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# **CCBE RESPONSE TO THE GREEN PAPER ON PROCEDURAL SAFEGUARDS FOR SUSPECTS AND DEFENDANTS IN CRIMINAL PROCEEDINGS THROUGHOUT THE EUROPEAN UNION**

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### **Introduction**

The Council of the Bars and Law Societies of the European Union (CCBE) is pleased to have the opportunity to comment on the Green Paper from the Commission on Procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union.

The CCBE is aware of the Treaty problems in this area as regards the principle of subsidiarity. However, the CCBE believes that current legislation, for example the European Arrest Warrant, has highlighted the need for a set of minimum standards throughout the European Union. The CCBE is of the opinion that the success of legislation like the European Arrest Warrant will be strongly dependent on the existence of certain minimum rights in all Member States and recognition of their use in practice.

One would have thought that the rights enshrined in international conventions such as the European Convention on Human Rights and other documents would ensure a satisfactory level of protection. However, the sad truth is that a number of Member States fail to meet the necessary standards of minimum rights during criminal proceedings.

It appears that the European Commission is reluctant to single out concrete problems in one or some of the Member States of the European Union. It is however important to identify areas within Member States where the level of protection is unsatisfactory or outright appalling. The CCBE believes that only by focusing directly on concrete examples and by inserting pressure on the Member State in question may changes be brought about. The CCBE would like to point out that in order for procedural safeguards to be “practical and effective” a system of free legal representation must exist.

The CCBE also highlights, as is noted in the Green Paper, that many important procedural aspects of pre-trial detention are not dealt with in the Green Paper as the Green Paper only deals with a small range of safeguards. The CCBE looks forward to the Commissions work in the many other areas where procedural safeguards are required e.g. search and seizure, gathering of evidence etc.

### **CCBE response to the Green Paper**

The CCBE supported by the national bar associations has an excellent opportunity to gather and assess information on the different legal systems. We suggest that the Commission should use this information to influence the initiative. The CCBE firmly believes that the best rather than the poorest standard of Member States should inspire the initiative. Thus, the CCBE will encourage its national bar associations to use this initiative to lobby for a solution at an EU level that would be less possible at a national level.

The CCBE believes that the Commission should try to push the poorest systems forward by example of the best systems. Since no country seems to hold all the best solutions to the different problems arising under the initiative a certain “forum shopping” should be applied.

## GENERAL

### **1 Is it appropriate to have an initiative in the area of procedural safeguards at European Union level?**

CCBE response:

The CCBE believes that it is most appropriate to have an initiative in the field of procedural safeguards. However, the CCBE would like to emphasise the very important and decisive principle that the aim of the project should not be to make minimum standards common standards. Instead the project should improve these minimum standards. Member States with higher standards should be applauded and their solutions provided as examples of best practices.

The basis for the present initiative is the political will to ensure that everybody has “a fair trial”. The notion of a “fair trial” is a legal standard that must be complemented and completed by secondary legislation. Thus merely stating, that everybody has the right to a fair trial does not in itself guarantee any effective protection. Article 6 of the ECHR not only acknowledges the right to a fair trial but also provides examples of what is to be understood by a fair trial. Among the examples are the demands for impartial judges, the right to legal representation and the right to interpretation.

However, the wording of Article 6 (and other fundamental documents) does not give exhaustive guidelines as to the notion of a “fair trial” or the notion of “legal representation” etc. The case law of the Strasbourg Court has elaborated on the content of the concept of a “fair trial” and the Court has thereby further developed the concept.

There are however, still a number of unanswered questions as to the concept of a “fair trial” and the sub-notions like “legal representation” etc.

The aim of the initiative of the Commission should be to put some flesh on the bones of these concepts thereby adding real value to the already existing legal sources.

The CCBE is firmly of the opinion that the European Union does not need a new document merely stating that everybody has the right to a fair trial. Europe needs an initiative to give meaning to the standard of “a fair trial”. In other words, it should be the main focus to add real and effective value to the already existing standard in order to further develop the standard. In order to fulfil this task the initiative must include binding minimum standards. Otherwise the initiative will crumble into a political statement or “soft-law”.

