# CROSS BORDER INVESTIGATION AND PROSECUTION OF BRIBERY AND CORRUPTION OFFENCES

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**ABSTRACT**: The paper will consider the investigation and prosecution of cross border corruption and bribery from a Scottish and EU perspective. The paper will consider more widely and fully the investigative powers available in such cases including the use of international mutual legal assistance instruments, as well as extradition and will consider whether the absence of common minimum standards and rules for the admissibility and recovery of evidence including the oral evidence of witnesses outwith the jurisdiction which exercises criminal jurisdiction and to further consider mechanisms to determine jurisdiction to ameliorate the current absence of common rules. The paper will highlight European experience of the concept of mutual recognition as a cornerstone of judicial cooperation and the wider international instruments in the field of mutual legal assistance in cross border cases.

## CORRUPTION: INTERNATIONAL IMPACT

" Corruption...undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organised crime, terrorism and other threats to human security to flourish ...corruption hurts the poor disproportionately by diverting funds intended or development, undermining a governments ability to provide basic services, feeding inequality and injustice and discouraging foreign aid investment" Kofi Annan

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## CORRUPTION : UNITED KINGDOM IMPACT

"Bribery blights lives. Its immediate victims include firms that lose out unfairly. The wider victims are government and society, undermined by a weakened rule of law and damaged social and economic development. At stake is the principle of free and fair competition, which stands diminished by each bribe offered or accepted.

Ultimately, the Bribery Act matters for Britain because our existing legislation is out of date. In updating our rules, I say to our international partners that the UK wants to play a leading role in stamping out corruption and supporting trade-led international developments. But I would argue too that the Act is directly beneficial for business. That's because it creates clarity and a level playing field, helping to align trading nations around decent standards".[2]

## IDENTIFYING CORRUPTION

Within Scotland, the Serious Organised Crime Division of the Crown Office has holistic responsibility, through its various teams of specialist prosecutors, for the investigation and prosecution of such criminality, including the recovery of the proceeds of crime whether established as the result of a criminal conviction or non- conviction based asset seizure. Within this structure, the international cooperation unit seeks the recovery of evidence believed to be outwith the United Kingdom, encourages participation with law enforcement and prosecutors overseas in Joint Investigation Teams, while maximising the benefits offered by EU agencies such as Eurojust or the European Judicial Network.

The Serious Fraud Office has jurisdiction within England and Wales in relation to the investigation and prosecution of inter alia bribery and corruption[3].

The SFO has identified the difficulty in detecting serious criminal conduct that is bribery or corruption given the secretive manner in which it is conducted and that the agreement to gain an unfair advantage is often retained between a close number of individuals whether acting in their own interest or acting in their capacity as employees of a company. Bribery

[2] Kenneth Clarke, UK Secretary of State for Justice, Preamble to UK Bribery Act Guidance, March 2011

[3] See R v Innospec Ltd (Southwark Crown Court) 26 March 2010 : sentencing agreements; R(on the application of Corner House Research) v Director of Serious Fraud Office [2008] UKHL 60: review of the discretion of the Director of the Serious Fraud Office to discontinue a prosecution given the threat made from a foreign national the court finding such an exercise of discretion was lawful weighing the competing interests of the wider public interest of protecting British lives which outweighed the public interest in pursuing a conviction.

and corruption in this latter category can be particularly difficult to identify and investigate given payments can be routed through a number of companies in a various jurisdictions. It is important to acknowledge that two additional aspects which will not be explored in this paper, namely the important role played by professionals in these schemes whether lawyers, accountants and bankers and sadly, the perception of judicial corruption which by denying the accused a fair trial also results in public interest in the prosecution of individuals or companies also being denied.

The SFO have identified "corruption indicators" which while not exhaustive but includes:

- abnormal cash payments
- pressure exerted for payments to be made urgently or ahead of schedule
- payments being made through a third party country - for example, goods or services supplied to country 'A' but payment is being made, usually to a shell company in country 'B'
- an abnormally high commission percentage being paid to a particular agency. This may be split into two accounts for the same agent, often in different jurisdictions
- private meetings with public contractors or companies hoping to tender for contracts
- lavish gifts being received
- an individual who never takes time off even if ill, or holidays, or insists on dealing with specific contractors himself or herself
- making unexpected or illogical decisions accepting projects or contracts
- the unusually smooth process of cases where an individual does not have the expected level of knowledge or expertise
- abuse of the decision process or delegated powers in specific cases
- agreeing contracts not favourable to the organisation either because of the terms or the time period
- unexplained preference for certain contractors during tendering period
- avoidance of independent checks on the tendering or contracting processes
- raising barriers around specific roles or departments which are key in the tendering or contracting processes
- bypassing normal tendering or contracting procedures
- invoices being agreed in excess of the contract without reasonable cause

- missing documents or records regarding meetings or decisions
- company procedures or guidelines not being followed
- the payment of, or making funds available for, high value expenses or school fees (or similar) on behalf of others.

## INTERNATIONAL AND EUROPEAN INSTRUMENTS ESTABLISHING A FRAMEWORK FOR CORRUPTION AND BRIBERY OFFENCES

### (a) INTERNATIONAL INSTRUMENTS

#### (i) United Nations Convention against Corruption

The Convention was adopted on 31 October 2003 and came into force on 14 December 2005 with 140 signatories to the Convention.

The Convention aims to promote the prevention (in particular coordinated approaches), detection and sanctioning of corruption, together with providing measures for international judicial cooperation. However, the Convention is notable for its provisions on asset recovery. The Convention also provides a review mechanism to consider the implementation of the convention within states signatories' domestic legislation.

#### (ii) United Nations Convention against Transnational Organised Crime

The Convention was adopted in November 2000 and came into force on 29 September 2003. 147 States are signatories to the Convention which recognises that corruption is an integral part of transnational organised crime.

The Convention creates and international framework for the investigation and prosecution of corruption and, in doing so, places several obligations on parties which fall into the following categories:

*Prevention*: effective measures to promote integrity and to prevent the corruption of public officials

*Criminalisation*: requires States Parties to criminalise corruption, focusing particularly on bribery of public officials.

*Anti-money laundering*: requires the criminalisation of money laundering and the establishment of a domestic regulatory and supervisory regime for banks and other financial institutions to combat money laundering.

*International cooperation*: provision of a broad framework for mutual legal assistance, extradition, law-enforcement cooperation and technical assistance and training. The provisions are largely mandatory and cover specific aspects of law enforcement cooperation such as extradition, gathering and transferring evidence, assisting investigations and prosecutions. They include requirements that states parties consider joint investigations, special investigative techniques and the transfer of criminal proceedings.

**(iii) OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions** [4]

This convention provides at Article 1:

"Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and

[4] 21.11.1997

conspiracy to bribe a public official of that Party.

Importantly, the convention provides for the establishment of criminal jurisdiction as:

Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.

2. Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.

