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CCBE RESPONSE TO THE COMMISSION PROPOSAL FOR A EUROPEAN EVIDENCE WARRANT

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Introduction:

The Council of Bars and Law Societies of Europe (CCBE), which through its member Bars represents more than 700,000 European lawyers, is pleased to have the opportunity to comment on the Commission proposal for a Council framework decision for a European Evidence Warrant.

The CCBE is of the opinion that the success of legislation like the European Evidence Warrant will be strongly dependent on the existence of certain minimum rights in all Member States and recognition of their use in practice, especially now with the inclusion of ten new member states.

The CCBE Response to the Green Paper on procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union, has commented that:

> *"the sad truth is that a number of Member States fail to meet the necessary standards of minimum rights during criminal proceedings. It is however important to identify areas within Member States where the level of protection is unsatisfactory or outright appalling. The CCBE believes that only by focusing directly on concrete examples and by inserting pressure on the Member State in question may changes be brought about. The CCBE would like to point out that in order for procedural safeguards to be "practical and effective" a system of free legal representation must exist"* [1]

The CCBE strongly believes that the adoption and entry into force of the EEW should be delayed until a draft Framework Decision on procedural safeguards at an EU level has been adopted. It would be logical to have procedural safeguards for suspects and defendants in criminal proceedings which are enforceable throughout the European Union, and to ensure that proper legal representation is provided in an issuing and an executing Member State.

European Arrest Warrant

The EEW, follows the model of the European Arrest Warrant (EAW) on procedure (a judicial document at an EU level, direct and immediate transmission between judicial authorities, etc…). However, the CCBE notes that the EAW has not been in existence long enough to see how it works or if it should be amended in some way. Furthermore, the CCBE would like to point out that there would be a huge difference in the workings of the EAW and the proposed EEW, as different procedures apply to the handing over of people when compared to the handing over of parts of evidence.

The background for the proposal

The EU has as its purpose to preserve and develop an area of freedom, security and justice. Against this background the Commission has presented a number of initiatives to strengthen the authorities of the member states in the fight against crime through increased cooperation and namely through a principle of mutual recognition. This mutual recognition system means that a decision from one member state must be recognised and executed by authorities in another member state without any subsequent scrutiny.

The CCBE finds the need to emphasize that the principle of mutual recognition and execution calls for a number of substantial considerations in relation to the overall objective of achieving freedom, security and not least justice in the region.

A region with freedom, security and justice does not only involve protecting citizens and companies in the member states against crime. To achieve freedom, security and justice in the region citizens and

[1] CCBE Response to the Green Paper on Procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union, pg 2.

companies in the member states deserve protection from unjustified and disproportionate measures by investigating authorities. Thus, the passing of a common set of rules must not result in a decrease of the general level of protection to the lowest legal standards in the EU.

The proposed rules - especially the removal of scrutiny in the requested state - may result in a situation whereby a member state that offers a high level of legal protection might have to lower its standards to the level of the member states offering a lower degree of legal protection. This is of great concern with regard to the fact that the proposed rules include coercive measures that can be used against towards citizens and companies who are not even suspected of having conducted criminal actions.

The proposal is founded on a principle of mutual recognition of legal decisions. This may lead to cases where the authorities in one member state will be obliged to conduct, for instance, a search of a private home or a company on the basis of a search warrant authorised by authorities in another member state even if the search according to the laws of the executing state would be illegal or the conduct that leads to the search warrant is not even considered a crime. The result may be a considerable weakening of the legal protection of the individual or company and may contribute to substantial confusion on when, how and on which grounds for instance a search can be conducted.

The differences in the legal standards in the 25 member states are not accounted for in the proposal and the risk of falling to the lowest common denominator is obvious. Rather than examining the need for the proposed initiative or to compare the different legal standards of the member states, the proposal suggests that the differences between the legal systems of the member states are an obstacle for fighting crime. The initiative thereby excludes any consideration of the importance of ensuring the protection of individual rights.

