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CCBE response to the call for evidence for the European Internal Security Strategy

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The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 45 countries, and through them more than 1 million European lawyers. The CCBE is recognised as the voice of European lawyers, representing European Bars and Law Societies in their common interests before European and other international institutions. Defending human rights and the rule of law are central values of the CCBE.

The CCBE welcomes the opportunity to provide its feedback in this process and would like to offer its expertise and readiness for future engagement in the development of the proposed EU initiative 'European Internal Security Strategy', as well as in its future implementation.

Remarks on the proposed European Internal Security Strategy

The CCBE notes that the broad purpose of the proposed strategy is to provide a comprehensive and overarching plan to strengthen the EU's internal security. The CCBE wishes to underline that it understands the evolving nature of security threats and the resulting need to re-evaluate the activities of the State and law enforcement authorities (LEAs). To this end, the CCBE would like to offer several recommendations in order to assist in the process of the preparation of the strategy.

On the broad purpose of the proposed strategy, the CCBE notes that the theatre of conflict is no longer exclusively on the battlefield, but has largely moved elsewhere and increasingly so in the cyber space. We also agree that the State's duty is to protect its citizens and to this end, it must also be able to take exceptional measures in the interest of national security. However, as we have also argued, the lack of a universally accepted definition of national security means that actions justified on the basis of national security cannot be effectively reviewed in courts to ensure that they comply with a strict test of what is necessary and proportionate.

This is of special importance to the protection of confidentiality of lawyer-client communications within the context of surveillance activities. For lawyers to be able to effectively defend their clients, there must be trust that the communications between lawyers and their clients is kept confidential. Any provisions that mandate access by LEAs or other governmental bodies to communications on the basis that such access is required for the protection of national security where there is no clear definition of what is meant by "national security" (and, especially as that phrase may be differently understood in different member states), renders it impossible for suspects or accused persons effectively to invoke their right to confidentiality of their communications with their lawyers. It also makes the judicial oversight of such interventions difficult, especially the assessment of the proportionality and necessity of such measures.

The CCBE would also like to recall its recommendations on the protection of client confidentiality within the context of surveillance activities which state that:

- any direct or indirect surveillance by the State must fall within the bounds of rule of law and stress in particular the importance of the confidentiality of lawyer-client communications;

- all surveillance activities need to be regulated with adequate specificity through primary legislation providing for explicit protection of lawyer-client communications;

- only communications falling outside the scope of professional secrecy or legal professional privilege may be intercepted;

- in the case of communications with lawyers, it is essential that judicial authorisation is obtained in advance of the imposition of any interception measure;

- any intercepted material obtained without (prior) judicial authorisation and in violation of the protection of client confidentiality should be ruled inadmissible in a court of law and be required to be destroyed; and

- it is necessary that legal remedies are made available to lawyers and their clients who have been the subject of unlawful surveillance and that a system of sanctions be introduced.

Generally, effective and accessible methods to identify confidential data, coupled with the imperative that law enforcement agencies and their surveillance systems honour such designations, must be developed immediately and used alongside the envisaged new measures.

The CCBE observes that the proposed strategy to a considerable extent is focussed on digital technologies. The consultation document mentions that the strategy would consider measures on access to data for law enforcement and data retention. Moreover, the document also points out that digital technologies and AI offer significant opportunities for improving law enforcement capabilities and addressing evolving threats.

The CCBE notes, that the consultation document does not distinguish clearly between the activities of law enforcement and intelligence agencies. There are some activities and powers of intelligence agencies that might not be suitable for law enforcement agencies, or at least with different safeguards. This should be kept in mind.

On the issue of law enforcement access to data, the CCBE has engaged with the Commission in the context of the work of the High Level Group on access to data for effective law enforcement (HLG). In our written submission to the work of the HLG, we stated that: '*any system providing for direct or indirect access to personal data of citizens undertaken by a State should fall within the bounds of the rule of law and must respect the legal requirements set out in EU law and the settled and well-established case law of the CJEU and the ECtHR. Given the risk that any access may constitute an interference with fundamental rights, it must be proportionate and, in particular, be kept to a minimum as regards the scope of surveillance and period of data retention. Crucially, such systems must guarantee the inviolability of data and other evidence falling under the principle of legal professional privilege or professional secrecy*.' We outlined several key characteristics that such measures should include, in particular provisions for the protection of lawyer-client confidentiality.

Regarding the use of digital technologies and AI to improve law enforcement capabilities, the CCBE stresses that, while it fully recognises the benefits that new technologies can bring, achieving such benefits cannot be allowed at the expense of fundamental rights and safeguards. Moreover, technology is not a silver bullet that would solve all pressing problems: there must be sufficient human oversight and input. This necessitates sufficient investment in people and processes.

Concerning the use of AI for law enforcement purposes, the CCBE has stressed that:

- such use is appropriately controlled and regulated and that such regulation reflects the specificities of these systems;

- the rules governing the use of AI tools are grounded in a clear set of ethical principles, such as respect for human rights, transparency, accountability and upholding of the rule of law, and which are set beforehand; and

- these principles are turned into use-case specific operational rules and guidelines that must be followed when introducing AI tools into the justice system or law enforcement to make sure that they do not jeopardise the above mentioned principles, including the presumption of innocence and the right to a fair trial.

The CCBE also underlines that the overall goal of enhancing the capabilities of law enforcement agencies and cross-border cooperation amongst them must be accompanied by the effective implementation of current procedural safeguards measures (as set out in the six procedural safeguards directives)[1] and a similar enhancement of the substantive and procedural safeguards available to suspects and accused persons.

Finally, the CCBE has also commented on Europol's powers and stressed that Internet service providers and/or law enforcement authorities and Europol should be required to ensure that the technology used to collect, process and exchange personal data amongst them guarantees that there is no interference with any kind of data protected by professional secrecy. The CCBE has also pointed out that effective legislative controls and democratic oversight should be in place to politically assess Europol's activity and the processing of personal data or data covered by professional secrecy/legal professional privilege.

CCBE recommendations

Given the above considerations, the CCBE calls on the Commission to ensure that the proposed initiative and the actions proposed therein:

- are firmly founded within the bounds of the rule of law and that they respect fundamental rights, in particular the presumption of innocence, the right to a fair trial and the confidentiality of lawyer-client communications, and, furthermore, set out concrete measures to address these concerns;

- acknowledge the need to lay down with adequate specificity and clarity the definitions and concepts of "national security", "extremism" "terrorism" and "crisis" as justificatory elements in relation to the forced access to and processing of personal data. In the CCBE's view, any such access must be proportional and be kept to a minimum as regards the scope of surveillance and period of data retention;

- gives due consideration to the principle of equality of arms and the rights of the defence, especially in the context of cross-border investigations and proceedings and proposes concrete measures to achieve them.

[1] The Directives concern the right to interpretation and translation in criminal proceedings, the right to information in criminal proceedings, the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, the presumption of innocence and the right to be present at the trial in criminal proceedings, on procedural safeguards for children who are suspects or accused persons in criminal proceedings and legal aid for suspects or accused persons in criminal proceedings. For more details, see Rights of suspects and accused (European Commission)