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## **BRIEFING PAPER ON THE PROPOSED DIRECTIVE ON ACCESS TO A LAWYER**

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## Briefing paper on the proposed directive on access to a lawyer

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### Introduction

**The Council of Bars and Law Societies of Europe (CCBE)**, which represents around 1 million European lawyers through its member bars and law societies from 31 full member countries, and 11 further associate and observer countries, **warmly welcomes the Commission's latest proposal on access to a lawyer in criminal proceedings**. The CCBE has called for many years now for common minimum safeguards for suspects and defendants as a matter of giving substance to the fundamental rights often presented as "at the heart of the Union".

Following the terrible events of 11 September 2001, the European Union passed a number of measures in the criminal field which aided the prosecution. This arose out of the urgency of those times. Now it is largely recognised that the balance between prosecution and defence is out of kilter, to the detriment of the defence. It is in this context that the European Commission is proposing measures to correct the balance and ensure an equality of arms.

On 8 June 2011, the European Commission presented its proposal for a directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest (COM(2011) 326). This is the third of a line of measures to define minimum common procedural guarantees for suspects and defendants in the EU. This line of measures was identified in a 'Roadmap', adopted by the EU Council on 30 November 2009, in which the EU Member States invited the Commission to present proposals over the following five years on (A) the right to translation and interpretation; (B) information on rights and information about the charges; (C) legal advice and legal aid; (D) communication with relatives, employers and consular authorities; and (E) special safeguards for suspected or accused persons who are vulnerable.

The good news is that Measure A was adopted early in 2010 and Measure B is in the final stages of adoption. The measure now presented by the Commission covers measures C (excluding legal aid, which is left for a later stage) and D in one single instrument. The proposal provides that the directive will apply from the time a person is made aware by the competent authorities of a Member State, by official notification or otherwise, that s/he is suspected or accused of having committed a criminal offence until the conclusion of the proceedings. It will also apply to persons who are the subject of proceedings under a European arrest warrant from the moment they are arrested.

### Responses

The CCBE would like to react here to some of the **criticisms expressed at governmental level**. We will take the arguments one by one, with the criticism put at the beginning of each argument in bold, followed by our counter-views:

- **The proposed measure would adversely affect the necessary balance between protecting the rights of the defence and the needs of the prosecution.** As mentioned above, this is not a widely held view. Most decision-makers would take the opposite view, that these measures are needed to restore the balance in favour of the defence after much pro-prosecution legislation at EU level (European Arrest Warrant, freezing orders, money laundering directives, European Investigation Order, European Supervision Order etc.).

- **The proposed directive would oblige prosecutors to wait for the arrival of the lawyer before the start of any questioning by the police or other law enforcement authorities, or the carrying out any procedural act or evidence-gathering at which the person's presence is required or permitted.** The rights of the defence can only be guaranteed as a fundamental right if the lawyer can be present with the client so as to control that the rules for questioning and evidence-

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gathering have been respected. If they are respected, the investigators should not worry about the presence of a lawyer.

- **The systematic intervention of the lawyer would damage the investigation.** The proposed directive only says that the lawyer “shall have the right to ask questions, request clarification and make statements, which shall be recorded in accordance with national law”. This seems proportionate. It has been argued against the current text that there is no limit in time to the duration and frequency of meetings between the suspect or accused person and his/her lawyer, but the text only says that these should not be limited in any way that may prejudice the exercise of the rights of defence – which is not the same thing. And in any case, it would not be legitimate for a lawyer to prolong or repeat meetings unnecessarily just to obstruct the proceedings.

- **There is no exception allowed for pre-trial custody for terrorism and organised crime.** This is not entirely correct. The proposed directive allows for derogations “in exceptional circumstances” and, whilst it is true that the derogation “shall not be based exclusively on the type or seriousness of the alleged offence”, it can (and must), be “justified by compelling reasons pertaining to the urgent need to avert serious adverse consequences for the life or physical integrity of a person”. Governments may regret that derogations “may only be authorised by a duly reasoned decision taken by a judicial authority on a case-by-case basis”, but how else can one be assured that the derogation will “not go beyond what is necessary”, “be limited in time as much as possible and in any event not extend to the trial stage” and “shall not prejudice the fairness of the proceedings”? It seems that the Commission has struck the proper balance here.

- **It is not the role of the lawyer to inspect the place of detention and check the conditions of detention,** as provided in the text. Suspects or defendants have no-one to put their case, if not their lawyer, and if there are legitimate complaints about the premises, the lawyer should be in a position to make a judgement and possibly to intervene. Moreover, the primary purpose of the right for the lawyer to access the place of detention is to guarantee that the person detained is effectively able to organise his/her defence.

- **The directive would impose on Member States the duty to control the quality of legal advice, a competence which belongs to national Bars.** Indeed, this would not be acceptable, but we see no trace in the text of a provision taking that direction.

- **The directive would mechanically increase the number of pre-trial custodies.** On the contrary, if the interested person can access a lawyer swiftly after being arrested, this reduces the risk of abuse and limits pre-trial detention to what is strictly necessary.

- **The budgetary consequences in respect of legal aid are being neglected.** The CCBE would not want legal aid to be left aside; on the contrary: promoting an ambitious EU approach in this area is one of our priorities since 2009. However, it should be reminded that legal aid is one of the measures covered by the ‘Roadmap’ and that it will be presented at a later stage; it is therefore not forgotten. Of course, there is a cost to justice and it will be necessary, in due time, to examine the financial side of this measure. However, it is noteworthy that financial arguments are not raised when discussing judicial cooperation in favour of the prosecution, for instance when introducing the European Arrest Warrant.

**Governmental criticisms made so far show a fundamental misconception of the lawyer** as being an obstacle to the smooth running of the investigation and of the criminal procedure. However, there is nothing in those countries which give access to a lawyer very early in the procedure that suggests that the efficiency of justice has suffered from it. On the contrary, the CCBE considers that an active

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defence lawyer is an essential actor in a fair trial, as recognised by the European Court of Human Rights.

**It would not suffice to rely on the case-law of the European Court of Human Rights**, which already recognises and upholds the right of access to a lawyer in different judgments. In the current state of play, national laws offer different solutions, and indeed varying degrees of protection, for the rights of the defence - as EU citizens suspected or accused of having committed a criminal offence in another Member State soon find to their dismay. Rights which one would consider as obvious in one Member State may not exist in another Member State. It is therefore important to compile and summarise the Court's case-law in a text that will allow citizens to know their rights without needing the assistance of specialised lawyers. The proposed directive has the merit of providing this, and proposing a text that will have to be implemented into the law of all Member States – where the judgments of the Strasbourg Court sometimes remain without effect. It is a matter of legal security.

The underlying notion of the EU in respect of the **free movement of people is based on confidence that fundamental legal rights are equally recognised and implemented in all jurisdictions within the EU**. Like the European Convention on Human Rights, the proposed directive only defines minimum common standards; we hope that the EU Member States will have more ambition than that.