Law Society of England and Wales response to European Commission Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility

February 2009
INTRODUCTION

1. The Law Society of England and Wales (the Society) is the representative body of over 120,000 solicitors in England and Wales. The Society negotiates on behalf of the profession and makes representation towards regulators and government in both the domestic and European arena. The Society is registered on the Register of Interest Representatives.

2. The Society welcomes this opportunity to respond to the European Commission Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility dated 11 November 2009.1

3. The Commission asserts that the number of co-existing instruments based on different underlying principles, namely mutual assistance and mutual recognition, makes the application of the rules "burdensome."

4. The Society refers to the Framework Decision on the European Evidence Warrant dated 18 December 2008.2 The Society observes that this mutual recognition instrument is burdensome not least because:

4.1. It was adopted in the absence of a horizontal instrument on procedural rights of suspects and defendants in criminal proceedings. The Society reiterates its call for the EU to introduce binding minimum procedural rights for suspects and defendants at all stages in the criminal process from investigation.3

4.2. Even the limited “Safeguards for execution” provisions (Article 12)4 in the European Commission's original proposal for the European Evidence Warrant dated 14 November 20035 were removed from the instrument during the course of the negotiations. The Society calls on Member States to respect these specific safeguards, which the Commission observed in its Explanatory Memorandum to the proposal were intended to enhance the effectiveness, consistency and visibility of some of the standards relevant for obtaining evidence at EU level (paragraph 46).6

4 Article 12
5 "Safeguards for execution
1. Each Member State shall take the necessary measures to ensure that the European Evidence Warrant is executed in accordance with the following minimum conditions:
(a) the executing authority shall use the least intrusive means necessary to obtain the objects, documents or data;
(b) a natural person shall not be required to produce objects, documents or data which may result in self-incrimination; and
(c) the issuing authority shall be informed immediately if the executing authority discovers that the warrant was executed in a manner contrary to the law of the executing State.
2. Each Member State shall take the necessary measures to ensure that, where a search and seizure is considered necessary in order to obtain objects, documents or data, the following minimum safeguards shall apply:
(a) a search of premises shall not start at night, unless this is exceptionally necessary due to the particular circumstances of the case;
(b) a person whose premises have been searched shall be entitled to receive written notification of the search. This shall state, as a minimum, the reason for the search, the objects, documents or data seized, and the legal remedies available; and
(c) in the absence of the person whose premises are being searched, the notification described in point (b) shall be provided to that person by leaving the notification on the premises or by other suitable means."
4.3. Moreover, its provisions on legal remedies are also unsatisfactory in other respects. For example, it purports to: allow Member States to restrict legal remedies to cases in which the European Evidence Warrant is executed using coercive measures (Article 18(1)) and to restrict where actions can be brought (Article 18(1) and (2)). The Society calls on Member States to provide effective legal remedies.

4.4. It does not explicitly provide that the issuing state must provide an explanation of how the European Evidence Warrant is “necessary and proportionate” in order to satisfy the executing state that that is the case. The Society observes that under the European Evidence Warrant the issuing authority must be satisfied that obtaining the objects, documents or data sought is necessary and proportionate for the purposes of proceedings for which an European Evidence Warrant may be issued (Article 7(a) and Article 5). The Society emphasises that the issuing state must provide an explanation of how the European Evidence Warrant is necessary and proportionate in order to satisfy the executing state that that is the case. Otherwise the executing state will be unable to comply with its obligations under Article 8 of the European Convention on Human Rights (Right to respect for private and family life) and the need for an effective remedy including in the executing state (Article 13 (Right to an effective remedy)). Moreover, it will be essential to ensure that necessity and proportionality is applied in practice, so that the European Arrest Warrant experience is not repeated.

4.5. It does not explicitly provide that suspects and defendants must also be able to apply for a European Evidence Warrant. The Society calls on Member States to implement it to respect equality of arms and enable suspects and defendants to apply for a European Evidence Warrant.

5. The Commission asserts that instruments based on mutual recognition may be regarded as “unsatisfactory” as they only cover specific types of evidence and they provide for a large number of grounds for refusal. In light of the above considerable shortcomings which already render the European Evidence Warrant burdensome on citizens potentially subject to it and on citizens seeking to exercise their rights, the Society would be extremely concerned by moves to extend this mutual recognition instrument to other types of evidence and to further diminish its already narrow grounds for refusal. Moreover, the Society is concerned by moves to do so without time to see how the European Evidence Warrant is implemented and how it works in practice.

