CCBE SUBMISSION

GREEN PAPER ON OBTAINING EVIDENCE IN CRIMINAL MATTERS FROM ONE MEMBER STATE TO ANOTHER AND SECURING ITS ADMISSIBILITY

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The Council of Bars and Law Societies of Europe (CCBE) is the representative organization of around 1 million European lawyers through its member bars and law societies from 31 full member countries, and 11 further associate and observer countries.

The CCBE is happy to offer observations to the questions posed at paragraph 5 set out to the member States and all concerned stakeholders.

We believe however it would be helpful to set out some preliminary and general observations which place the individual answers in an overall context.

It is a truism that for a measure such as that envisaged to succeed, it must enjoy the confidence and support of all affected parties, who surely share a desire to ensure that the administration of justice is fair as far as possible to all concerned.

In that regard it is perhaps unfortunate that previous measures, particularly the European Arrest Warrant have proceeded in the absence of matching guarantees in the area of procedural safeguards. It is becoming apparent that failure to provide proper training and resources for defence lawyers tasked with the conduct of European Arrest Warrant litigation is leading to real problems in practice, particularly where there is a difficulty securing input from legal professionals in the requesting State.

The CCBE are pleased to note that in its introductory remarks to this Green Paper the Commission in paragraph 2 specifically refers to a proposal on minimum safeguards. We believe that it is essential to have minimum procedural safeguards in force before any future instruments are agreed.

The CCBE therefore wish to make the following general points.

1. Measures in relation to the obtaining and admission of evidence must be framed in a manner that ensures that the resource being created is equally available to all parties in the proceedings, both the prosecution and the defence. On a narrow reading of the green paper a concern does arise that all that is being addressed is how prosecution evidence from another member State can be rendered admissible at the Court of trial. It is equally of course the situation that defendants are handicapped in seeking to secure the admissibility of evidence, potentially wholly exculpatory, because that evidence is located in a different member State, or even in the possession of a government of another member State. This vacuum needs to be addressed.
2. Any new measure if it is to be effective, and particularly if it is to operate in a fair fashion, must be preceded by an adequate period of promulgation with opportunities for all lawyers, be they judges, prosecutors or defence lawyers to secure, at public expense, adequate training to enable them to effectively conduct the litigation.

Given the transnational nature of the measure proposed it will not be adequate that trained lawyers are available only in the State where the trial is being conducted. All parties will require access to properly trained lawyers in the State where evidence, whose admission is sought, is located. This is presently readily available to prosecutors under existing mutual recognition models, but no provision has yet been made for that facility to be extended to the defence. This is required urgently. Adequate resources will need to be put in place to ensure properly publicly funded legal assistance is available to achieve equality of arms between the parties if the evidence measure is to be a success in terms of the administration of justice.

We make the point that it would be contrary to the common good and against the public interest if evidence which would be inadmissible in the State where it is located, could become admissible in another member State. Such a scheme could create the incentive for "forum shopping" and lead to the undesirable situation where a person could be convicted based on evidence that a relevant member State deemed inadmissible. We go further to suggest that not only should evidence satisfy the admissibility criterion in both its place of location and in the State of trial, but furthermore there should be established minimum safeguards and guarantees to ensure that there is a pan-European standard below which no admissibility test should fall. It follows that the same considerations must apply to obtaining evidence.

Turning then to the individual questions we would respond as follows.

5.1. In principle the position of all parties would be improved by the existence of a single instrument governing the reception of evidence in transnational cases. The existing accumulation of ad hoc measure is so opaque as to cause unnecessary confusion and potentially injustice. However, if a single instrument is to promote the aims of justice not only must its forms and procedures be standard and uniform, and of course easily intelligible, but the safeguards of the rights of suspected persons must not be compromised in any way.

If a single instrument simply became a procedural devise to circumvent existing safeguards it would undermine public confidence in the criminal justice system and actually retard rather than promote the development of mutual recognition, respect and trust.

There is no reason in principle why evidence which can be received in national courts, should not be amenable to a union wide instrument provided the purpose of the instrument is not to make admissible evidence that is otherwise inadmissible on the basis of its unfairness or inherent unreliability.

As it clear from the foregoing the proposed measure should be equally available to all parties and adequate resources should be provided for a party, such as an accused, to avail of the rights conferred on him, if necessary at public expense.

5.2. Rules would be required to ensure that the only evidence sought and admitted was probative, reliable and neither unfairly nor illegally obtained. The rules should ensure that the utmost caution is exercised in satisfying these tests. That is to say evidence that fails these tests in either the requesting or executing state should not be admissible.

Further more minimum safeguards and guarantees should be promulgated and any evidence which has not been obtained in compliance with those safeguards should be excluded even if it were admissible according to the law of the two affected member States. The logic is that a progressive measure such as that envisaged should only be used to ensure best practice, and should not be used to facilitate reliance on evidence which falls below acceptable minimum safeguards.

To that extent we are advocating not merely a double lock but a triple lock.

5.3. As stated at 5.2 while it may appear to run counter to other principles and mutual recognition, insofar as the admission of evidence is concerned, the emphasis must be on ensuring that only reliable evidence, that is to say evidence that is probative and neither unfairly nor illegally obtained is admitted.

In due course specific rules will of course be required to deal with specific types of evidence and evidence gathering. It is beyond the scope of this question and answer at this time to be definitive in that regard.

5.4. We already know from the experience of the European Arrest Warrant that significant problems in practice have arisen by virtue of the absence of an adequate resource in terms of properly trained lawyers available to persons of limited means. Special arrangements must be put in place to ensure that there are available at public expense an adequate supply of suitably trained expert lawyers to assist an accused whose rights are affected by evidence secured under the envisaged

measure. In the ordinary case it will be necessary to have legal assistance both in the State of trial and in the State where the evidence is located. If more complex scenarios arise it is of course conceivable that additional resources will be required in further states.

It should however be remembered at all times that there appears to be a willingness to commit those resources to assist on the prosecution side, and applying the principle of equality of arms this should not be denied to the defence.

5.5. As with every other measure proposed which requires familiarity with more than one legal system urgent measures must be put in place to match the resources available as between member states cooperating together, with the resources required by lawyers representing suspected persons in cases with transnational dimensions.

6. If by common standards for gathering evidence is meant to establish best practise across all member states then this is self evidently desirable. If however by common standards is meant a lowering of the threshold to a union wide minimum whereby each existing member state and its citizens lose some of the protections that have been established over many years of the development of national law this is to be opposed.

7. In principle common standards should be capable of applying throughout the European Union, differentiating the type of standard to match the type of evidence rather than to match the member state.

8. As we have referred to above we believe that before this measure is adopted there must be put in place actually working and adequately resourced a system of minimum safeguards and guarantees in relation to the collection and admission of evidence. That will not alone require the formulation and promulgation of rules, but also the provision to affected parties of adequate resources in terms of trained lawyers and legal aid so that the rights thus guaranteed can in fact be enforced in practice. It little avails a defendant to have rights but for the enforcement of those rights to be beyond his economic means.

Accordingly we recommend that immediate attention be given to the generation of the necessary safeguards both legal and practical.