Furthermore, the proposal does not take into account the fact that the national regulations on forced measures in the administration of criminal justice typically, are based on a set of rules based on an internal origin and coherence. The national rules for conducting investigations and forced measures are built upon a system of *checks and balances*. The proposal interferes with this balance thus creating an obvious risk of a shift in the balance of the level of legal protection. The CCBE must emphasize that mutual recognition and execution of forced measures and other investigational measures raises difficult questions. It is therefore, a substantial step to accept the principle of mutual recognition and execution of legal decisions aimed at persons who are either not at all under suspicion or persons who are under suspicion but are protected by the presumption of innocence.

Furthermore, the contradiction which is implied in the principle of mutual recognition in its current form must be pointed out. The proposal implies that a court in the requested member state does not have any access to scrutinise a request from another member state to collect evidence and does not have any practical power to deny the request. Even in cases where the request for the taking of evidence seems possible or even likely to be disproportional, there is no access for the requested court to interfere.

The lack of access to scrutiny for the authority executing the foreign request is not a display of mutual trust, rather the opposite. Instead, the principle of mutual recognition becomes a shield behind which the requesting member state can hide. There will be no need to explain in details the grounds for the request. In the eyes of the CCBE, a system of mutual trust and recognition should be open and fully accessible for the executing authority to examine the grounds for the request. The requesting member state should therefore be confident that the executing member state would abstain from executing the request only where justified to do so. The reason for denying the executing state from conducting a scrutiny seems in essence to speed up the execution of the request. In so far as the present system is too slow these types of problems should rather be solved through better cooperation between the member state authorities rather than through weakening of the legal protection of the individual.

The need for the proposal

There are already agreements between the member states that make it possible to provide mutual aid in securing evidence as a part of a criminal investigation. From the explanatory notes to the proposal it appears that the existing agreements are not sufficiently effective to secure an effective cooperation in fighting crime. The proposal, however, does not include a more specific analysis as to why the existing arrangement is insufficient. Specifically there is no explanation in the proposal as to whether the inadequacy of the current arrangements are caused by slow procedures in the member states, or

because the requested member state in a number of cases refuses to grant the request because it finds that the evidence that constitutes the basis for the request is insufficient for the purposes of conducting the measure. If the latter is the case, it must be considered if the foundation for mutual trust, which the proposal presumes, exists at all. If the problems in the existing arrangements, however, are caused by insufficient or troublesome communication between the authorities in the different member states, improved efficiency should be achieved through better administrative procedures.

COMMENTS TO THE INDIVIDUAL SECTIONS IN THE PROPOSAL

ARTICLE 2 DEFINITIONS

From article 2 it is evident that an evidence warrant can be issued by a judge, investigating magistrate or a prosecutor provided they are competent under national law to issue a European Evidence Warrant. According to the phrasing of this section, instances, where a search and seizure authorised by a *prosecutor* in one member state must be executed in another member state, is possible. In such instances there will be no judicial review by the *courts* at any time, as to determine if the search warrant is legal because the member states are obliged to conduct the search upon request without any scrutiny of the request.

ARTICLE 3 – TYPES OF OBJECTS, DOCUMENTS OR DATA COVERED

Article 3 provides that an evidence warrant can be issued with the purpose of acquiring all objects, documents and data that can be used in court for trials described in article 4.

There is no definition for the meaning of "*objects*" or "*documents*" (in contrast with the provision of a definition in article 2 for "computer data"). This leaves open the possibility for the requesting and issuing authorities to act without strict control or guidance.

Furthermore, the information contained in forms A or B, is enough to impact on the fundamental rights of an individual. Although the EEW has the purpose of speeding up the gathering of evidences, it must be noted that such evidence is to be used in a criminal process against a defendant, and the protection of his or her rights is what should be considered. Any safeguards should also be extended to fact finding, not just to the proceedings. If there are no preliminary safeguards, what follows is tainted.

Real-time evidence gathering, evidence gathering from a person's body etc. cannot be authorised by a European Evidence Warrant.