3. When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.[5]

The Convention also provides measures on judicial cooperation and that bribery of foreign officials shall be an extradition offence.[6]

**(iv) Council of Europe Criminal Law Convention on Corruption**[7]

This convention was particularly notable for establishing the Group of States against corruption (GRECO)

**(b) EUROPEAN UNION INSTRUMENTS**

**(i) Council Decision on contact point network against corruption**[8]

[5] Article 4
[6] Article 9 and 10: with the convention providing the legal base for the issue of a request for extradition.
[7] 27.1.1999

This network was established in consequence of agreement in the Hague Programme of measures[9]

The network aims to "improve cooperation between authorities and agencies to prevent and combat corruption" through the establishment of a network of experts, with Europol, Eurojust and the European Commission being fully engaged.

The network is tasked with constituting a "forum for the exchange throughout the EU of information on effective measures and experience in the prevention and combatting of corruption."[10]

**(ii) Council Framework Decision on combating corruption in the private sector**[11]

This decision aimed to ensure that both passive and active corruption in the private sector was criminalised in all EU Member States including legal persons. The offences were to incur "effective, proportionate and dissuasive penalties"[12]

The provisions of the council decision provide:

Article 2

Active and passive corruption in the private sector

1. Member States shall take the necessary measures to ensure that the following intentional conduct constitutes a criminal offence, when it is carried out in the course of business activities:

(a) promising, offering or giving, directly or through an intermediary, to a person who in any capacity directs or works for a private-sector entity an undue advantage of any kind, for that person or for a third party, in order that that person should perform or refrain from performing any act, in breach of that person's duties;

(b) directly or through an intermediary, requesting or receiving an undue advantage of any kind, or accepting the promise of such an advantage, for oneself or for a third party, while in

[8] 2008/852/JHA of 24.X.2008
[9] Official Journal C 53, 3.3.2005 p 1: The Hague Programme in strengthening freedom, security and justice in the European Union.
[10] Article 3.1
[11] 2003/568/JHA of 22.VII.2003
[12] Preamble 10.

any capacity directing or working for a private-sector entity, in order to perform or refrain from performing any act, in breach of one's duties.

2. Paragraph 1 applies to business activities within profit and non-profit entities.

3. A Member State may declare that it will limit the scope of paragraph 1 to such conduct which involves, or could involve, a distortion of competition in relation to the purchase of goods or commercial services.

4. Declarations referred to in paragraph 3 shall be communicated to the Council at the time of the adoption of this Framework Decision and shall be valid for five years as from 22 July 2005.

5. The Council shall review this Article in due time before 22 July 2010 with a view to considering whether it shall be possible to renew declarations made under paragraph 3.

Article 3

Instigation, aiding and abetting

Member States shall take the necessary measures to ensure that instigating, aiding and abetting the conduct referred to in Article 2 constitute criminal offences.

Article 5

Liability of legal persons

1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for offences referred to in Articles 2 and 3 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

(a) a power of representation of the legal person;

(b) an authority to take decisions on behalf of the legal person; or

(c) an authority to exercise control within the legal person.

2. Apart from the cases provided for in paragraph 1, each Member State shall take the necessary measures to ensure that a legal person can be held liable where the lack of

supervision or control by a person referred to in paragraph 1 has made possible the commission of an offence of the type referred to in Articles 2 and 3 for the benefit of that legal person by a person under its authority.

3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are involved as perpetrators, instigators or accessories in an offence of the type referred to in Articles 2 and 3.

Finally, the council decision provided the jurisdictional scope of the measure as

1. Each Member State shall take the necessary measures to establish its jurisdiction with regard to the offences referred to in Articles 2 and 3, where the offence has been committed:

(a) in whole or in part within its territory;

(b) by one of its nationals; or

(c) for the benefit of a legal person that has its head office in the territory of that Member State.

2. Any Member State may decide that it will not apply the jurisdiction rules in paragraph 1(b) and (c), or will apply them only in specific cases or circumstances, where the offence has been committed outside its territory.

3. Any Member State which, under its domestic law, does not as yet surrender its own nationals shall take the necessary measures to establish its jurisdiction with regard to the offences referred to in Articles 2 and 3, when committed by its own nationals outside its territory.[13]

## UNITED KINGDOM DOMESTIC LEGISLATION

### THE BRIBERY ACT 2010

[13] Article 7

**(a) Background**

In 1995, The Nolan Committee on Standards in Public Life published a report (Cm 2850I), suggesting the English Law Commission, a body charged with law reform and review, consider consolidation of the law on bribery, which is did in its report "Legislating the Criminal Code: Corruption". Following a government working group, the then UK Government in June 2000, published a White Paper [14]which resulted in the publication of the first draft Corruption Bill in 2003.[15] The strength of the Parliamentary Joint Committees was seen when that body criticised the retention of the agent/principal relationship underpinning the offence. [16] The Government undertook a further consultation [17]which resulted in the issue being referred back to the Law Commission which after further consultation produced a further report [18]which in turn led to the publication of a draft Bribery Bill in March 2009. [19]

The Bribery Act 2010 received Royal Assent on 8 April 2010 and entered into UK (and Scottish law) on 1 July 2011.[20]

There have been a number of successful prosecutions

- a court clerk convicted of accepting bribes to not record road traffic convictions on a court database was sentenced to three years imprisonment
- a person who failed his taxi driver test offered the tester who was a council official £200 which was refused. He was convicted and sentenced to 2 months imprisonment suspended for 12 months.

**(b) Offences**

[14] "Raising Standards and Upholding Integrity: the prevention of Corruption Cm 4759"
[15] Corruption Draft Legislation Cm 5777
[16] Joint Committee on the Draft Corruption Bill Session 2002-03 Report and Evidence HL 157, HC 705. See Government response at The Government Reply to the Report from the Joint Committee on the Draft Corruption Bill Session 2002-03 HL 157, HC 705, Cm 6068
[17] Bribery: Reform of the Prevention of Corruption Acts and SFO powers in cases of bribery of foreign officials
[18] Reforming Bribery (Report No. 313) on 20 November 2008
[19] Further Joint Parliamentary scrutiny was undertaken by the Joint Committee on the Draft Bribery Bill, First Report, Session 2008-09, HL115, HC430 – I & II). The Government responded to the Joint Committee's report on 20 November 2009 (Government Response to the conclusions and recommendations of the Joint Committee Report on the Draft Bribery Bill, Cm7748
[20] The Bribery Act 2010 (Commencement) Order 2011Statutory Instrument 1418/2011

The major change this legislation provides is to replace the previous law which focussed criminal conduct on the agent/principal relationship "in favour of a model based on an intention to induce improper conduct"[21].

The Act creates two broad classes of criminal conduct

- offering, promising or giving of an advantage - offences of bribing another person[22];
- requesting, agreeing to receive or accepting of an advantage - offences of being bribed[23]

In addition, it creates the offence of bribery of a foreign public official[24] as well as the new criminal offence where a commercial organisation fails to prevent bribery[25].

