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Editorial

Dear friends and colleagues,

Another year of ECBA activities is coming to a close and we have made many achievements over the last 12 months. We are the only defence practitioners' association whose membership covers over 35 council of Europe states and we have worked hard to make sure our voice can be heard throughout Europe. The field of procedural safeguards is one of the crucial points on the political

agenda since the Stockholm programme has included the road map on procedural rights. We have fought for this and we will not stop fighting for the citizens' rights and the "defence of the defence" all over Europe. Our written statements, open letters to MEP's and justice ministers and our verbal contributions at many experts' hearings and other conferences express the views of those who work in the field of criminal justice every day. It is not only our academic knowledge but also our practical experience that qualifies our expertise in this field. As a matter of principle the ECBA continues to campaign for minimum safeguards in criminal proceedings. This is the only way in which basic human rights can be protected. It is a fundamental counterweight to the extensive powers being given to Member States.

The ECBA's campaign for a European letter of rights – including the right to silence – has been advanced with the recent project of the University of Maastricht and the German federal ministry of justice together with the participation of the ECBA. The book on this project has just been published by Intersentia. Our goal is to ensure that any individual arrested anywhere in the EU is informed of his basic rights whilst he is deprived of his liberty in a language that he can understand. Why is it that over half a century after the adoption of the European Convention on Human Rights that this simple but fundamental step has not been taken? The politically agreed road map of the Stockholm programme and the recent proposal of the European Commission for measure B of this road map (Information on Rights and

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Information about the Charges) demonstrate that things are moving in the right direction. For example it is almost universally accepted now that there must be a right to access to the file; however it is still politically problematic to include the right to silence in the European letter of rights. Our fight must and will be continued on this specific matter.

The ECBA is deeply concerned to ensure proper judicial oversight of a European Investigation Order (EIO). An EIO must be issued and supervised by a court of law in accordance with the general principles of European law. The court must control the transfer of evidence to other jurisdictions and ensure the integrity and fairness of any procedure. Anything less than this will begin to erode the proper division of power between the state and the judiciary.

Finally friends and colleagues, we are looking forward to meeting you all personally again at our next conference in Budapest on 6 & 7 May 2011. In addition to our political engagement, our main purpose is to develop a network of defence practitioners and to provide a forum for the exchange of views and experience which is best achieved at our conferences. We welcome all members to be actively involved in our work – we have succeeded in making politicians and bureaucrats understand that there is a need to understand the practical impact of their proposals – we welcome the involvement of members to participate in expert meetings and projects to make sure our voice is heard. You can contact the secretariat or any of our board members if you like to join a working group, participate in one of our

coming up projects or propose a new initiative.

Ljubljana Autumn Conference: October 1 and 2, 2010

The ECBA 2010 Autumn Conference was organized in Ljubljana as a joint conference with the Austrian Criminal Bar Association and the Universities of Graz and Ljubljana.

Alongside the river, Ljubljana offers many picturesque views and breathes hospitality – an ideal setting to discuss “Defence Rights in the early investigative stage of criminal proceedings”.

The Friday evening reception was held in the Faculty of Law of the Ljubljana University. ECBA’s Chairman welcomed the delegates and both the Dean of the Faculty of Law (Prof. Dr. Peter Grilc) and the Vice-President of the Slovenian Bar Association (Rok Koren) spoke a warm welcome on behalf of the host city.

On Saturday, the main topic was the recent jurisprudence of the European Court of Human Rights (ECtHR) concerning the rights of a suspect to have access to an attorney in the earliest stages of the criminal investigation, starting of course with the *Salduz* against Turkey case of the ECtHR (November 27th, 2008).

Prof. Dr. Károly Bárd of the Central European University Budapest gave an overview of the impact the Lisbon Treaty has or could have in the field of criminal procedural law in general and defendants’ rights in particular.

He focused on the harmonization of the rights of the defendant in a pre-

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trial stage – being a part of the Lisbon Treaty – and the necessity thereof. He advocated a development towards harmonization of the rights of the defendant within the EU in order to create a common safety net for every EU citizen who is a suspect in any criminal case.

