

ECBA Initiative April 2017 (Draft 15/04)

“Agenda 2020: A new Roadmap on minimum standards of certain procedural safeguards”

A. Executive Summary

The European Criminal Bar Association (ECBA) is an association of independent specialist defence lawyers. The association was founded in 1997 and has become the pre-eminent independent organisation of specialist defence practitioners in all Council of Europe countries.

The ECBA recognises the need of new and strong commitments to the EU in these anxious times. We need to strengthen the EU as a guarantor for peace, our common values, human and fundamental rights, and the rule of law in our common area of freedom, security and justice. The ECBA offers constructive collaboration with all EU institutions and national ministries of justice and (other) NGO's.

Since the Stockholm Programme and the Roadmap on procedural rights of 2009 it is generally recognised in all EU Member States that mutual recognition as a legal principle in the field of criminal matters requires mutual trust. The Roadmap of 2009 has been almost completed (except Measure E on vulnerable adult suspects). The implementation process of the respective EU Directives at national level must be observed and monitored carefully. However, legislative action should continue to be taken at EU level in order to strengthen the rights of suspected or accused persons in criminal proceedings. This ECBA Initiative for an “Agenda 2020: A new Roadmap on minimum standards of certain procedural safeguards” is designed to lead to the strengthening of the legal principle of mutual recognition and its underlying component: mutual trust. A Roadmap adopted by the EU Member States in 2020 is a politically realistic goal to achieve the real objective, legislation by means of Directives or Regulations (cf. Art 82 TFEU) on the following (see annex for details) for the future legislative period(s):

- Measure A: Pre-Trial-Detention, including the European Arrest Warrant
- Measure B: Certain Procedural Rights in Trials
- Measure C: Witnesses' Rights and Confiscatory Bans
- Measure D: Admissibility and Exclusion of Evidence and other Evidentiary Issues
- Measure E: Conflicts of Jurisdiction and ne bis in idem
- Measure F: Remedies and Appeal
- Measure G: Compensation



B. The European Criminal Bar Association

Today the ECBA represents over 40 different European countries including all 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. In 2016 a sub-association, the European Fraud and Compliance Lawyers (www.efcl.eu), was founded; the EFCL is holding regularly one additional annual conference in June.

Through its conferences, working-groups, website and newsletters the ECBA provides a suitable forum to access absolutely up-to-date information on legal developments. Through the work of its board and members the association actively seeks to shape future legislation with a view to ensuring that the rights of European citizens in criminal proceedings are enhanced in practice. Through the networking opportunities available with individual and collective membership, members establish one to one contact with other practitioners and national defence associations in other Member States both with a view to the exchange of information and to practical cooperation in specific cases. This experience from comparative jurisdictions shapes and informs the submissions which are made by the ECBA to the lawmakers, and ensures that those submissions are given due weight.

The ECBA was a member of the EU Justice Forum and participates in several EU-projects (e.g. training events for defence lawyers jointly with ERA and EIPA, networking/legal aid; letter of rights; pre-trial emergency defence; European Arrest Warrant; translation and interpretation, SUPRALAT). We have been regularly invited to many EU experts' meetings concerning criminal law issues. Further information on the ECBA can be found at our website: www.ecba.org.

C. Mutual Recognition and Mutual Trust in Criminal Matters

Since the Amsterdam Treaty and the Tampere Council in 1999, the legal principle of mutual recognition of judicial decisions has been continually established, ultimately laid down in the Lisbon Treaty in Art. 67, 82 TFEU. Mutual recognition as a generally recognised legal principle in the field of criminal matters requires mutual trust. This was clearly expressed in 2009 by the Stockholm Programme and the "first" Roadmap on procedural safeguards. Nobody in Europe can disavow or ignore the political success story in this field since the adoption of the "first" Roadmap. The ECBA is proud to have constructively contributed to the formation of the "first" Roadmap since 2002, which was a thorny path, and the subsequent EU

legislation on the various measures in the field of procedural safeguards after 2009 (in particular translation/interpretation, right to information, access to a lawyer and legal aid, rights of children, presumption of innocence and right to silence). We are still missing an appropriate Measure on EU wide minimum standards for the specific protection of vulnerable adult suspects (cf. Measure E of the 2009 Roadmap), for example handicapped people, and we urge the responsible politicians insofar to complete the "first" Roadmap of 2009.

