

**STATEMENT ON THE MEMBER STATE INITIATIVE REGARDING THE  
EUROPEAN INVESTIGATION ORDER IN CRIMINAL MATTERS**

9145/10 (Brussels, 29 April 2010)

**I.** The ECBA was founded in 1997 and has become the pre-eminent independent organisation of specialist defence lawyers in all Council of Europe countries. We represent over 35 different European countries including 26 EU Member States. The ECBA's aim is to promote the fundamental rights of persons under investigation, suspects, accused and convicted persons, not only in theory, but also in the daily practice in criminal proceedings throughout Europe. We are member of the Justice Forum and we participate in several EU-projects (e.g. networking/legal aid; letter of rights; pre-trial emergency defence; European Arrest Warrant) and we are regularly invited to many EU experts' meetings concerning criminal law issues. More information on the ECBA can be found at our website: [www.ecba.org](http://www.ecba.org).

**II.** It is not our intention to repeat here the history of the various proposals in the area of mutual recognition and evidence, however the ECBA has previously provided responses to the proposals for the European Evidence Warrant (EEW) which culminated in Framework Decision 2008/978/JHA of 18 December 2008 and the Commission's Green Paper on obtaining evidence in criminal matters from one member state to another and securing its admissibility (COM(2009) 624 final). We invite the Member States who have proposed the Initiative on the European Investigation Order (EIO) to take into account the ECBA's position papers on these proposals together with the responses provided by other NGOs, Member States and other parties. In our view the Commission had adopted the correct approach by promoting a consultation on the principles of mutual recognition in the area of evidence in criminal matters. Legislation without an appropriate consultation process including defence practitioners produces bad law as has been proved in the past in terms of some of the initiatives of EU Member States.

**III.** Unfortunately there is confusion with the number of current proposals in this area. The ECBA calls for the suspension of further implementation of the EEW pending the result of a full impact assessment to establish whether further legislation is required in this field and, if so, how this should be progressed.

**IV.** This briefing document is intentionally short. The ECBA will provide further and more detailed arguments on any of the points raised, if requested. At present, the ECBA rejects the replacement of the existing laws and rules on mutual assistance in criminal matters and on the implementation of mutual recognition of evidence in criminal proceedings by a single instrument, for the following reasons:

1. Any further extension of the principle of mutual recognition should be conditional on **binding and enforceable minimum safeguards for criminal proceedings** in the European Union to be in force, including the effective right to legal assistance and to legal aid in both issuing and executing Member States. Mutual recognition can only be extended and deepened after the "step-by-step approach" initiated by the Swedish Presidency has led to noteworthy results. In the absence of enforceable minimum safeguards, there are growing concerns by EU citizens that their rights and freedoms are being undermined rather than enhanced by EU legislation<sup>1</sup>.

2. Mutual recognition of evidence in criminal proceedings presupposes the existence of **binding and enforceable safeguards** regarding the **collection and the use of evidence**. The ECBA does not agree with the Council's Discussion paper on the EIO that the field of obtaining evidence does not necessarily require the same rules as the

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<sup>1</sup> See for example the following recent articles critical of the EAW:

[http://www.presseurop.eu/en/content/article/72501-extradition-fine-mess;](http://www.presseurop.eu/en/content/article/72501-extradition-fine-mess)

[http://www.dailymail.co.uk/news/article-1305343/More-1-000-Britons-exported-trial-year.html;](http://www.dailymail.co.uk/news/article-1305343/More-1-000-Britons-exported-trial-year.html)

[http://www.cmjornal.xl.pt/detalhe/noticias/exclusivo-cm/ingles-presos-por-burla-que-nao-fez.](http://www.cmjornal.xl.pt/detalhe/noticias/exclusivo-cm/ingles-presos-por-burla-que-nao-fez)

execution of penalties or decisions to arrest people. The safeguards and rules of evidence are fundamental to ensuring a fair trial. These safeguards include the presumption of innocence, the right not to incriminate oneself and the exclusion of evidence obtained in violation of fundamental rights and freedoms and in particular of immunities and privileges. Safeguards include grounds for refusal (ne bis in idem, dual criminality, territoriality, etc), necessity, proportionality, judicial scrutiny and legal remedies, legal representation and legal aid, data protection, and the opportunity for the defence to use the EIO to gather exculpatory evidence. Safeguards should be available in both issuing and executing Member States. Evidence can only be mutually recognised if such guarantees are in force.

3. The ECBA does not believe that a "single regulation" covering all types of evidence is **feasible**. There are major differences between different types of evidence. The national rules on Criminal Procedure ensure the legitimacy and integrity of evidence through different means and at different procedural stages. This results in serious problems for the transfer of evidence to another criminal jurisdiction. Furthermore a distinction should be drawn between orders to obtain the transfer of evidence that has already been collected and orders to obtain or produce evidence that has not yet been collected or produced. The EIO proposal mixes both judicial decisions and police co-operation methods, at least some of which are not appropriate to be decided under Art 82(1)(a) of the Treaty on the Functioning of the European Union (TFEU)<sup>2</sup>. In our view it is not possible to provide a single regulation to cover the different types of evidence, the differing national rules and procedural stages without creating serious practical problems and undermining the integrity and

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<sup>2</sup> Regulations concerning these aspects should be approved on the basis of article 82 (1) (d) TFEU.

fairness of the process. Mutual recognition does not provide the flexibility required to deal with this area efficiently, practically and fairly.