Mrs. Anna Berlee reported on the research done together with Prof. Taru Spronken and Mrs. Liesbeth Baetens to draft a EU-wide Letter of Rights in criminal proceedings. She explained the subtlety which is needed in order to draft a useful EU-wide Letter of Rights, because the language, details and style need to be carefully considered in order to create a clear and understandable document, informing EU citizens of their rights and how to utilise to these rights in a confrontation with the police/investigators.

Thereafter, the team of Prof. Dr. Richard Soyer (Austria) presented the results of the Pre-Trial Emergency Defence project. This project was handled by the Austrian Criminal Bar Association in co-operation with the ECBA and the Universities of Graz, Ljubljana, Vienna and Zagreb. Below is a report on the study by Stefan Schumann and it is available on our [website](#).

Together with Prof. Dr. Soyer, the country rapporteurs gave a presentation on the emergency lawyer services in their respective countries and demonstrated that EU Member States – even when they are neighbouring countries – have a very different approach as far as emergency lawyers are concerned.

All speakers agreed that an adequate emergency lawyer system should

exist throughout the EU in order to assist every suspect at the very first moment of police interrogations. This is what the Salduz doctrine is about.

There followed a panel of defence practitioners discussing the project results as presented by Prof. Dr. Soyer and his team.

The significant differences between Member States were very clear. The panel also discussed the need for harmonization of (defence) legislation as presented by Prof. Dr. Károly Bárd in the morning was shown.

To provide Member States legal aid to ensure the right to legal assistance is accessible to every EU citizen and practical difficulties of proving a mandatory emergency lawyer service with a limited list of practitioners was discussed.

The conference ended according to tradition, with reports on recent developments in different Member States by Mr. Alexis Anagnostakis (Greece), Bertil Dahl (Sweden), James MacGuill (Ireland), Neil Swift (UK) and Diederik Van Omme (the Netherlands).

A lot of work is still to be done in order to achieve a EU-wide defence standard which respects the Salduz case-law of the ECtHR and more specifically to guarantee that:

- every defendant is aware of his rights from the first police interrogation;
- every defendant has the possibility to have legal assistance and to obtain legal advice prior to and during this first police interrogation;
- Member States provide sufficient means of legal aid to secure this

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assistance for suspects with insufficient incomes.

A common regulation of these rights throughout the EU is mandatory to achieve an equal level of defence rights in the early investigative stage of criminal proceedings.

The Conference Presentations, as well as a more detailed report are available on the [website](#).

The EU funded “Pre-trial Emergency Defence” project: Assessing pre-trial access to defence rights in four European countries

You will find the [summary](#) of this project published on our website.

European Investigation Order (EIO)

The ECBA published their statement on the member state initiative regarding the European Investigation Order in criminal matters (9145/10 (Brussels, 29 April 2010)) in October 2010. The statement was sent to MEPs, Ministries of Justice and NGOs throughout the EU and is available on the [website](#). In summary the proposal intends to replace the mutual legal assistance regime with a single mutual recognition instrument for the exchange of evidence and other material amongst member states. Attempts at producing a EU wide instrument in this area is not new and the ECBA has already provided commentary on proposals for the European Evidence Warrant (EEW) and the Commission's Green Paper on obtaining evidence in criminal matters from one member state to

another and securing its admissibility (COM(2009) 624 final).

The EEW proposal is currently on hold pending the negotiations on the EIO. The EEW was limited to obtaining pre-existing evidence in the form of objects, documents and data from another Member State for use in criminal proceedings and was to run in parallel with the mutual legal assistance regime for objects and documents that fall outside of its scope.

The EIO proposes to replace the EEW and mutual legal assistance with a single unified mutual recognition instrument. The grounds for non-recognition and non-execution are extremely limited and more limited than those provided in the EEW. There will be little or no scrutiny in the executing state and mechanisms for challenge will be in the issuing state.

The ECBA statement has questioned whether a single instrument is feasible, necessary or desirable and has called for any further extension of the principle of mutual recognition to be conditional on binding and enforceable minimum safeguards for criminal proceedings. The replies we have received are available on the website.

The Academy of European Law (ERA) has organised a conference in Brussels in conjunction with the Belgian Presidency of the Council of the EU to discuss the EIO on the 14 and 15 December 2010. Louise Hodges and Vânia Costa Ramos will be attending on behalf of the ECBA. We would be grateful if members could provide us with any views you may have on the proposal so that we

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can take these into consideration at that meeting. Also please let us know if you plan to attend the conference – it would be beneficial to have criminal defence practitioners active in the debate.

