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**CCBE RESPONSE ON THE PROPOSAL FOR A COUNCIL FRAMEWORK DECISION
ON CERTAIN PROCEDURAL RIGHTS IN CRIMINAL PROCEEDINGS THROUGHOUT THE
EUROPEAN UNION**

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Introduction

The Council of Bars and Law Societies of Europe (CCBE), which through its member Bars represents more than 700,000 European lawyers, is pleased to have the opportunity to comment on the proposal for a Council framework decision on certain procedural rights in criminal proceedings throughout the European Union. The proposed framework decision is based on a green paper on procedural safeguards for suspects and defendants in criminal proceedings. The CCBE has already given a response to the Green Paper including a number of recommendations for further improvements of the initiative.

General remarks on the draft proposal

It is most positive that the Framework Decision includes a number of the recommendations contained in the CCBE response to the Green Paper. First and foremost, the fact that the initiative is in the form of a legally binding instrument is particularly welcomed, since it means adding real value to community law.

So far the legal instruments launched to ensure an area of freedom, security and justice have focused only on improving the possibilities for the investigating powers of the member states. The initiatives have not focused on the rights of the individuals in question but have relied on the rights enshrined in the European Convention on Human Rights.

The CCBE would like to recall that the ambition to create an area of *justice* cannot be fulfilled without the express insurance of balanced, fair and open criminal proceedings in all member states which emphasises as much the assurance of a fair trial and against miscarriage of justice as the need for effective cooperation between the investigative bodies of the member states.

But though the ECHR includes a minimum protection by endorsing the principle of presumption of innocence, the right to remain silent etc., the ECHR cannot in itself be taken as giving substantial guarantees for effective protection of individual rights throughout criminal proceedings. The CCBE regrettably agrees with the following remarks as contained in paragraph 22 of the explanatory memorandum:

“.....the Commission's research and consultation, together with the case-law of the ECHR, shows the ECHR is implemented to very differing standards in the Member States and that there are many violations of the ECHR. Those divergences prejudice a common protection of procedural rights within the Union, jeopardize mutual trust and affect the smooth operation of the mutual recognition principle. Furthermore, the Commission's aim is to render more efficient and visible the practical operation of ECHR rights with this proposal so that everyone in the criminal justice system is more aware of them, not only defendants but also police officers, lawyers, translators and interpreters and all other actors in the criminal justice system. This should lead to better compliance with the ECHR.”

The quotation in itself shows the need for substantial guarantees. Moreover, the quotation makes it obvious, that the introduction of further initiatives based on mutual recognition without scrutiny in the requested state should not be introduced until a basis for mutual trust has been established by the introduction of binding minimum standards.

In light of the far-reaching initiatives in the field of cooperation in criminal matters the CCBE supports initiatives that might be instrumental in creating a platform for establishing mutual trust between Member States. The CCBE finds it pivotal to stress that the cornerstone of cooperation in criminal matters is a certain level of protection of individual rights. Thus, the basis for mutual recognition of decisions is the assurance of the rule of law and protection of fundamental rights in all member states. The present initiative is a first step in creating this platform. Nevertheless, it must be noted that the initiative in itself is not adequate to establish and maintain the basis for mutual trust and recognition.

The Commission is considering other initiatives to strengthen the protection of individual rights e.g. initiatives concerning ne bis in idem, detention on remand, etc. In so far as the Commission wishes to pursue a policy of mutual trust and recognition, rather than the more traditional mutual assistance schemes, these initiatives should be put in place before embarking on further integration based on even more enhanced mutual recognition.

The CCBE agrees with the reaction of the European Criminal Bar Association (ECBA) with regard to the position of the defence¹.

Specific remarks regarding the articles of the Framework decision:

Article 1: Scope of application of procedural rights

Article 1 provides that the proposal is to apply to all “*proceedings*” aiming to establish the guilt or innocence of a person suspected of having committed a crime.

It is however not clear from the wording of the following articles at what stages of the proceedings the rights apply. Thus, it is not clear if “*proceedings*” refer to court proceedings only or also to, for instance, the preliminary questioning of a more or less suspected person by the police. The CCBE finds it important that the initiatives clearly expresses that the rights enshrined in the proposal apply from the very beginning of an investigation. For instance the right to have a lawyer present during questioning by the police should apply to all persons being interviewed in relation to a criminal offence.