On conviction, a company faces an unlimited fine and a person up to ten years imprisonment.[26]

It can be seen that, especially in the world of commerce much of the investigation will focus on cross border criminal conduct whether to establish the advantage obtained through the offer and acceptance of a bribe or the offer or request by a person within a foreign entity to secure the unfair commercial advantage, or what the act defines as the improper performance of a relevant function or activity in breach of a relevant expectation[27]. To that end it is worth noting the preventative offence that criminalises the failure by a commercial organisation[28] to take appropriate steps to prevent those associated with the commercial organisation bribing others to obtain or retain business for the organisation or obtain or retain an advantage for the organisation[29].

Given the significant impact conviction can have on a commercial organisation, both commercial[30] and reputational, the Lord Advocate in Scotland has published guidance on

[21] The Bribery Act 2010 Explanatory notes
[22] Bribery Act 2010 s 1
[23] Bribery Act 2010 s 2
[24] Bribery Act 2010 s 6
[25] Bribery Act 2010 s 7
[26] Bribery Act 2010 s 11 (on indictment). On summary complaint the penalties are the statutory maximum fine (currently £5000) and 12 months imprisonment respectively in Scotland.
[27] Bribery Act 2010 s 4
[28] Bribery Act 2010 s7(5) defines this as an incorporated body in the UK, body corporate , partnership established within the UK for the purposes of carrying out a trade or profession.
[29] Bribery Act 2010 s 7(1). A statutory defence of "adequate procedures designed to prevent " such criminal conduct by persons associated with the organisation is provided: Bribery Act 2010 s 7(2)
[30] Within the EU, a person or commercial entity which is convicted of fraud or money laundering is excluded from participation in public contracts across the EU : Directive 2004/18/EC Article 45)

self - reporting by commercial organisations which seeks to encourage "good corporate governance and to creating a corporate culture in which bribery is not hidden"[31] This guidance is effective until 30 June 2014. To be effective the commercial organisation must inter alia submit a report fully disclosing the nature and seriousness of the relevant offending and the harm caused, the extent of the wrongdoing and where within the company structure it occurred. Having regard to all the circumstances, criminal investigation and prosecution may not occur but rather the case passed to the civil recovery unit to enable non conviction based asset seizure to take place under the Proceeds of Crime Act 2002 and an appropriate level of settlement reached.[32]

**(c) Jurisdictional Reach of the Bribery Act 2010**

Criminal jurisdiction is established in the UK and Scotland in respect of the for acts of criminal conduct captured by the Bribery Act namely, active[33] and passive[34] bribery, commercial bribery[35]and a commercial organisation failing to prevent bribery by a person associated with it[36]on one of the following bases:

- the criminal conduct constituting the offence took place in the United Kingdom;
- the criminal conduct constituting the offence is requested or made outwith the United Kingdom for the benefit of a United Kingdom organisation
- the bribe relates to a function or activity of the organisation within the United Kingdom
- the criminal conduct, which takes place outside the United Kingdom, would, if it had taken place within the United Kingdom would have been criminal conduct is undertaken by a person who has a "close connection" with the United Kingdom

[31] Annex A
[32] See the sentencing statement by the High Court of Justiciary in *HMA v Weir Group PLC http://www.scotland-judiciary.org.uk/8/695/HMA-v-WEIR-GROUP-PLCI* where the company was fined £3 m for breaching trade sanctions in Iraq while also making restitution of almost £14m through the civil confiscation .
[33] Bribery Act 2010 s1
[34] Bribery Act 2010 s2
[35] Bribery Act 2010 s6
[36] Bribery Act 2010 s7. Associated person is defined by Bribery Act 2010 s 8 as "a person who performs services on behalf" of the relevant commercial organisation, with the question of whether the person so performs that service to be determined by "reference to all the relevant circumstances and not merely by reference to nature of the relationship between " the person and the commercial organisation.

whether as a UK citizen, national, person ordinarily resident in the United Kingdom a body incorporated in the United Kingdom or a Scottish partnership.

- Where a commercial organisation fails to prevent bribery, even where the offending act or omission which form part of the offence do not take place in any part of the United Kingdom.

The latter of these bases provides universal jurisdiction where the commercial organisation has been incorporated or is a body corporate in the United Kingdom and carries on business or any part of its business in the United Kingdom. Therefore, it has been suggested that a commercial organisation incorporated in the United States and which is subject to the United States Foreign Corrupt Practices Act [37] which has a subsidiary company in the United Kingdom, could find itself the subject of investigation and prosecution in the United Kingdom for failing to prevent those acting on behalf of the US company bribing others in jurisdictions ouwith the United Kingdom.

## EUROPEAN MEASURES IN RELATION TO THE RECOVERY OF EVIDENCE IN THE INVESTIGATION AND PROSECUTION OF BRIBERY

### The Principle of Mutual Recognition

The principle of mutual recognition of judicial decisions is the cornerstone of judicial cooperation within the European Union. It provides that executing authorities must recognise and give effect to orders issued by judicial authorities in other Member States of the European Union. While the principle derives from the free movement of goods within

[37] The FCPA provides exemptions for facilitation payments to be made/made to facilitate or expedite routine government action and for reasonable *bona fides* business promotion not available under the Bribery Act 2010.

the European Union, in the field of freedom, security and justice, it reflects the requirement that with the free movement of people within the European Union, where one can travel from the northern tip of Sweden to southern Portugal or from Calais to the eastern borders of Europe in Romania, without showing a passport or crossing a physical border, also requires that judicial decisions are recognised and given effect and are mutually enforceable in Member States without the need of formality[38].

It has been most successful in the context of the European Arrest Warrant (EAW) which removed the scheme of extradition amongst the Member States of the European Union replacing that with "a system of surrender between judicial authorities… the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice."[39]

It has been developed within the recovery of evidence and the search and seizure of assets[40].

## EXTRADITION

### EUROPEAN ARREST WARRANT

The European arrest warrant was introduced by the Council Framework Decision on the European arrest warrant and the surrender procedures between member states[41]

[38] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States Preamble 6

[39] *Ibid* Preamble 5. See also *Dabas v High Court of Justice, Madrid (Criminal Appeal from Her Majesty's High Court of Justice)* [2007] 2 AC 31 at paragraph 8; *Campbell v HM Advocate* 2008 JC 265; *La Torre v HM Advocate* 2008 JC 23

[40] *Inter alia* Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the EU of orders freezing property or evidence; Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders; 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. See also the Directive of the European Parliament and the Council on the freezing and confiscation of proceeds of crime in the European Union which seeks to replace these instruments in a global measure and provide for extended confiscation orders which "signifies the ability to confiscate assets which go beyond the direct proceeds of a crime. A criminal conviction may be followed by the (extended) confiscation not only of assets associated with the specific crime, but of additional assets which the court determines are the proceeds of other similar crimes.". It also seeks to introduce a non conviction based asset confiscation scheme.

It has been implemented in all member states of the European Union. It was required to be implemented by 1 January 2004 and while that was not achieved, by 22 April 2005, all member states had enacted domestic legislation giving effect to the Framework Decision. It was implemented in the United Kingdom by the Extradition Act 2003[42].

