differences of opinion among member states as to the extent to which the territoriality principle should apply as a ground for refusing an evidence warrant. Under that principle, a member state may refuse to execute a warrant if the offence was committed wholly or partly on its own territory. That would provide a useful safeguard and should not be restricted to cases in which the offence has been committed entirely, or for an essential part, in the territory of the executing state. Another issue is the definition or lack of it, of the term 'serious crime' in member states. National priorities and sentiments are different and change all the time. An example is drink-driving.

An issuing authority

As to a common definition of an issuing authority, the European Scrutiny Committee said that the entire range of authorities that are currently regarded as competent to make requests for mutual legal assistance should not be able to issue evidence warrants, making the European evidence warrant not just applicable to cross-border crimes. There are no safeguards in place to protect the English legal system from being subject to the decisions of an issuing authority. The definition of *'issuing authority'* is found in Article 2(c) and does not include the police, customs or frontier authorities. An issuing authority is defined as '*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 their 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'*. Article 19 on legal remedies encompasses a challenge against the recognition and execution of a European Evidence Warrant, although a member state retains discretion to restrict that challenge to warrants that involve coercive measures. An issuing state is required to make available the legal remedies that would apply in a comparable domestic case. Some still view the European Evidence warrant as harmonisation of laws by the back door.

A contemporary issue- corruption

The criminalisation of corruption, and particularly of foreign public officials, means that a company registered in State A and bribing officials in State B may violate anti-corruption legislation in both States. Concurrent jurisdiction may arise. Where there is concurrent jurisdiction, the States may either agree to bring criminal proceedings in one State, or run concurrent proceedings. However they need to ensure the factual overlap between the offences is not so considerable as to engage the double jeopardy bar to any subsequent extradition request. Both cases will require cooperation between the States as regards evidence.

Obligations: Articles 6 and 10

Obligation to reply to within any reasonable deadline indicated by the contacting authority, or, if no deadline has been indicated, without undue delay, and inform the contacting authority whether parallel proceedings are taking place in its Member State (Article 6). Obligation to enter into direct consultations in order to reach consensus on any effective solution aimed at avoiding the adverse consequences arising from such parallel proceedings, lead to the concentration of the criminal proceedings in one Member State (Article 10).

Eurojust: Article 12

Where it has not been possible to reach consensus in accordance with Article 10, the matter shall**,** where appropriate**,** be referred to Eurojust by any competent authority of the Member States involved, if Eurojust is competent to act under Article 4(1) of the Eurojust Decision (Article 12).

No Live evidence: Article 3

Article 3 limits the applicability of the EEW to a limited category of evidence, which is already in existence, and is easily available. It does it not include 'live' evidence taken by means of interviews or hearings, bodily material or biometric data (including DNA samples and fingerprints) or real-time information (such as intercepted communications or bank account monitoring). Nor does it include any analysis conducted on such evidence.

Further Reading

BBC, “Q & A: European Evidence Warrant, Tuesday, 6 June 2006” http://news.bbc.co.uk/1/hi/world/europe/5051532.stm

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/2003/0688 final - CNS 2003/0270 */ http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52003PC0688:EN:HTML

J. A. E. Vervaele, European Evidence Warrant: Transnational Judicial Inquiries in the EU (Intersentia N.V., Antwerpen 2005)

Transnational organized criminals arrested and charged by US police

Sally Ramage

Over one hundred members and associates of transnational organized criminal groups operating in Los Angeles; Santa Ana, California, Miami and Denver were arrested, and charged in February 2011. Assistant Attorney General Lanny A. Breuer of the Criminal Division announced that:

'Today's indictments allege literally hundreds of criminal acts in three states – from extortion and kidnapping to firearms trafficking and health care fraud. The common denominator among these defendants and their criminal enterprises is the use of violence and intimidation to commit crimes for profit. But we are determined to fight back. In less than one month, the Justice Department has announced the largest one-day takedown against La Cosa Nostra, coordinated a nationwide gang takedown and, today, arrested more than 80 Armenian Power members, associates and others with ties to organized crime. These groups bring fear into our communities, defraud innocent victims, and put the safety and security of our neighbourhoods at risk. We are taking an aggressive stand against these organized criminal groups and will continue our efforts to put them out of business. The Southern California indictments that target the Armenian Power organized crime enterprise provide a window into a group that appears willing to do anything and everything illegal to make a profit. These types of criminal organizations – through the use of extortions, kidnappings and other violent acts – have a demonstrated willingness to prey upon members of their own community. As we have seen in Los Angeles and elsewhere, these groups also engaged in various fraud schemes that clearly have had a significant impact on financial institutions and their customers who have lost millions of dollars and lost their sense of security through identity theft and credit card fraud. Organized crime relies on extortion and the intimidation of victims through violence and fear. Today's takedown has removed 100 members and associates of organized crime groups from the streets of Miami, Los Angeles and Denver. We stand firm in our resolve to help eliminate organized criminal activity, be it domestic or transnational. We have seen organized crime spread from shakedowns on street corners to complex cyber schemes, human trafficking and other crimes perpetrated across international borders. Transnational enterprises are siphoning hundreds of millions of dollars from our economy to perpetuate their cycle of greed.' The alleged crimes include kidnapping, extortion, assault, witness intimidation, bank fraud, and credit card fraud and drug distribution.

Illegal 'search and seizure' in the United States

Sally Ramage

The Fourth Amendment to the U.S. Constitution protects citizens from the unlawful search and/or seizure of a citizen's private property. The Fourth Amendment prohibition

against unlawful search and seizure protects citizens from the search and seizures of their bodies, homes, business, cars and other private property.

The Fourth Amendment

The scope of the Fourth Amendment protection against unlawful search & seizure is broad and kicks in when police search any place or item in which a citizen has a legitimate expectation of privacy. This would clearly include a citizen's body in the case of a police stop of any kind. It would include the home, office, business, car or other property in which there is an expectation of privacy. Finally, it would include items such as luggage, bags, briefcases, and purses which are private in nature. The government simply has no right without probable cause to search these private areas. The determination of probable cause can be pretty complex. The gist of probable cause justifying a search is that law enforcement has reasonable grounds to believe a crime has been or is being committed, the property or item to be search is linked to the crime, the person in control of the property or item has committed the crime in question, and the circumstances dictate that interests of law enforcement dictate that property or item be searched at that particular time.

Search and seizure

Your Fourth Amendment Right against Unlawful Search & Seizure applies whenever a police stops you for questioning, you are pulled over in your vehicle, the police want to enter your home or business to conduct a search or for the purpose of making an arrest, the search of your car following seizure, the search of any other personal property such as bags, briefcases, purses and so on after seizure, and many other situations where your real or personal property is seized and/or searched by law enforcement. There are significant consequences to law enforcement for an unlawful search and seizure. The most severe is the exclusion of any evidence discovered or seized during the illegal search under the Exclusionary Rule.

Statements to foreign officials

Statements to foreign officials can be suppressed, as was decided in the recent trial US *v Navarro-Montes*[2]. In this case, Navarro-Montes moved to suppress statements he made to Mexican authorities on three separate occasions in January 2008 and February 2009. He argued that his statements were inadmissible because he was not given his *Miranda* warnings, and also because he had made the statements involuntarily. Navarro-Montes is a non US who claimed entitlement to Fifth Amendment rights under the United States Constitution because the United States and Mexico were involved in a joint venture to investigate and detain him. The courts stated that two exceptions generally apply to the admissibility of voluntary statements made to foreign officials on foreign soil in the absence of *Miranda* warnings, the precedent cases being *United States v Yousef*[3][4] and *United States v. Heller*.[5]

[2] S.D. California, January 27, 2011.

[3] *Yousef* also gives the definition of a 'joint venture'. A joint venture occurs where the United States actively participated-either directly or indirectly-in the questioning of the defendant. Even if United States law enforcement did not directly question a defendant, courts suggest that a joint venture nonetheless exists

Caselaw precedents

Also, by case precedents *United States v Hensel* 509[6], and *United States v Hensel* 509 [7]if the United States engages in a 'joint venture' with the foreign officials 'statements elicited during overseas interrogation by foreign police in the absence of *Miranda* warnings must be suppressed if American officials participated in the foreign interrogation, or if the foreign authorities were acting as agents for their American counterparts, the exclusionary rule should be invoked. (See *Yousef*[8] and also *United States v Abu Ali*[9]).

