

European Commission adopts Draft Directive on Right to have Access to a Lawyer

The ECBA welcomes the European Commission's proposal to guarantee suspects' rights to speak with a lawyer and to inform others of their arrest, however they urge the Member States to also consider the need for guarantees of legal aid for those who are not able to pay for legal assistance.

The current shameful situation in Europe is that if you are suspected of committing a criminal offence you could be held in custody in a prison with no access to a lawyer, no right to legal aid, no knowledge of the crime you have been accused of, no right to interpretation and translation of material and no right to inform your family, consulate or anyone else of your whereabouts and what is happening to you. This is the situation that millions of holiday makers, business travellers, visitors and residents find themselves in every year. It can be a terrifying and life changing experience.

The ECBA welcomes the European Commission's announcement of a proposal on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest. These are two fundamental rights that are essential in ensuring that European citizens' and those that travel to Europe are treated fairly and justly. In particular we are pleased to see that the right to speak with a lawyer will be guaranteed from the moment they are held by the police until the conclusion of proceedings. 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 the other safeguards afforded to him or her. Our main concern is that the proposal does not include minimum standards on the right to legal aid as was originally envisaged (see below in relation to the Stockholm Programme). The provision of legal aid differs widely in different Member States, including whether such funding is available to non-residents, and we urge the Member States to ensure that there is adequate funding and resources available in order to ensure that the right to access to a lawyer is available to all and not only to those who have the ability to pay at the time that the arrest occurs.

The proposal recognises that the conditions under which suspects can consult a lawyer differ between Member States, including when a suspect can see a lawyer, how long they are able to speak with them, the issues that can be discussed with the suspect, whether the discussions are confidential, whether the lawyer can be present during any interrogation and the role they have in the process. In addition the current situation is that those subject to a European Arrest Warrant may not currently have access to a lawyer in the country where the warrant has been issued until they are surrendered to that country. There are similar differences in terms of the right of suspects to inform others when they have been arrested.

The Commission's proposal intends to guarantee these rights in practice, by:

- providing access to a lawyer as soon as possible, but in any event before the start of any police questioning and to continue throughout any criminal proceedings;
- providing access to a lawyer in such a time and manner as to allow the suspect or accused person to exercise his rights of defence effectively;
- guaranteeing confidentiality of communications between the suspect and their lawyer, whether in meetings or other forms of communication;
- allowing the lawyer to play an active role during interrogations, to check detention conditions and to be present at other investigative or evidence-gathering procedures that are permitted in accordance with national law;
- ensuring that the suspect is able to communicate with at least one person (in addition to their lawyer) as soon as possible and where the suspect is a child, that their legal representative or other adult is informed as soon as possible;
- allowing detained suspects abroad to have their country's embassy or consulate informed of their detention and to communicate with them;
- ensuring individuals subject to a European Arrest Warrant have the right to legal advice in both the country where the arrest is carried out and the country where the individual is to be taken to.

The ECBA is concerned that there is no erosion of these basic proposals during the negotiations with the Council and the Parliament and that the proposed rights are strengthened rather than diminished. Our concerns are based on solid foundations. The ECBA and many other organisations and individuals have been campaigning for many years to ensure that there are minimum standards on the rights of suspects and accused persons in criminal proceedings throughout the European Union. We have found it incomprehensible why the governments of member states have been reluctant to provide minimum procedural rights to individuals in criminal proceedings. In April 2004 the European Commission tabled their first proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union (9318/04 COPEN 61 + ADD 1). There followed a long process of discussion and negotiation between the Member States but despite the efforts of the ECBA, other NGOs and many Member States, it became clear there was no collective political will to agree the provisions and the proposal was reduced to little more than a letter of intent which held no compulsion or compellability.

During the Swedish Presidency in 2009, a programme to strengthen procedural safeguards was resurrected and the [Stockholm Programme](#) introduced a Roadmap of Procedural Safeguards which provides a step-by-step programme as follows:

Measure A: Translation and Interpretation

Measure B: Information on Rights and Information about the Charges

Measure C: Legal Advice and Legal Aid

Measure D: Communication with Relatives, Employers and Consular Authorities

Measure E: Special Safeguards for Suspected or Accused Persons who are Vulnerable

Measure F: A Green Paper on the Right to Review of the Grounds for Pre-Trial Detention



As set out above, this measure on legal advice has already been eroded by not including minimum standards on the provision of legal aid. 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 will 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.

For further details on this press release, please contact secretariat@ecba.org.

For further information on the European Criminal Bar Association please see www.ecba.org.