ECBA CORNERSTONES ON ACCESS TO A LAWYER IN CRIMINAL PROCEEDINGS

2nd Statement on the Proposal for a Directive of the European Parliament and of the Council on the Right of Access to a Lawyer in Criminal Proceedings and on the Right to Communicate upon Arrest

COM (2011) 326 final (Brussels, 8 June 2011) – Interinstitutional File2001/0154 (COD)
Draft Text Revised by the Council per 31 May 2012 (Council Document 10467/12)[1]

I. THE BACKGROUND

The ECBA is extremely concerned about the General Approach of the Member States agreed on 8 June 2012. The rapporteur of the LIBE Committee of the European Parliament (Ms Antonescu) and the MEPs that are backing her report of 7 February 2012 deserve respect and support in their political fight for the Directive It is a fight for fundamental rights of innocent European citizens. The ECBA expressly backs the European Commission in the coming up trilogue of European Council, European Parliament and the European Commission to defend their Directive proposal of 8 June 2011 on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest which the ECBA has welcomed and positively commented at several opportunities verbally and in writing[2].

The right of access to a lawyer and the right to communicate upon arrest in criminal proceedings are two core rights which are essential in ensuring a fair and just treatment of legally presumed innocent European citizens and those who travel to and in Europe. The right to legal aid (Measure C "Part 2") will also be very important. The ECBA must remain very vigilant to ensure that the Commission fulfils its obligations to put forward a draft Directive on legal aid in the near future.

We have already seen attempts to agree on minimum standards of procedural rights in criminal proceedings which shamefully failed because even the standards of the ECHR and the jurisprudence of the ECtHR, which reflects valid law in all Council of Europe States, were not politically acceptable in the EU. During the Swedish Presidency 2009 the Stockholm Programme was approved by the European Council. The Roadmap for strengthening procedural rights, part of the Stockholm Programme, was a new start to establish these fundamental rights of European citizens throughout the EU not only in legal theory but also in daily practice of criminal proceedings. Furthermore the purpose of a Directive should not solely be the codification of ECHR-rights but it should go further and lay down clear rules for certain problematic areas in the daily practice e.g. at police stations, in line with what the Commission proposed (added value).

The General Approach of the Council of 8 June 2012 is a dramatic step back to the times before the Stockholm Programme and is now the new synonym for the potential failure of this extremely important component of mutual trust between Member States and public confidence in the EU. The Council's General Approach is not compliant with ECHR standards and would partly lead to the prevention of the application of these rights in practice. If it became law, it would lead to numerous claims before the European Court of Justice and the European Court of Human Rights, as well as before national Constitutional Courts. This new political failure of the Member States in the Council

[1] http://register.consilium.europa.eu/pdf/en/12/st10/st10467.en12.pdf . A general approach with minor changes (10908/12) has been reached on June 8, 2012, but this text not available online yet –see the respective press release on http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/130761.pdf.

[2] On 11 June 2011 the ECBA has issued a press released welcoming the presentation of the proposal. The press release is available on the website: http://www.ecba.org/extdocserv/MeasureC-pressrelease0611.pdf. On 16 September 2011 the ECBA sent a Statement on the Directive Proposal to all Ministers of Justice of the EU Members States, the Permanent Representatives in Brussels and the Members of the Parliament – see http://www.ecba.org/extdocserv/ECBA_Stat_PropMeasureC.pdf.

must be repaired in the trilogue. But no compromise is better than a bad one. However, a final failure would send a disastrous message to the world that the EU is not capable of upholding and honouring its citizens' rights. Instead of improving mutual trust and mutual recognition, approving the current draft of the Council would have the exact opposite effect – blocking criminal justice in Europe due to violation of the fundamental rights of the EU Citizens. These violations undermine mutual trust and are the true obstacle to the effectiveness of criminal justice, not the presence of a lawyer as some Member States do not stop to argue. Legal assistance by a lawyer is a fundamental component of any criminal justice system under the rule of law without which justice cannot be achieved. By avoiding or postponing the participation or intervention or any legal assistance by a lawyer and the possibility of derogations from the confidentiality of the lawyer/client relation, the Council's draft completely ignores the fact that confidential legal advice and access to a lawyer at any stage of the proceeding are part of the core rights of a fair trial which often constitute a guarantee for admissibility of evidence at trial. The Council's draft is moreover not only non-compliant with the ECtHR case-law but it would lead also to an inefficient criminal justice system, nationally and in the common area of freedom, security and justice.

Since June 2011, the ECBA has expressed its concern that there could be an erosion of the proposal's text during the negotiations and that the proposed rights should be strengthened rather than diminished. Sadly the General Approach as resulting from negotiations within the Council confirms that these concerns were not ill-founded. Again, no compromise is better than a bad one.

