CCBE RESPONSE TO THE RECENT POSITION TAKEN BY FRANCE, BELGIUM, THE NETHERLANDS, UNITED KINGDOM AND IRELAND REGARDING THE PROPOSED DIRECTIVE ON THE RIGHT OF ACCESS TO A LAWYER IN CRIMINAL PROCEEDINGS AND ON THE RIGHT TO COMMUNICATE UPON ARREST

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CCBE response to the recent position taken by France, Belgium, the Netherlands, United Kingdom and Ireland regarding the proposed Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 31 member countries and 11 further associate and observer countries, i.e. through its members, around 1 million European lawyers.

The CCBE is alarmed by the recent position taken by five Member States regarding the proposed Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest. The five Member States – **Belgium, France, Ireland, the Netherlands and the United Kingdom** – express "*serious reservations about the Commission's approach*" which, in their view, *"would present substantial difficulties for the effective conduct of criminal proceedings*".

Measure C specifically caters for a situation where limited derogations can arise where, for instance, evidence might otherwise be destroyed. It is difficult to see in practise how a fair investigation would in any way be compromised by the availability to the detained person of legal advice. It is nevertheless perfectly easy to see how a police force might consider themselves disadvantaged by a person being made aware of their rights at precisely the time that they need to invoke them. This is therefore not a sound argument to be advanced by member states.

The signatories of the letter accept that they had voluntarily agreed in the road map that there was a need to strengthen the procedural safeguards. However, they now oppose the proposed Directive ("Measure C"). .

This paper examines the arguments put forward by the five signatory Member States, and rebuts them one by one with reasoned arguments. It would also be desirable if each of the signatories set out the position that applies in their own jurisdiction and explain why they do not believe that their system requires strengthening with safeguards.

I - First claim by Belgium, France, Ireland, the Netherlands and the United Kingdom "*The Directive would hamper the effective conduct of criminal investigations and proceedings."*

(a) The final sentence of the first paragraph provides that *"It is not possible to legislate to enhance and strengthen the rights of defendants – either at EU or domestic level – without also factoring in the resources and functioning of the criminal justice system."*

It is obvious from this sentence that a major concern for the signatories is that they may have to properly resource their systems to ensure that suspects have access to their fundamental rights. The CCBE maintains that this is no less than their duty. While there obviously is a cost involved in providing access to legal advice, that cost is certainly less in societal terms and in all probability in financial terms than the cost that would be incurred by claims of miscarriages of justice - where trials are protracted by virtue of challenges to what has transpired in custody and to the inevitability of appeals and other litigation arising from unsatisfactory conditions of detention. Providing proper representation at the appropriate time ensures that properly advised persons can save significant court time in making admissions where appropriate and with the benefit of advice.

(b) The signatories seek to portray the measure as applying to minor cases, but the reality is that their criticisms are directed at the provision of legal advice to persons in custody. This begs the question as to whether or not Member States have given excessive powers of detention to their police forces to hold persons for questioning for minor matters. If the issue is sufficiently grave

to justify the deprivation of a suspect's liberty, it should not be viewed as minor and should attract the full protections of Measure C.

(c) The example given of the "mere" taking of fingerprints is simplistic. While fingerprints and photographs may appear to be routine matters, the taking of bodily samples, including intimate samples, gives rise in a number of jurisdictions to complicated decisions where refusal to permit the taking of certain samples can lead to inferences being drawn. These decisions require expert legal assistance and advice. The CCBE would be most interested to know, in respect of each of the jurisdictions, whether the taking of fingerprints (being their chosen example) ever arises independently of a detention where questioning is also a feature.

(d) The signatories contend that providing access to a lawyer would incur delay which might not be in the suspect's interest. In the first instance, Measure C identifies possibilities where delay need not occur. Secondly, the signatories have chosen not to give a single example of how they believe a suspect's interests could be harmed by the provision of legal advice even if that leads to some delay. Delay can be reduced, if not eliminated altogether, by the provision of a proper duty-lawyer scheme on a publicly funded basis.

(e) The CCBE would also like to point out that the European Court of Human Rights (ECtHR) has not limited the scope of the right to legal assistance to include only situations where a suspect is being questioned by the authorities (though the main bulk of its case-law deals with this matter). For example, in *Pishchalnikov v Russia*, the Court found a violation of Article 6 because the respondent had participated in an "investigative experiment" without a lawyer, though he had requested the assistance of such (see paras. 62 *et seq*).

(f) Above all, it is not understandable why the presence of a lawyer at investigative acts which require the presence of a suspect would hamper the efficiency of the investigation. Lawyers should not be considered to be "enemies" of the investigation; on the contrary, their participation ensures fairness of the procedures and admissibility of evidence gathered in their presence. Moreover, where the presence of a lawyer could prejudice the acquisition of evidence, restrictions on this right may apply (Article 4(3) of the proposed Directive).

II – Second claim by Belgium, France, Ireland, the Netherlands and the United Kingdom "*There is no clarity on the Directive's relationship to the requirements of the European Convention on Human Rights"*

(a) The suggestion made by the signatories that all decisions of the Strasbourg court are country-specific completely ignores the fact that to a greater or lesser degree decisions of the European Court of Human Rights affecting one country are authorities for legal arguments in the remainder of the Council of Europe Countries. Judgments from the Strasbourg Court, while concerning a specific country, still have interpretative authority and therefore provide legal guidance to other Council of Europe countries. It is expected therefore that there will be litigation in countries where suspects will seek to rely on the rights identified in *Salduz*, *Brusco*, and *Sebalj*. It is wholly undesirable that individual suspects would have to litigate against their own Member States when the alternative would be that the safeguards identified in those cases could be reflected in Measure C.

