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## **COMMENTS FROM THE CCBE ON THE PROPOSAL FOR A EUROPEAN INVESTIGATION ORDER**

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The Council of Bars and Law Societies of Europe (CCBE) is the representative organisation 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 responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

The CCBE would like to submit the following comments in response to the proposal for a '*European Investigation Order*'.

### I Introduction

On 29 April 2010, 7 Member States (Belgium, Bulgaria, Estonia, Spain, Austria, Slovenia and Sweden) filed a proposal for a '*European Investigation Order*' (EIO). This proposal intends to replace not only the two existing instruments in the field of mutual assistance, the '*European Evidence Warrant*' (2008/978/JHA) and the '*Framework Decision on the execution in the European Union of orders freezing property or evidence*' (2003/577/JHA) but also all other legal instruments in this field like the 1959 '*Convention on mutual assistance in criminal matters*' (ratified by all Member States), the First and Second Protocol to this Convention and also parts of the Schengen Convention (articles 48-53) and some of its Protocols.

Article 82(2)(a) of the Treaty of the Functioning of the European Union, the Lisbon Treaty, is supposedly the legal basis for this proposal. Because the proposal is based on the Lisbon Treaty, it is subject to qualified majority voting and no veto's can be raised by Member States.

### II Scope of the EIO

The proposal can be summarised as follows:

- Whilst the European Evidence Warrant was based on the type of evidence to be gathered, the EIO is based on the investigative measures as such. The issuing state decides what it wants and in what way the material should be collected by the executing state;
- The EIO covers **all** investigative measures with the exception of very few that are explicitly excluded;
- The issuing authority decides which measure should be executed by the executing authority, the executing state has no room to decide that other, less coercive ways may be more appropriate to achieve the desired goal with a very limited number of exceptions;
- A new EIO-form is to be used, clear time limits are set;
- An EIO can be issued in both criminal and administrative proceedings;
- Officials of the issuing authority are allowed to assist in the execution in the executing authority;
- There are hardly any grounds for refusal, (*ne bis in idem*, double criminality, territoriality, etc are no grounds for refusal);
- There is no mentioning at all of any defence rights, human rights are only touched upon in the most general way possible, there is no assessment of the impact on potential human rights violations by the proposal;

### III CCBE comments

#### a. Legal Basis

Article 1 of the EIO reads as follows: “*European Investigation Order shall be a judicial decision issued by a competent authority of a memberstate (the issuing state) in order to have one or several specific investigative measure(s) carried out in another memberstate (the executing state) with the view to gathering evidence within the framework of the proceedings referred to in article 4*”.

Based on Article 1, there is no definition of ‘*investigative measure(s)*’. Without proper assessment it must be concluded that the definition of an ‘*investigative measure*’ varies in all 27 Member States. The CCBE questions whether, for example, talking to informants will be considered an investigative measure, or is a police officer who is having his eye out in the public domain carrying out an investigative measure, or whether a police officer who asks the shop-owner if he can have a look at his CCTV-recordings, etc, etc?.

This lack of definition of an ‘*investigative measure*’ raises a number of concerns.

The first problem goes back to the legal basis. Operational policing matters go beyond the mutual recognition principle. That means that the voting-rule would not be a qualified majority but unanimity (art. 89 of the Lisbon Treaty) in Council with consultation of the European Parliament. Therefore without a proper definition we doubt that the legal basis of the proposal is sufficient.

The second problem is that the current mutual assistance instruments deal with a number of actions that can hardly be considered to be ‘*investigative measures*’. One can think of the acts mentioned for instance in article 49 of the Schengen Convention. What will happen with these acts if the instruments that contain them will be abolished after the introduction of the EIO?

The lack of a proper definition of ‘*investigative measure*’ means that this proposal, which will have a huge impact on all citizens in the European Union, does not contain the required legal certainty and legal clarity.

#### b. Opt-outs

On the basis of Protocols number 21 and 22 the United Kingdom, Ireland and Denmark can opt-out of the proposal. Although we understand that the United Kingdom and Ireland have notified their wish to take part in the adoption, we understand that Denmark will not take part. If one or more countries of the Union do not take part in the proposal the question arises what the status will be of the old existing instruments that will be abolished between the Member States that will adopt the proposal.

#### c. Defence rights

The proposal intends to deal with **all** imaginable ‘*investigative measures*’.

