FAIR TRIALS INTERNATIONAL

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Submission

Fair Trials International's response to a European Member States' legislative initiative for a Directive on a European Investigation Order

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About Fair Trials International

Fair Trials International (FTI) is a UK-based NGO that works for fair trials according to international standards of justice and defends the rights of those facing charges in a country other than their own.

FTI pursues its mission by providing individual legal assistance through its expert casework practice. It also addresses the root causes of injustice through broader research and campaigning and builds local legal capacity through targeted training, mentoring and network activities.

Although FTI usually works on behalf of people facing criminal trials outside of their own country, we have a keen interest in criminal justice and fair trial rights issues more generally. We are active in the field of EU Criminal Justice policy and, through our expert casework practice, we are uniquely placed to provide evidence on how policy initiatives affect defendants throughout the EU.

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1 Introduction

1.1 Fair Trials International wishes to raise its concerns over a new Member States' legislative initiative on cross-border evidence-gathering dated 29 April 2010 (EIO proposal). The UK has until 29 July 2010 to decide whether to opt into the EIO proposal. Our concerns arise both with regard to (a) legislative substance - the EIO proposal raises important fundamental rights issues; and (b) legislative process - there has been insufficient time to understand the full implications for Member States or citizens and there has been no impact assessment.

1.2 **Substance** We should say at the outset that we would, in principle, welcome any measure whose overall effect is to facilitate the lawful gathering, safeguarding and admissibility of all available evidence relevant to an alleged offence. Clearly the more fairly obtained evidence that is available, the more likely a just outcome will be achieved: national borders should not be a bar to this process. However, any new evidence-gathering instrument must safeguard all the applicable fundamental rights and do nothing to diminish their protection. The EIO proposal does not meet this test.

1.3 The EIO proposal would grant significantly wider powers to Member States, which would be easier to exercise and harder to refuse than currently. The EIO proposal contemplates replacing all existing mutual legal assistance obligations with a new, mutual recognition based approach to evidence-gathering. The scope of evidence covered would also be vastly increased. There are significant costs implications – both human and financial - and no clear evidence that other approaches (such as improving the operation and resourcing of existing mutual legal assistance tools) would not be preferable.

1.4 **Legislative process** It is unclear what relationship the EIO proposal bears to the substantial work recently undertaken by the European Commission, including the launch in November 2009 of a Green Paper[1] on cross-border evidence-gathering. In its Stockholm Programme Action Plan[2], the Commission said a new, comprehensive system was required for obtaining evidence in cross-border cases. The responsibility and time frame for this exercise were specified[3] as the "*Commission"* and *"2011*" respectively. The new Member States' initiative therefore came as a surprise to those expecting a full and open consultation process informed by a detailed impact assessment before any legislative proposal.

1.5 The UK is now in the invidious position of having to decide whether to opt in and thus at least air its concerns on the instrument during subsequent negotiations (but with no guarantee of influencing the final text), or opt out, meaning requests for evidence made to or by the UK would be handled under a different regime than that which would apply to the majority of States bound by the EIO.

1.6 We believe the UK should use its influence to persuade the Member States who initiated the EIO proposal to withdraw it. Fair Trials International has itself called on all Members of the European Parliament's Civil Liberties Committee to reject it and insist on a thorough impact assessment exercise. This would allow the Commission to continue its work in line with the timetable it originally proposed. Only in this way can the substantial implications and likely costs be understood and an informed debate take place, at EU and national level, on any resulting legislative proposal.

[1] 11.11.2009 COM(2009) 624 final
[2] 20.4.2010 COM(2010) 171 final
[3] In the Action Plan's Annex (page 18)

2 Executive summary

Defence evidence-gathering at the heart of justice

Fair Trials International's casework team unfortunately sees the real injustices wrought by the defence being unable to effectively gather and adduce evidence. Such issues are an aspect of many of the cases that we are involved with. Until there is equality of arms between the prosecution and defence when it comes to evidence-gathering, individuals will continue to pay the price.