The European arrest warrant is a judicial decision issued by a member state with a view to the arrest and surrender by another member state of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.[43]

A European arrest warrant may be issued where an offence is:

(1) punishable by the law of the issuing member state by a period of imprisonment of a maximum period of twelve months, or where a sentence has been passed or a detention order has been made, for a sentence of at least four months; and

(2) one of a number of specified offences if they are punishable in the issuing member state by a custodial sentence or a detention order for a maximum period of at least three years, and as they are defined by the law of the issuing member state, must, under the terms of the Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European arrest warrant.

The specified offences (the 'framework list offences') are extensive and include:

(a) participation in a criminal organisation;

(b) terrorism;

(c) trafficking in human beings;

(d) sexual exploitation of children and child pornography;

(e) illicit trafficking in narcotic drugs etc and in weapons etc;

(f) laundering of the proceeds of crime;

(h) computer-related crime;

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41 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) (OJ L190, 18.07.02, p 1

42 Extradition Act 2003

43 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA Art 1.1

(i) corruption

(j) racism and xenophobia;

(k) fraud on the European Union budget

(l). Swindling ; and

(m) various forms of forgery[44].

In relation to offences of fraud on the EU Budget, whether committed by bribery or otherwise, together with corruption the request for extradition of a person will not require a test of double criminality to be applied in the executing state. This is important as it obviates the comparison of national law and legal definitions. This is because the Member States reached agreement that these offences are so serious they merit such an approach.

A person sought for extradition may be able to argue against that by advancing a number of grounds that bar extradition but if the requesting state marks the offences as a framework list offence, the person will not be able to argue extradition should be refused on the grounds of legal definition of the offence in the requesting Member State.

The EAW has been the most successful instrument underpinned as it is by the principle of mutual recognition. In the period 2004-2009, 11500 individuals have been surrendered within the European Union to Member States to face trial, be sentenced or serve prison sentences imposed.

## JUDICIAL COOPERATION

**(a) The European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 20.IV.1959)** provides at:

"Article 1

1. The Contracting Parties undertake to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in

[44] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA Art 2.2

respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party.

Such a request will be made by letter of request which will provide information on the crime under investigation and the nature of the evidence sought to be recovered.

However, such evidence will be recovered under the procedural and substantive law of the requested Member State:

Article 3

1. The requested Party shall execute in the manner provided for by its law any letters rogatory relating to a criminal matter and addressed to it by the judicial authorities of the requesting Party for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents.

2. If the requesting Party desires witnesses or experts to give evidence on oath, it shall expressly so request and the requested Party shall comply with the request if the law of its country does not prohibit it.

3. The requested Party may transmit certified copies or certified photostat copies of records or documents requested, unless the requesting Party expressly requests the transmission of originals, in which case the requested Party shall make every effort to comply with the request. "

It was not until this article was amended by the Second Additional Protocol in 2001 that the requested MS Judicial authorities could specify execution of requests in a manner that would make the recovered evidence admissible under national law of the requesting MS rules of procedure and practice:

"Article 8 – Procedure

Notwithstanding the provisions of Article 3 of the Convention, where requests specify formalities or procedures which are necessary under the law of the requesting Party, even if unfamiliar to the requested Party, the latter shall comply with such requests to the extent that the action sought is not contrary to fundamental principles of its law, unless otherwise provided for in this Protocol. "

This was the first step towards recognition of a need to ensure that while evidence is recovered, it is of equal, if not greater, practical importance that the evidence is admissible before the Courts of the requesting MS.

(b) **Freezing Orders** [45]

The freezing order framework decision is, like the European Arrest Warrant, based on the principle of mutual recognition.

It also includes the framework list offences. This means that if a judge or prosecutor issues a freezing order, it must be given effect to by the executing state and if it is issued for evidence in relation to an investigation of corruption, the will be no requirement to apply double criminality before executing the measure.

The scope of the freezing order is wide as it defines evidence as "objects, documents or data which could be produced as evidence in criminal proceedings"[46] The decision on execution of the freezing order ought to be taken and communicated to the issuing authority within 24 hours.[47] The freezing orders framework decision has been transposed into Scots law[48]. A Court will be nominated by the Lord Advocate to give effect to the overseas freezing order by issuing a warrant authorising a constable to:

(a)to enter the premises to which the overseas freezing order relates and search the premises to the extent reasonably required for the purpose of discovering any evidence to which the order relates, and

(b) To seize and retain any evidence for which he is authorised to search[49].

In Scotland, the order may be postponed only if to do otherwise would jeopardise an investigation in Scotland[50]. The evidence is retained until such time as the Lord Advocate is requested to transmit it to the issuing authority[51].

[45] Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence
[46] Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence Article 2.
[47] Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence Article 5.3. This time period applies in Scotland: Act of Adjournal (Criminal Procedure Rules Amendment No 5) (Miscellaneous) 2009
[48] Crime (International Cooperation) Act 2003 ss20-15
[49] Crime (International Cooperation) Act 2003 s22 (1)
[50] Crime (International Cooperation) Act 2003 s23
[51] Crime (International Cooperation) Act 2003 s24

(c) **European Evidence Warrant**[52]

The European Evidence Warrant follows the same approach as the European Arrest Warrant and is likewise underpinned by mutual recognition.

An EEW may be issued for the following proceedings and for evidence that already exists.

"Article 5

Type of proceedings for which the EEW may be issued

The EEW may be issued:

(a) with respect to criminal proceedings brought by, or to be brought before, a judicial authority in respect of a criminal offence under the national law of the issuing State;

(b) in proceedings brought by administrative authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters;

(c) in proceedings brought by judicial authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law, and where the decision may give rise to further proceedings before a court having jurisdiction in particular in criminal matters; and

(d) in connection with proceedings referred to in points (a), (b) and (c) which relate to offences or infringements for which a legal person may be held liable or punished in the issuing State.

PROCEDURES AND SAFEGUARDS FOR THE ISSUING STATE

Article 7

Conditions for issuing the EEW

[52] 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

Each Member State shall take the necessary measures to ensure that the EEW is issued only when the issuing authority is satisfied that the following conditions have been met:

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

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

These conditions shall be assessed only in the issuing State in each case."

An EEW may also be used in the recovery of evidence in possession of the executing authority or discovered during execution of the EEW. (Article 4.4 and 4.5)

The EEW is in the now familiar form similar to that for the EAW.

The EEW must be recognised and evidence recovered as it would be under ordinary domestic procedure:

"Article 11

Recognition and execution

1. The executing authority shall recognise an EEW, transmitted in accordance with Article 8, without any further formality being required and shall forthwith take the necessary measures for its execution in the same way as an authority of the executing State would obtain the objects, documents or data, unless that authority decides to invoke one of the grounds for non-recognition or non-execution provided for in Article 13 or one of the grounds for postponement provided for in Article 16.

2. The executing State shall be responsible for choosing the measures which under its national law will ensure the provision of the objects, documents or data sought by an EEW and for deciding whether it is necessary to use coercive measures to provide that assistance. Any measures rendered necessary by the EEW shall be taken in accordance with the applicable procedural rules of the executing State.