The mission to achieve mutual trust has not been completed because partial distrust still clearly exists between EU Member States and from the EU citizens' point of view. Therefore, we must carefully observe the implementation process of all the Directives that were adopted in conjunction with the Roadmap after 2009 and the additional Directive (EU) 2016/343 on presumption of innocence and the right to be present at the trial. We would like to express our expectation that the defence lawyers working at the European level at the European Criminal Bar Association (ECBA) and at the Council of Bars and Law Societies of Europe (CCBE) will be part of the compliance process directed by the Commission in order to improve the quality of process and outcome of this necessary compliance regarding the implementation of EU legislation at the national level.

However, there is still much work to be done. We should attempt to improve existing mutual recognition instruments, e.g. the European Arrest Warrant (see *ECBA Handbook on the EAW*: <http://handbook.ecba-eaw.org/>). Effective legislative measures at EU level are lacking in important areas, such as pre-trial detention (cf. Measure F of the 2009 Roadmap); or conflicts of jurisdiction (Art. 82 para. 1 b) TFEU), to avoid double or multiple prosecution and trials, an area that certainly relates to issues of ne bis in idem (Art 50 CFEU, Art 54 CISA) where we have a precise legal framework and certain jurisprudence but still identify many practical problems. Important components of criminal proceedings in the EU Member States, in particular the entire trial phase, or legal remedy (appeal) guarantees including the right to be heard, are also not sufficiently protected (i.e. practically and efficiently not only theoretically and illusory) by concrete minimum standards despite the general clauses in Art 6, 13 ECHR, in Art 14 ICCPR and in Art 47 ff CFEU and the corresponding jurisprudence. Witnesses' rights (e.g., access to a lawyer, the right to silence, legal privileges, confiscatory bans) and other evidentiary issues (e.g., the admissibility or exclusion of evidence, the right of the defence to gather or to ask for evidence, recording of police interviews) need certain minimum rules alike. All these issues are essential in order

to establish the required mutual trust in the EU (cf. Art 82 par 2 TFEU).

The longstanding discussion on a Regulation for the establishment of a European Public Prosecutor's Office (EPPO) - ongoing since 2013 - and the many different interim drafts have further demonstrated that new, additional measures are necessary in the field of procedural safeguards at the EU level. To give one example: the current draft Regulation on EPPO establishes rules on compensation (cf. Art 69), however, that is neither a general rule as minimum standard for criminal proceedings throughout the EU nor does it cover compensation for damages after (ex post) unlawful deprivation of liberty (cf. Art 5 para 5 ECHR) or other (ex post) unjustified coercive measures, or for legal fees in cases of acquittal or termination of the investigation, due to lack of evidence or, in cases of proven innocence, as the result of an investigation or after miscarriage of justice (cf. Art 14 par 6 ICCPR). The European legislator should close this gap.

Action should continue to be taken at the EU level in order to strengthen the rights of suspected or accused persons in criminal proceedings. This initiative will ultimately lead to the strengthening of the legal principle of mutual recognition and its underlying part: mutual trust. The ECBA suggests the initiative "Agenda 2020: A new Roadmap on minimum standards of certain procedural safeguards" which would include legislation by means of Directives or Regulations (cf. Art 82 TFEU) on the following (see annex for details):

- Measure A: Pre-Trial-Detention, including the European Arrest Warrant
- Measure B: Certain Procedural Rights in Trials
- Measure C: Witnesses' Rights and Confiscatory Bans
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Annex