2.1 We question the appropriateness of replacing all existing evidence-gathering measures with a new instrument based on mutual recognition (see **Section 4**). This is questionable given:

- the absence of a coherent EU-wide data protection regime in the criminal context
- the wide variance in standards of evidence-gathering and evidence-handling in Europe
- the lack of any basic common standards in evidence-gathering and evidence-handling in Europe
- the fact that there has as yet been no implementation of basic minimum procedural defence safeguards, with only one measure having been passed (at the time of writing), which is not due for implementation until July 2013.

2.2 Lessons must be learned from the European Arrest Warrant about the risks of over-rigid mutual recognition based instruments without the necessary accompanying protection of, and respect for, fundamental rights across all Member States. We are concerned that an instrument in the form proposed would risk a substantial increase in the number of evidence requests received and a consequent increase in the costs and resources needed to deal with them. It is far from clear that there would be a net benefit to the UK and the risk of fundamental rights infringements will also increase.

2.3 Additional safeguards are needed to protect fundamental rights in the evidence-gathering process. These include the implementation of common basic standards on evidence-gathering across the EU, the consideration of the proportionality and necessity of any request for evidence, the allocation of sufficient time and facilities to deal with all necessary evidence requests (including those for evidence reasonably requested by the defence), the need to safeguard evidence and keep a detailed audit trail throughout the process, and to ensure that where interviews take place by telephone or video-conference, all original recordings are kept until the case has been finally disposed of. (See **Section 5**.)

2.4 We have specific concerns about the EIO proposal (See **Section 6**) including:

- The lack of express refusal grounds in key areas, such as
    - breach of fundamental rights
    - proportionality (the offence is trivial and/or the request would involve disproportionate use of resources or unnecessary infringement of privacy or other fundamental rights)

        - double jeopardy (the person being investigated has already been tried for the same offence)
        - territoriality (the alleged offence was not committed in the issuing but in the executing State)
    - The absence of a dual criminality requirement, meaning one State could be required to investigate conduct it does not itself treat as criminal
    - The lack of protection for individuals in custody who are transferred to other States for questioning
    - The absence of necessary safeguards relating to evidence given via telephone and videoconferencing
    - The absence of provisions enabling the defence to request an EIO to be issued where necessary in the interests of justice.

3 EIO proposal: background and overview of key shortcomings

3.1 The Commission released its Green Paper in November 2009 and held an experts' meeting in Brussels in February 2010. The Green Paper envisaged a single instrument based on the principle of mutual recognition, replacing the current Mutual Legal Assistance (MLA) and European Evidence Warrant[4] (EEW) regimes.

3.2 The Commission's proposals were controversial in that they extended the scope of the kind of evidence obtainable under the EEW, by mutual recognition, to include evidence not yet in existence. This could include requests to interview suspects or witnesses or obtain information in real time, by intercepting and monitoring telephone or email communications or by monitoring activity in bank accounts. States could also be required to obtain or analyse DNA samples or fingerprints and send the information to the issuing State within fixed deadlines. The mutual recognition mechanism proposed by the Commission would allow States to issue standard-form requests seeking judicial orders with extremely limited grounds for refusal. This contrasts strongly with the existing MLA approach.

3.3 Then, with no prior public consultation and no explanation of its relationship to the Commission's own work, a new Member States' legislative initiative was released on 29 April 2010. The initiating Member States are: Belgium, Bulgaria, Estonia, Spain, Luxembourg, Austria, Slovenia and Sweden. This EIO proposal is very similar in scope to the type of mutual-recognition based instrument outlined in the Commission Green Paper.

3.4 If adopted in this form, it would involve major changes to the system of evidence-gathering. This raises important fundamental rights issues. Several fundamental rights are engaged by pre-trial evidence-gathering procedures, including the right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR), privacy rights under Article 8 ECHR and, in some cases, rights under Article 3 ECHR. Any new evidence-gathering instrument must safeguard these rights and, in particular, must not prejudice or compromise the right to be tried on evidence not obtained by violation of fundamental rights or other key protections such as the equality of arms principle or the ability to test prosecution evidence.

