

Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer and on the right to inform a third party upon deprivation of liberty

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, and through them around 1 million European lawyers. The CCBE has been following discussions regarding the Proposal for a Directive on the right of access to a lawyer and on the right to inform a third party upon deprivation of liberty.

In advance of the forthcoming trilogue discussions, the CCBE would like to communicate the following points regarding certain aspects of the proposal:

(1) Confidentiality

The mission of an independent lawyer and member of a regulated profession relies on the absolute confidence granted by his client who must be able to consult his lawyer with all the confidentiality needed, and without fearing that confidentiality of communications may be interfered with. In this regard, the CCBE supports the position of the LIBE Committee as provided in AM 55:

“Member States shall ensure *in all circumstances* that the confidentiality of *all* meetings between *a person to whom Article 2 refers to* and his lawyer is guaranteed. They shall also ensure the confidentiality of correspondence, telephone conversations and other forms of communication permitted under national law between the suspect or accused person and his lawyer. *The confidentiality is absolute and shall not be subject to any exception.* [AM 55]”

The CCBE believes the position of the Council - which would allow exceptions to the principle of confidentiality - disregards the fact that this proposal aims to enhance rather than diminish the rights of a suspect or defendant in criminal proceedings. To allow derogations from confidential discussions is a breach of a fundamental principle and in direct contradiction with the aim and purpose of the proposal.

The Council is proposing two circumstances when Member States may temporarily derogate from confidentiality of communications. Firstly, when there is “*an urgent need to prevent a particularly serious crime, such as terrorism*”.

The CCBE believes this reason is unjustified and should not be included in any provision regarding confidentiality. The essence of this proposal is that police by eavesdropping on a consultation between an innocent lawyer, and his suspected client hope to entrap the latter into believing his instructions are confidential – when in fact they are not. This is not alone a violation of Article 6 guarantees, but strikes at the heart of the rule of law. In real terms, seasoned terrorists will quickly learn not to discuss anything while in custody, and the measure will be of no effect. More importantly all other suspected detained persons will be afraid to seek candid advice, lest they too are eavesdropped on. The proposal is unlikely in

practice to achieve results against terrorism, but will certainly undermine public confidence in the administration of justice.

A lawyer communicating with his client and lawfully exercising his duties cannot contribute in any way to a future serious crime (terrorism or other). On the other hand, if serious evidence indicates that the lawyer, instead of lawfully performing his duties, is participating in a crime to be committed, he may be excluded as explained below.

Secondly, the Council is proposing that Member States may temporarily derogate from confidentiality of communications when *“there is serious reason to believe, based on objective and factual circumstances, that the lawyer concerned is involved with the suspect or accused person in a criminal offence and criminal proceedings may be opened against this lawyer.”*

The right to access a lawyer is the right to access an independent lawyer – not a lawyer that is under suspicion. The consequence of lawyers colluding with a client is addressed in the national legislation of Member States and this aspect should not be included in this proposed Directive, especially under an Article dealing with Confidentiality. If a lawyer is part of collusion then he is not acting as a lawyer and he should be denied access to a client. If there are *“objective and factual circumstances, that the lawyer concerned is involved with the suspect or accused person in a criminal offence”* then this should be sufficient information in itself to deny access to the lawyer. If such *“objective and factual circumstances”* exist there is no justification for allowing a lawyer to consult with his client and then listen in on the conversations. Naturally, any lawyer aggrieved at exclusion should have the right to a prompt and effective appeal mechanism.

The CCBE suggests that any restriction on access to a lawyer when the *“lawyer concerned is involved with the suspect or accused person in a criminal offence”* should be included in Article 3 of the proposal “Right of access to a lawyer”. By removing this provision from Article 4, this would mean that from the moment a lawyer is in communication with a client, confidentiality of discussions can be guaranteed.

