



CCBE RESPONSE TO THE COUNCIL TEXT OF 31 MAY 2012 REGARDING THE PROPOSED DIRECTIVE ON THE RIGHT OF ACCESS TO A LAWYER IN CRIMINAL PROCEEDINGS AND ON THE RIGHT TO COMMUNICATE UPON ARREST

CCBE response to the Council text of 31 May 2012 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 Member States in its paper dated 31 May 2012 regarding the proposed Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest (Document number 10467/12).

The CCBE believes that the position adopted by the Council is in contradiction to the aim of the Commission proposal – the provision of safeguards for suspects and defendants in Criminal proceedings. The Council's version of Measure C clearly falls below the standards set by the jurisprudence of the European Court of Human Rights (ECtHR) in relation to the right to have access to a lawyer and legal assistance, thus contradicting the very purpose of the Roadmap which aims at not only ensuring the standards established so far by the ECtHR case-law but also expanding the rights of suspects in criminal proceedings. The Council text has drifted away in numerous substantive ways from both the intention and wording of the Commission proposal.

The CCBE wishes to make the following comments with regard to the latest version of the Council text. These observations are not the only concerns we have with the Council text, but rather the most alarming of the many concerns.

1. Confidentiality

Article 4

Confidentiality

1. Member States shall guarantee the confidentiality of communication between a suspect or accused person and his lawyer, including meetings, correspondence, telephone conversations and any other forms of communication permitted under national law.
2. In exceptional circumstances only Member States may temporarily derogate from paragraph 1 when, in the light of the particular circumstances, this is justified by one of the following compelling reasons:
 - (a) there is an urgent need to prevent serious crime; or**
 - (b) there is sufficient reason to believe that the lawyer concerned is involved in a criminal offence with the suspect or accused person.**

CCBE comments: The CCBE is of the firm opinion that there should be no exception to the principle of confidentiality based on the reasoning that “*there is an urgent need to prevent serious crime*” or that “*there is sufficient reason to believe that the lawyer concerned is involved in a criminal offence with the suspect or accused person.*” These are wholly erroneous justifications and are not related in any way with the principle of confidentiality.

The phrase “*there is an urgent need to prevent serious crime*” is vague and open to abuse. The CCBE asks whether there are non-serious crimes and if so, what crimes? Why do States bother to investigate and prosecute non-serious crimes? There is no justification whatsoever for a derogation like this.

Furthermore, if a lawyer is suspected of committing a serious crime or of colluding with the suspect then the lawyer should simply be denied access to the client and a new lawyer appointed. The principle of confidentiality should remain intact as it is a fundamental principle that exists regarding communications between a lawyer and his client.

2. Scope

Article 2

Scope

1. This Directive applies to suspects or accused persons in criminal proceedings from the time a person has been **officially notified or informed otherwise** by the competent authorities of a Member State that he is suspected or accused of having committed a criminal offence. It applies until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspected or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal.
2. This Directive applies to persons subject to European arrest warrant proceedings from the time they are arrested in the executing Member State in accordance with Article 9.
3. Where the law of a Member State provides for the imposition of a sanction regarding minor offences by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed to such a court, this Directive shall apply only to the proceedings before that court following such an appeal.
4. **In relation to minor offences, where the law of a Member State provides that only a fine can be imposed as the main sanction and deprivation of liberty cannot or shall not be imposed as such a sanction, this Directive shall only apply once the case is before a court having jurisdiction in criminal matters.**

CCBE comments: The CCBE contends that the Directive should apply from the very moment a person is suspected of a criminal act. The notion of the Directive applying from the time a person is “*officially notified or informed otherwise*” is vague and open to abuse.

With regard to “*Minor offences*” the definition of minor offences is not provided and this can, and will, cause major difficulties. In addition, a minor offence can have major implications for a person, as it may trigger other consequences for the person in question. The CCBE is of the opinion that a case where deprivation of liberty may be imposed cannot be a minor offence. Therefore, the exemption for cases where deprivation of liberty is possible and only shall not be imposed should be deleted.

3. Article 3 ‘The Right of access to a lawyer in criminal proceedings’

Article 3

The right of access to a lawyer in criminal proceedings

1. Member States shall ensure that suspects and accused persons have the right of access to a lawyer in such a time and manner so as to allow the person concerned to exercise his rights of defence practically and effectively.
2. The suspect or accused person shall have access to a lawyer without undue delay. In any event, the suspect or accused person shall have access to a lawyer from the following moments in time, whichever is the earliest:
 - (a) **before he is officially interviewed by the police or other law enforcement or judicial authorities;**
 - (b) upon the carrying out by investigative or other competent authorities of an investigative or other evidence-gathering act in accordance with paragraph 3(c);

- (c) as soon as practicably possible after the deprivation of liberty;
- (d) in due time before the suspect or accused person, who has been summoned to appear before a court having jurisdiction in criminal matters, appears before that court.