It is therefore of great importance to point out the unsuitability of the remarks of the Green Paper concerning the binding status of the initiative. On page 10 the Green paper talks about a “best practise guide” and on page 16, the Green Paper states the following:

*“The green paper does not seek to create new rights nor to monitor compliance with rights that exist under the ECHR or other instruments, but rather to identify the existing rights the Commission sees as basic and promote their visibility”*

The CCBE finds these statements to be unambitious and in contradiction with the official *acquis communautaire* demanding the effective adherence of all Member States to fundamental human rights as laid down in the ECHR. Thus, all Member States already are obliged to uphold the ECHR. Therefore there is no added value in introducing an initiative merely stating what is or should already be common standards in all Member states.

The initiative should indeed result in legally binding community law obliging Member States to uphold certain minimum standards. The initiative should aim at establishing an overall better level of protection of individual rights. Moreover, the initiative should aim at raising the standard above the lowest common denominator.

### ***Procedural safeguards for cross-border as well as national cases***

The legal aid directive recently enacted by the Council of Ministers covers only legal aid in civil and commercial cross-border cases. Moreover, the legal aid directive only applies to persons lawfully residing in a Member State. The CCBE would like to stress that in cross-border cases there would be a need to have two defence lawyers in matters such as the application of the European Arrest Warrant.

Obviously, minimum rights in the field of criminal law must cover everybody regardless of nationality or ground of residence.

Even more obvious, the same minimum rights must apply in national and cross-border cases. It is unthinkable that cross border cases should be treated less favourably than national cases since it would be seen as discrimination. On the other hand, no Member State should be able to reserve an area of competence to refuse nationals the same rights as enshrined in cross border cases. The CCBE recommends that the initiative apply to "everybody" irrespectively of nationality or place of the crime investigated.

### ***The right to be informed of grounds for suspicion or charge***

The CCBE would also like to add that being arrested and detained is a serious and unpleasant experience and should only be used where substantial reasons deem it to be necessary. The police must therefore upon arrest inform the detainee of the grounds for suspicion or the charges brought against him. Requiring the police to substantiate the arrest might contribute to preventing the excessive use of arrest and detention.

Though being arrested and detained is most unpleasant it also means the conferring of certain rights that other persons, e.g. witnesses, do not enjoy e.g. the right to having a lawyer present etc. In order to make the initiative effective, it is therefore crucial that the initiative defines at what moment the rights enshrined come into action and may be referred to and relied on.

The CCBE holds that the maximum of procedural safeguards must apply on arrest. This is also referred to and supported in the Green Paper.

## LEGAL REPRESENTATION

### **2 In order to ensure common minimum standards of compliance with Article 6(3)(c) ECHR, should Member States be required to establish a national scheme for providing legal representation in criminal proceedings?**

CCBE response:

The right to legal representation is already guaranteed by Article 6 of the European Convention on Human Rights.

In order to add substantial value the initiative from the Commission should focus on the nature or *content* of the right of legal representation more than the right itself. Hence, the initiative shall ensure, that everybody upon arrest immediately has an effective right to legal representation by a properly trained, independent defence lawyer of his own choice.

The purpose of ensuring the right to legal representation is however worthless unless the defence lawyer has sufficient means to defend the interests of the client. The initiative should therefore guarantee the defence lawyer a number of rights including:

- the right to visit his client in private
- the right to talk to his client in private and in full confidence
- the right to access all material concerning the case whether considered relevant or irrelevant by the police and whether filed on the case or not
- the right to be informed about and to be present at further investigation
- the right to be present during questioning of his client
- the right to be present and to ask question etc at all times in court whether pre-trial or during trial hearings
- substantial protection of the freedom of speech of the defence in order not to impede criticism of the investigation or prosecution
- the right to receive notice well in advance of investigation etc. in order to be able to prepare a proper defence

The costs of legal representation must – as pointed out in the Green Paper – be paid by the State. However, it is open for the State to apply a means tested system for granting free legal aid. The Green Paper lists a number of criteria for determining who should be granted free legal aid, cf. ECHR Article. 6

The CCBE finds a need for more definite regulation on free legal aid than just “interests of justice”. The CCBE believes that this is a notion far too vague to assure certainty on who qualifies for free legal aid.