Article 3, subsection 3, provides that an evidence warrant can be issued for the purpose of acquiring existing evidence such as a copy of an interrogation report, a copy of a result of a DNA analysis, provided the evidence is located at an official authority, and provided the evidence was gathered prior to the issue of the evidence warrant.

Article 3, subsection 3, implies a risk of evasion. The authorities of one member state cannot perform an interrogation of a person in another member state, but if the member state can persuade the other member state to interrogate the person, the interrogation report can be requested and handed over.

It seems problematic to allow, for instance, that police interrogation reports can be handed over and used as evidence in cases where there is no right to demand the person interrogated to be re-interrogated. According to the proposal, there is no requirement that the interrogation report must relate to the relevant case. In addition, it appears that there is no distinction between an interview of a witness or an interrogation of a suspect. Likewise, there is no requirement that the interrogated person has been properly advised of the possibility of the report being handed over to the authorities of another member state. Proper advice in this matter can be relevant because the different European justice systems attach different weight to such reports as evidence. Whereas some member states allows widespread use of police reports as evidence other member states in general do not accept police reports as evidence due to a principle of direct evidence.

Article 4 – Type of proceedings for which the European Evidence Warrant may be issued

According to article 4 (b) an evidence warrant can be issued in cases raised by an administrative authority regarding acts punishable by national law, and for which a trial can be expected.

The phrasing of the article leaves doubts on the precise area of application of the European Evidence Warrant. Article 4 (b) aims at cases raised by the authorities as part of their supervision of public administration. It does not appear clearly if it is a requirement for obtaining an evidence warrant that a criminal matter is being investigated or if it is sufficient that a criminal case might be raised eventually. In instances where the law of the requesting member state provides the possibility of search warrants as a part of their public supervision duties, the rules for the European Evidence Warrant seems to allow the search warrant regardless of whether a criminal or administrative case is being pursued.

Article 6 – Conditions for issuing the European Evidence Warrant

According to article 6 (a) a European Evidence Warrant can be issued only if the required objects etc. are necessary and proportionate. Furthermore the forced measure is governed by the standards of the issuing member state. The actual control of those rules is performed by the relevant authorities in the issuing member state.

As provided by article 6 (a) the description of when a warrant can be issued is vague and imprecise. It is required to mention those factors that must be included in the considerations of whether the warrant should be authorised or not.

This wide description of the main considerations is in contrast to the more detailed provisions in national law on search and seizures. A search and seizure warrant in criminal cases are subject to highly detailed and thorough regulation. The conditions required for a search in article 6 (a) are not identical with the conditions in national law of the member states. This difference may lead to instances where the requested authorities are obliged to conduct a search and seizure on grounds that are insufficient compared to the requirements in national law of that member state.

Article 6 provides that the issuing authority decides if the measure is proportionate and necessary. It is a condition that the measure can be performed in the issuing member state. It cannot be expected that the issuing member state will perform any scrutiny of the proportionality and necessity of the measure beyond that of which is required in the issuing member state. When the conditions for allowing the measure is satisfied in the issuing member state, it cannot be considered realistic that the issuing member state will conduct any further scrutiny and investigation as to determine if the measure is legal according to the law of the executing member state. In reality the European Evidence Warrant will imply that the legal protection for the person in the executing member state will be at the same level as secured by the law of issuing member state.

Article 9 – Warrant for additional evidence

According to article 9, subsection 3, representatives from the authority of the issuing member state that participate in conducting the measure can, on site issue additional requests if there is a need for it. The provision opens for the possibility to correct and focus the investigation as the search is being conducted. The executing authority has no means of not complying with the requests of the issuing authority. The provision therefore gives the issuing authority the complete control of the search. A complete control such as this raises the question of whether the exercise of authority in reality resides with the executing member state and therefore may raise the question of surrendering sovereignty to another member state.

Article 10 – Conditions on the use of personal data

As mentioned above regarding article 4, the area of which the European Evidence Warrant can be utilised is very broad and vaguely defined. It is apparent that it can be issued in non-criminal matters as well as criminal matters. This is presumed in article 10 (b) and (c) because the collected information seems to be able to stream from the case, for which is was gathered, to other similar cases or cases in which there is a serious danger to the public.