That said, the draft report of the LIBE committee of 7 February 2012 (2011/0154 COD – PE464.063v01-00) is satisfactory and deserves principal support even if there are differences with the ECBA (e.g. regarding the waiver) and other NGOs. The political hope of those who know and accept the jurisprudence of the ECtHR (which is valid law in all EU Member States) and those who follow the rule of law rests now with the Commission and the Parliament. Nevertheless there are a large number of proposed amendments from MEPs (44-177 in the document of 22 March 2012) which have to be criticised strongly and do not deserve any support at all. The report will be discussed and voted in July and it is of utmost importance that the members of the LIBE committee are aware of the implications of their vote. All MEPs should understand the direction of the negotiations during the trilogue which will start soon.

In the subsequent paragraphs we summarise the ECBA cornerstones with which the proposed Directive must in any case comply. The ECBA offers experience, expertise and legal competence of defence practitioners from over 35 Council of Europe states including all EU member states. We are willing to provide technical and expert legal advice to the EU institutions as well as collating information and data to contribute to the shaping and development of this legislation so that we have a European justice system that we can be proud of, rather than ashamed.

For further questions and comments please contact:
Prof. Dr. Holger Matt, Chairman, ECBA (kanzlei@dr-matt.de)
Vincent Asselineau, Vice Chair, ECBA (vasselineau@farthouat.com)
Dr. Dian Brouwer, ECBA Board Member (dian.brouwer@cms-dsb.com)
Vânia Costa Ramos, ECBA Board Member (vcr@advogados.in)

For more information on the ECBA please visit www.ecba.org

II. THE CORNERSTONES ON ACCESS TO A LAWYER IN CRIMINAL PROCEEDINGS

1. The role of the lawyer – overcoming the myth

- The timely and active participation of a defence lawyer in criminal proceedings contributes to the effectiveness of criminal justice systems – it is **not an obstacle** to criminal justice.
- It **ensures the fairness** of proceedings, because immediate access to legal advice is a pre-condition to exercising one's rights.
- It helps achieve a **better quality of process including evidence gathering**, and therefore of the evidence obtained, which helps to **secure its admissibility**.
- It contributes to **preventing miscarriages** of justice and even to avoiding large numbers of appeals - resulting in **a reduction of the costs** of criminal proceedings.
- **It facilitates mutual recognition** in the EU because **mutual trust** in fair proceedings throughout Europe would be developed **in practice –** as access to a lawyer from the very beginning of the proceedings meets not only ECHR standards but also the common standards of many EU national legislations.

2. Waiver of the right to counsel in criminal proceedings

- Unless national law provides for mandatory defence, a citizen may waive the exercise of the right to counsel.
- The waiver does not constitute a waiver of the right itself and may be revoked at any time of the proceedings.
- Avoiding misuse of waivers cannot be sufficiently remedied through Measure B of the Roadmap on procedural rights, thus the factual and legal consequences of a waiver have to be the subject of **real legal advice not only of information, at least for serious crimes, situations of deprivation of liberty, cases involving vulnerable suspects and EAW cases**.
- **Legal advice about the consequences of a waiver through a lawyer** should always be available in order to allow a waiver of the right on access to a lawyer in the context of criminal proceedings.
- **Advice on waivers by police officers or any law enforcement or judicial authorities should be inadmissible**.

3. Confidentiality

- Communication between the suspect and/or accused and his counsel has to be confidential and may not be monitored.
- **No exception** to the legal protection of this confidentiality is **allowed**.
- A general clause for derogation such as “threat to public safety” is not acceptable at all.
- Cases in which the lawyer is himself/herself suspected of having committed a crime or an offence follow the national law which must consider the **legal privileges of a lawyer** in his/her professional capacity. Apart from the possibility of substituting a lawyer through a judicial decision, the **absolute confidentiality of the suspect and his/her lawyer must not be affected** by any legal measure against the lawyer in a criminal proceeding against this lawyer.

4. Scope of the right of access to a lawyer

The temporal scope

- The right to counsel applies **at any stage** of the criminal proceeding.
- This starts with the beginning of the investigation, namely if a competent regulatory body acts to clarify the suspicion of an offence and to pursue a suspect if necessary.
- Whether the suspect has been informed that he is subject to criminal proceedings is **totally irrelevant** as well as when and how.
- An “official” notice to the suspect or accused is also **totally irrelevant** for this purpose.
- The right will be valid throughout the proceedings, until its final completion.

The material scope

- The right to counsel in criminal proceedings applies **in all criminal proceedings**.
- It does not matter whether the proceedings concern a petty or a (particularly) serious offence or crime, a crime that seldom occurs or mass-infringements, such as traffic offences.
- The right to counsel is particularly important in cases where entities other than courts have the **power to investigate and punish criminal conduct.**
- **Exceptions are not admissible**.
- The right to counsel must be made available **in disciplinary proceedings** opened as a consequence of suspicion of criminal acts.