The CCBE proposes that the initiative states that all costs stemming from cases ending with acquittal of the person charged is paid by the State with no reimbursement. Persons acquitted should not be affected financially by the case.

As to the question of a means-tested system, the CCBE finds it questionable whether a means-tested system is cost efficient. Moreover, the means-test should not be applied before the result of the trial is known. The presumption of innocence implies that the State lays out the costs for the defence lawyer. Only afterwards should the State be able to be reimbursed and only after an assessment of the compatibility with the “interests of justice” standard in the ECHR.

Since the defence lawyer in a number of cases is to be paid by the State, it is pivotal for the upholding of full independence of the defence lawyer, that the rights stated above are backed by a duty on the State to pay for such measures. Moreover, the payment of the legal defence should – at least in larger and more complex cases – be paid in instalments not to cause cash flow difficulties for the lawyer in question.

As to the protection of the freedom of speech of the defence, reference could be made to the *Nikula vs. Finland* case (case no. 31611/96) where a Finnish defence lawyer was charged and punished for criticising actions conducted by the prosecution during investigation and trial. The European Court of Human Rights found a breach of Article 10 of the ECHR.

**3 If Member States are required to establish a national scheme for providing legal representation in criminal proceedings, should the requirement extend to verifying that remuneration is enough to make participation in the scheme attractive for defence lawyers?**

CCBE response:

Yes. Currently the system for remuneration for lawyers is very bad in some countries, for example, Germany. In the interests of justice it is important that high quality lawyers defend suspects and defendants. In this regard it is important to provide appropriate remuneration to attract such lawyers. This remuneration, and responsibility for such remuneration, should be a matter for the Member State.

The question that must be asked is whether the scheme is effective for the defendant. The CCBE suggests that the Commission undertake a study in each Member State to determine whether the system for providing legal representation is effective and whether the system for remuneration is effective to attract quality lawyers.

**4 If Member States are required to establish a national scheme for providing legal representation in criminal proceedings, should the requirement extend to verifying the competence, level of experience and/or qualifications of the lawyers participating in the scheme?**

CCBE response:

There would be a need for close co-operation between national States and national bars. If such a scheme was to exist, it must be the national bar associations and not the State that carries out such verification. This would also seem to be necessary to ensure the "independence of the lawyer".

**5 Article 6(3) of the ECHR provides that a person charged with a criminal offence be given free legal representation "if he has not sufficient means to pay for legal assistance". How should Member States make the assessment of whether the defendant is able to pay for legal representation or not?**

CCBE response:

If a person is detained and charged, the person should be entitled to legal representation regardless of his financial means. This would also fall within the principle of the presumption of innocence. The presumption of innocence should lead to the situation whereby a lawyer would be provided.

**6 Article 6(3) of the ECHR provides that a person charged with a criminal offence be given free legal representation "when the interests of justice so require". Should this right be limited to offences which carry a risk of a custodial sentence or extended to cover, for example, a risk of loss of employment or loss of reputation?**

CCBE response:

In any situation in which disclosure is involved, a person should have an automatic right to a lawyer.

**7 If free legal representation is to be provided for all offences except “minor” ones, what definition of “minor offences” would be acceptable in all Member States?**

CCBE response:

The CCBE believes as stated in our response to question 6, that in any situation in which disclosure is involved, a person should have an automatic right to a lawyer.

**8. Should there be sanctions, other than any findings of the ECtHR, if a Member State fails to provide legal assistance and representation where a person is entitled to it?**

A country that does not have a fair system of legal aid should be excluded from the system of mutual recognition. Rights are only effective if there are means of enforcing them.