Article 2: The right to legal advice

The relevant article reads as follows:

“1. A suspected person has the right to legal advice as soon as possible and throughout the criminal proceedings if he wishes to receive it

2. A suspected person has the right to receive legal advice before answering questions in relation to the charge.”

The words “*if he wishes to receive it*” in paragraph 1 seem superfluous. A suspected person has the right to legal advice as soon as possible in order to ensure that the principle of equality of arms is respected.

Moreover, the word “*charge*” seems to imply, that the right to legal advice prior to giving statement applies only to statements given after formally charged. In order to ensure the applicability of article 2 to all statements given while being a suspect, the word “*charge*” should be replaced by the word “*suspicion*”. Thus, it should be made clear, that the right to have a lawyer present also applies to police interrogation during the investigation prior to a formal charge. This level of protection already exists in

¹ The ECBA position paper can be found on its website : www.ecba.org

some member states whereas other member states may have to adjust their national law. However, common minimum standards should not be set by a lowest common denominator. The proposed change to the application of article 2 corresponds with the explanatory memorandum on article 2 where it is stated that:

“The Article provides that legal advice should be provided as soon as possible. It is important that a suspect benefits from legal advice before answering any questions in the course of which he may say something he later regrets without understanding the legal implications.”

This should apply to any interrogation not only custodial.

The proposal does not expressly state that the right enshrined in article 2 includes, not only the right to legal advice, but also the right to have a lawyer present during questioning. The CCBE proposes an amendment to ensure this right unless waived by the person in question. Again this right is enshrined in some member states whereas other may not include such rights, and again the level of protection should aim for the highest rather than the lowest standard if member states are to have mutual trust in their legal systems. The right to have the lawyer present should also appear from the proposed letter of rights.

Article 3: Obligation to provide legal advice

Whereas article 2 governs the right to legal advice, article 3 imposes an obligation on Member States to provide legal assistance. This positive obligation on the Member States applies only to certain situations listed in article 3. The list does not cover all relevant situations where legal assistance should be offered. Thus, mandatory assignment defence council should also cover for instance where the taking of evidence – for instance hearing of witnesses, seizure of material etc – is determined or conducted by the court. Moreover, mandatory legal assistance should apply to all cases where the court decides to exclude the public during the hearing of the case, or where the possibility of expulsion of a foreign citizen is invoked.

Article 4 – obligation to ensure effective legal advice

According to article 4, paragraph 2, member states shall ensure a mechanism to provide for a replacement of a lawyer if the legal advice given is found not to be effective. It appears from the explanatory text to the proposal that the purpose of this article is to ensure the quality of the lawyer for the benefit of the person in question.

However, the assessment is to be carried out by a body assigned by the Member State. This seems highly problematic. In theory, article 4 may be very instrumental in removing a defence lawyer where the state may wish to hamper the effectiveness of legal advice. Whereas the aim of the article in itself is reasonable, the article must ensure that the removal of a defence lawyer can only be ordered by an independent body composed of independent lawyers. The competence to hear complaints over the effectiveness of the defence lawyer should therefore be exercised by the disciplinary bodies of the national Bar Associations and article 4 should be amended to ensure full independence of the defence lawyer.

Articles 2-4 aims to ensure that an arrested or interrogated person has effective legal advice. The articles may be instrumental in ensuring access to legal advice but fall short of ensuring full efficiency of the defence lawyer. The Framework Decision does not include any requirements as to the right of the defence to obtain information on the case etc.

As pointed out in the CCBE response to the Green Paper, ensuring the right to legal advice is of limited value unless the defence lawyer has sufficient means to defend the interests of the client. In this light it is most positive that article 2(2) ensures the right to legal advice before interrogation etc. The Framework decision should however also guarantee the defence lawyer a further number of rights including:

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- the right to visit, talk with and correspond in writing with the client in private and in full confidence
- the right to access to 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 during further investigatory steps including the right to be present during all interrogation of the client
- the right to be present and to ask questions before the court whether pre-trial or during trial
- etc.

The need for making the contents of the rights enshrined actual and effective is also stressed in the Synthesis Report of the Network of Independent Experts "Conclusions and Recommendations on the Situation of Fundamental Rights in the European Union and its Member States in 2003", where on page 98 the Network of Independent Experts welcome the present initiative and give guidelines as to the content of the rights enshrined in the proposal.

Without the protection of the rights listed, the value of having a right to legal representation seems to be of a formal rather than of a substantial character.

