STATEMENT ON THE PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE RIGHT OF ACCESS TO A LAWYER IN CRIMINAL PROCEEDINGS AND ON THE RIGHT TO COMMUNICATE UPON ARREST[1]

COM (2011) 326 final (Brussels, 8 June 2011)

I. The European Criminal Bar Association

The European Criminal Bar Association (ECBA) is an association of independent specialist defence lawyers. The association was founded in 1997 and has become the pre-eminent independent organisation of specialist defence practitioners in all Council of Europe countries. We represent over 35 different European countries including all EU Member States. The ECBA's aim is to promote the fundamental rights of persons under investigation, suspects, accused and convicted persons, not only in theory, but also in the daily practice in criminal proceedings throughout Europe.

Through its conferences, website and newsletter the ECBA provides a suitable forum to access absolutely up-to-date information on legal developments. Through the work of its legal development sub-committee the Association actively seeks to shape future legislation with a view to ensuring that the rights of European citizens in criminal proceedings are enhanced in practise. Through the networking opportunities available with membership, members establish one to one contact with other practitioners in other member states both with a view to the exchange of information and to practical cooperation in specific cases. This experience from comparative jurisdictions shapes and informs the submissions which are made by the Association to the law makers, and ensures that those submissions are given due weight.

We are member of the Justice Forum and we participate(d) in several EU-projects (e.g. training events for defence lawyers jointly with ERA, networking/legal aid; letter of rights; pre-trial emergency defence; European Arrest Warrant) and we are regularly invited to many EU experts' meetings concerning criminal law issues.

Further information on the ECBA can be found at our website: www.ecba.org.

[1] http://ec.europa.eu/justice/policies/criminal/procedural/docs/com_2011_326_en.pdf.

II. The Proposal – General Approach

The ECBA welcomes the European Commission's Directive proposal on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest[2].

The right of access to a lawyer and the right to communicate upon arrest in criminal proceedings are two core rights which are essential in ensuring that European citizens and those who travel to Europe are treated fairly and justly.

In particular we have to stress positively the original proposal that includes the right to ***meet*** with a lawyer (Art. 4), not only to communicate with him, and the absolute right of **confidentiality** (Art. 7). These rights have to be guaranteed ***at any stage of the proceeding*** which should be mentioned explicitly in Art. 3 and definitely before the start of any questioning, not only before formal questioning to avoid malpractice. To avoid misuse has to be the main objective in terms of the waiver (Art. 9), too, therefore ***legal advice*** about the consequences of a waiver ***through his or her lawyer*** should be the proposition of any waiver in this context.

In our view the **right to legal assistance** distinguishes itself from other procedural safeguards as it is a **precondition** enabling the alleged offender **to defend him- or herself effectively** and make use of other safeguards afforded to the citizen who is legally presumed as innocent. Of course the right to be informed of those rights is important as well, but in the majority of cases effective use of rights needs the confidential advice of a defence lawyer. Therefore it should be impossible to allow a mutually recognisable waiver (Art. 9) without legal advice by his or her defence lawyer.

The ECBA is concerned that there is no erosion of the proposal's text during the negotiations with the Council and the Parliament and that the proposed rights are strengthened rather than diminished. The current discussions between member states on this proposal[3] demonstrate that our concern of erosion is sensible real one.

In the following paragraphs we will address particular aspects of the Directive proposal which the ECBA considers to be the essential cornerstones of the right of access to a lawyer in criminal proceedings, including European Arrest Warrant

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[2] On 11 June 2011 the ECBA has issued a press released welcoming the presentation of the proposal. The press release is available on the website: http://www.ecba.org/extdocserv/MeasureC-pressrelease0611.pdf.