The CCBE also believes that there should be monitoring by independent bars and that bars should have a monitoring mechanism in place.

The CCBE would like to add that it is not clear from the question whether this refers with an ad hoc case or does it refer to a State's failure to implement procedural safeguards. Similar to the proposals for the European Public Prosecutor, it is difficult to imagine who one can complain to in cases of a breach of rights. Also in cross-border cases, which party would make the complaint - the individual or the national state - and who again would the individual or State complain to.

## **PROVISION OF LEGAL TRANSLATORS AND INTERPRETERS**

The CCBE supports the ideas mentioned to strengthen the qualifications of interpreters and translators and welcomes minimum standards in this field.

The Green Paper appears to focus merely on the need for interpretation and translation during court sessions. It is however important to recognise that the need for oral interpretation and possibly also translation of documents already arises during questioning by the police.

Hence, access to free interpretation and translation should already come into effect during the police investigation. In some Member States, the importance of high quality interpretation seems to be neglected at the preliminary stages of a criminal case. Thus, police officers tend to rest upon their own language skills when interviewing or interrogating persons who do not speak or understand a language. It is therefore quite common to experience police officers communicating in for example, English or German with persons who are not from an English or German speaking country. Obviously this procedure is applicable where both the police officer and the person being interviewed master the language used at a sufficient level. However, it is not unusual to experience police officers conducting interviews in a language they barely master. It is even more frequent - especially in cases involving non-European citizens - that the person interviewed has little knowledge of the language used during the interview.

Based on the above the CCBE recommends more specific regulation of the language applied during both investigation and trial. Thus the initiative must ensure application of a language that both the interviewer and the interviewed are familiar with and capable of giving detailed and precise statements. On the part of the investigating police officer this would imply the capability of writing the report of the interview in the language applied during interview and thereby using the exact wording of the statements taken during the interview.

### **9 Should there be a formal mechanism for ascertaining whether the suspect/defendant understands the language of the proceedings sufficiently to defend himself?**

CCBE response:

Yes. It is important that a basic system is in place to ascertain whether the suspect/defendant understands the language of the proceedings sufficiently to defend himself. There must also be special regard for the nature of legal terms and their significance.

### **10 Should Member States adopt criteria to determine how much of the proceedings, including those prior to the trial should be interpreted for the suspect/defendant?**

CCBE response:

The CCBE suggests that all relevant information should be interpreted for the suspect/defendant. This would include all proceedings prior to the trial.

### **11 What criteria can be used to determine when it is necessary for the defendant to have separate translators and interpreters from the prosecution/court (depending on the legal system)?**

CCBE response:

The CCBE holds the opinion that it is a necessary safeguard for the defendant to have a separate interpreter. This would facilitate a situation whereby the accused would be aware of and be able to notify that the interpreter for the prosecution was not interpreting correctly.

The CCBE believes that the interpreter for the accused should be separate. The CCBE also believes that as a necessary caution all proceedings should be recorded. In addition, the legal aid system should also provide cover for interpretation.



It is essential that the Commission in any proposed legislation regard the standard to be that of a fair trial. Any practical limitation on this standard must be overcome. One must postpone the trial until appropriate interpretation is available, otherwise there is no fair trial.

**12 Should Member States be required to provide translations of certain clearly defined procedural documents in criminal proceedings? If so, which documents represent the minimum necessary for a fair trial?**

CCBE response:

In principle all documentation should be translated, and most certainly the charge. The defence lawyer should be asked whether there is any documentation that does not need to be translated. The right to translation of documents should begin immediately on apprehension. Furthermore, every country must ensure that there is a facility for appeal in the event that a document is not translated. The CCBE would suggest that the principle should be all evidence that is relevant to guilt or innocence should be either interpreted or translated.