3. Each Member State shall ensure:

(i) 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 EEW;

and

(ii) that measures, including search or seizure, are available for the purpose of the execution of the EEW where it is related to any of the offences as set out in Article 14(2)."

Importantly, the evidence has to be proportionate to the investigation. To that end it ought to meet any challenge made with reference to Article 8 of the European Convention on Human Rights.

However the EEW may not be issued for the recovery of the following evidence (which will likely lead to a traditional letter of request and an EEW being issued together, especially from those Member States whose systems of law and rules of procedure are reliant on oral evidence in trial proceedings):

"2. The EEW 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."

Statements of witnesses may be taken where:

"the EEW may, if requested by the issuing authority, also cover taking statements from persons present during the execution of the EEW and directly related to the subject of the EEW. The relevant rules of the executing State applicable to national cases shall also be applicable in respect of the taking of such statements." (Article 4.6)

Importantly, in addition, an EEW should be issued only where the object, documents or data concerned could be obtained under the national law of the issuing State in a comparable case. In other words the requesting judicial authorities may only seek recovery of that evidence which is could under its own territorial and jurisdictional rules of procedure.

A consideration of the recitals to the FD bears fruit in addressing the deficit of the admissibility of evidence:

"(14) It should be possible, if the national law of the issuing State so provides in transposing Article 12, for the issuing authority to ask the executing authority to follow specified formalities and procedures in respect of legal or administrative processes which might assist in making the evidence sought admissible in the issuing State, for example the official stamping of a document, the presence of a representative from the issuing State, or the recording of times and dates to create a chain of evidence. Such formalities and procedures should not encompass coercive measures.

(15) The execution of an EEW should, to the widest extent possible, and without prejudice to fundamental guarantees under national law, be carried out in accordance with the formalities and procedures expressly indicated by the issuing State.

(16) To ensure the effectiveness of judicial cooperation in criminal matters, the possibility of refusing to recognise or execute the EEW, as well as the grounds for postponing its execution, should be limited. In particular, refusal to execute the EEW on the grounds that the act on which it is based does not constitute an offence under the national law of the executing State (dual criminality) should not be possible for certain categories of offences."

However most importantly, the EEW provides that the execution of the request and the recovery of the evidence sought should be as required by the law and procedure of the requested MS procedural requirements.

This is a significant step forward.

Under the 1959 Convention, search and seizure of property is subject to the test of dual criminality. This is no longer necessary under the EEW where the crime under investigation is one of the Framework list of offences thus enabling the recovery of evidence in such cases to be in accordance with the rules of procedure of national law of the requested MS.

As mutual recognition of a judicial decision seeking the recovery of evidence the grounds of refusal are limited.

The executing state may refuse to recognise or execute the EEW within 30 days of receiving it if:

- the execution breaches the ne bis in idem principle;

- in certain cases specified in the framework decision, the act is not an offence under its national law;
- execution is not possible with the measures available to the executing authority in the specific case;
- there is an immunity or privilege under the law of the executing state that makes its execution impossible;
- it has not been validated by a judge, court, investigative magistrate or public prosecutor in the issuing state when so required;
- the offence was committed on the territory of the executing state or outside the issuing state where the law of the executing state does not allow for legal proceedings;
- it would harm national security interests;
- the form is incomplete or incorrectly completed.

The Framework Decision also requires at recital

"(27) This Framework Decision respects the fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected by the Charter of Fundamental Rights of the European Union, notably Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to execute an EEW when there are reasons to believe, on the basis of objective elements, that the EEW has been issued for the purpose of prosecuting or punishing a person on account of his or her sex, racial or ethnic origin, religion, sexual orientation, nationality, language or political opinions, or that the person's position may be prejudiced for any of these reasons."

**(d) Challenges to the Admissibility of Evidence Recovered under the European Evidence Warrant**

The interaction of the recovery of evidence, its admissibility under the procedural law of the requested Member State and that of the requesting MS and the rights of the accused when such evidence is sought to be introduced at trial ought to be considered.

Recital 14 Member States must ensure that all interested parties have access to legal remedies against the recognition and execution of an EEW. These remedies may be limited

to cases where coercive measures are used. The actions are to be brought before a court in the executing state; however, the substantive reasons for issuing the EEW may only be brought before a court in the issuing state.

However Article 18 provides:

"Legal remedies

1. 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 an EEW pursuant to Article 11, in order to preserve their legitimate interests. Member States may limit the legal remedies provided for in this paragraph to cases in which the EEW is executed using coercive measures. The action shall be brought before a court in the executing State in accordance with the law of that State.

2. The substantive reasons for issuing the EEW, including whether the conditions established in Article 7 have been met, may 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.

3. Member States shall ensure that any time limits for bringing an action mentioned in paragraphs 1 and 2 are applied in a way that guarantees the possibility of an effective legal remedy for interested parties."

It is therefore envisaged that challenge may be taken by "any interested party" may challenge the recovery of the evidence under the EEW prior to transmission to the requesting Member State. For a third party, the ability to challenge the grounds of issuing the EEW being as it should before the Court of the issuing Member State will be potentially difficult.

The question arises whether, as in the UK, the accused could be regarded as such a party having an interest. This must be the case where, for example, a property owned by him is searched in one jurisdiction and evidence recovered and then sought to be introduced at a trial against him in another Member State.

The question arises whether on different grounds he would be able to challenge that evidence within the trial context. The answer appears to be in the affirmative, as logically the tests to be applied to determine the issues are different and for different reasons.

The issue before the Court of the requested MS will be to determine whether the evidence is recovered in terms of domestic law implementing the EEW whereas the challenge before the trial court will be on the question of fairness and fair trial which must include issues of fairness and lawfulness and regularity of recovery of the evidence.

The question that can only be determined at national level is whether the Court in the requested Member State having determined the evidence to have been lawfully and regularly recovered under the domestic law implementing the EEW that will be sufficient to enable to trial court in the requested Member State to accept the evidence has been lawfully recovered and any residual issue of fairness and fair trial would fall to be on much more restricted grounds.

In such circumstances we ought to consider the guidance provided in the case of Steffensen (C-276/01) from the European Court of Justice. Unless the evidence recovered is subject to a rule of community law, then the ordinary rules of national law are applicable.

"72.

In this case, account must be taken, more specifically, of the right to a fair hearing before a tribunal, as laid down in Article 6(1) of the ECHR and as interpreted by the European Court of Human Rights.

73.

It is necessary; first of all, to examine the argument of the Danish Government and the Commission that in this instance the right to a fair hearing and the consequences arising from it are not applicable in the case in the main proceedings since the question referred concerns an administrative act and not proceedings before a tribunal.

74.

Although the evidence at issue in the main proceedings was obtained in an administrative procedure preceding the appeal brought before the national court, it is nevertheless clear that the specific question referred by it seeks to establish whether that evidence may be admitted in a proceeding pending before it. Therefore, the question clearly concerns the admissibility of evidence in a procedure before a tribunal within the meaning of Article 6(1) of the ECHR.