ECBA/Justice Project: Best Practice in European Arrest Warrant Cases

Our successful Introductory Seminar in London took place on the 28th September 2010 when a full contingent of European Lawyers met to discuss the detail of what we are hoping to achieve. By the end of one year we hope to have collected evidence which demonstrates what are the problems facing clients and lawyers in EAW cases. An Interim Report will be prepared based upon this evidence which will be available in 2011 when the European Commission will be presenting their proposal for legal representation and, we anticipate, legal aid. After a further year's work a Final Report will be completed which will make recommendations to ensure that the rights of requested persons are protected.

The countries selected to take part in this project are Sweden, Poland, United Kingdom, The Netherlands, Denmark, Italy and Greece. We will be grateful to receive assistance from other countries as time goes on. The main structure comprises the participating lawyers liaising with their national representatives of the International Commission of Jurists in the collection and collation of the evidence, after which it is sent on to Jonathan Mitchell of the ECBA and Jodie Blackstock of Justice for the preparation of the Reports.

The work will be undertaken by lawyers who carry out a large number of EAW cases. In the case of Sweden where the number of EAW cases is lower than in the main continental European countries, by far the greatest number of EAW cases arises in the Port of Ystad due to the large number of people arriving on the ferry from Poland. We have decided to accept the help offered to us by the appointed defence lawyers of the Ystad District Court in obtaining evidence from their cases, and we are looking into an extension of this method for the larger Swedish cities of Stockholm, Goteborg and Malmo.

We are proud to be at the sharp end of a really useful exercise which we trust will produce hard evidence of the difficulties that are regularly faced by European defence practitioners, yet which are universally and disgracefully ignored by the EU member states and the Council of the EU.

Experts' Meeting on Procedural Safeguards in the EU

An Experts' Meeting on Procedural Rights/Access to a Lawyer organized by European Commission was held in Brussels on 11th-12th October 2010.

The main issues on the agenda were the development of Measure C which aims to strengthen the right to legal advice in the EU and Measure D on the right to communication while in detention. The Commission proposed to divide measure C in two legal instruments – C1 for legal representation and C2 for legal aid.

Concerning Measure C, some of the "hot topics" were: the need to

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regulate the legal consequences of the breach of the right to legal assistance; whether to approve a single instrument on legal aid and legal representation, or not; whether there should be regulations concerning quality of legal assistance; whether there should be a regulation for access to legal representation for EAW proceedings.

At the beginning of the meeting the results of three studies were presented. All these studies pointed out the need to ensure access to legal representation from the first moment at which a person is confronted with criminal proceedings. The Joint study of the ACBA, the Universities of Graz, Ljubljana, Vienna and Zagreb and the ECBA presented for the first time at the Ljubljana Autumn conference was presented at this meeting.

Vânia Costa Ramos, on behalf of the ECBA, made a presentation on the topic of "Access to a Lawyer in European Arrest Warrant cases".

The urgent need to establish a legal and practical framework granting access to legal representation to any citizen who faces transnational criminal proceedings in both Member States (or more) involved (meaning, any proceedings with any connection to a foreign jurisdiction, including EAW proceedings) was defended.

In practice, the person usually ends up having assistance of a lawyer in the executing and in the issuing MS, but this assistance is not contemporaneous and therefore is not capable of providing effective legal representation. This can result to miscarriages of justice (e.g.

<http://www.telegraph.co.uk/travel/travelnews/7777036/Lisbon-ordeal-for-passport-theft-victim.html>), a waste of financial resources transferring persons who are released after arriving in the issuing MS.

The ECtHR case law has to be adapted and applied to cases with cross-border links: i.e., access to a lawyer in all concerned jurisdictions at the earliest stage and as an absolute minimum upon detention for questioning. This must certainly include the right to legal aid, otherwise the right to legal assistance would be ineffective.

Vânia also urged for support to grant better networking and training for defence lawyers throughout the EU and mentioned some current projects of the ECBA and its partners on this field.