(b) The fact that the Court has not had the chance to deliver rulings on all specific issues regarding access to a lawyer does not prevent an EU directive, which aims at establishing common standards, from including any other provisions which follow the line of the Court's case-law. It took, for example, some decades until the Court ruled that the "garde à vue" in France with no access to a lawyer is incompatible with the Convention. Why should EU countries wait for a conviction of a Member State and not pro-actively lay down minimum standards on all essential aspects of the right to legal assistance which comply with the Court's basic approach to this fundamental right?

(c) Regrettably, the CCBE believes that a key to the signatories' thinking may be found in the final sentence of the penultimate paragraph under this heading. "*It is therefore surprising that the Commission's Impact Assessment relies on the proposal's relationship to the ECHR rights to assert that it will have a comparatively negligible practical and financial impact on the legal*

systems of the Member States." Undoubtedly Measure C will have a significant financial impact on those Member States which do not presently comply with the requirements of Article 6. In some of the Member States in question, the laws and procedures do not provide currently for the presence of a lawyer during questioning. If Article 6 was being complied with in these countries Measure C would not add greatly, if at all, to the expense. Of course, if Article 6 is not being complied, with there will be a financial impact, but that should not justify continuing failure to follow best practice.

(d) In the final paragraph of this section, the signatory States identify two proposals where they outline what is required by established ECtHR case-law – namely, the right to inspect the place of detention and the right to communicate with a third party. Starting with the right to inspect the place of detention, it should be borne in mind that inhumane conditions of detention can have the effect of altering a person's will, no less than threats or actual violence, oppressive or unfair questioning, and improper inducements,. This concept has been addressed in jurisprudence. Presumably no signatory State would support inhumane conditions of detention, and all this measure provides is that there would be an immediate review by an independent person of any complaint in that regard. The observations by a lawyer of the actual conditions of detention would remove uncertainty and controversy which might arise either immediately in litigation to procure the release from custody of the suspect, or at a later date in the context of a challenge to the investigative phase and any evidence that was yielded therefrom. In fact, signatory States might be expected to welcome such an efficient, timely and cost effective mechanism to monitor safe standards of detention. As such, this measure can be seen as a logical progression of steps taken to guarantee the Article 6 and Article 3 rights of a suspect.

Similarly, taking the second right mentioned by the signatory States, the entitlement to have a person notified of a suspect's detention is a further aid to ensuring that fundamental rights are observed. The availability to the detained person of family, community or consular support at a time of greatest vulnerability is fair and reasonable. To the extent that this facilitates a suspect in availing of guaranteed rights, the notification requirement is a logical progression from established Article 6 and Article 3 rights.

(e) A conviction based on evidence acquired by violating the right to have access to lawyer cannot, as a rule, be fair and safe. The proposed Directive rightly provides for exclusion of all such evidence and not only of suspects statements. Evidence other than statements of a suspect is of no less importance in criminal proceedings. Moreover, the Directive (Article 13(3)) does allow the use of such evidence if this would not prejudice the rights of the defence.

III - Third claim by Belgium, France, Ireland, the Netherlands and the United Kingdom *"The Directive must establish minimum standards in a way which takes into account the different ways in which Member State systems secure the right to a fair trial".*

(a) In a common judicial area, it is essential to have common minimum standards in criminal procedures. Leaving domestic laws as they are, and waiting for a ECtHR decision in order to adjust each one of them separately to the Convention, would undermine mutual trust between Member States and make mutual recognition of criminal judgments difficult. The fact that some of the States opposing the Directive (France, Belgium, The Netherlands) have been repeatedly convicted in recent years by the ECtHR for violation of the right to access to a lawyer gives the impression that they somehow "fight" in defence of their domestic legal systems instead of productively co-operating with other states in order to establish minimum standards throughout the European Union.

(b) While the signatories identify factors that should be taken into account, they do not propose how this should impact on Measure C. Do the Member States in question, for instance, accept that persons who can be held for questioning for 7 days, and against whom inferences can be drawn, should have an entitlement to the presence throughout questioning of a lawyer? It is simplistic to suggest that legal advice is essential in minor road traffic matters where there is in fact no evidence-gathering process taking place. Where however there is an evidence-gathering process, even though it is a road traffic matter, fair procedures should nonetheless apply.

IV – Fourth claim by Belgium, France, Ireland, the Netherlands and the United Kingdom *"The missing element: impact assessment and legal aid"*

(a) The signatories recognise that legal aid is a complex issue including serious financial as well as quality aspects, yet they ask for the right of access to a lawyer to be addressed jointly with the right to legal aid. The CCBE, like the Commission, draws rather the opposite conclusion, i.e. that legal aid deserves to be addressed separately and should not unduly delay the adoption of this measure. Undoubtedly, this measure will have a significant financial impact on those Member States which do not presently comply with the requirements of Article 6 of the European Convention on Human Rights, but financial concerns have not moderated the enthusiasm for measures which assist the prosecution. In addition, it would appear to be a logical step to conclude the parameters regarding access to a lawyer first, and then discuss legal aid provisions with regard to these parameters.

(b) Furthermore, the proposed Directive does not interfere with existing domestic legal aid systems. Therefore, it is not understandable why adoption of the same would have substantial negative effects on Member States, as the opposing States maintain. If legal assistance and legal aid in one single legal instrument would be perfect, why is the regulation of legal assistance while leaving legal aid for a later stage not good enough?

(c) In essence, if the costs that arise are substantial and additional, it simply underlines the fact that there has been a gap which ought not to have arisen in the first instance in the provision of proper legal representation to persons held in detention.

Conclusion

In light of the above, the CCBE urges the Member States in question to change their approach and support the adoption of the proposal.