**13 Should Member States be required to draw up national registers of legal translators and interpreters?**

CCBE response:

Yes. Member States might wish to draw up a national register for legal translators and interpreters. However, the defendant should have the right to be allowed to bring in his own interpreter or translator if he so chooses. This would mean that the list on the register would not be an exclusive list.

**14 If Member States set up national registers of legal translators and interpreters, would it be preferable to use those registers as a basis for drawing up a single European register of translators and interpreters or to have system of access to the registers of other Member States?**

CCBE response:

The CCBE believes that it would be best to have a system of access to the registers of other Member States.

**15 Should Member States be required to establish a national scheme for training legal translators and interpreters? If so, should a system of accreditation, renewable registration and continuous professional development be established?**

CCBE response:

Yes. The CCBE believes that this would be good idea. In addition the CCBE would like to highlight that the value of accreditation is that it establishes ethical standards. However, the CCBE would like to emphasise that the list should not be exhaustive and that the defendant should have the right to be allowed to bring in his own interpreter or translator if he chooses.

**16 Should Member States be required to appoint an accrediting body to govern a system of accreditation renewable registration and continuous professional development? If so, is it desirable that the Ministry of Justice or Interior work with the accrediting body so as to ensure that the views and needs of the legal and linguistic professions are both taken into account?**

CCBE response:

It would seem appropriate and necessary that the national Ministry of Justice or its equivalent would work with any accrediting body.

- 17 If Member States are required to establish a national scheme for providing legal translators and interpreters in criminal proceedings, should the requirement extend to verifying that remuneration is enough to make participation in the scheme attractive for translators and interpreters?**

CCBE response:

We refer to the answer to question number 3. As with remuneration for lawyers the CCBE believes that in the interests of justice it is important that high quality legal translators and interpreters are employed. In this regard it is important to provide appropriate remuneration to attract such legal translators and interpreters.

As referred to in our response on remuneration for lawyers, the question that must be asked is whether the translation or interpretation is effective for the defendant.

- 18 How may and by whom should a Code of Conduct be drawn up and regulated?**

CCBE response:

Bar associations should have a role and be included in drawing up any code of conduct.

- 19 The Commission understands that there is a dearth of appropriately qualified legal translators and interpreters. What can the Member States do to make this a more attractive profession?**

CCBE response:

Member States could ensure that proper remuneration, facilities and staff are available to make this an attractive profession.

- 20 Should there be sanctions, other than any findings of the ECtHR, if a Member State fails to provide interpretation and translation where a person is entitled to it?**

CCBE response:

The CCBE believes that a Member State should be excluded from the mutual recognition agreements in cases where a Member State fails to provide interpretation and translation when a person is entitled to it. Furthermore, evidence gathered without interpretation or translation being provided should be excluded from the case.

## PROTECTING VULNERABLE GROUPS

- 21 Are persons in the following categories especially vulnerable? If so, what can Member States be required to do to offer them an adequate level of protection in criminal proceedings:
- (a) foreign nationals,
  - (b) children,
  - (c) persons suffering from a mental or emotional handicap, in the broadest sense,
  - (d) the physically handicapped or ill,
  - (e) mothers/ fathers of young children,
  - (f) persons who cannot read or write,
  - (g) refugees and asylum seekers,
  - (h) alcoholics and drug addicts,

Should any further categories be added to this list?

CCBE response:

This list should not be exhaustive. The following categories should also be added

- members of minorities
- political opponents
- people suspected of political offences

The CCBE would also like to bring to the Commission's attention that there is a very big difference in the protection that should be afforded to a political opponent and that of a young mother, for example. The proper protection needs to be considered in each case.

It is also suggested that the police and lawyer should have an obligation to contact a judicial body and request protection where needed.

- 22 Should police officers, lawyers and/or prison officers be required to make an assessment, and a written note of that assessment, of a suspect/defendant's potential vulnerability at certain stages of criminal proceedings?

CCBE response:

Yes

- 23 If police officers, lawyers and/or prison officers are to be required to make an assessment of a suspect/defendant's potential vulnerability at certain stages of criminal proceedings, should there be a mechanism for following up the assessment with appropriate action?