75.

It should be noted, next, that, it follows from the case-law of the European Court of Human Rights that Article 6(1) of the ECHR does not lay down rules on evidence as such and, therefore, it cannot be excluded as a matter of principle and in the abstract that evidence obtained in breach of provisions of domestic law may be admitted. According to that case-law, it is for the national courts to assess the evidence they have obtained and the relevance of any evidence that a party wishes to have produced (see Mantovanelli v. France, judgment of 18 March 1997, Reports of Judgments and Decisions 1997-II, § 33 and 34; and Pélissier and Sassi v. France, judgment of 25 March 1999, Reports of Judgments and Decisions 1999-II, § 45).

76.

However, according to the same case-law, the review carried out by the European Court of Human Rights under Article 6(1) of the ECHR of the fairness of a hearing - which requires essentially that the parties be given an adequate opportunity to participate in the proceedings before the court - relates to the proceedings considered as a whole, including the way in which evidence was taken.

77.

Lastly, it should be observed that the European Court of Human Rights has held that, where the parties are entitled to submit to the court observations on a piece of evidence, they must be afforded a real opportunity to comment effectively on it in order for the proceedings to reach the standard of fairness required by Article 6(1) of the ECHR. That point must be examined, in particular, where the evidence pertains to a technical field of which the judges have no knowledge and is likely to have a preponderant influence on the assessment of the facts by the court (see Mantovanelli, cited above, § 36).

78.

It is for the national court to assess whether, in the light of all the factual and legal evidence available to it, the admission as evidence of the results of the analyses at issue in the main proceedings entails a risk of an infringement of the adversarial principle and, thus, of the right to a fair hearing. In the context of that assessment, the national court will have to examine, more specifically, whether the evidence at issue in the main proceedings pertains to a technical field of which the judges have no knowledge and is likely to have a

preponderant influence on its assessment of the facts and, should this be case, whether Mr Steffensen still has a real opportunity to comment effectively on that evidence.

79.

If the national court decides that the admission as evidence of the results of the analyses at issue in the main proceedings is likely to give rise to an infringement of the adversarial principle and, thus, of the right to a fair hearing, it must exclude those results as evidence in order to avoid such an infringement. "

As Advocate General Stix-Hackl stated in her opinion in this case:

"68.

It follows from the case-law of the European Court of Human Rights that, although the convention does not lay down rules on evidence as such, the particular proceedings considered as a whole, including the way in which evidence was taken, must meet the requirements of a fair trial within the meaning of Article 6(1) of the ECHR. (22) Among those requirements are, above all, the adversarial nature of proceedings and the equality of arms of parties to the proceedings. In accordance with those principles, a party to a criminal or civil trial must have the opportunity to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision; moreover, he must be able to present his case in court in circumstances which do not put him at a significant disadvantage in relation to his adversary. (with reference to Vermeulen v. Belgium, judgment of 20 February 1996, Reports of Judgments and Decisions 1996-I, p. 233, § 33, Nideröst-Huber v. Switzerland, judgment of 18 February 1997, Reports of Judgments and Decisions 1997-I, p. 101, § 23, and Morel v. France, judgment of 6 June 2000, Reports of Judgments and Decisions 2000-VI, § 27.

69.

Thus, according to the case-law of the European Court of Human Rights, the use in court of evidence which is vitiated by irregularities is not automatically precluded. What is decisive here too is whether the party to the proceedings can effectively defend himself in the circumstances of the case. (with reference to Schenk v. Switzerland, judgment of 12 July

1988, Series A no. 140, p. 29, §§ 45 and 46, and Mantovanelli v. France, judgment of 18 March 1997, Reports of Judgments and Decisions 1997-II, pp. 436-37, § 34.)

Ultimately the resolution of seemingly complex issues of evidence must be governed under either common principles of fairness under national law as well as Article 6 of the Convention, as the accused must receive a fair trial. The locus for challenge of that evidence will be within the Court of the issuing member state in other words when the evidence is in fact sought to be led against the accused.

However, when such evidence is being recovered there may be scope for that evidence to be challenged where the accused is aware of the investigation. This can occur within the UK where, in addition to the prosecutor, the Court may allow officials of the requesting member state to participate and a lawyer who represents any party to the proceedings, in the hearing of evidence from a witness.

**(e) European Arrest Warrant Framework Decision**

Recovery of evidence under Article 29 of the EAWFD must be considered. That article provides for the recovery of evidence connected to the crime but also for effectively the proceeds of crime.

The decision provides:

"Handing over of property

1. At the request of the issuing judicial authority or on its own initiative, the executing judicial authority shall, in accordance with its national law, seize and hand over property which:

(a) may be required as evidence, or

(b) has been acquired by the requested person as a result of the offence.

2. The property referred to in paragraph 1 shall be handed over even if the European arrest warrant cannot be carried out owing to the death or escape of the requested person.

3. If the property referred to in paragraph 1 is liable to seizure or confiscation in the territory of the executing Member State, the latter may, if the property is needed in connection with pending criminal proceedings, temporarily retain it or hand it over to the issuing Member State, on condition that it is returned.

4. Any rights which the executing Member State or third parties may have acquired in the property referred to in paragraph 1 shall be preserved. Where such rights exist, the issuing Member State shall return the property without charge to the executing Member State as soon as the criminal proceedings have been terminated."

This provision raises a number of issues.

It has been implemented in Member States in an inconsistent manner. Additionally the FD provides no guidance or provision on rules of procedure to be followed, how the rights of third parties may be exercised, the route of transmission of the recovered evidence.

It is also far reaching as it provides for the search and seizure of the proceeds of crime.

In practice, either ordinary rules governing mutual legal assistance are utilised or a formal letter of request is issued together with the EAW. This is potentially problematic if these requests are required to be transmitted to different offices in the requested Member State.

However it provides none of the guidance or safeguards provided in Article 8 of the 2000 Convention on mutual legal assistance:

"Restitution

1. At the request of the requesting Member State and without prejudice to the rights of bona fide third parties, the requested Member State may place articles obtained by criminal means at the disposal of the requesting State with a view to their return to their rightful owners.

2. In applying Articles 3 and 6 of the European Mutual Assistance Convention and Articles 24(2) and 29 of the Benelux Treaty, the requested Member State may waive the return of articles either before or after handling them over to the requesting Member State if the restitution of such articles to the rightful owner may be facilitated thereby. The rights of bona fide third parties shall not be affected.

3. In the event of a waiver before handing over the articles to the requesting Member State, the requested Member State shall exercise no security right or other right of recourse under tax or customs legislation in respect of these articles."

**(f) Evidence of Witnesses**

Many jurisdictions require witnesses to provide oral evidence in court and that evidence be subject to cross examination. The direct evidence of witnesses can be as problematic as no witness can be compelled to attend and give evidence before a Court in another jurisdiction. However the ability to utilise either video conference[53] or telephone conference[54] for giving evidence has been beneficial although care needs to be taken to ensure practical aspects such as the witness viewing productions is taken into account.