[4] 2008/978/JHA, 18 December 2008, which is currently due to be implemented by January 2011

3.5 As our work at Fair Trials International shows, there is a wide gap between the rights citizens theoretically have to a fair trial and data/privacy protection and the reality on the ground. This is particularly true of cases with a cross-border element, where individuals are unfamiliar with the language and the legal and data protection systems of the country where investigations or proceedings are taking place and less able to assert their rights or even learn of their infringement. For this reason, great care must be taken when considering any new evidence-gathering powers, to improve the protection of fundamental rights and ensure proportionality and equality of arms. Problems in these areas are undermining the proper functioning of the flagship mutual recognition instrument, the European Arrest Warrant (EAW)[5].

3.6 The EIO proposal is far from satisfactory in terms of guaranteeing fundamental rights and ensuring proportionality. In its current form, it runs the risk of repeating the injustices and wasted resources which have undermined the EAW's operation. This is perhaps not surprising given the haste with which it has been produced, the absence of prior consultation by the Member States concerned (at least any transparent or wide-ranging consultation) and the lack of any impact assessment. The text contains no reference to a proportionality test, no requirement of dual criminality, no list of offence categories to take the place of dual criminality checks, no double jeopardy or territoriality bar, and only a passing reference to fundamental rights obligations being "unaffected" by the Directive.

3.7 Not only are executing States powerless to refuse on proportionality or fundamental rights grounds. Issuing States also have no express duty to observe proportionality or human rights considerations when issuing requests, nor can executing States refuse to carry them out on proportionality or fundamental rights grounds: at least the grounds for refusal do not say they can and experience from the EAW system suggests that courts need very clear legislative grounds for refusal in order for challenges on these grounds to succeed.

UK court and police resources could be stretched by excessive numbers of EIO requests

Some Member States, such as Poland, cannot choose whether or not to prosecute offences once a formal complaint has been made. With the EAW, this has resulted in large numbers of extradition requests for offences as trivial as stealing piglets. In 2008 Detective Sergeant Gary Flood of Scotland Yard's extradition unit (speaking in the Guardian: http://www.guardian.co.uk/uk/2008/oct/20/immigration-extradition-poland-lithuania-law*) estimated that 40% of all extradition cases dealt with by the Metropolitan Police originated in Poland. He said many of the offences were so minor they would lead to either a caution or no investigation at all in England and Wales. The EIO proposal in its current form could see a similar hike in the number of EIO requests, with serious financial and resourcing consequences for the police and judicial authorities who would have to deal with them.*

4 Is mutual recognition the right approach to fair evidence-gathering?

4.1 The European Arrest Warrant has been operating long enough to see how mutual recognition instruments can operate unjustly in the absence of minimum defence rights and of provisions in the framework legislation protecting fundamental rights and the

[5] See, for example, our Submission to the European Union Justice and Home Affairs Council Working Group on the EAW dated 31 July 2009 and available at http://www.fairtrials.net/images/uploads/Submission%20to%20EU%20on%20EAW.pdf

proportionality principle. Mutual recognition instruments can lack the necessary flexibility and tie the hands of judges, leaving them no discretion to refuse requests despite compelling fundamental rights and proportionality objections. Similarly, they tie the hands of some States' prosecuting authorities who, statistics suggest, are being forced to issue Arrest Warrants for minor crimes[6].

4.2 There is wide variance among Member States in methods and standards of evidence gathering and handling. In some States it is difficult and sometimes impossible for defendants to gather evidence or challenge prosecution evidence due to inflexible hearing procedures, unavailability of legal aid, or insufficient time to call witnesses, obtain translations and consult with experts**.** This is especially so in cross-border cases.

4.3 To give one example, standards diverge widely across the EU about how and in what circumstances DNA evidence should be collected, how long it should be held for, whether it may be searched by investigating authorities and in what conditions it should be maintained. Any new evidence-gathering measures under which DNA evidence could be obtained, held, analysed or transferred should aim to foster greater protection for fundamental rights in this context. This in itself would be a vast project and it is only one example of the kind of evidence the EIO proposal encompasses: a no-questions asked approach to inter-state DNA requests under mutual recognition is inappropriate until stronger systems are in place that all countries can be confident are followed across the EU to protect such sensitive evidence and ensure it is handled safely.