3. The right of access to a lawyer shall entail the following:

- (a) Member States shall ensure that a suspect or accused person has the right to **communicate** with the lawyer representing him, including prior to an official interview with the police or other law enforcement or judicial authorities. The duration, frequency and means of communications between the suspect or accused person and his lawyer may be regulated in national law and procedures, provided that the suspect or accused person is able to exercise his rights of defence effectively;
- (b) Member States shall ensure that the suspect or accused person has the right for his lawyer to be present and, in accordance with procedures in national law, participate when he is officially interviewed. When a lawyer participates during an official interview this shall be recorded in accordance with national law;**
- (c) Member States shall determine in their national law in respect of which investigative or other evidence-gathering acts the suspect or accused person has the right for his lawyer to attend, provided that this does not unduly delay these acts and that it does not prejudice the acquisition of evidence.

The suspect or accused person shall as a minimum have the right for his lawyer to attend the following investigative or other evidence-gathering acts, if these acts are provided for in the national law concerned and if the suspect or accused person is required to attend the act concerned:

- i) identity parades;
- ii) confrontations;
- iii) experimental reconstructions of the scene of crime.

4. Notwithstanding provisions of national law concerning the mandatory presence of a lawyer, in all cases where the suspect or accused person is deprived of liberty, Member States shall make the necessary arrangements to ensure that a suspect or accused person is in a position to effectively exercise his right of access to a lawyer, unless he has waived this right in accordance with Article 8.

In cases when a suspect or accused person is not deprived of liberty, Member States shall not prevent a suspect or accused person from exercising his right of access to a lawyer.

5. In exceptional circumstances and in the pre-trial stage only Member States may temporarily derogate from the application of the rights provided for in this Article when this is justified by compelling reasons in the light of the particular circumstances of the case.

CCBE comments: Article 3 provides that the suspect or accused person shall have access to a lawyer “before he is officially interviewed by the police or other law enforcement or judicial authorities”. The CCBE believes that the term “officially” must be deleted. An interview with the authorities is always official as it has official consequences.

Article 3(3)(a) also provides that “Member States shall ensure that a suspect or accused person has the right to communicate with the lawyer representing him, including prior to an official interview with the police or other law enforcement or judicial authorities.” The CCBE wishes to stress that the right of access to a lawyer involves not only the right to communicate with the lawyer but the right to meet with the lawyer in person. This would be consistent with Strasbourg case law (*Pishchalnikov*, *Salduz*, *Brusco*, and *Sebalj*).

Article 3(3)(b) provides that “Member States shall ensure that the suspect or accused person has the right for his lawyer to be present and, in accordance with procedures in national law, participate when

he is officially interviewed..” The CCBE contends that a client should not only be entitled to have his lawyer present but the lawyer should have the right to actively participate in the interview - simple presence is not sufficient as a lawyer should always be allowed to participate in the interview. Active participation is about getting the truth on the table - it is to enlighten the case. The active participation of a lawyer ensures fairness of the procedures and admissibility of information gathered in their presence. This again would be consistent with Strasbourg case law (*Pishchalnikov, Salduz, Brusco, and Sebalj*).

Article 3(5) provides that “*In exceptional circumstances and in the pre-trial stage only Member States may temporarily derogate from the application of the rights provided for in this Article when this is justified by compelling reasons in the light of the particular circumstances of the case.*”. The CCBE is alarmed at the reference to this provision which is vague, and amounts to a major derogation which is open to all kinds of abuse. The provision needs to be deleted.

4. Derogations

Article 7

General conditions for applying temporary derogations

1. Any temporary derogation under Articles 3(5), 4(2) and 5(3),
 - (a) shall not go beyond what is necessary;
 - (b) shall be limited in time as much as possible;
 - (c) shall not be based exclusively on the type of the alleged offence; and
 - (d) shall not prejudice the overall fairness of the proceedings.
2. Temporary derogations under Articles 3(5) and 4(2) may only be authorised by a duly reasoned decision taken on a case-by-case basis, either by a **judicial authority, or by another competent authority** on condition that the decision may be subject to judicial review.

