

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

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INTRODUCTION

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.

We understand discussions have reached an advanced stage and the CCBE is keen to ensure that the outcome remains true to the original motive for the proposal – that of enhancing the rights of suspects and defendants in criminal proceedings.

The CCBE finds it striking (and perhaps helpful to remind all institutions) that discussions on procedural safeguards first commenced in 2004 before being put aside. If the proposal is adopted in its current form, Member States will have three years to implement the provisions (until 2016) followed by two further years where a report will be prepared to assess the extent to which Member States have taken the necessary measures in order to comply with this Directive (2018).

It would be a true failure, given the time periods involved, if valuable, necessary and effective procedural safeguards are not achieved at the end of this very lengthy process.

The CCBE would like to communicate the following points:

I: RECITALS

Recital 21 (a)

(21a) Member States should be **encouraged to make general information available, for instance on a website or by means of a leaflet that is available at police stations, to facilitate suspects or accused persons in obtaining a lawyer. However, Member States** would not need to actively pursue that a suspect or accused person who is not deprived of his liberty will be assisted by a lawyer if the person concerned has not himself arranged to be assisted by a lawyer. **Such suspect or accused person concerned** should be able to freely contact, consult or be assisted by that lawyer. **[compare AM 19]**

CCBE comment:

The phrase "*should be encouraged to*" is unworkably weak, especially given the recent provision regarding a letter of rights. The CCBE suggests that this phrase be removed and the word "*must*" be inserted. The CCBE also suggests that in order to provide practical information the word "*general*" should be removed and replaced with the words "*practical and effective*" so that the sentence reads:

"Member States must make practical and effective information available ..."

Recital 21 (b)

(21b) In cases where a suspect or accused person is deprived of liberty, Member States should make the necessary arrangements to ensure that the person concerned is in a position to effectively exercise his right of access to lawyer, including by arranging for the assistance of a lawyer when the person concerned does not have one, unless he has waived this right. **The arrangements** could imply, inter alia, that the competent authorities arrange for the assistance of a lawyer on the basis of a list of available lawyers from which the suspect or accused person could choose. The arrangements **could include** those on legal aid if applicable. **[compare AM 19]**

CCBE comment:

With regard to the sentence "*In cases where a suspect or accused person is deprived of liberty, Member States should make the necessary arrangements to ensure that the person concerned is in a position to effectively exercise his right of access to lawyer...."*

The CCBE proposes that the word "*should*" be replaced by "*must*"

The CCBE believes that the words "**could include** those on legal aid if applicable." should read "**must include** those on legal aid if applicable".

Recital 23

(23) Member States should be permitted to temporarily derogate from **the right of access to a lawyer in the pre-trial phase** when there is a need, in cases of urgency, to avert serious adverse consequences for the life, liberty or physical integrity of a person. During a temporary derogation on this ground, the competent authorities may question a suspect or accused person without the lawyer being present, it being understood that the suspect or accused person has **been informed of his right to remain silent and can exercise that right**, and that questioning does not prejudice the rights of the defence, **including the privilege against self-incrimination**. Questioning may be carried out **for the sole purpose and to the extent necessary to** obtain information that is essential to avert serious adverse consequences for the life, liberty or physical integrity of a person.

CCBE comment:

The CCBE notes that the specific requirement to remind a person about their right to silence, and the limited nature of the questioning permitted is a step in the right direction. Nevertheless, it is disappointing that when questioning is conducted in the absence of a lawyer, the answers are admissible. The CCBE requests the introduction of an exclusionary rule in these circumstances. This exclusionary rule should apply to all situations when a lawyer is not present. An exclusionary rule is the generally accepted most efficient safeguard against investigative over zealotry, and this measure would benefit from including such a deterrent.

The introduction of the phrase "*for the sole purpose and to the extent necessary to*" should be interpreted as meaning that any questions straying beyond this narrow remit are inadmissible. The CCBE believes the following sentence should be inserted to reflect this:

"Any evidence which is obtained beyond that purpose and extent must be deemed inadmissible."

The CCBE believes the same observations apply in regard to Recital 23. (a) and 23. (b).

Recital 23 (a)

(23a) Member States should **also** be permitted to temporarily derogate from **the right of access to a lawyer in the pre-trial phase** where immediate action by the investigating authorities is imperative to prevent a substantial jeopardy to criminal proceedings, in particular to prevent destruction or alteration of essential evidence, or to prevent interference with witnesses. During a temporary derogation on this ground, the competent authorities may question a suspect or accused person without the lawyer being present, it being understood that the suspect or accused person has **been informed of his right to remain silent and can exercise that right**, and that questioning does not prejudice the rights of the defence, **including the privilege against self-incrimination**. Questioning may be carried out **for the sole purpose and to the extent necessary to** obtain information that is essential to prevent a substantial jeopardy to criminal proceedings.