Police could be powerless to stop DNA profiles of UK nationals being sent abroad

Recent estimates suggest the UK national DNA database contains 5.1 million DNA profiles[7]. Hundreds of thousands of these belong to people who were acquitted or never charged. If the EIO proposal becomes law the UK could be forced to send this data to other EU States or analyse it on their behalf and send back the results.

Example *A murder is committed on 30 July 2013 in a nightclub in Spain. The club is frequented mainly by UK nationals on package holidays. Local police issue an EIO request asking the UK to (1) send it identification information on all UK nationals who flew to Spain between 1 and 30 July 2013 and (2) to search its DNA database, to see whether any of those identified are on it and (3) to provide DNA records of any such person to the Spanish authorities so they can be compared with DNA found at the scene. The UK police would like to refuse this request on the grounds it is too wide, it will impose a huge cost and resource burden and it risks sending Spain the DNA profiles of people never charged with an offence. The EIO proposal in its current form would not allow the police to refuse.*

4.4 We are also uneasy about using mutual recognition instruments in the continuing absence of minimum procedural defence safeguards. Only one of the basic protections among the group of six measures to be introduced following adoption by the European Council of the Roadmap[8] of procedural rights has been enacted[9], and Member States have three years before having to implement it. Whilst we are heartened by the

[6] See for example the Guardian, 20 October 2008, http://www.guardian.co.uk/uk/2008/oct/20/immigration-extradition-poland-lithuania-law
[7] http://www.telegraph.co.uk/news/newstopics/politics/5078599/Five-million-people-now-on-DNA-database.html
[8] 2009/C 295/01, Resolution of the Council, 30 November 2009
[9] Provisional text available here: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2010-0220&language=EN&ring=A7-2010-0198#BKMD-16

increased rate of progress on these key measures since July 2010, there is a long way to go before individuals enjoy enforceable basic fair trial rights across Europe.

Is there anything wrong with Mutual Legal Assistance?

4.5 Before introducing such a fundamental change to the system of evidence gathering, it is important to consider what more could be done to promote the wider use of existing MLA Convention (MLAC) tools. This entails obtaining more information from practitioners (both prosecution and defence) about whether (and if so how) existing measures are failing to achieve justice. Otherwise we risk unintentionally losing what is working, or could work, well and replicating existing flaws. We note in this context that the UK in its own response to the Commission's Green Paper stated: "*The MLAC is popular and has been effective as it creates one (broadly) coherent system for making MLA requests that practitioners can understand and apply easily. It is also wide-ranging in the form of MLA that can be sought.*"

4.6 MLA is governed in the UK by the Crime (International Cooperation) Act 2003, which offers a basis for the defence to seek from the court, via letters of request, evidence it requires but which is located in another Member State. The defence, at least in theory, is entitled to the same assistance from the authorities of the requested State as the prosecution would be.

4.7 Several Member State representatives made similar comments during the Commission's consultation exercise. Germany and Poland both argued that the introduction of a system based on mutual recognition was premature, and there should first be a full assessment on the operation of mutual assistance measures. Eugenio Selvaggi, Advocate General of the Italian Court of Cassation, noted that the application of the principle of mutual recognition should not entail taking a step backwards in terms of the flexibility of current MLA instruments. This was a common theme among the countries represented; France, the UK, Finland and Sweden were just some of the Member States calling for the flexibility of the MLA system to be retained[10].

4.8 Such a study might well show, as anecdotal evidence suggests, that the real problem with the MLA regime is not that it is fragmentary or complex as the Preamble to the EIO proposal suggests (at paragraph (5)), but that MLA requests are not prioritised sufficiently by some States due to operational and funding restrictions which force them to treat them less seriously than domestic evidence-gathering, resulting in delays and the sidelining of foreign requests.

5 Necessary safeguards in any comprehensive cross-border evidence-gathering instrument

The following is a non-exhaustive list of requirements for any comprehensive and fair system of cross-border evidence gathering. Even if an MLA regime is retained, we would advocate for the inclusion of similar safeguards to ensure they are available to defendants in all Member States' legal systems.