Extradition Procedures

With respect to extradition procedures, *Yousef* [10]held that:

'[E]vidence that the United States may have solicited the assistance of a foreign government in the arrest of a fugitive within its borders is insufficient as a matter of law to constitute United States participation under the joint venture doctrine....United States law enforcement officers are not required to 'monitor the conduct of foreign officials who execute a request for extradition or expulsion.'

Even where a defendant voluntarily makes a statement, due process is violated where "the foreign officers' conduct is so egregious that it 'shocks the conscience' of the American court." *United States v Angulo-Hurtado,* [11] (citing *United States v. Rosenthal*[12] *see also Abu Ali.* [13]*United States v Maturo* [14] holds that any statements made as a result of such conduct are inadmissible in an American court. Although not exhaustively defined, the types of circumstances that warrant the application of this exception generally involve the use of torturous interrogative methods. (See *United States v. Nagelberg*[15]).

UK related laws

With regard to extradition, Police and Criminal Evidence Act 1984, Code D, sets out the police powers, which may be relied upon in extradition, cases, additional to the police's common law powers. Police have new powers in the UK Crime and Security Act 2010 modelled on those contained in PACE, to enable police officers to respond to extradition requests effectively.

Code D sets out the police powers that may be relied upon in extradition cases, additional to the police's common law powers. The powers in the Act are modelled on those contained in PACE, but where necessary and appropriate, they supplement domestic provisions to enable officers to respond to extradition requests effectively. Under extradition proceedings, the purpose will include establishing identity; maintaining the Custody Record, statistics and monitoring (refer to

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if the American law enforcement agents used the foreign officials to carry out such questioning in order to circumvent the *Miranda* mandates

[4] 327 F.3d 56, 145-46 (2d Cir.2003).

[5] 625 F.2d 594, 5995th Cir.1980).

[6] F.Supp. 1364, 1375 (D.Me.1981)

[7] Ibid 6.

[8] Ibid 4.

[9] 395 F.Supp.2d 338, 381 (E.D.Va.2005).

[10] At 146, quoting U*nited States v. Lira*, 515 F.2d 68, 71 (2d Cir.1975).

[11] 165 F.Supp.2d 1363, 1370 (N.D.Ga.2001).

[12] 793 F.2d 1214, 1230-31 (11th Cir.1986).

[13] 395 F.Supp.2d at 380.

[14] *United States v. Maturo*, 982 F.2d 57, 60-61 (2d Cir.1992).

[15] 434 F.2d 585, 587 n. 1 (2d Cir.1970).

Extradition Codes C3.3 and D1.2). The information may be passed between law enforcement agencies, both here and abroad, and within Her Majesty's Government. The person's rights under use, disclosure and retention of photographs, fingerprints and samples are explained in the Extradition Codes of Practice Codes D3.13--3.18 and 4.17--4.19.

As a consequence of the Data Retention Directive, the Prüm Treaty—signed by 11 Member States—makes all Member States' databases on fingerprints, DNA and vehicle registration accessible to the authorities of other Member States. The United States must be applauded for treating the law with respect and holding fast to precedent, unlike in the United Kingdom where due process has been slacked in the name of 'crime control'. The Police and Criminal Evidence Act 1984 (PACE) allows the police unfettered interrogation of suspects and allows police to detain suspects in order to question them, even though it is understood that there is a presumption of innocence as per the Human Rights Act 1998 (Article 6(2)) and the European Convention on Human Rights 1948.[16] It appears that in the United Kingdom, the assumption that it is not the suspect's duty to establish innocence, no longer applies, although Code of Practice A (note 1) and Code of Practice C (para 12.5) appears to maintain the rule that no-one need talk to the police in the United Kingdom.

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[16] See *Funke v France* [1993] 16 EHRR 297. Note that Art 6(2) interprets the word 'charged' to include 'arrested, even if not charged'. See also Redmayne, M. (2007) Rethinking *the Privilege against self-incrimination*, Sweet & Maxwell, London. See also *The right of Silence*, Home Office Research Study 174, Home Office, 2000.