CCBE comment:

The CCBE believes the provisions regarding derogations contained in Recital 23 (a) are too vague and could be applied to any situation. The CCBE believes that the only acceptable situations where temporary derogations are possible are in cases where there is an "*urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person*" as set out in Article 3.5 (a). For the remedy of judicial review (article 7(2)) to be effective the reviewer must be governed by a clear unambiguous principle.

Recital 24:

(24) Confidentiality of communication between a suspect or accused person and his lawyer is key to ensuring the effective exercise of the rights of the defence and is an essential part of the right to a fair trial. Member States should therefore respect the confidentiality of meetings and other forms of communication between the lawyer and the suspect or accused person in the exercise of the right of access to a lawyer provided for in this Directive, **without derogation. This Directive is without prejudice to procedures that address the situation when there are objective and factual circumstances whereby the lawyer is suspected of being involved with the suspect or accused person in a criminal offence. Criminal activity of the lawyer should not be considered to be legitimate assistance to suspects or accused persons in the framework of this Directive.** The obligation to respect confidentiality not only implies that Member States should refrain from interfering with or accessing such communication but also that, where the suspect or accused person is deprived of liberty or otherwise finds himself in a place under the control of the State, Member States should ensure that arrangements for communication uphold and protect confidentiality. This is without prejudice to mechanisms in place in detention facilities in order to avoid illicit enclosures being sent to detainees, such as screening correspondence, as long as such mechanisms do not allow the competent authorities to read the communication between the suspect or accused person and his lawyer. **This Directive is also without prejudice to procedures in national law according to which forwarding correspondence may be rejected if the sender does not agree to the correspondence first being submitted to a competent court.**

CCBE comment:

The CCBE believes that the following should be deleted from the Recital: "**This Directive is without prejudice to procedures that address the situation when there are objective and factual circumstances whereby the lawyer is suspected of being involved with the suspect or accused person in a criminal offence**"

The above is not a matter of confidentiality and therefore should not belong to any provision dealing with confidentiality. The above provision relates to Article 3 on access to a lawyer rather than confidentiality. It is essential that this provision be removed if the intended guarantee is to be clear and unambiguous.

The CCBE has previously stated that 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 in a Recital 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. Of greater importance is that every suspect must have the reassurance that all consultations in all circumstances remain confidential. Without such reassurance the necessary relationship of candour and trust between lawyer and client cannot be established and maintained.

The CCBE also believes that the following sentence should be deleted from the Recital: "**Criminal activity of the lawyer should not be considered to be legitimate assistance to suspects or accused persons in the framework of this Directive.**"

This sentence used in this context may open the possibility for the Member States to breach confidentiality on a very vague basis and a very low level of suspicion against the lawyer. The right to confidentiality is a right of the suspect who may not (always) know about a possible criminal activity of a lawyer. While the CCBE appreciates that a suspect should not be protected because he may know about the criminal behaviour of the lawyer,

this might not always be the case and the sentence is not limited to criminal activity together with the knowledge of the suspect.

II: ARTICLES

Article 3.4. (The right of access to a lawyer in criminal proceedings)

Member States shall endeavour to make general information available to facilitate suspects or accused persons in obtaining a lawyer.

Notwithstanding provisions of national law concerning the mandatory presence of a lawyer, Member States shall make the necessary arrangements to ensure that suspects or accused persons who are deprived of liberty shall be in a position to effectively exercise their right of access to a lawyer, unless they have waived this right in accordance with Article 8.

CCBE comment

The words “*endeavour to*” should be removed. The requirement to “*endeavour*” is extremely weak. This could result in situations where vulnerable suspects, including non-nationals, or the poor, will not be in a position to access a lawyer if the State does not guarantee to provide one. The word “*general*” with regard to “*general information*” is also of little practical value.

The CCBE suggests the following wording:

“Member States must provide practical information available to facilitate suspects or accused persons in obtaining a lawyer.”

Article 3. 5. (The right of access to a lawyer in criminal proceedings)

In exceptional circumstances and in the pre-trial stage only, Member States may temporarily derogate from the application of the rights provided for in paragraph 3 when and to the extent this is justified, in the light of the particular circumstances of the case, by one or more of the following compelling reasons:

- (a) an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;**
- (b) immediate action by the investigating authorities is imperative to prevent a substantial jeopardy to criminal proceedings.**

CCBE comment:

The CCBE is against the derogation proposed in 3.5 (b) where it is provide that a derogation is possible when “*immediate action by the investigating authorities is imperative to prevent a substantial jeopardy to criminal proceedings.*” This provision is too vague and could be applied to a large number of possible situations.

The CCBE believes that it is essential that it be clarified that the derogation in 3.5 (a) is only meant as a temporary derogation for as long as a lawyer has not yet arrived, either because he is on his way to the suspect, or because it was not possible to inform a lawyer. This derogation should not apply in a situation when a lawyer is present and ready to assist the suspect. In addition, a derogation should only be authorised by a judicial authority.

Article 4 Confidentiality

Member States shall **respect** the confidentiality of communication between a suspect or accused person and his lawyer **in the exercise of the right of access to a lawyer provided for under this Directive**. This shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law.