CCBE comments: It is essential that any derogation should only be authorised by a judicial authority. Allowing a “*competent authority*” to authorise a derogation is a wholly unacceptable situation.

5. Waiver

Article 8

Waiver

1. Without prejudice to national law requiring the mandatory presence or assistance of a lawyer, Member States shall ensure that, in relation to any waiver of a right referred to in Articles 3 and 9 of this Directive:
 - (a) the suspect or accused person has been provided with sufficient information so as to allow him to have **adequate knowledge** about the content of the right concerned and the possible consequences of waiving it; and (b) the waiver is given voluntarily and unequivocally.
2. The waiver and the circumstances under which it was given shall be noted, using the recording procedure in accordance with the law of the Member State concerned.
3. Member States shall ensure that a waiver can be subsequently revoked at any point during the criminal proceedings. In case of revocation this Directive shall apply from the point in time when the waiver was revoked. In exceptional cases during the trial stage, the consequences of a revocation may be subject to judicial discretion.

CCBE comments: It is inconceivable that a suspect could waive his rights having “adequate knowledge” about the content of the right concerned and the possible consequences. A suspect needs to have full knowledge of the consequences that could follow.

6. European Arrest Warrant

Article 9

The right of access to a lawyer in European Arrest Warrant proceedings

1. Member States shall ensure that a person requested for surrender in accordance with Council Framework Decision 2002/584/JHA has the right of access to a lawyer upon arrest pursuant to the European Arrest Warrant in the **executing** Member State.
2. With regard to the content of the right of access to a lawyer, the requested person shall have the following rights in the **executing** Member State:
 - the right of access to a lawyer in such a time and manner so as to allow him to exercise his rights effectively and in any event as soon as practically possible after the deprivation of liberty;
 - the right to communicate with the lawyer representing him. The duration, frequency and means of communications between the requested person and his lawyer may be regulated in national law and procedures, provided the requested person has the possibility to exercise his rights under Council Framework Decision 2002/584/JHA effectively;
 - the right for his lawyer to be present and, in accordance with procedures in national law, participate during a hearing of the requested person by the executing judicial authority. When the lawyer participates during the hearing this shall be recorded in accordance with national law.
3. The rights provided for in this Directive under Articles 4, 5, 6, 8, 11 and - when a temporary derogation under Article 4(2) or Article 5(3) is applied - Article 7 shall apply, *mutatis mutandis*, to European arrest warrant proceedings, as well as Article 3(4).

CCBE comments: The CCBE has always maintained that it is essential that a lawyer be provided in the executing and the issuing State – dual representation is an absolute necessity. With regard to the executing State, the provision of a lawyer ensures that procedures are correct, and the lawyer is positioned to advance grounds of refusal for the execution of the warrant where applicable e.g. *ne bis in idem* situations. The provision of a lawyer in the executing State will be a step towards enhancing mutual trust and towards making the EAW more effective.

It is of utmost importance that there is also access to a lawyer in the issuing state right from the point of time when the suspect is arrested and gets to know about the proceedings. There is no reasonable argument not to allow access to a lawyer in the issuing state just because the arrested person was not arrested in the issuing state. By excluding access to a lawyer in the issuing state the person faces worse conditions compared to the situation that he or she would have been arrested in the issuing state. The whole purpose of this initiative is to guarantee fundamental safeguards to all citizens. Removing the originally proposed guarantee of dual representation will result in those with means and knowledge having representation of their choice in both states and with the vulnerable and impecunious losing out – the very antithesis of the original objective.

7. Remedies

Article 11

Remedies

Member States shall ensure that a suspected or accused person has an effective remedy under national law in instances where his right of access to a lawyer has been breached.

CCBE comments: The Council text does not specify any remedies. The CCBE believes that it is essential to refer to the Commission proposal in this regard where it is provided that *“the remedy shall have the effect of placing the suspect or accused person in the same position in which he would have found himself had the breach not occurred”* and *“Member States shall ensure that statements made by the suspect or accused person or evidence obtained in breach of his right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 8, may not be used at any stage of the procedure as evidence against him, unless the use of such evidence would not prejudice the rights of the defence.”*

A conviction based on evidence acquired by violating the right to have access to lawyer cannot, as a rule, be fair and safe. The Commission proposal 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.

Conclusion

As mentioned above, the Council text has drifted away in numerous substantive ways from both the intention and wording of the Commission proposal. The CCBE urges Member States to change their approach and support the adoption of the Commission proposal that will enhance procedural safeguards rather than lead to a diminution of rights.