A very limited number of ‘*investigative measures*’ are explicitly excluded from the proposal. Article 3.2 provides that the setting up of a Joint Investigation Team and its obtaining of evidence are excluded. The same goes for a specific type of interception of telecommunications (in relation to article 18(1)(a) and 18(2)(a) and (c) and article 20 of the Convention of 29 May 2000).

A number of measures are very explicitly dealt with like the temporary transfer to the issuing state of persons held in custody for the purpose of investigation (article 19), the hearing by videoconference (article 21), the hearing by telephone-conference (article 22), information on bank-accounts (article 23), information on banking-transactions (article 24), the monitoring of banking-transactions (article 25), controlled deliveries (article 26) and investigative measures implying gathering of evidence in real time, continuously and over a certain period of time (article 27).

There is one issue however that **all** ‘*investigative measures*’, specifically dealt with or not, have (or lack) in common: they do not contain any mention at all about the defence or defence rights. Defence rights are totally non-existing in the proposal. All these measures can have great impact on the fundamental rights of citizens of the Union. It is for that reason appalling that no thought at all has been given to the rights of the defence. The CCBE believes that it is absolutely necessary to ensure

that defence rights, the principle of a fair trial and equality of arms in criminal proceedings are fully respected in the proposal.

Not only is there a clear need for the addition of defence rights in relation to the ‘investigative measures’ that will be carried out through the use of an EIO, these rights also need to be available to those who are affected by the issuing or the execution of the order itself. The CCBE concludes that it is a basic requirement of article 6 of the European Convention on Human Rights that defence rights will also have to be available to those affected by the issuing or execution of an EIO itself. Again, this needs further scrutiny and assessment of the exact impact of the proposal but we have no doubt that the persons that are affected by the issuing of an EIO and those who are affected by its execution will have to have access to legal remedies. These legal remedies will have to be installed not only after the moment a measure has been carried out but also, unless there will be very, very serious objections, before that moment, but at least as soon as possible. One of the main characteristics of the case law of the European Court on Human Rights is that legal remedies must be practical and effective and not theoretical and illusory.

The proposal does not contain the possibility for the defence to make use of an EIO. It goes without saying that proper defence sometimes require for witnesses to be examined abroad, documents to be obtained abroad and added to the case file at home, etc. It follows from the Dayanan case (ECHR 13 October 2009, Dayanan v. Turkey, 7377/03, paragraph 32) that *‘the accused must be afforded the possibility of investigating facts and, in particular, potentially favorable evidence’*. The proposal must contain an article that explicitly deals with providing the possibility for the defence to make use of an EIO.

#### **d. Type of proceedings for which the EIO can be issued**

The proposal is not limited to criminal proceedings, as an ‘investigative measures’ can be requested in administrative proceedings. There is no proper definition of administrative proceedings. Without proper assessment the CCBE believes that there might be a whole variety of administrative proceedings throughout the Union. A lot of issues that can be covered by administrative proceedings (f.i. license of a pub or company) may well contain issues that *‘may give rise to the proceedings before a court having jurisdiction in particular in criminal matters’* (alleged overstepping restrictions to the licence f.i. selling alcohol to minors). (Article 4, b, *“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 rule of law and where the decision may give rise to the proceedings before a court having jurisdiction in particular in criminal matters”*). It may well be that the mayor of a local village who intends to shut down a pub because the owner has no proper license or whose license should be revoked because he sold alcohol to a minor, is dealing with an administrative proceeding according to the proposal?

The issuing and executing authority of an EIO is not limited to judicial authorities (art.2(1) and art.2(2) in connection with art. 28(1)(a) and art.6(2)). The CCBE questions whether this means that a clerk in the mayor’s office can order the authorities in a foreign jurisdiction to tap telephones in that country?

#### **e. Grounds for refusal**

Article 10 of the proposal contains four grounds for non-recognition or non-execution:

- an immunity or privilege under the law of the executing state;
- national security interests that will jeopardize the source of the information or involve the use of classified information relating to specific intelligence activity;
- when the ‘investigative measure’ indicated by the issuing authority does not exist under the law of the executing state or its use is restricted to a list or category of offences that are not investigated through the EIO and there is no ‘investigative measure’ available that can achieve a similar result;
- in proceedings brought by administrative or judicial authorities in respect of acts which are punishable under the national law of the issuing state and where the decision may give rise to

proceedings before a court having jurisdiction in particular in criminal matters and the measure would not be authorised in a similar national case.

There are no other grounds for refusal. The difference with the EAW and the EEW (and freezing orders) is striking. There is no ground to refuse an order on the basis of *'ne bis in idem'*, which is unimaginable because the principle of double jeopardy is a basic right enshrined in article 50 of the EU's Charter of Fundamental Rights.