[10] At the Commission's meeting of experts on evidence in Brussels in February 2010. All Member State responses can be found at: http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_0004_en.htm

5.1 The **proportionality and necessity** of any request must be established by the issuing State to the satisfaction of the executing State. The latter must be satisfied that the evidence sought is relevant to an actual, clearly specified, serious offence, which there are reasonable grounds to suspect has occurred. Requests must **not be permitted for general "fishing expeditions"** or routine crime prevention purposes.

5.2 The evidence provided must only be retained and used for the **specific, prescribed purpose** for which it was produced. It should not be capable of staying on databases indefinitely and becoming the subject of any number of future requests unrelated to the one for which it was originally produced.

5.3 Any new instrument should be underpinned with **basic minimum standards of fairness in the gathering and handling of evidence** so that judicial authorities across the EU can be confident that by following them (whether issuing or receiving requests) they will be in compliance with domestic legislation and with their obligations under the ECHR and the Charter for Fundamental Rights. This could help to raise current standards and ensure that the goals of a fair trial and protection from unwarranted privacy infringements are treated as paramount by all States. The new instrument must not have the effect of a general lowering of standards. Instead, it must be based on the highest standards in operation among Member States.

5.4 Any new instrument must refer to the overriding **interests of justice and the right to a fair trial** as paramount considerations for both requesting and requested States, and must require all implementing legislation to reflect this.

5.5 **Tape-recordings** must be made and retained for trial where the request is to interview any person, whether or not a suspect, in order to safeguard the rights of the defence to challenge evidence alleged to have been obtained improperly or transcribed or translated inaccurately.

5.6 **Opportunity to cross-examine**: The defence must have the opportunity to test the reliability of prosecution evidence, including by cross-examination of witnesses who are questioned or who give oral testimony pursuant to an EIO, to ensure compliance with Article 6(3)(d) ECHR. This may require time to enable the defence to appoint interpreters, obtain translations of documents and consult with and adduce the evidence of other potential witnesses.

5.7 **Protection for suspects**: If the request seeks the questioning of a potential suspect, or of a witness who becomes a suspect during the interview, they must be advised they are a suspect at the earliest opportunity. They must be advised of their rights (including the right to legal assistance, an interpreter, translation of relevant documents and information about the charges). Before questioning proceeds, sufficient time must be allowed for these rights to be exercised.

5.8 **Safeguarding of forensic and electronic evidence**: Standards must be specified for protecting the integrity of evidence for trial. This is a particular risk in the context of DNA or other forensic evidence and of electronic evidence, where the risk of loss, corruption or tainting are substantial. There must be a clear, verifiable audit trail available for use at trial, available to the defence and to the Court, showing who has been responsible at

each stage for collecting and safeguarding the evidence, so that the person/s can be questioned as necessary.

6 Specific concerns on the EIO proposal text

None of the above safeguards would be afforded by the EIO proposal. The text has the following particular shortcomings:

Decision to issue an EIO

6.1 Article 2(a) defines an issuing authority widely, to include any "*public prosecutor [or] other judicial authority as defined by the issuing State".* The EIO proposal substantially reduces grounds for refusal and opportunities for scrutiny in the executing State would be minimal or non-existent. Therefore, in order to ensure that EIOs are used appropriately and proportionately, the decision to issue an EIO must be subject to prescribed safeguards requiring (a) that the decision-maker has sufficient independence from the executive arm of the state and (b) there is transparency of process concerning why the EIO has been issued. This is necessary to reduce the scope for unwarranted infringements being made into citizens' privacy as a result of over-enthusiastic or improper use of these potentially very wide evidence-gathering powers.

6.2 Article 4 outlines when an EIO can be issued. There is no requirement for the alleged activity to be a criminal offence under the law of the executing State. This is the first time an EU mutual recognition instrument would dispense with dual criminality (or a substitute list of offence categories as with the EAW). The effect would be that an executing State risked infringing the rights of individuals, incurring considerable expense in funds and resources in the process, in having to obtain evidence about alleged activity that it does not itself deem criminal. Lack of dual criminality should therefore be added under Art 10(1) as a ground for refusal to execute an EIO (see below).

UK police could be required to investigate people for complaining about doctors or lawyers

Criminal defamation is an offence in some EU States, such as Portugal, but not in the UK. So someone in the UK who published a complaint about the professional conduct of a Portuguese lawyer or doctor could have their house and computer searched for relevant evidence by UK police if requested to do so by Portuguese police officers.