In the event of a joint investigation team then such issues ought to be the subject of agreement in advance and much more readily addressed by the lawyers from the Member States parties to the JIT.

**(g) Joint Investigation Teams**

Article 13 of the 2000 Mutual Legal Assistance Convention provided for the establishment of Joint Investigation Teams. However, few teams were established and in an attempt to reinvigorate the initiative, the Council adopted on 13 June 2002 a Framework Decision on Joint Investigation Teams[55]

Article 1 provides

"By mutual agreement, the competent authorities of two or more Member States may set up a joint investigation team for a specific purpose and a limited period, which may be extended by mutual consent, to carry out criminal investigations in one or more of the Member States setting up the team. The composition of the team shall be set out in the agreement"

Article 1.3 provides for the status of the team

"(a) The leader of the team shall be a representative of the competent authority participating in criminal investigation from the Member State in which the team operates. The leader of the team shall act within the limits of his or her competence under national law.

(b) The team shall carry out its operations in accordance with the law of the Member State in which it operates. The members of the team shall carry out their tasks under the leadership

[53] Crime (International Cooperation ) Act 2003 s29
[54] Crime (International Cooperation ) Act 2003 s31

[55] Council Framework Decision of 13 June 2002 on joint investigation teams (2002/465/JHA)

of the person referred to in subparagraph (a), taking into account the conditions set by their own authorities in the agreement on setting up the team.

(c) The Member State in which the team operates shall make the necessary organisational arrangements for it to do so"

This is a crucial element of the decision, as it provides the legal basis for the actions of the members of the team. The team will ordinarily consist of senior police officers, the prosecutor or investigating magistrate as well as any other individual who can usefully contribute such as the National Member of Eurojust[56].

The recovery of evidence is made more simple under the JIT agreement as it is anticipated that each Member of the team will exercise their own national powers for the benefit of the investigation, thus avoiding the use of letters of request or issuing European Arrest Warrants. As such, such issues as the likely jurisdiction for prosecution of the case ought to be decided at an early stage, so that the recovery of evidence is focused an early stage to meet the procedural and evidential rules and requirements of that Member State.

Member States operate diverse rules for the disclosure of evidence. This has been problematic under the JIT framework and yet, with some care and consideration at an early stage ought to be minimized.

The moist recent report from the Joint Investigation Team Secretariat observed:

"However, procedural and practical problems may arise, stemming from the diversity of disclosure rules applicable to the various parties to the JIT. Differences in the stages of investigation or the nature of proceedings in the Member States involved in the JIT may also result in disclosure difficulties.

These can be linked to: (i) the timing and extent of disclosure, and the persons entitled to it, (ii) the possibility of delaying such disclosure, as well as (iii) whether the JIT Agreement, its annexes and the Operational Action Plan (OAP) should be considered part of the case file, and, therefore, subject to disclosure if so required by applicable national law.

Lack of common understanding or awareness of Member States' specific disclosure regimes may result in untimely disclosure of information in one Member State. This can happen, for

[56] Article 9f of the consolidated Council Decision on the strengthening of Eurojust and amending Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime

example, when unexpected arrests take place in one Member State party to the JIT. Such measures then result in the immediate disclosure of material, which may jeopardise ongoing or future investigative measures carried out by the other parties to the JIT[57]"

**(h) Eurojust[58]**

Eurojust is based in the Hague and is able through its national members to "stimulate and improve the coordination, improve cooperation and support the competent authorities of the Member States"[59] in assisting in judicial cooperation amongst the prosecutors and investigative magistrates in Member States of the European Union.

Article 1 of the decision provides

"Eurojust shall be composed of one national member seconded by each Member State in accordance with its legal system, being a prosecutor, judge or police officer of equivalent competence."

In relation to corruption, the competent national authorities must inform their national member at Eurojust without delay "of any case in which at least three Member States are directly involved and for which requests for or decisions on judicial cooperation, including regarding instruments giving effect to the principle of mutual recognition, have been transmitted to at least two Member States"[60] This notification then makes all the benefits of Eurojust available to those national authorities.

The national authorities can seek a coordination meeting where the national members as well as senior police officers and prosecutors from the relevant Member State in receipt of a letter of request or where there is reasonable anticipation judicial cooperation may be brought together to discuss the sharing of information, the nature of the investigation and assistance sought, the manner in which any evidence recovered should be recovered to ensure it is relevant and admissible under national law of the Member State exercising criminal jurisdiction. This is funded by Eurojust and world class interpretation is provided.

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[57] Report on Joint Investigation Teams (JITs) and Eurojust's JITs funding 8/2013. In the period from 25 October 2010 – 22 May 2013 funding of 5,235,932.67 Euros has been made available for supported JITs. In that period 105 JITs were supported.

[58] Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime

[59] Article 3.1 of the Council Decison

[60] Article 13.6 of the consolidated Council Decision on the strengthening of Eurojust and amending Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime

In addition, the national members themselves may be able to offer assistance to the requesting competent authority. The amended decision provides that each National Member will retain their domestic powers as judges or prosecutors for use in their role at Eurojust.[61] Both the national members and the college of Eurojust may ask the competent authorities of Member States to carry out any of the following tasks:

"giving its reasons,

to :

(i) undertake an investigation or prosecution of specific acts;

(ii) accept that one of them may be in a better position to undertake an investigation or to prosecute specific acts;

(iii) coordinate between the competent authorities of the Member States concerned;

(iv) set up a joint investigation team in keeping with the relevant cooperation instruments;

(v) provide it with any information that is necessary for it to carry out its tasks;

(vi) take special investigative measures;

(vii) take any other measure justified for the investigation or prosecution;

(b) shall ensure that the competent authorities of the Member States concerned inform each other on investigations and prosecutions of which it has been informed;

(c) shall assist the competent authorities of the Member States, at their request, in ensuring the best possible coordination of investigations and prosecutions;

(d) shall give assistance in order to improve cooperation between the competent national authorities;

(e) shall cooperate and consult with the European Judicial Network, including making use of and contributing to the improvement of its documentary database;"[62]

[61] Article 9.3 and 9a of the consolidated Council Decision on the strengthening of Eurojust and amending Council
Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime
[62] Article 6.1 and 7.1 of the consolidated Council Decision on the strengthening of Eurojust and amending Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime

**(i) European Judicial Network**

The European Judicial Network[63] is a network of over 400 prosecutors and judges across the Member States of the European Union, who can be contacted to clarify any issues related to criminality, offences, law, practice and procedure. Within the context of an investigation of corruption or bribery, initial contact would eb made to establish the nature of the legal definition of such a crime in the jurisdiction where it is anticipated a request for assistance in the recovery of evidence will be issued. This is crucial important as most member states require double criminality to be established before the exercise of coercive measures.

One of the greatest strengths of the EJN is the ability of Members to share experience of the practical operation of the EU instruments and measures in the area of judicial cooperation.

