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Proposal for a Directive of the European Parliament and of the Council on provision of legal aid for suspects or accused persons deprived of liberty and legal aid in European Arrest Warrant proceedings

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Introduction

The CCBE has examined the proposal on the provision of legal aid for suspects or accused persons deprived of liberty and legal aid in European Arrest Warrant proceedings. The CCBE has the following comments to make:

CCBE comments on the Explanatory Memorandum

- **4.** We welcome the intention that "this proposal seeks to improve the rights of suspects or accused persons in criminal proceedings. Having common minimum standards governing these rights should boost mutual trust between judicial authorities and thus facilitate the application of the principle of mutual recognition. A certain degree of compatibility between the legislation of Member States is pivotal to improve judicial cooperation in the EU".
- **6.** We note that the current proposal is closely linked to Measure C on the Right to access a lawyer and the right to communicate upon arrest.
- **7.** We are very concerned with the following statement "the need for caution is particularly obvious in times of fiscal consolidation, when cost implications need to be carefully weighed" as society pays a heavy price where persons who are put on trial are not properly and effectively legally aided. We reiterate concerns expressed on other occasions that the absence of effective legal aid is a strong factor in relation to the amount of time lost through inefficiencies where there is inadequate representation, the cost of miscarriages of justice, of people spending prolonged periods unnecessarily in prison and many other issues.
- **10.** We welcome the recognition that "it is in the early phase of the proceedings, especially if deprived of liberty, that suspects or accused persons will be most vulnerable and most in need of legal aid to be assisted by a lawyer. Therefore, the Directive makes provisions for so called "provisional legal aid" which brings significant added value and improved mutual trust between criminal justice systems."

Similarly, with regard to 11, "moreover while all Member States provide access to legal aid for suspects and accused persons in criminal proceedings, it appears the requested persons in European Arrest Warrant proceedings do not always have access to legal aid in the Member States. This hampers the exercise of the right provided for in the Directive on access to a lawyer i.e., access to a lawyer in both the executing and issuing Member State. Moreover the rights in Article 6 ECHR including the right to legal aid do not extend to

extradition proceedings. Therefore in order to improve mutual trust and make the trial to dual defence in European Arrest Warrant proceedings effective, the Directive also requires Member States to give access to legal aid, beyond provisional legal aid as the requested persons are not always deprived of liberty."

- **13.** We note that the measure on legal aid is linked to the measure for the European Public Prosecutor.
- **14.** We would wish to acknowledge the recitals referring to the applicable international tests.

Article 47 (3) of the Charter provides that "legal aid shall be made available to those who lack sufficient resources insofar as such is necessary to ensure affective access to justice".

Article 6.3. ECHR states that everyone charged with a criminal offence has the right to "defend himself in person or through legal assistance of his own choosing or if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require".

Effective access to legal representation is paramount to ensure the respect of the presumption of innocence and the rights of the defence as set out in Article 48 of the Charter.

20. Regarding "the objective of the Directive is to ensure that suspects or accused persons in criminal proceedings who are deprived of liberty **and** persons subject to European Arrest Warrant proceedings have access to legal aid to render effective their right of access to a lawyer as provided for in the directive on the right of access to a lawyer".

The use of "and" strongly supports the proposition that persons who are subject to an arrest warrant procedure but who are not deprived of liberty should have this access. This does not carry over into the draft Articles.

- **21 and 22**. We welcome the fact that the right applies from the deprivation of liberty in criminal cases and from the time of arrest in the executing Member State until the surrender in European Arrest Warrant cases.
- **25**. We welcome the fact that this is seen as an important measure to reinforce the right not to incriminate oneself.
- **26.** We welcome that the right is without delay after deprivation of liberty and before any questioning.

We welcome the strong statement "Member States should therefore ensure that access to provisional legal aid is available without delay after deprivation of liberty and before any questioning takes place".

27. With regard to the following:

"to this effect, Member States should set in place procedure or mechanisms for example duty lawyer schemes or emergency defence services, allowing intervention with short notice at police stations or detention centres, so that the right to provisional legal aid and access to a lawyer without undue delay after deprivation of liberty and before any questioning becomes practicable and <u>effective</u>".

We stress the importance of the word "effective" as we believe, for example, that that a scheme of duty lawyers who are inadequately trained and poorly resourced would not in our contention be effective.

- **30**. In Arrest Warrant cases, provisional legal aid is available from the deprivation of liberty. Can it be assumed that it continues if liberty is restored following bail?
- **33.** We would welcome the strong statement.

"In order to ensure the effectiveness of the right to appoint a lawyer in the issuing Member State to assist the lawyer in the executing Member State, according to Article 10 of Directive 2013/48/EU on the right of access to a lawyer, Member States shall ensure that there is a right to access legal aid in the issuing Member State for requested persons that exercise this right of access to a lawyer, for the purpose of the European Arrest Warrant proceedings in the executing Member State."