Grounds for refusal

6.3 The EIO Proposal would remove almost all the traditional grounds open to receiving States under MLA and does not even reproduce the limited refusal grounds which were contained in Article 13 of the (unimplemented) Framework Decision on the EEW. These former grounds for refusal - now removed - include:

- proportionality– by contrast, Article 7 (a) of the EEW requires that obtaining the evidence is necessary and proportionate for the purpose of proceedings to which the issuing of the EEW related
- executing State's option not to carry out coercive measures

- double jeopardy (*ne bis in idem*) – designed to stop a person being prosecuted more than once for the same facts. This a mandatory ground to refuse an EAW.

- territoriality, where the alleged crime was committed in the requested State's jurisdiction,

- the provision requiring that the issuing State would be legally entitled to obtain the evidence under domestic law if it was located there: prosecutors could thus take advantage of the EIO to get evidence they would not be able to get domestically. This is a flagrant inequality of arms.

Acquitted – but investigations continue

Under the current proposals a person who had been acquitted of computer hacking in Spain could continue to be investigated in relation to the same alleged hacking activity by France. He could have his house and office searched and computers seized. Without double jeopardy as a ground for refusal, a person found innocent of a crime could continue to endure intrusive investigations regarding the same allegations.

6.4 Regarding fundamental rights as a ground for refusal, the text is inadequate. It simply states (Article 1(3)): "*This Directive shall not have the effect of modifying the obligation to respect the fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty, and any obligations incumbent on judicial authorities in this respect shall remain unaffected. This Directive shall likewise not have the effect of requiring Member States to take any measures in contradiction of its constitutional rules relating to freedom of association, freedom of the press and freedom of expression in other media."* This is not even referred to in Article 10 among the (limited) grounds it provides for refusing an EIO. It is insufficient to establish a foundation for States to protect human rights either when issuing or executing EIOs.

6.5 We note that the Home Office's fundamental rights analysis of the EIO proposal concludes[11] that as any search or seizure that is the result of an EIO would be for the purposes of a criminal investigation or criminal proceedings, "in all but the most extreme of cases, any interference with the fundamental rights guaranteed by Article 8… would be justified and proportionate" (Para 13). We consider this over-optimistic. Decisions by the European Court of Human Rights, from *Campbell v The United Kingdom*[12] to *S and Marper v The United Kingdom*[13], illustrate the need for greater realism in this context. In both cases, the UK was severely criticised for disproportionate infringements of privacy contrary to Article 8 ECHR, notwithstanding that the conduct criticised was regarded by it as necessary for criminal investigation or prosecution purposes. Similar findings have been made against other Member States.

6.6 Refusal should also be permitted where the requested measures are disproportionate to the offence suspected or committed. Such a proportionality bar would ensure time and money are not wasted on unnecessary evidence-gathering and that fundamental rights are not infringed for trivial reasons or to a greater degree than is necessary.

[11] Explanatory Memorandum on European Union Legislation Justice and Home Affairs Matters: Initiative for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters, Baroness Neville-Jones, May 2010
[12] (1992) 15 EHRR 137
[13] (2008) 48 EHRR 1169

6.7 There is also no provision requiring the issuing State to confirm it cannot obtain the same information itself: this risks "forum-shopping" for the purpose of saving the costs and resources of the investigation, as it would allow one State to offload on to another the burden of gathering the evidence.

Remedies

6.8 Article 13 states: "*Legal remedies shall be available for the interested parties in accordance with national law. The substantive reasons for issuing the EIO can be challenged only in an action brought before a court of the issuing State".*

6.9 The inclusion of a reference to a legal remedy is welcome: however this provision is too brief. Provisions similar to Art 18 of the EEW should be included. This would enable an individual bringing an action to challenge the recognition and execution of an EEW, and in such circumstances both the issuing and executing State must provide the interested parties with all relevant information. The executing State should also be allowed to suspend the transfer of evidence pending the outcome of a challenge.