Article 5 – the right to free legal advice

Article 5, (1) requires the state to bear some or all of the costs of legal advice given under article 3. According to article 5(2) Member States may subsequently ascertain whether the suspected person's means allows him to contribute to the payments of the costs. In light of this, the wording "*if these costs would cause undue financial hardship to the suspected persons or his dependents*" should be transferred to article 5(2).

It appears from the article that the Member States may uphold a means tested system. However, it also appears that recovery should be subsequent.

Article 5 does not take into account the outcome of the criminal proceedings. In order to honour and ensure full value of the presumption of innocence article 5 should however ensure free legal advice to those acquitted in court. Similarly, a suspected person should not be asked to pay for legal advice where the police subsequently decide not to press charge.

As to cases resulting in conviction, it is not clear whether the proposed system calls for the Member States to lay out the costs with a subsequent possibility of recovery, or whether the ascertaining of the suspected person's means may take place upon allocating the defence lawyer. The difference between the two systems may seem tenuous but may indeed influence the effectiveness of the proposed rules. Whereas the former system honours the presumption of innocence by ensuring free legal advice "for the time being" the latter leaves the financial burden of legal advice on the suspected person at a stage of proceeding where the person is to be considered innocent. This may not restrict financially independent suspects from taking advantage of the opportunity to have legal advice. However, in most Member States the threshold for granting free legal advice is fixed at a level where the vast majority of the middle class may be excluded from free legal aid, however, the costs of a defence lawyer may very well seriously influence the economy of a middle class person. Innocent persons may therefore choose – or be forced – to refrain from the benefits of a defence lawyer during the case. In a system where the state temporarily bears the financial burden of the defence council the costs are levied only on guilty persons and therefore offers greater protection for the rights of the individual.

Article 6-9 – the right to free interpretation etc.

The English version of the Framework Decision leaves the impression that the right to free interpretation applies at all stages of the “*proceedings*” from the very first interrogation by the police to the actual conviction in court. However the English version sometimes refers to “*proceedings*” and sometimes to “*criminal proceedings*”. As already pointed out it should be made clear that the rights enshrined apply at all stages unless stated otherwise.

According to article 9, any party may have access to recorded interviews etc. conducted via an interpreter.

Article 9 specifically states that the recording is only made to ensure the quality of the interpretation and may not be used in court as evidence.

The CCBE would like to stress that national procedural law differs greatly as to the value and admissibility of evidence produced outside the court. In some member states a recording of an interview is admissible as evidence in other member states it is not. In light of this, the proposal should not include any regulation of the use as evidence of recordings.

Article 11 -the right of suspected persons entitled to specific attention

According to article 11(1) Member States shall ensure that an audio or video recording is made of any questioning of suspected persons entitled to specific attention. A transcript of the recording shall be provided to any party in the event of a dispute.

The purpose of article 11(1) undoubtedly is to strengthen the rights of the suspect. It must therefore be assumed, that the recording is meant to serve as evidence in one way or the other. Article 11 does not regulate the use of the recording and it is therefore not clear if the recording may be used only to establish if the suspected has received adequate attention according to his specific physical or mental condition – or if the recording may also be admitted as evidence if the suspected person gives different statements during the course of the criminal proceedings or refuses to testify in court. Whereas article 9(1) specifically regulates the use of recordings of interpreted statements, article 11 does not include any regulation of the value as evidence of recordings made in conformity with article 11.

As mentioned the judicial systems of the member states attach different attention to the value of evidence of statements given to for instance the police and the proposal should therefore not include any reference as to the value of evidence of the recordings.

Article 12 – the right to communicate

As already mentioned the right to communicate – in full privacy – with a defence lawyer is an essential right and should therefore be safeguarded in the Framework decision.

Article 14 – Duty to inform a suspect of his rights in writing – Letter of rights

The CCBE is in favour of a letter of rights as proposed. The CCBE suggests that annex B of the proposed letter of rights also includes specific information on the rights provided under the ECHR, especially articles 3, 5 and 6.

Article 15 – Evaluating and monitoring the effectiveness of the Framework Decision

The CCBE supports the introduction of an independent group of experts to monitor and evaluate the Framework decision. The CCBE attaches great importance to having a group of experts with practical

experience. Moreover the group of experts should include the participation of practising lawyers as well as judges from the member states, representatives from human rights groups etc. As representative of some 700.000 lawyers in Europe the CCBE would be most interested to participate in the expert group and would propose for the CCBE to have a seat in the expert group.