The use of information, other than personal, does not appear to be governed by the framework decision.

ARTICLE 15 – GROUNDS FOR NON-RECOGNITION OR NON-EXECUTION

The width of article 15, subsection 2 (b) is unclear. The notions of immunity and privileges lead the mind towards special positions of a personal kind. It must be assumed that according to article 15, subsection 2 (b) a search cannot be conducted in an embassy or in the royal family. In contrast, it seems unclear if the category of persons that enjoys an extended protection according to national law also enjoys this protection in relation to the European Evidence Warrant.

It is furthermore unclear if the provisions in national Data Protection law that prohibits the usage of information from a database must be understood as providing "immunity" in the sense of article 15, subsection 2 (b). It is unclear, for instance, if a foreign authority can gather information from e.g. a donor database provided the law in the foreign member state allows this for a similar database.

ARTICLE 16 – DUAL CRIMINALITY

According to article 16 there is no requirement for dual criminality for the crimes listed in subsection 2 in order to obtain a European Evidence Warrant. Furthermore, dual criminality is not required if the search can be carried out without a search on private premises. After the expiration of a transition period dual criminality cannot be invoked and the executing member state consequently cannot refuse execution on the grounds that there is no dual criminality.

The mentioned list, which contains the same types of crime as the European arrest warrant, mentions in broad terms, the kind of crimes that may provide the grounds for the execution of the evidence warrant without further examination for dual criminality. The list includes terms such as "cyber criminality" which seems to cover a large number of acts which may be illegal in some countries, but not in others. Equally, the list contains the term "fraud". Since there is no limitation to the jurisdiction according to the proposal, cases may occur where a person or company has performed some, according to national law, legal actions that may be illegal according to the statutes of one or more of the member states.

ARTICLE 19 – LEGAL REMEDIES FOR COERCIVE MEASURES

According to article 19, subsection 1 all member states must ensure that all interested parties have access to legal remedies if a European Evidence Warrant should be imposed upon them.

The exercise of the right must be performed in the issuing member state. This implies that in a number of instances it will be impossible or very troublesome for those who consider themselves unjustified affected by the warrant to use the legal remedies at their disposal. If one imagines that e.g. a Portuguese court authorises a European Evidence Warrant towards a company situated in Denmark, the Danish company will be forced to protest etc. in Portugal according to Portuguese law, which will be both difficult and expensive for the Danish company. Again, it should be borne in mind that the company need not be charged or accused. According to national law, a search of premises belonging to person who are not under suspicion of a criminal nature, can be initiated under the circumstances provided by the relevant statutes.

According to subsection 6, the transfer of the objects etc., which have been collected during the search, can be suspended if a party to the case has filed a complaint. The suspension can be stretched for a maximum of 60 days after which the issuing authority can demand the material transferred – irrespective of whether the complaint has been handled or not. This protection is insufficient for the persons involved. In the above mentioned example, the Danish company may risk that, in spite of its complaint, the gathered material will be handed over to the Portuguese authorities. If the material later turns out to be illegally gathered, it will be determined by Portuguese law whether the collected material can be used in court or not.

Role of the defence lawyer

The CCBE is concerned that there is no reference to defence lawyers in any of the articles of the EEW. When one considers that the main focus of the EEW is on criminal matters, the failure to make reference to defence lawyers is astonishing. In this respect, the CCBE would like the following to be taken into account:

- the availability of legal representation in the issuing and executing Member States;

- the possibility for the defence lawyer to request of the issuing authority, judge or investigating magistrate, evidence for his clients through the EEW, in order to be in the same position as the prosecutor.

We propose a modification of article 12.1.b) and 12.1.c) and to add a third point to article 12 with the obligation to appoint free legal representation to safeguard the parties, and the possibility to ask for the EEW to gather evidence for the defendant in the same way as it is available to prosecutors. This third point, should include the possibility to appeal the warrant in the executing State and to transfer the appeal to the issuing State, if this is not possible, it should be possible to stay the proceedings.