6.10 The provision in Art 13 that an EIO can only be challenged before a court of the issuing State, may lead to unfairness. Suspects and defendants may have to mount challenges in countries other than their own; in legal systems they are not familiar with and at great expense. The reasons for issuing an EIO should therefore be open to scrutiny where necessary in the interests of justice, in the executing State as well as the issuing State.

Legal status of visiting police

6.11 Article 16 provides that officials from the issuing State, when present in the executing State in pursuance of an EIO should be regarded as officials of the executing State with respect to offences committed against them or by them. This raises the possibility that police officers from the issuing State would visit the executing State in order to actively conduct investigations themselves. This is not discussed elsewhere in the EIO proposal. This has the potential to cause a great deal of confusion – for the police as well as citizens of the executing State. Police officers from one Member State would inevitably not be as well-versed in the policing procedures of the State they are visiting. It must be ensured that if it is necessary for police to visit another Member State they play a passive role when it comes to conducting investigations, instead relying on the expertise of the domestic force.

Transfer of a person in custody

6.12 Articles 19 and 20 deal with the transfer of persons held in custody to the issuing and executing State respectively for purposes of investigation. Article 19 (1), for example, states: "*An EIO may be issued for the temporary transfer of a person in custody in the executing State in order to have an investigative measure carried out for which his presence on the territory of the issuing State is required, provided that he shall be sent back within the period stipulated by the executing State".*

6.13 Provisions should be added to ensure that prisoners are kept in similar conditions (or improved conditions) when moved to other States and to ensure they are kept for no

longer than necessary in the requesting State. The wording of both articles should be altered to make it clear that they do not apply to those under the age of 18, to ensure vulnerable young people do not have to undergo the distressing experience of being moved to a prison in another country.

Video and telephone conferencing

6.14 Articles 21 and 22 provide for evidence via videoconference and telephone conference. Although this can be refused if "*the use of videoconference is contrary to fundamental principles of the law of the executing State [or] the executing Member State does not have the technical means for videoconference"* there are no specific provisions on important areas such as the quality of technical means or the basic fair trial rights of the defendant. We are concerned at the implications of extending powers to obtain evidence in this way, particularly the ramifications it may have for the defence right to cross-examine witnesses and to have sufficient time to obtain its own evidence in response. We believe detailed standards need to be laid down before these measures can be made the subject of any mutual-recognition based instrument.

6.15 Whenever evidence is given via video or telephone link it is crucial that original recordings are retained for examination by the defence and the trial judge, to ensure that all necessary safeguards were observed during questioning and that any apparent errors in translation into another language can be pointed out and more accurate translations obtained.

Duty to inform individuals affected

6.16 There is no mention in the EIO proposal of any requirement that the issuing authority or the executing authority inform the suspect or any other individuals affected by the evidence-gathering, that such activity is taking place. Such notification is obviously not appropriate for covert operations or where there was a real risk a suspect might be tipped off before the investigation has taken place, or that witnesses or evidence might be tampered with. However, where the investigation would not be prejudiced, there must be a duty to inform all interested parties of the EIO. Defendants should in any event be informed about evidence obtained by an EIO well in advance of any trial to enable them to challenge the collection and transfer of evidence and seek their own responsive evidence in time for the trial, with assistance from prosecution authorities if necessary.

6.17 Similarly, individuals whose evidence (such as DNA samples) has been transferred to an issuing State, leading to their elimination as suspects, should have the right to be informed of this. Without such protections innocent people have no way of knowing what has been done with their DNA evidence and no way to challenge its unlawful retention or unauthorised future use or further transfer.

Records of how evidence gathered and stored: rules on retention and use

6.18 The EIO proposal is silent on the duty of officials in issuing and executing States to keep proper records of how evidence is gathered, stored, analysed and transferred. Without such an audit trail, there is a risk that the defence, other affected persons and the court itself would be unaware of, or unable to raise the possibility of, contamination or loss of evidence, such as DNA samples or banking records. Without a clear legal duty to

keep such records for the duration of any proceedings (and until all possible appeals and challenges are over), it will be impossible for courts and the defence to check that correct procedures were followed. There must also be clear rules about the retention of all original evidence for possible examination by the defence and court, once proceedings on foot.