CCBE comment:

The CCBE believes that it is essential that Member States guarantee (rather than “*respect*”) the confidentiality of communications. This is an essential requirement.

Article 5.3 (right to have a third party informed)

Article 5.3. Member States may temporarily derogate from the application of the rights set out in paragraphs 1 and 2 when this is justified, in the light of the particular circumstances of the case, by one of the following compelling reasons:

- (a) an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person ;**
- (b) an urgent need to prevent a situation where there could be a substantial jeopardy to criminal proceedings.**

CCBE comment:

The use of the words “ *a situation where there could be*” is vague and open to abuse. The CCBE suggests that, in line with the wording in 3.5, these words should be deleted.

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, **orally or in writing**, with **clear and sufficient information in simple and understandable language** about the content of the right concerned and the possible consequences of waiving it; and **[compare AM 62]**

(b) the waiver is given voluntarily and unequivocally.

2. The waiver, **which can be made in writing or orally, shall be noted, as well as** the circumstances under which the waiver was given, 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 **and that the suspect or accused person is informed about this possibility [AM 66]. A revocation of a waiver shall come into effect from the point in time when the revocation was made.**

CCBE comment:

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.

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 in the executing Member State upon arrest pursuant to the European Arrest Warrant.

2. With regard to the content of the right of access to a lawyer in the executing Member State, the requested person shall have the following rights in that Member State:

(a) 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 without undue delay from deprivation of liberty;

(b) the right to meet and communicate with the lawyer representing him;

(c) 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, 5a, 6, 8 and - when a temporary derogation under Article 5(3) is applied - Article 7 shall apply, *mutatis mutandis*, to European arrest warrant proceedings in the executing Member State.

4. The competent authority in the executing Member State shall, without undue delay after deprivation of liberty, inform the requested person that he has the right to appoint a lawyer in the issuing Member State. The role of that lawyer in the issuing Member State is to assist the lawyer in the executing Member State by providing him with information and advice with a view to the effective exercise of the rights of the requested person under Council Framework Decision 2002/584/JHA.

5. Where the requested person wishes to exercise this right and does not already have a lawyer in the issuing Member State, the competent authority in the executing Member State shall promptly inform the competent authority in the issuing Member State. The competent authority of that Member State shall, without undue delay, provide information to the requested person to facilitate him in appointing a lawyer there.

6. The right of a requested person to appoint a lawyer in the issuing Member State to assist his lawyer in the executing Member State is without prejudice to the time limits set out in Council Framework Decision 2002/584/JHA or the obligation on the executing judicial authority to decide, within those time limits and the conditions defined under that Framework Decision, whether the person is to be surrendered.

CCBE comment:

The CCBE has always stressed 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 enforced 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. It is unfortunate that the member states have diluted the wording of this article, as earlier versions were far more acceptable. It is especially short sighted that the amendment appears to be motivated by a concern to avoid the cost of "dual representation", given that experience to date is that substantial cost savings can be achieved where such representation is in place. EAW proceedings should be included in legal aid schemes under the conditions set out in national law.

Article 11.2 Remedies

1. Member States shall ensure that suspects or accused persons **in criminal proceedings as well as requested persons in European Arrest Warrant proceedings** have an effective remedy under national law in instances where **their rights under this Directive** have been breached.
2. **Without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in criminal proceedings, in the assessment of statements made by a suspect or accused person or of 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 3(5), the rights of the defence and the fairness of the proceedings are respected.**

CCBE comment:

The CCBE believes that that an investigative body which wrongfully breaches the rights of a suspect should not be entitled to benefit from their own wrongful conduct and evidence obtained in these circumstances should be excluded. This is an internationally recognised policy choice. This is an important safeguard for the rights of the defence and is necessary in order to ensure that an effective deterrent exists.

Article 13 Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [36 months after publication of this Directive in the *Official Journal*]. They shall immediately inform the Commission thereof.
2. When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.
3. Member States shall communicate to the Commission the text of the measures of national law which they adopt in the field covered by this Directive.

Article 13a [new] Report

The Commission shall by [24 months] after the deadline for implementation of the Directive mentioned in Article 13(1)] submit a report to the European Parliament and to the Council, assessing the extent to which the Member States have taken the necessary measures in order to comply with this Directive, accompanied, if necessary, by legislative proposals

CCBE comment:

The CCBE believes that providing Member States with 36 months to bring their laws into line with the Directive is excessive as this realistically should be achieved in a far shorter period (a maximum period of between 18 - 24 months should be acceptable). If a Member State requires 36 months to comply with the basic provisions contained in the Directive,

this in itself illustrates how far behind Member States are with regard to having proper standards in place.

In addition, providing an additional 24 months for a report to be drawn up to determine whether Member States are in line with the Directive is shameful as this means that Member States can take no action in effect for the next 5 years under the current wording. This illustrates a lack of urgency with regard to the requirement for Member States to implement proper basic standards.

A 12 month period was applied to the other Roadmap measures and this Directive should be no exception.

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 including practical examples in order to ensure that the Directive achieves its aim.