It logically follows from this that the process of granting legal aid in the issuing Member State should be a swift process as it is designed to support the intended swift Arrest Warrant proceedings.

35. This provides that provisional legal aid will apply in the executing Member State where a person has been deprived of liberty.

It is logical that provisional legal aid should also apply in the issuing Member State to ensure consistency. What is the point in having provisional legal aid in the executing Member State if the lawyer so appointed cannot advance his client's case without the assistance of a lawyer in the issuing Member State where the entitlement is to legal aid (following full assessment) rather than provisional legal aid. This is a very important point.

Comments on the Recitals

7. "One of the fundamental features of a fair trail as stated by the European Court of Human Rights ECTHR is that everyone charged with a criminal offence is <u>effectively defended</u> by a lawyer assigned officially if need be. The fairness of criminal proceedings requires that a suspect must be granted access to legal assistance from the moment of deprivation of liberty."

We emphasise that the correct test is that the person is "effectively defended".

9. "In order for suspects or accused persons who are deprived of liberty to be in a position to <u>exercise effectively the right</u> of access to a lawyer at the early stages of the proceedings, they should not have to wait for access to a lawyer pending the <u>processing of the application for legal aid and the assessment of the eligibility criteria for legal aid".</u>

This is the second test of effectively. One needs to be able to have effective access but also to an effective lawyer.

14. "To ensure that requested persons can effectively exercise their right to appoint a lawyer in the issuing Member State to assist the lawyer in the executing Member State in accordance with Directive 2013/48/EU the issuing Member State should ensure that requested persons have access to legal aid for the purpose of the European Arrest Warrant proceedings in the executing Member State. This right may be subject to an assessment of the means of the requested person and/or whether it is in the interests of justice to provide legal aid, according to the applicable eligibility criteria in the issuing Member State in question."

This militates against providing proper and swift assistance in a guaranteed format. If it becomes routine that issuing Member States delay the decision making on legal aid then lawyers in executing Member States will simply not bother exercising the right to dual representation and it will become completely meaningless.

Comments on the Articles

Article 1.3. We welcome that nothing in this Directive shall be interpreted as limiting the rights provided for in Measure C.

Article 3.d "lawyer" means any person who in accordance with national law was qualified and entitled including by means of accreditation by an authorised body to provide legal advice and assistance to suspects or accused persons.

We stress the fact that where a lawyer is assigned under a duty scheme, rather than chosen by a suspect there must be sufficient quality controls to ensure that they are adequately and currently trained.

Article 4.1 "Member States shall ensure that the following persons, if they so wish, have the right to provisional legal aid.

- A. Suspects or accused persons in criminal proceedings who are deprived of liberty.
- B. Requested persons deprived of liberty in the executing Member State".

The test at 4.b appears to exclude from eligibility persons who are subject to Arrest Warrant proceedings, but are only briefly taken into custody for the purpose of production before court. This would be a significant omission insofar as provisional legal aid is concerned.

It does not rest easily with:-

Article 5.1. "The executing Member State shall ensure that requested persons have the right to legal aid upon arrest pursuant to a European Arrest Warrant until they are surrendered, or in the cases of non surrender, until the decision on surrender has become final", as that simply reflects existing practise with provisional legal aid applying as an emergency measure.

The CCBE believes that the Directive creates uncertainty regarding the precise circumstances where provisional legal aid shall apply in EAW cases.

According to Art. 4.1 b) requested persons have a right to "provisional legal aid" in the executing state, when they are deprived of liberty. Art. 5.1 rules that requested persons shall have the right to "legal aid" "upon arrest" pursuant to an EAW. According to Art.5.3 the criteria for the legal aid may be drafted by the Member States.

It can be deduced that the intention of the Commission is to draft a right to "provisional legal aid" for people who get arrested on the basis of an EAW. To avoid any misunderstanding it should be made clear how far this provisional legal aid shall reach. The understanding of the CCBE is that provisional legal aid shall at least apply for requested persons when they are questioned and brought before a judge after having been arrested.

Article 5.2. "the issuing Member State shall ensure that requested persons, that exercise their right to appoint a lawyer in the issuing Member State to assist the lawyer in the executing Member State, according to Article 10 of Directive 2013 / 48 / EU, have the right to legal aid in that Member State for the purpose of the European Arrest Warrant proceedings in the executing Member State".

This wording is problematic. There is no proposal for provisional legal aid in the issuing Member State. This is the position irrespective of whether the requested person is deprived of liberty or not. We wish to stress the benefits that flow from dual representation in terms of respect for the rights of the requested person, speed and efficiency of the court processes where there is effective assistance from the outset, the saving in cost where a formal surrender is not necessary because the case in fact can be

dealt with on a non-custodial basis or by other arrangement, and the saving in terms of prison time where there are unnecessary incarcerations.