[3] See document no. 12897/11 of the Council of the European Union on the Interinstitutional File 2011/0154 (COD), available on http://register.consilium.europa.eu/pdf/en/11/st12/st12897.en11.pdf and document no. 12643/11 of the Council of the European Union on the Interinstitutional File 2011/0154 (COD), available on http://register.consilium.europa.eu/pdf/en/11/st12/st12643.en11.pdf

proceedings, that have to be guaranteed in order to ensure the fairness of criminal proceedings all over the European Union. This proposal is an essential requirement for improving mutual trust and mutual recognition in criminal matters in the European Union.

III. The Proposal – Detailed Approach

1. The role of the lawyer

Before addressing specific provisions of the Directive proposal, we would like to stress that the right of access to a lawyer should not be regarded as an obstacle to the effectiveness of criminal justice or as an obstacle to mutual recognition. On the contrary, the timely and active participation of a defence lawyer in criminal proceedings contributes to achieving a **better quality of the process including evidence gathering**, and therefore of the evidence obtained, which supports securing its admissibility. In fact, evidence obtained through adversarial evidence gathering proceedings tends to be closer to the reality of the facts of the case. This contributes to preventing miscarriages of justice and even to avoiding large numbers of appeals. This results in a reduction of the costs of criminal proceedings.

Furthermore the possibility to have access to a lawyer from the very beginning of the proceedings meets not only the European Convention on Human Rights (ECHR) standards but also the common standards of many EU national legislations and will therefore **facilitate mutual recognition** in the EU because **mutual trust** in fair proceedings throughout Europe would be developed **in practise**.

The first interrogation by the police is one of the most important steps in criminal cases. There is a danger that the suspect may not understand his factual and legal situation without his own lawyer's advice even if he is informed on his rights formally. The pressure felt by individuals when held in custody without any legal advice should not be under estimated. The temptation to say what the interrogators want in the belief that this will mean they are released can be overwhelming. This could lead to false confessions (see the *Salduz* case[4]), miscarriages of justice and unreliable leads for further investigations which could waste valuable time for the investigators. The presence of a lawyer and his legal advice at the early stage of the proceeding can vice versa support the correctness of confessions or testimonies in general.

[4] ECtHR, Grand Chamber, Salduz v. Turkey, 27 November 2008, No. 36391/02, in: HUDOC database of the EctHR, http://www.echr.coe.int/echr/Homepage_EN.

2. Waiver (Art. 9)

In commenting on the specific provisions considered in the proposal, we emphasise that our biggest area of concern in the proposal is that of waiver of rights.

Section 2 of Art. 9 establishes a quasi "mutual recognition of waivers". This provision makes it imperative that accross the European Union the quality of any waiver can be established without any doubt. The case law of the European Court of Human Rights (EctHR) states that a waiver should be "*voluntary*, and must constitute a *knowing* and *intelligent relinquishment* of a right" (*Pishchalnikov*, EctHR, 24 September 2009, nr. 7025/04). Art. 9 should therefore provide sufficient safeguards that any waiver in the European Union satisfies this test. The current proposed wording of Art. 9 does not provide these safeguards.

The need for better safeguards in the wording of Art. 9 is emphasised by the observation that the practice in national jurisdictions shows a substantial risk of unsafe or abusive waivers. Practitioners in all European countries can give examples from their own case files in which the suspected or accused person is misinformed - or not informed at all - by police officers about legal rights. In most instances this can be remedied through measure B of the road map on procedural rights, the directive on the right to information and most pertinently through a letter of rights throughout Europe. But the factual and legal consequences of a waiver have to be the subject of real legal advice not only of information. Neither police officers nor justice authorities – due to their primary interest to investigate, prosecute and sentence people - are in the right position to give any legal advice to suspected or accused persons. They have a clear conflict of interest and are not in the best position to reasonably decide whether to advise an individual to waive rights or not, and what the consequences of each decision could be.

This should be a general concern of everyone involved in law enforcement, since uninformed waivers lead to unsafe judicial decisions, and subsequently to unsafe convictions. The risk of unsafe waivers are the greatest in cases involving vulnerable suspects, in European Arrest Warrant cases, and in cases concerning the more serious offences which in the view of the ECBA, are the cases in which pre-trial detention is most frequently applied.