CCBE response:

Yes

- 24 If the police and/or law enforcement authorities fail to assess and report a suspect's vulnerability, are sanctions appropriate? If so, what should those sanctions be?

CCBE response:

Yes, sanctions are appropriate.

The CCBE believes that disciplinary action against policeman would need to be applied or equivalent action that would carry serious consequences.

In addition to this, there is a government duty to decide on the fairness of a trial.

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## **CONSULAR ASSISTANCE**

The CCBE strongly supports the inclusion of a right for foreign citizens to contact the embassy or consulate for assistance and guidance. The CCBE therefore advises that the initiative be formulated in such a way so that members of the embassy or consulate have free access to meet with arrested or detained citizens of a country, unless the person in question waives this right.

- 25 Should Member States be required to ensure that there is an official with responsibility for looking after the rights of suspects and defendants in criminal proceedings in the Host state, including acting as a liaison person with their families and lawyers?**

CCBE response:

This is a good idea.

- 26 Should Member States be required to ensure that their police authorities comply with the Vienna Convention on Consular Relations by ensuring that police officers receive appropriate training?**

CCBE response:

Yes. There should be a formal registration in the Consulate when nationals are arrested abroad.

However, the accused should be asked whether he wants the consulate to be informed of his arrest.

- 27 Should there be any sanction for failing to comply with the VCCR? If so, what should this be?**

CCBE response:

The CCBE believes that disciplinary procedures should be applied for failing to comply with the Vienna Convention on Consular Relations.

## **THE LETTER OF RIGHTS**

The CCBE is not against the introduction of a "Letter of Rights" to be handed out to persons in custody.

Whereas a Letter of Rights might contribute to providing information on rights which a person held in custody has, the CCBE would like to stress that such a Letter should be a supplement rather than an alternative to oral information given by the police.

It is important to maintain that the Rights must be explained with a possibility to ask questions as to the exact content of the Rights. Furthermore, as may be deduced from the Green Paper, the value of a Letter of Rights should not be overestimated. The safeguarding of the rights of an accused lies in access to a defence lawyer. Thus, it is important to underline that a Letter of Rights may in no way form the basis for exempting certain (minor) offences from the right to a defence lawyer.

Since the receiving of a Letter of Rights should be a right for the person in question nobody should be obliged to sign or acknowledge the receipt of a Letter of Rights.

### **28 Is a common EU wide Letter of Rights feasible? If so, what should it contain?**

CCBE response:

Yes a common EU wide Letter of Rights is feasible.

The letter should contain information (in a language that the defendant can understand) on the following Rights for a defendant:

- (i) his entitlement to an independent and properly trained lawyer, free of charge and state funded, if he cannot afford to pay for the lawyer himself;
- (ii) his entitlement to select a lawyer of his choice;
- (iii) his entitlement to a properly qualified and trained, and approved, interpreter free of charge and state funded;
- (iv) his entitlement to have his family/friends informed of his arrest immediately (this is for obvious historical reasons a constitutional right in some Member States);
- (v) his entitlement to consulate assistance as soon as possible;
- (vi) his entitlement to consult a lawyer to advise him pre-interview. If he wishes to consult a lawyer, he must not be interviewed before he has received advice from the lawyer.
- (vii) special arrangements must be made to safeguard the special interests of vulnerable suspects, eg. young person/mentally ill etc.;

The Letter of Rights should be presented at the beginning of each interrogation. Furthermore, a copy of this Letter of Rights should be available in each cell.

### **29 When should the Letter of Rights be given to the suspect?**

CCBE response:

The letter of Rights should be read in a language that the person understands and given to the person immediately on arrest and at the beginning of each new interrogation.

**30 Should the defendant be required to sign a receipt as evidence that he has been given the Letter of Rights?**

CCBE response:

No. The defendant could be asked to sign the letter and if he refuses to sign it should be noted that he refuses to sign.