4. The ECBA does not see the **necessity** of a regime such as the EIO. The Convention of 29 May 2000 on mutual legal assistance in criminal matters has now been ratified by 23 Member States. The ECBA is not aware of evidence showing that the circulation of evidence under this Convention suffers from any deficiencies. The ECBA therefore urges that a full impact assessment is conducted to establish whether further legislation is required in this field and, if so, how this should be progressed. This should critically evaluate reliable empirical studies on alleged or real shortcomings and carefully consider the cost implications of changing the current system. It is noted that several Member States who responded to the Commission's consultation were not in favour of changing the current system. It appears to us that efforts should be made to ensure the remaining Member states ratify the Convention and to deal with any deficiencies identified in the current system rather than introducing a new regime.

5. If any deficiencies are detected in the current system, they should be handled individually with focused and practical measures. In this regard, the ECBA favours a **"step-by-step approach"** also in the field of mutual recognition of evidence in criminal proceedings.

6. **Adequate training** opportunities in the field of mutual recognition in criminal matters for all lawyers have to be organized at public expense, not only for prosecutors and judges, but also for defence practitioners.

**V.** In the view of the ECBA the following are fundamental cornerstones of any mutual recognition of evidence in criminal proceedings:

**1. Collection of evidence**

- a. An EIO must be issued by a **court of law** – not by any other judicial or even police authority<sup>3</sup> and there should be a review system for such decisions.
- b. The executing Member State shall only enforce an EIO if and insofar as a similar warrant could be issued under its law (**principle of dual legality of the collection of evidence**).
- c. All the exclusionary rules – from both issuing and executing Member States – based on recognised privileges and immunities must be respected (**the principle of most favourable treatment on immunities and privileges**).
- d. All the exclusionary rules – from both issuing and executing Member States – based on the protection of fundamental rights and freedoms must be respected (**the principle of protection of fundamental rights and freedoms**).
- e. The **rights of defence** and the commonly affected **rights of (extranei) third parties** must be respected in the issuing and executing Member States.
- f. The execution of an EIO must be rejected if its issue has violated **general principles of European Law**, such as the protection of fundamental rights and freedoms, the necessity of a sufficient degree of suspicion or the proportionality principle (see Art 7 of the EEW), ne bis in idem (double jeopardy). The same applies if the order was **abusively** issued.
- g. Express grounds of refusal should include **dual criminality and territoriality**.

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<sup>3</sup> If restricted to orders issued by a court of law, the EIO could be based on Art 82 (1) (a) TFEU, as stated in the proposal.

- h. Specific **explicit rules and safeguards** must be provided for the most **intrusive evidence gathering** (if it is deemed appropriate that such police co-operation methods should form part of the EIO, see above.)
- i. The accused and his defence counsel must be able to request the issuing of a EIO under the same conditions as the prosecuting authorities (**principle of equality of arms**).
- j. There must be an effective **legal remedy** against the execution of a EIO in the issuing and executing Member State. The legal remedy must allow at least the review of the dual legality of the collection of evidence and the respect for the principle of most favourable treatment on immunities and privileges. The legal remedy must prevent the transfer of the evidence to the issuing Member State pending decision. The issuing state should **indemnify the defence costs** if a challenge to the EIO is successful in either the issuing or executing state.
- k. Throughout the process, national and EU legislation on **data protection** should be respected and enforced.
- l. In order to enforce these fundamental rights there should be **judicial scrutiny** in both the issuing and executing Member State.

## **2. Transfer of evidence**

- a. Before the evidence is transferred to the issuing Member State, its legality, fairness and integrity must be assessed *ex officio* by an independent **judge or court** of the executing Member State.
- b. Before the evidence is transferred to the issuing Member State, the right to make submissions concerning the legality of the collection and of the transfer of the evidence must be granted to the

accused or suspected or concerned persons (**right to be heard**).

- c. If the suspect has not been granted the right to make the aforementioned submissions due to the circumstances of the procedure, *e.g.* the suspect has not been identified at that stage, , this right should be granted as soon as possible and, if applicable, the judicial authority in the executing State may revoke the decision to transfer the evidence and request the issuing State to return any evidence which has in the meantime been transmitted.

### **3. Use of evidence (Admissibility)**

- a. The **only** evidence that can be used in the issuing Member State is that which has been **lawfully collected and transferred** according to the above mentioned criteria.
- b. Evidence obtained by means of a EIO can only be used if it complies with the **general principles of European Law**, in particular the protection of fundamental rights and freedoms.
- c. Exceptions can only be allowed if the **integrity of the evidence and the fairness of the procedure** are not affected by the violation of the law.
- d. If evidence has been transferred and there is a subsequent decision (in the issuing or executing State) that the evidence has been unlawfully obtained, the issuing Member State **shall return the evidence** to the executing Member State.

### **4. Transfer to third countries**

The further transfer from the issuing Member State to third countries is **not allowed without consent** of the executing Member State. Before consent can be granted for the further transfer the concerned parties,



in particular the suspect or accused, have to have an opportunity to be heard formally.

**For further questions and comments please contact:**

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