CONCLUSION

There is no documented need for the proposed act. Furthermore the balance in the proposal between the investigational considerations and the personal liberty, security and justice, which is a cornerstone upon which the EU is based, is in favour only of investigational considerations. The mutual recognition and execution should not be extended to include cases where the presumption of innocence resides, as well as cases where the warrant could be issued against persons or companies that are not under criminal suspicion.

The problems that can occur in the cooperation in the fight against crime instead should be solved through better communication and cooperation between authorities of the member states. If the proposal is passed, it might have the consequence that forceful measures against citizens or companies in the requested state in the future no longer will be approved by the authorities of that state, but by foreign authorities according to foreign law. There is no basis for having full confidence in that the law and administration in all of the 24 EU member states is on a level of legal protection that can be compared to the high level of some member states. Thus, the proposal will rely on the lowest common denominator rather than the highest.

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ADDITIONAL COMMENTS:

Article 3.3. Leaves open the possibility ("EEW may be issued…") to have retroactive effect on the gathering of evidence, which could be against the general principles of Law, besides the juridical insecurity it creates.

Article 4(b) This article is too ambiguous and could be dangerous by leaving open a range of possibilities without specification.

Article 4 (c) Join both previous paragraphs a and b, being unnecessary because of redundancies.

Article 9.1. This provision concerning additional evidence should explain clearly the need for such additional evidence.

Article 9.3. This article provides that the authority that has issued the warrant participates in its execution. This is a provision that has not been mentioned before for the execution of a warrant, and it may suppose a deep change in the philosophy that underlines the rules for the EEW.

Article 10.1. This paragraph goes against the previous paragraph with the formula "For any purpose other than those set out…" which again falls in juridical insecurity.

Article 11. Means the execution ipso facto without any possibility of opposition or appeal.

Article 12:

Article 12. 1 (b) a natural person or a legal entity shall not be required to produce objects, documents or data which may result in self-incrimination; and

Article 12. 1(c) If the executing authority discovers that the warrant is executed in a manner contrary to the law of the executing state, the evidence gathered should be declared null and void.

Proposal. 12.3. The CCBE proposes to add a third point. This point refers to the need to appoint free legal representation to safeguard the rights of the defence for any party in both the issuing and the executing member states, and with the possibility that any defence lawyer may ask any judge or investigating magistrate dealing with a criminal case to request through the EEW the gathering of evidences in any member state.

> *Also it should have the possibility to appeal the warrant in the executing State and to transfer the appeal to the issuing State, if this is not possible, it should be possible to stay the proceedings,*

Article 13 (b) There should be an appeal against the declaration of confidentiality if the rights of the defence are affected by it, with the nullity of the evidences obtained

Article 13. (c) If the issuing authority may require that the executing authority allow “an interested party nominated by the issuing authority to be present during the execution of the warrant”, there should, on the same basis, be an allowance for appointed legal representation.

Article 14. This is another article that provides a broad range of action which goes far beyond the principle of mutual recognition.

Article 15 (1) Should include a general clause of non execution if the warrant goes against any fundamental right, not only against the *ne bis in idem* principle. The wording of Point 2 (a) should also be changed from the possibility of opposing “may oppose” to completely prohibiting the execution of the warrant.

Article 18.2 (b). Though the warrant could be executed and the information provided is sufficient, the issuing authority should cover all the requirements for it, as soon as possible.

Article 19. We propose legal remedies not only for coercive measures, but against the issuing of the EEW even without coercive measures. Any legal resolution must have the possibility of being appealed, not only when coercive measures are used.

Article 19.6. Documents, objects and data should not be transferred to the issuing authority until the appeal has failed, otherwise it would fail in its objective.

Article 22. The substitution by administrative measures weakens the judicial control of new ways of judicial cooperation. It is suggested that the CCBE could monitor the implementation of the EEW through information provided by its members as a means of being aware of the possible diminution of liberties and rights.