A great number of MS reacted to Vânia's speech, which led to an animated debate between practitioners and government's representatives. Most of the MS stated that they could not express their opinion on the subject, because either they did not know what it was meant by "double defence", or they were not ready to transmit a position on it. All seemed suspicious and concerned that it would affect the MR system by shifting control from the issuing to the executing MS. Some MS also mentioned that a regulation on double defence would imply the amendment of the EAW Framework Decision, which was not desirable because "everything is working out well"...

The ECBA is preparing a short statement on double defence, in

order to: 1) explain the concept; 2) demonstrate its advantages; 3) show that it would be quite simple to implement; 4) show how double defence is in accordance with the *Salduz et al.* Case law.

The experts (Bar Associations, defence practitioners, NGO etc.) agreed that the right to legal representation should arise on arrest, in accordance with the most recent case-law of the ECtHR¹. This case law implies that the right to a lawyer arises before any police questioning. Several MS have legal systems that do not allow the suspect's access to a lawyer at this early stage and some are amending their legislation in order to bring it into line with the recent ECtHR case-law.

The majority of the representatives of the Governments declared their support for the Commission's proposal in general terms, but stated that they did not to have a final position on the matter.

Concerning Legal Aid, the ECHR provides for the defendant's right to free representation "if he has not sufficient means to pay for legal assistance". The defendant does not have to prove "beyond all doubt" that he lacks the means to pay for his defence².

¹ (*Salduz v. Turkey* – application 36391/02, judgment of 27.11.2008; *Panovits v. Cyprus* – application 4268/04, judgment of 11.12.2008; *Pishchalnikov v. Russia* – application 7025/04, judgment of 24.09.2009; *Dayanan v. Turkey*, application 7377/03, judgment of 13.10.2009).

² (*Pakelli v. Germany*, judgement of 25.04.1983, Series A 64 para. 34)

The right to free legal representation is not unconditional. According to Strasbourg's case-law certain factors should be taken into consideration (seriousness of the offence, severity of the potential sentence, complexity of the case, personal situation of the defendant).

The Commission's proposal on measure D includes inter alia that "A suspected or accused person who is deprived of his or her liberty shall be promptly informed of the right to have at least one person, such as a relative or employer, informed of the deprivation of liberty, it being understood that this should not prejudice the due course of the criminal proceedings.

In addition, a suspected or accused person who is deprived of his or her liberty in a state other than his or her own shall be informed of the right to have the competent consular authorities of the deprivation of liberty".

The general feeling on this issue was supportive, but there is a need to conduct further assessment and studies on this matter. Some preliminary remarks were raised by representatives of the Governments that the exercise of this right could possibly harm the due course of proceedings (possible communication with accomplices, etc.).

Luxembourg Conference, October 23rd and 24th: "Criminal Justice in Europe: Challenges, Principles and Perspectives"

Preminent speakers attended this Conference including:

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Dean Spielmann, Judge of the ECtHR; Koen Lenaerts, Judge at the ECJ; Marc Jaeger, President of the General Court; Lord Justice Sir John Thomas, Judge at the Court of Appeal, London; Vivianne Reding, European Commissioner; plus a star-studded cast of the academic and government elite of Europe.

Jonathan Mitchell of the ECBA asked Vivianne Reding why there was a rush to finalise the European Investigation Order (EIO) whereas so much negotiation had gone on with the EEW, especially as the EIO appeared to exclude the courts from allowing lawyers to challenge it. The reply was: "There are three things on the agenda to be done in the immediate future: putting in place procedural rights; in Spring 2011 bringing in a comprehensive system of Rights for Victims; and bringing in new Investigating Powers with Eurojust and the European Prosecutor". The direct question about the EIO was avoided, but it was clear that defence rights were not really on the agenda. On the agenda are the rights of victims, and the strengthening of procedural rights by giving more powers to prosecution organisations and Eurojust.

The Judges were asked by Jonathan Mitchell whether they considered a single European Court should be set up (i.e. a merger of the ECHR and the ECJ) which would be stronger and simpler for litigants than the present divided system. Their replies can be summarised as follows:

(i) A new system was being considered by all the European Judges of creating a "Network of Judges" so that the judiciary could be kept in touch with the rulings and

judgements in the High Courts of all the MS. Contact would be by email and other usual methods but also more meetings and gatherings to discuss the trends and legal principles that were emerging through case law and European statutes. Lord Justice Thomas (UK) delighted many when he said: "It may be possible to bring about a change in the European architecture in the future, whereby there will be much better and easier contact between all the European Judges, to bring about a more unified interpretation and structure for European Cases";

(ii) Judge Koen Lenaerts said that a new system of Pre-Trial Applications was in place which so far had received few applications, but he hoped criminal lawyers would start to familiarise themselves with and use the new system;

(iii) They suggested measures to ensure there were better candidates for judicial appointments, and made it clear to the MS that the judiciary would only accept proficient candidates, and not the poor quality candidates so often offered to them in the past.