6. The Society believes that the EU should instead focus on redressing the shortcomings in the current European Evidence Warrant by adopting balanced legislation in which equality of arms is respected. In the meantime, consideration could be given to drafting a procedural safeguards, specific safeguards and Article 8 compliance template for Member States to complete when making and dealing with requests.

7. The Commission asserts that the number of co-existing instruments based on different underlying principles, namely mutual assistance and mutual recognition, may cause “confusion” among practitioners. The Society observes that the European Evidence Warrant potentially adds to the confusion. Indeed, the Commission acknowledged in its Explanatory Memorandum to its proposal for a European Evidence Warrant dated 14 November 2003 that the European
Evidence Warrant risked introducing the inconvenience for practitioners of having to use different types of instruments for different aspects of the same case and cited by way of example a European Evidence Warrant for objects and documents, but a mutual assistance request for taking witness statements (paragraph 38). It sought to allay these concerns by emphasising that it was the first step towards a single mutual recognition instrument that would replace all of the existing mutual recognition instruments (paragraph 39).

8. However, the Society observes that a mutual legal assistance request can still be made for both aspects of the case, which overcomes such confusion. Confusion introduced by the European Evidence Warrant is not a good reason to overhaul a functioning regime. Indeed, the Society is against replacing a coherent, practical mutual legal assistance regime that practitioners use with an expanded untested mutual recognition regime with considerable shortcomings in terms of citizens’ rights.

9. The Commission asserts that instruments based on mutual assistance may be regarded as “slow and inefficient.” The Society observes that the length of time taken to execute mutual legal assistance requests is a potential concern in some cases. However, the underlying issue is one of lack of resources to execute the requests and lack of communication. The Society is of the view that these underlying issues will not be addressed by imposing unworkable fixed deadlines for the myriad of evidence gathering conducted. It may be useful to reflect on how requests could be prioritised, on ensuring that there are fully functioning lines of communication throughout the process and on providing realistic time frames and reasoned changes thereto throughout the process.

10. The Commission asks whether it would be useful to supplement an instrument with non-legislative measures, for example drafting guidelines and providing training. The Society supports greater awareness raising, training and guidelines for practitioners on the current instruments. The Society observes that the Mutual Legal Assistance Guidelines for the United Kingdom have been very helpful for practitioners.7

11. The Commission observes that the existing instruments on obtaining evidence in criminal matters only approach the issue of admissibility in an indirect manner as they do not set any common standards for gathering evidence. The Commission asserts that there is therefore a risk that the existing rules on obtaining evidence in criminal matters will only function effectively between Member States with similar national standards for gathering evidence. The Commission asks under the heading admissibility of evidence if common standards for gathering evidence should be introduced. The Society notes that Eurojust already co-ordinates Joint Investigative Teams of police officers and prosecutors for serious cross-border crime involving more than one Member State.

12. The Society observes that it is unclear whether the Commission is thereby envisaging rules on the admissibility of evidence as opposed to rules on obtaining evidence considered by the Society above. The current system under domestic rules for gathering evidence following an MLA request is that; if the requesting state has admissibility requirements then it can request in the MLA request that the evidence is gathered in a way to meet its admissibility requirements and the requested state will generally comply with this if it is able to do so under its own domestic rules. The Society is not aware of serious issues that have arisen

because a requesting state has domestic rules which do not allow measures to be taken to meet the admissibility requirements of a requesting state.

13. The Society is of the view that harmonising the rules on admissibility of evidence would not be feasible, desirable or necessary. The rules on admissibility of evidence are different throughout the European Union, not least because there are completely different legal systems. For example, the legal system in England & Wales is based on the common law and is an adversarial system. Evidence is normally admissible if it is relevant. In general, there is no presumption that evidence will be excluded simply because it has been unlawfully obtained, although there are special rules in relation to confession evidence. The trial judge has a common law discretion, as well as a statutory power, to exclude evidence which would impact on the fairness of proceedings.8

14. Again, consideration could instead be given to introducing a template for Member States to complete to illustrate what has been done to render the evidence potentially admissible. This template could include a section relating to whether domestic rules allow evidence requested to be gathered in certain way to meet the admissibility requirements in the requesting state.

15. The Society also adds that the Commission consultation is extremely vague and open-ended in respect of obtaining evidence and admissibility of evidence. The Society calls for a more detailed targeted public consultation and an impact assessment on all proposals, including Member State initiatives.

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8 *In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.* s.78 Police and Criminal Evidence Act 1984.