5. The content of the right

- **The right to communicate with the lawyer always includes the right to meet with a lawyer and must not be restricted** because without that substantial legal advice is impossible in many cases and reasonable defence lawyers have simply to advise their clients not to make any statement and thereby the positive role a defence lawyer can bring to the process can be undermined.
- It must include the right to **reasonably long and reasonably frequent personal meetings** between the accused and counsel.
- It must include in principle **the right of counsel to be present** when investigative measures are being undertaken, the right to ask questions and make comments or submissions.
- Irrefutable urgent investigative measures may also begin in the absence of legal counsel, unless otherwise determined by national law.
- If the person has not waived his right to counsel**, no interview may begin** until the accused has met his legal counsel with the possibility of strictly confidential talks, and the counsel may attend the hearing and participate in it by asking questions etc.
- Finally, if a person is deprived of his/her liberty, he **must always be promptly informed** that a certain lawyer is trying contact him for the purpose of providing him with legal assistance.

6. Exceptions to the right

- There should be no exceptions to the right of access to a lawyer in criminal proceedings and in European Arrest Warrant cases.
- Any exception of the **application of this right must be strictly limited**, well defined and provided for explicitly by law.
- Fear of "undermining investigation" **must not be a ground** for limiting the right, since it would give investigative authorities the discretion to enable the right to be exercised or not, thus undermining the equality of arms protected in Art 6 ECHR.
- If the lawyer is suspected of performing illegal actions, he can be made subject to criminal proceedings himself and thus replaced by another lawyer by means of a judicial decision.

7. Dual Representation in European Arrest Warrant proceedings and execution of mutual recognition instruments

- Within proceedings concerning the execution of mutual recognition instruments, for example in EAW proceedings, a person has to defend himself **both in the issuing and in the executing States**.
- The right to counsel must therefore be granted in both states.
- Furthermore conditions for an **effective collaboration** and defence have to be ensured.
- The deprivation of liberty on the grounds of a **European Arrest Warrant** has to be observed as a unique and continuous deprivation of liberty that (other than in purely national cases), **involves two jurisdictions** and therefore requires legal combined assistance in those two jurisdictions.
- The execution of any **other mutual recognition instruments** must also be analysed as a part of a unique criminal process involving more than one jurisdiction and therefore requiring combined legal assistance in the respective jurisdictions.

- This understanding of the right to legal counsel will foster **mutual trust** within the EU and will consequently improve the effectiveness of the principle of **mutual recognition**.
- Furthermore a different solution is **not compliant with the ECHR and article 6 of the TUE**[3].
- Persons subject to an EAW are **not protected by Article 6 ECHR** since EAW proceedings are akin to extradition proceedings (not criminal proceedings). Therefore it is imperative that their rights are laid down in EU Directives. In the absence of EU legislation to protect person subject to an EAW, their rights depend upon national law. The rights laid down in the FD on the EAW are very weak and refer only to national provisions. EU Member States have very different standards of protection and these differences undermine mutual trust so only an EU instrument can create the conditions for mutual trust.
- Access to a **lawyer limited to the executing State** is not effective as "access to a lawyer", as this lawyer cannot properly exercise the rights of defence, namely to assess himself and to help the courts to assess the validity of the arrest warrant in the issuing State and the existence of grounds for refusal or the need to ask for guarantees, as enshrined e.g. in the FD on the EAW.
- **Dual representation** will not bring many practical problems as in many cases the person subject to a European Arrest Warrant already has a lawyer in the issuing state. Therefore in order to make the right of access to a lawyer in both Member States effective, it would only be necessary to insert in the EAW form or in the SIS-notice a place where this lawyer and his or her contact details can be inserted.
- In cases where a lawyer has not yet been retained or appointed in the issuing Member State, this person would in any case be granted the assistance of a lawyer in the issuing State after being surrendered, as he/she is deprived of his/her liberty.
- Granting effective dual representation is only a **matter of timing**: anticipating the intervention of the lawyer from the issuing Member State.
- Experience has shown that many European Arrest Warrants are issued for minor offences. In many of these cases, once the person has been surrendered to the issuing Member state, they may **avoid prison** by simply paying a fine. In these cases, executing a European Arrest Warrant represent a huge **financial burden** that could have easily been avoided by the intervention of a lawyer in the issuing State.
- Early access to dual representation may lead to a **more cost effective and timely solution** for Member States and will ensure that citizens' rights are respected.

8. Legal remedies

Without remedies there are no effective rights

- All the violations of the right of access to a lawyer must practically be **protected by an effective legal remedy** which puts the citizen in the position in which he/she would be, had there not been a violation of his/her rights.
- Any **evidence** obtained or any investigative act carried out in violation of the core right to access to a lawyer may not be used for any purpose and must be excluded.
- The criteria for excluding evidence must go beyond the general assessment "fairness of the proceedings" criteria of the ECtHR and create a **higher EU-standard**.

***

[3] See Opinion of the Council of Europe Secretariat: "The Council of Europe Secretariat however suggests to rethink the wording of Article 11 (4) of the draft Directive ("limited to what is needed") which appears unduly restrictive, and not to limit the effective exercise of the applicant's rights to the executing member state, but also to the issuing state" – available on http://www.coe.int/t/dghl/standardsetting/hrpolicy/external_relations/Docs/Opinion_2011_en.pdf.