**31 What would be the legal consequences, if any, of failing to give the suspect the Letter of Rights?**

CCBE response:

This would depend on the national legal system and it would be a matter for the trial judge to decide. In addition there should be disciplinary proceedings against the police officers. The CCBE would advise that if a person waives a right, it should be waived in the presence of a lawyer.

## **EVALUATION AND MONITORING**

**32 Is evaluation of compliance with common minimum standards an essential component of mutual trust and consequently of mutual recognition?**

CCBE response:

Yes. This would appear to be necessary in order that countries have faith in each other's legal system.

**33 What information does the Commission need in order to make an effective assessment of compliance with any agreed common minimum standards of procedural safeguard?**

CCBE response:

The CCBE believes that the Commission should require a report by an independent body, for example Amnesty International, Human Rights Watch and/or appropriate NGO's. There should also be a representative for lawyers. This report should be compiled on an annual basis. National bar councils could also compile reports.

**34 Is recording of police interviews a desirable tool for efficient monitoring?**

CCBE response:

Regarding the presentation and assessment of evidence in criminal cases, some countries see it as an extra protection for the accused or witnesses being interviewed by the police to demand the interview to be recorded on tape or videotape. The rationale behind this is to ensure full identity between the content of police material and the actual statements of the person in question. Moreover, a recording could reveal if the person in question is being threatened or abused during the interview.

However other countries do not share this opinion. In some Member States criminal law rests fundamentally on the principle that all evidence must be produced directly before the court. The prosecution therefore cannot simply send a file containing police reports to the judge prior to the hearing of the case instead of producing the evidence in the courtroom.

Thus, all statements of witnesses must be heard directly by the court itself, and the defence has the right to cross-examine all witnesses.

The material gathered by the police is therefore first and foremost gathered in order to give the prosecution sufficient knowledge to assess whether to raise charges.

All interviews by the police are written down in a police report. If in court the witness changes his statement the prosecution may confront the witness with his previous statements as they appear in a police report. It is then left to the court to consider whether to believe or disbelieve the witness. If the witness cannot be heard in court because of illness, death, disappearance etc., it is up to national law and the courts to decide whether to include the material from the police report in the evidence of the court. As pointed out in the *Kamansinski vs. Austria* case before the Strasbourg Court such evidence may not be the sole basis of conviction.

Some CCBE member bars are deeply concerned that the introduction of recording of all interviews would result in severe pressure from the prosecution to play the recordings in court. This would result in the effective abolition of the principle of direct and immediate production of evidence before the court. There are numerous examples of cases where statements before the court vary tremendously from those given to the police but where the court for one or another reason chooses to rely on the evidence brought before it rather than the material gathered by the police during investigation.

In this respect, some of our member bars would strongly recommend the upholding of the principle of immediate and direct production of evidence before the court where the prosecution and the defence enjoy the same right to present and question the circumstances of the case.

However, other member bars like the Law Society of England and Wales believe that recording is a good device and that such recordings should be made in the presence of a lawyer.

**35 Are sanctions for a level of provision found to fall below commonly agreed minimum standards appropriate? If so, what could those sanctions be?**

CCBE response:

The CCBE finds it important to consider the consequences of failure to comply with the rights enshrined in the initiative. Some of the rights are of such importance that failure to observe them may result in release or acquittal of the defendant whereas a new investigation or a new trial may repair other breaches.

By adding consequences to failure to comply, this initiative stands a greater chance of effectively adding value to the present level of protection.

Furthermore, it must be accepted that rights are of no value unless they have remedies and are guaranteed by the judiciary.

**CONCLUSION**

The CCBE welcomes this paper. However we realise that this paper only forms part of the Commission's work on safeguards. The CCBE encourages the Commission to use this opportunity to make a worthwhile difference in the field of procedural safeguards.

The CCBE also looks forward to analysing the Commission's future work on the handling of evidence and the proposals on bail conditions.

The CCBE is available to answer any questions that the Commission might have with regard to any aspect of this response.