On other matters Sabine Leutheusser-Schnarrenberger (Federal Minister of Justice Berlin) agreed that there needed to be "more uniform procedural standards" within the EU along the lines of the 2004 Framework Decision, and Yves Bot (Advocate General, ECJ) agreed that in the future there needed to be "a dialogue between the requesting and the requested states in EAW cases", and that in those cases the principle of proportionality must be more rigorously applied.

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It is a disappointment that on the major European measures we can expect during the next year there is no visible appetite amongst the European bureaucrats and the Commission for any movement towards the use of judges and the courts to settle procedural or other injustices, or towards the strengthening of defence rights and procedures. By contrast judges are now clearly grappling with some of the problems defence practitioners have been complaining about for at least the past ten years, and it seems are determined to bring their powers and skills to bear on them.

FRA Stakeholder meeting on Access to Efficient and Independent Justice

On the 4th and 5th of October a stakeholders consultation meeting took place at the EU Agency for Fundamental Rights (FRA) in Vienna. The FRA is an advisory body of the European Union, which was established in 2007. Its objective is to make fundamental rights a reality for everyone living in the EU. The FRA gives advice on its own initiative or at the request of the European Parliament, the Council of the European Union or the Commission. For more details, please visit its website (www.fra.europa.eu).

The meeting discussed two FRA studies and a handbook. First a legal study, which will be launched in early December 2010, focusing on a country level assessment of access to justice in civil cases by analysing obstacles and exemplifying good practices. Secondly a social study which will build on the finding of the legal study as well as on other

studies of the FRA, and reviewed the sociological aspects of access to justice through equality bodies in eight selected EU Member States. The findings of the social study will be available late 2011 or early 2012. The handbook is a joint project with the European Court of Human Rights, focuses on European non-discrimination law. It will be published in March 2011 and will provide practical information for practitioners about non-discrimination law.

The objectives of the meeting were to provide recommendations on how to improve access to justice in Europe in general, and to give feedback on the studies. The participants underlined the need to include positive examples of solving problems concerning access to justice, as well as information on the impact of European case law on member states' laws and procedures. The studies should be distributed as widely as possible, preferably via fact sheets in all of the official languages of the EU. Furthermore numerous practical recommendations were made on how the FRA should follow up access to justice studies with regard to communication, education and networking. Stakeholders agreed that access to justice might be affected by the global economic crisis, as it may, for example, have impact on budgets of equality bodies. The participants also emphasized the importance of the FRA reaching out to local and regional level stakeholders who are often crucial in making access to justice happen in practice.

The FRA may conduct a study on access to justice in criminal cases in 2012. Participants argued that the same methodology can be applied as

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in the FRA's legal study on access to justice in civil cases. Although it is still not certain that a study on criminal law will be initiated, the FRA would welcome any comments or suggestions from the ECBA.

It was a fruitful meeting which led to concrete recommendations for the present study and the follow-up study which will hopefully be of practical use to the FRA.

Young Defenders Training Programme

In March-April 2011 Fair Trials International (FTI) will host a networking and training event for young lawyers across Europe (up to 10 years post-qualification) on the fields of human rights law, criminal law and advocacy.

Deadline for applications is 18 January 2011.

More information available on www.fairtrials.net

Membership renewal

We would like to thank all ECBA members for their support last year(s). As the end of the year comes near an e-mail with all the information regarding membership renewal for the year 2011 has been sent around to all members. The annual fee will remain the same as previous year. We hope you will continue to support us.

Key Dates

ECBA Executive Committee and Advisory Board Meeting, London
17th December 2010

ECBA Spring Conference Budapest
6th-7th May 2010

Your views....

Do you have any questions, remarks or information relating to this newsletter? Please e-mail them to: secretariat@ecba.org

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