The CCBE does not and never will condone the actions of any lawyer who knowingly participates in any criminal activity of a client. There are already professional ethical rules and disciplinary sanctions, in addition to criminal sanctions, in place to deal with lawyers who participate in criminal activity. The CCBE would never advocate the non-investigation of criminal activity of lawyers. However, the investigation of a lawyer and the right to confidentiality are two completely different issues and should be treated as such. In the Council’s proposal these two systematically separate issues are being confused resulting in a substantial loss of clarity of the Directive’s text and – more importantly - in undermining the fundamentals of the right to counsel and to fair proceedings.

It follows that all interests are protected where the suspect lawyer is excluded, but the consultation with the replacement lawyer remains confidential. Firstly, the detained person is still afforded legal representation where he can be confident his instructions and the advice given remain confidential. Secondly, the authorities prevent any acts of collusive criminality. Thirdly, the lawyer under suspicion is aware that this is so, and has a fair opportunity to vindicate his good name.

(2) Derogations on access to a lawyer

The CCBE accepts that Member States may temporarily derogate from access to a lawyer when there is “*an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;*” as specified in 5 (a) of the Council text. The CCBE would like to add that we could not support an authority other than an “independent judicial authority” having the power to authorise a derogation. Giving this power to “other competent authorities” (e.g. police authorities) as well would open the door to all kinds of abuses, which would not be averted by simply providing a remedy to the suspect against such decisions.

However, the CCBE cannot accept Council proposal 5 (b) which would allow for derogations when there is an “*urgent need to prevent a substantial jeopardy to criminal proceedings where giving access to a lawyer or delaying the investigation would irretrievably prejudice an on-going investigation.*”

Firstly, there are no situations in which having a lawyer present would “*irretrievably prejudice an on-going investigation.*” Lawyers are not “enemies” of an efficient investigation. On the contrary, their timely and full involvement in investigative proceedings not only prevents abuses and miscarriages of justice but also contributes to establishing the true facts following fair procedures.

Secondly, it is not acceptable to consider denying access to a lawyer where “*delaying the investigation would irretrievably prejudice an on-going investigation*”. The investigation does not have to be delayed as a suspect should have the immediate right to consult a lawyer by phone if there are geographical or other circumstances that would delay the arrival of a lawyer in person. To permit otherwise, would create a risk whereby a suspect could make a statement without their lawyer being present (and of course, any statement made without a lawyer present would need to be excluded).

(3) Minor offences

The CCBE believes that in any case where deprivation of liberty is an option, even as a default punishment if non-custodial alternatives fail, then this should not be regarded as a minor case.

(4) Waiver

The CCBE believes that a suspect needs to be informed *in writing* of his right to waive access to a lawyer. The suspect should also be informed in a simple and understandable way of the consequences of waiving his right and any agreement to waive the right should be in writing.

The CCBE could accept an oral waiver only in cases where there has been prior legal advice. However, if the waiver was exercised prior to receiving legal advice, then this needs to be specified and noted. Any waiver, and circumstances surrounding a waiver, should be recorded visually and by audio means and maintained in a permanent form.

The CCBE would like to add that children who are in custody should not have the possibility to waive their right of access to a lawyer under any conditions.

(5) European Arrest Warrant Cases

The CCBE supports the position of the LIBE Committee regarding the necessity to have a lawyer in the issuing State. The engagement of a lawyer in the issuing State is essential in order to ensure that grounds can be raised which will specify why an arrest warrant should not be issued in certain cases. It also will facilitate the great number of cases where through dialogue the issues concerning surrender, trial and punishment can be handled to the satisfaction of all concerned. Swift agreed procedures are often equally in the interests of both prisoners and Requesting states, with obvious economies in court time and costs. This has been the experience to date in cases where adequate representation (usually privately funded) has been available in both relevant states.

(6) Scope

Regarding the scope of the Directive, the CCBE supports the wording of the LIBE Committee (AM 37)

“1. This Directive applies from the time a person is made aware by the competent authorities of a Member State, by official notification or otherwise, that he is suspected or accused of having committed a criminal offence, ***and irrespective of whether he is deprived of liberty or not***, [AM 37] 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.”

Conclusion

The CCBE hopes the above points can be taken into account during these important discussions, and the CCBE is happy to provide further input in order to ensure that the Directive achieves its aim.