Dual criminality is not a ground for refusal. Until now the dual criminality requirement was only abolished in a standard list of 32 crimes with at least a sentencing threshold of 3 years. Now the whole dual criminality principle has been abandoned.

The same goes for the territoriality exception. Now the requested authority will – with no possibilities for any exception whatsoever - have to cooperate in providing evidence against a person who has committed no crime whatsoever on the soil of the executing state. For example, the Dutch police will have to carry out a house search on the premises of a perfectly respected general practitioner who is involved in an euthanasia-process in total concurrence with Dutch regulations if a foreign (administrative) authority feels it appropriate to order this raid.

#### **f. Human Rights**

Although the Preamble of the proposal states clearly that it respects the fundamental rights and observes the principle recognized by article 6 of the Treaty of the European Union and by the Charter of Fundamental Rights of the European Union, notably title VI, there is no ground for refusal available for the executing authority if it reaches the conclusion that executing would lead to a breach of these rights. It is obvious that a number of rights contained in the Charter can be relevant in the context of the EIO: the right to liberty and security, prohibition of torture and inhuman or degrading treatment or punishment, the rights of the child, protection of personal data, protection in the event of removal, expulsion and extradition, freedom of expression and information, the presumption of innocence and the right of defence, the right not to be tried or punished twice in criminal proceedings for the same criminal offence, the right to an effective remedy and to a fair trial.

It appears as if those who drafted the proposal have not given any proper thought to what these rights mean in reality. We cannot deal in the time given with a proper study on all potential *'investigative measures'* that will be covered by this proposal and its impact on fundamental rights of citizens of the Union. Undoubtedly however such a study, that needs to be undertaken, will lead to the conclusion that grounds for refusal should be added.

#### **g. Proportionality and subsidiarity**

'The area of freedom, security and justice' is a major issue on the European agenda. Under its heading citizens have a number of rights like the free movement of goods (art. 28), movement of workers (art. 45), services (art. 56), capital (art. 63), etc. Infringements on these rights can be made but only if they are proportionate. These same principles of Union law occur in article 49(3) of the Charter on Fundamental Rights. Before the introduction of the Lisbon Treaty the European Court of Justice already established that principles of subsidiarity and proportionality are basic principles of European Union law (Ferwerda, ECJ 5 March 1980, 256/78 and Hauer, ECJ 13 December 1979, 44/79). In a number of evaluations of the implementation of the EAW great concerns are identified on this very subject.

There should be the possibility for the executing state to refuse the execution if it reaches the conclusion that the execution of the EIO will be disproportionate or in breach with the subsidiarity-principle.

It is on the basis of fundamental principles of European Union law that the executing state will have to be allowed to decide in what manner a certain investigation within its territory will have to be dealt with. Apart from that it is difficult to envisage how an issuing state can decide what would be the most appropriate and efficient way to deal with a certain type of investigation in a different state.

#### **h. Lack of judicial control.**

The proposal shows an overall lack of judicial checks and balances. The competence of the issuing authorities, on the other hand, is far-reaching. Some examples:

An EIO can be issued by any judicial authority with competence to order the gathering of evidence, police authorities not excluded.

A system where colleague police authorities in the executing State decide whether or not the order should be recognised and executed, is not a system that provides the required checks and balances. The police authority which carries out the investigation does not have the required distance to make this kind of assessment.

For an EIO to be recognised and executed it does not even seem necessary that it has been assessed that an offence actually has been committed.

The EIO does not restrict the use of the obtained evidence, even when that evidence is no longer required by the issuing State. Given the huge amount of data that can be acquired these days, this results in a lack of protection of a lot of private data of both suspects and many third parties.

The threshold for hearing experts or witnesses by video conference, instead of in person, is limited to whether the issuing authority finds it is not "desirable" for the witness or expert to attend in person.

Although the EIO does not apply to cross-border surveillance, it seems to apply to in-country surveillance, although the latter is a more far-reaching measure.

The proposal enables the evidence obtained to be immediately transferred, without any prior consent of an independent judge in the executing State.

As a result, the lack of judicial control can lead to arbitrary police actions, where there is no attention whatsoever for the protection of the rights of the suspect or third parties. Judicial control still offers the best guarantee of independence, impartiality and proper procedure and therefore of a fair trial.

#### **i. Closing remarks**

The CCBE hopes that the above points highlight the many problems with the proposal, and the CCBE is happy to provide further information on any of the points raised.