## FUTURE INITIATIVES ON THE RECOVERY AND ADMISSIBILITY OF EVIDENCE

**(a) European Investigation Order**

The Stockholm Programme seeks the development of a core of common minimum rules based upon and in further development of the principle of mutual recognition.

In particular the programme states

"The European Council considers that the setting up of a comprehensive system for obtaining evidence in cases with a cross-border dimension, based on the principle of mutual recognition, should be further pursued. The existing instruments in this area constitute a fragmentary regime. A new approach is needed, based on the principle of mutual recognition but also taking into account the flexibility of the traditional system of mutual legal assistance. This new model could have a broader scope and should cover as many types of evidence as possible, taking account of the measures concerned.

The European Council invites the Commission to

[63] Initially established by Joint Action 98/428/JHA and amended by Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network

- propose a comprehensive system, after an impact assessment, to replace all the existing instruments in this area, including the Framework Decision on the European Evidence Warrant, covering as far as possible all types of evidence and containing deadlines for enforcement and limiting as far as possible the grounds for refusal,

- explore whether there are other means to facilitate admissibility of evidence in this area.[64]"

The Commission brought forward a Green Paper[65] which sets out various questions but which principally are designed to determine if Member States would welcome a replacement of the existing legal regime on obtaining evidence in criminal matters by a single instrument based on the principle of mutual recognition covering all types of evidence, including evidence that does not already exist or is not directly available without further investigation or examination. This led to the Commission bringing forward a new proposal. This proposal is the draft Directive of the European Parliament and of the Council regarding the European Investigation Order[66]

The EIO seeks to provide a simple, single regime for the recovery of evidence based upon the principle of mutual recognition and as such recognising and respecting the evidential rules and procedures of the Member States.

Preambles 10 and 11 set out he objective sought to be achieved:

"(10) The EIO should focus on the investigative measure which has to be carried out. The issuing authority is best placed to decide, on the basis of its knowledge of the details of the investigation concerned, which measure is to be used. However, the executing authority should have the possibility to use another type of measure either because the requested measure does not exist or is not available under its national law or because the other type of measure will achieve the same result as the measure provided for in the EIO by less coercive means.

(11) The execution of an EIO should, to the widest extent possible, and without prejudice to fundamental principles of the law of the executing State, be carried out in accordance with the formalities and procedures expressly indicated by the issuing State. The issuing authority may request that one or several authorities of the issuing State assist in the

[64] Stockholm Programme Article 3.1

[65] "Green Paper on Obtaining Evidence in Criminal Matters from One Member State to Another and Securing its Admissibility" Com (2009) 624 Final Brussels, 11.11.09

[66] Brussels, 29 April 2010, 9145/10, Interinstitutional file 2010/0817 (COD).

execution of the EIO in support of the competent authorities of the executing State. This possibility does not imply any law enforcement powers for the authorities of the issuing State in the territory of the executing State"

It is envisaged that the issue and receipt of an EIO will be proportionate to the investigation and most importantly will be executed expeditiously[67] and in a manner that meets the evidential requirement s of the requesting state's rules of procedure and evidence, thus ensuring the evidence is admissible.

**(b) Draft Directive of the European Parliament and the Council on the fight against fraud to the Union's financial interests by means of criminal law [68]**

While this draft directive is aimed at the protection of the budget of the European Union, it proposes significant measures.

It is estimated fraud on the EU budget is about 600m Euros per annum. The draft directive proposes new definitions of offences including corruption, bribery through bid rigging as well as corrupt acts by public officials.

Interestingly, the draft directive also seeks agreement on minimum periods of imprisonment to reflect the seriousness of the offences. In relation to active or passive corruption, the penalty where the advantage or damage is at least EUR 30000, the proposed period of imprisonment is a minimum penalty of at least 6 months imprisonment[69].

**(c) Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office[70]**

This initiative ought to be noted. It is envisaged that offences of fraud on the budget of the European Union be investigated and prosecuted by the European Public Prosecutor. The scope of the offences within the competence of the EPPO are yet to be determined but will almost certainly include those offences sought to be defined in the draft directive on the fight against fraud to the Union's financial interests by means of criminal law.

The EPPO will have a prosecutor in each Member State who will undertake the investigation and prosecution of relevant offences within that jurisdiction.

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[67] Draft Directive Article 11 envisages no execution in no more than 90 days from the decision on recognition of the EIO.

[68] {SWD(2012) 195 final}; {SWD(2012) 196 final} 11.7.12

[69] Draft Directive Article 8.1

[70] {SWD(2013) 274 final} {SWD(2013) 275 final}

The EPPO will, if established, work under newly drawn rules of procedure across the entire EU. If achieved this will create harmonised rules of criminal procedure[71] including access to evidence, questioning of witnesses, search and seizure of evidence and the proceeds of crime, surveillance, pre trial detention, forum and criminal jurisdiction across all Member States of the European Union.

## CONCLUSIONS

It can be seen there is a wide range of International and European instruments which provide a framework for both the definition of bribery and corruption and methods of recovery of evidence and individuals in cross border investigations and prosecutions.

Focussing within the European context, extradition is facilitated on a swift, simplified system of surrender underpinned by the mutual recognition of judicial decisions and a recognition that corruption is an offence where double criminality need not be established thus obviating extradition being refused on the dissimilar legal definition of the offence. Extradition has however safeguards for the accused as even within the European space extradition can only take place if compatible with the accuseds rights under both the European Convention on Human Rights and the Charter of Fundamental Rights. Evidence can be recovered by a number of mechanisms whether the traditional letter of request or the European evidence warrant or freezing order underpinned as they are by the principle of mutual recognition. Challenge to evidence recovered outwith the requesting state can be taken in the context of the trial in terms of domestic criminal procedure rules of fairness and compatibility with fair trial rights under Article 6 of the European Convention on Human Rights or within the requested state as the forum for execution of the request.

Eurojust and the European Judicial Network provide additional support to the prosecutor or investigating magistrate by providing quick, specialised access to judges and prosecutors in other jurisdictions to facilitate closer cooperation in cross border enquiries. Close working with colleagues through the European Judicial Network and Eurojust can, in practice, often overcome some of the practical issues around recovery of evidence to ensure it is admissible at trial.

[71] http://eppo-project.eu/index.php/EU-model-rules/english/eu_model_rule_Model-Rules?url=d7bf5b9a999f5d266c34ece7ddcb5efd.pdf

In appropriate cases, a Joint Investigation Team may be established bringing together relevant actors whether police, prosecutor, investigating magistrate or Eurojust, to enable a focussed investigation across a number of jurisdictions enabling early discussion and agreement on forum for prosecution, coordinated search and seizure operations as well as arrests.

Looking to the future, there may be greater cohesion across Member States with common definitions and procedure in the fight against fraud on the budget of the European Union including as it does bribery and corruption whether through the adoption of the draft directive or the establishment of the European Public Prosecutors Office.

However, these developments ought not to be seen solely in light of prosecutorial tools but the procedural rights and safeguards of the accused and especially the overarching requirement of observance of Article 6 fair trial rights needs to be taken into account and likewise developed.