Therefore, it is the view of the ECBA that the whole purpose of the proposal under discussion would be undermined if the waiver of the right to assistance of legal counsel is not duly safeguarded. This leads to the following observations.

Art. 9, Section 1. under (a) sets as the first condition, that "the suspect or accused person has received prior legal advice on the consequences of the waiver or has otherwise obtained full knowledge of these consequences." It should be a matter of course that **the police or judicial authorities can inform a suspect or accused person**

of their procedural rights (best done as a letter of rights as measure B proposes), but <u>can never advise</u> (or simply inform) a suspect or accused person on the consequences of waiving their rights. The only one in a position to *advise* a suspect on the legal consequences of their decisions, is his or her lawyer.

Art. 9 should be redrafted in order to establish that a waiver and its mutual recognition can only be valid if it is preceded by ***legal advice through his or her lawyer*** on the consequences of the waiver. As an absolute minimum, this should be available in cases involving vulnerable suspects, in European Arrest Warrant cases, and in cases concerning the more serious offences where police custody (garde a vue) or pre-trial detention (detention provisoire) is frequently applied. The clause ("or has otherwise obtained full knowledge of these consequences") must be deleted without any replacement. It is unjustifiable that police officers or justice authorities can assume any "full knowledge" on the part of the suspect: there would be a certain possibility of an abuse of process. Prior legal advice through his or her lawyer (as source about the consequences of a waiver) should be mandatory.

3. Confidentiality (Art. 7)

Confidentiality is the core of the right of access to a lawyer.

It is not possible to give effective legal advice, without the opportunity for confidential communications between the lawyer and his client. The Commission has recognised the importance of confidentiality and adopted a very wise and reasonable approach to this subject, by excluding this article from any derogation. The ECBA strongly urges Member States and Members of the European Parliament to maintain this approach during negotiations. Of course that absolute nature of confidentiality of the lawyer-client relationship does not encompass the cases in which, previously to meeting or communicating with the client, the lawyer is himself a suspect of participating in an offence.

4. Definition and scope of the right of access to a lawyer (Art. 3 and 4)

These matters, which are established in articles 3 and 4 of the Directive proposal, are extremely important and have to meet certain standards.

As initially laid down in the proposal, the right of access to a lawyer in criminal proceedings and in European Arrest Warrant proceedings **must be granted promptly and before any questioning**. Therefore the newly suggested amendment ("formal questioning") should not be adopted unless it is very carefully defined, as otherwise it **risks for undermining the objective of the Directive.**

Furthermore **the right to communicate with the lawyer cannot exclude the right to meet with a lawyer** and therefore Art. 4/1 (now 4/1a) of the proposal should be redrafted in order to include "the right to communicate and *to meet* with the lawyer representing him". In most cases it is not possible to duly assist an individual and to have full awareness of the reach of a criminal case without meeting with the person concerned. A provision that only grants the right to communicate with a lawyer could lead, for instance, to this right being reduced to a consultation by telephone. The consequence is that a substantial legal advice is impossible in many cases and reasonable defence lawyers have to simply advise their clients not to make any statement and thereby the positive role can be undermined a defence lawyer can bring to the process.

Although we can understand, the redrafting of numbers 2 and 3 of Art. 4 (changes from the perspective of "the lawyer's right" in the original proposal to the perspective of "the suspect's right") in our view is **only acceptable if the conditions set out above for safe waivers are met.**

In addition it would be important to include a provision ensuring that the suspect or accused person **has to be informed promptly that a lawyer has presented himself** to provide him with legal assistance (for example, where the family of the suspect has provided a lawyer for the defendant).

Finally we agree that Art. 4/4 should be handled in the Directive concerning pre-trial detention.