6.19 States should not be allowed to retain for future analysis or use any evidence that has been obtained for use in a case, once that case has been finally disposed of. There is no mention of this or of retention periods generally, in the EIO proposal.

Defence must have right to seek necessary evidence

6.20 There is no reference in the EIO proposal to the rights of the defence to have these powers exercised on its own behalf, in order to obtain evidence needed for a fair trial. Any Directive must work in a similar way to existing MLA measures by enabling defence evidence-gathering on reasonable request or at the court's own initiative. Nothing should prevent the defence from applying to an issuing authority in one State to request another State for evidence where there are reasonable grounds to believe the evidence exists and is relevant to the charges.

6.21 The rights of the defence to gather evidence and enable necessary investigation in order to obtain evidence in other Member States must be given far more consideration in discussions on evidence-gathering. Explicit reference should be made in any new evidence-gathering instrument, to the rights of the defence, on application to the issuing State, to obtain relevant evidence. Unless the EIO also applied to defence requests for evidence, dispensing with MLA would reduce the tools available to the defence in cross-border cases to gather the evidence necessary for a fair trial, whether primary evidence to make a positive defence case, or evidence needed to challenge the case and supporting evidence of the prosecution.

Andrew Symeou: extradited on evidence obtained by police brutality – and no guarantee he will be able to adduce evidence of his own

Andrew Symeou (21) spent a year in pre-trial detention in Greece after being extradited to stand trial for manslaughter. The victim had died of his injuries after falling from a podium in a nightclub, having been struck. Witnesses interviewed after the events in question say their statements implicating Andrew were beaten out of them by Greek police. They later retracted them.

Five of the murder victim's friends, who did witness the incident, have never been given a proper opportunity to give statements to the Greek police, though they have done so in the coroner's enquiry in the UK (where these witnesses live). This is despite Andrew having asked Greece and the UK to cooperate in ensuring their evidence is available for the trial. These witnesses have described the perpetrator as tall, blond, clean shaven and wearing a blue polo shirt. Andrew has dark hair and, at the time, had a beard. Photos of him on the night show him wearing a yellow t-shirt. These witnesses have also said that they were shown CCTV footage of three men hastily leaving the club at around the time the incident took place. Andrew's lawyer has been told that this film is no longer on the case file.

The ability to adduce evidence is crucial to enable Andrew to prove his innocence. Had the Greek police been required to follow basic and transparent standards to retain and protect important real-time evidence, Andrew and his lawyer would have been able to examine the CCTV footage, or at least discover why it disappeared. Despite having now spent a year on remand, Andrew is not confident he will get a fair chance to prove his innocence. He has been advised that he cannot compel Greece to require the attendance of these key witnesses if they are in the UK and do not attend voluntarily.

7 Conclusion

7.1 Clearly the UK, and all other Member States, must be able to rely on speedy and efficient cross-border cooperation in the fight against crime, but this must not entail a weakening of the fundamental rights UK – and EU – citizens are entitled to rely on.

7.2 Everyone in the EU has the right to be treated fairly in criminal investigations and proceedings and to have data about their private lives protected from unwarranted or disproportionate disclosure. This entails citizens being allowed a full opportunity to defend themselves and participate meaningfully in their trial. It requires a coherent data protection system fully applicable in the criminal justice context to be put in place across the EU. These rights are not variables, to be weighed in the balance with other policy considerations. They are core rights. They should now be restored to the centre of EU criminal justice policy.

7.3 What is needed before any mutual recognition based evidence-gathering instrument can be considered is a detailed set of binding primary legislation affording the protections set out in this paper, as well as a full set of procedural safeguards and strong EU level data protection laws, fully implemented across the Union. Meanwhile, the EU should prioritise improving existing MLA legislation so that the interests of suspects, defendants and others whose rights are affected by evidence requests, are properly protected. This will require a detailed consultation with practitioners on the prosecution and defence side and a careful assessment of what works well in MLA and what needs to improve.

7.4 Mutual recognition and inter-state cooperation should not be seen as ends in themselves, but as potential means to serve the overriding interests of justice. Those interests are as important in the context of gathering, handling, retaining and sharing evidence as they are in a trial. The interests of justice cannot be served if fundamental rights are sidelined.

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