5. European Arrest Warrant proceedings (Art. 11)

For many years the ECBA, as well as other organisations, have campaigned for the need to guarantee effective access to legal representation in European Arrest Warrant proceedings. The lack of this safeguard has proven to be a source of miscarriages of justice and also a source of misuse of financial resources.

The establishment of legal provisions in this particular point is therefore most welcome. By **establishing the right to dual representation** (both in the executing and in the issuing state) the Commission has met the criticism made by many organisations and academics. In fact, it is not possible to grant effective legal representation in European Arrest Warrant cases without granting the possibility of access do the so-called double defence.

It has to be underlined that **dual representation will not bring many practical problems**.

In many cases, the person subject to and European Arrest Warrant already has a lawyer in the issuing state. Therefore in order to make the right to access to a lawyer

in both member states effective, it would only be necessary to insert in the EAW or in the SIS-notice to identify this lawyer and his or her contact details. This would enable the court and the lawyer in the executing state to be aware of the identification of the lawyer. The executing state would inform the issuing state without delay on the detention of a person sought by the latter and the issuing state would simply inform the lawyer of this fact, enabling him to contact the lawyer in the executing state.

In cases where a lawyer has not yet been retained or appointed in the issuing member state, the provisions laid down in the proposal will also not represent an undermining of the effectiveness of European Arrest Warrant proceedings. Once a person is surrendered, they will be granted the assistance of a lawyer in the issuing state (the proposal, following ECtHR case-law, states that the person has the right to a lawyer from the moment that he is deprived of his liberty). Therefore, granting effective dual representation is only a matter of timing: anticipating the intervention of the lawyer from the issuing member state. Moreover, from a technical point of view, the deprivation of liberty on the grounds of an European Arrest Warrant has to be observed as a unique and continuous deprivation of liberty that (other than in purely national cases) involves two jurisdictions and therefore requires legal assistance in those two jurisdictions.

Dual representation will not delay the proceedings, thus the time-limits established in the Framework Decision on the European Arrest Warrant will not be changed.

There are already some member states where countries in which the presence of a defence lawyer in the executing state is mandatory and there has been no evidence that this is a source of excessive delays in European Arrest Warrant proceedings.

Moreover, in addition to preventing miscarriages of justice, double defence brings other advantages to European Arrest Warrant proceedings.

On one hand, **the intervention of a lawyer from the issuing state is essential to help both the lawyer and the court in the executing state to assess the verification of any refusal grounds as swift as possible.**

On the other hand, **dual representation will reduce costs.** Experience has shown that many European Arrest Warrants are issued for minor offences. In many of these cases, once having been surrendered to the issuing member state, the person may avoid prison by simply paying a fine. In these cases, executing an European Arrest Warrant represent a huge financial burden that could have easily been avoided by the intervention of a lawyer in the issuing state – the lawyer would have simply informed the lawyer in the executing state on the possibility of paying the fine and the person who was being sought would have paid it before being surrendered!

6. Legal remedies (article 13)

Article 13 is undoubtedly one of the added values of the Directive proposal. Its wording might seem revolutionary, but it is not new. Indeed it is the result of clearly re-stating decisions in the case-law of the European Court of Human Rights related to violations of the right of access to a lawyer in criminal proceedings. But, as we all know, **without remedies there are no effective rights**. This is one of the key areas where there is real added value to EU citizens in the directive. The European Convention on Human Rights and the respective jurisprudence set out the standards, but they do not provide an effective legal remedy that prevents miscarriages of justice while the proceedings are still going on.

Therefore it is not acceptable to exclude a provision on legal remedies, such as the one established in article 13.

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The ECBA will continue to monitor the progress of this current proposal which is vital to the fundamental rights and freedoms of individuals throughout Europe. We are willing to provide technical and expert legal advice to the EU institutions as well as collating information and data to contribute to the shaping and development of this legislation so that we have a European justice system that we can be proud of, rather than ashamed.

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