29 September 2011

Open letter regarding the Proposal for a Directive of the European Parliament and of the Council on the rights of access to a lawyer and of notification of custody to a third person in criminal proceedings

Kenneth Clarke QC MP, Lord Chancellor and Secretary of State for Justice (England and Wales)

I.W. Opstelten, Minister of Security and Justice (The Netherlands)

Alan Shatter TD, Minister for Justice, Equality and Defence (Ireland)

Stefaan De Clerck, Ministre de la Justice (Belgium)

Michel Mercier, Garde des Sceaux, Ministre de la Justice et des Libertés (France)

Dear Ministers,

When the Swedish Presidency Roadmap on procedural rights ("the Roadmap") was approved by the European Council in December 2010, our organisations welcomed it as a means by which enforceable Europe-wide defence standards could be improved. We did so based on our collective expertise and experience in providing legal services to and advocating on behalf of people across Europe who experience the effects of the current arrangements under which legal rights vary across borders and information on rights can be difficult to access.

The stated intention of the Roadmap is *"**to expand existing standards**"* including those to be found in the European Convention on Human Rights (ECHR) and other relevant regional and global instruments and ***"to make their application more uniform".***

The action subsequently taken by the European Commission to translate the Roadmap into practice has a double purpose, both to create confidence in the common European justice space in the interests of combating criminality and to protect citizens of one Member State who find themselves facing criminal proceedings in another.

The enactment of a standardised set of defence rights that meet or exceed international human rights standards is a necessary precondition to mutual recognition amongst Member States in the criminal justice area.

The rights of access to a lawyer in criminal proceedings and to communicate upon arrest are essential elements of any ECHR-compliant system of defence rights. Consequently, our organisations welcome your recognition of the importance of these rights in principle; however, we have serious reservations about the validity of the proposition (set out in your joint note to the Council of the European Union dated 21 September 2011, document 14495/11) that the Commission's proposals on this subject "would present substantial difficulties for the effective conduct of criminal proceedings by their investigating, prosecuting and judicial authorities".

Having carefully considered the content of your joint note, we wish to make the following observations regarding the validity of the objections that it contains.

I. The Directive would not hamper the effective conduct of criminal investigations and proceedings

Our organisations do not accept the proposition that the draft Directive should be revised to "strike the right balance between on the one hand the right of access to lawyer and on the other hand the need to ensure the effectiveness of Member State justice systems".

This is a false dichotomy.

Far from being a matter to be weighed in the balance with the effectiveness of the Member State justice systems, the right of access to a lawyer, if protected in an effective manner, is an additional means to ensure the effectiveness of such systems. In jurisdictions where the right to access to a lawyer is fully respected in practice, the integrity of the criminal justice system is protected and the costs associated with mistrials, retrials and miscarriages of justice are reduced. Indeed, as the introduction of the Police and Criminal Evidence Act 1984 in England and Wales has shown, access to a lawyer provides a safeguard to both suspects and police officers by introducing an objective arbiter.

Of course, we agree that "any legislation in this field must enable criminal proceedings to be conducted effectively and efficiently". But this does not imply, as your joint note appears to suggest, that recognising in the Directive an effective right of access to a lawyer is an impediment to the effective investigation and prosecution of offenders.

ECHR jurisprudence makes no distinction between the types of offences which attract safeguards and therefore the European Union member states already have an obligation to ensure *all* suspects can access sufficient procedural safeguards to comply with their obligations under the Article 6 right to a fair trial.[1] Furthermore, ECHR jurisprudence already contemplates the possibility that some limitation of the right to access to a lawyer of choice may be justified in exceptional circumstances, a fact that has been reflected in articles 3(1)(b) and 8 of the draft Directive (though some of our organisations have already indicated our concerns about these provisions as presently worded).

[1] See *Öztürk v. Germany* and *Zaichenko v Russia* (where the right against self incrimination was breached by questioning the suspect at the roadside without prior notification to the suspect of their rights in what initially appeared to be a traffic violation but as a result of his answers became much more serious).

Another crucial dimension of this issue, to which your joint note does not allude, is that both the right of access to a lawyer and the right to communicate upon arrest provide formal safeguards against ill-treatment (a right protected by Article 3 ECHR and by other regional and global standards). In many jurisdictions, people who are subsequently charged with very serious offences may initially be held "for identification purposes", summoned for "informative talks" or questioned as witnesses. Even if they are not subsequently charged, the experience of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment has shown that it is during such initial periods in the hands of law enforcement officials that the risk of ill-treatment may be most acute.

II. Clarity on the Directive's relationship to the requirements of the European Convention on Human Rights

In their Joint Declaration issued in Interlaken following the High Level Conference on the Future of the European Court of Human Rights in 2010, representatives of the 47 Member States of the Council of Europe clarified that the obligations of a State extend beyond executing a judgment "directed at one country, in one concrete case, with all its specificities". A Member State is also obliged to take account of relevant jurisprudence of the European Court of Human Rights related to other States, where it has implications for its own domestic law and practice.

According to section B.4 of the Interlaken Declaration:

> 4. The Conference recalls that it is first and foremost the responsibility of the States Parties to guarantee the application and implementation of the Convention and consequently calls upon the States Parties to commit themselves to:
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> [...]
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> b) fully executing the Court's judgments, ensuring that the necessary measures are taken to prevent further similar violations;
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> (c) taking into account the Court's developing case-law, also with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another State, where the same problem of principle exists within their own legal system [...]

The Commission's 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 very clearly sets out (at paragraph 13 of the Explanatory Memorandum) the recent rulings of the European Court of Human Rights that clarify the scope of the right of access to a lawyer.

Our organisations consider that the Commission's proposal is firmly grounded in the jurisprudence of the European Court of Human Rights and we do not agree with your suggestion that it "goes beyond the current requirements of the ECHR". Moreover (and without prejudice to the foregoing remarks), as the European Court of Human Rights has repeatedly stressed, the European Convention on Human Rights is a "living instrument" to be interpreted in the light of present-day circumstances. As the "direction of travel" in the jurisprudence of the European Court of Human Rights in relation to procedural rights is abundantly clear, it would not only be legitimate, but also forward-looking and prudent if the Commission were to seek to "future proof" the content of the Directive against entirely foreseeable developments in the future case law of the Court. Certain of our organisations have already made practical suggestions to the Commission regarding the manner in which this might be done.

We accept that it may be correct to assert that obligations "such as the right to have a lawyer inspect the place of detention and the right to communicate with a third party of one's choice" may not be "based on established case law of the European Court of Human Rights concerning Article 6 of the ECHR". However, such obligations have a clear and direct connection to the obligation upon States to have in place effective safeguards to ensure that Article 3 of the ECHR is respected in practice. By inspecting the place in which his/her client is being held, a lawyer can reassure him/herself that poor detention conditions are not being used to assist in procuring a confession through coercive means. In a similar vein, the right to communicate with a third party ensures that persons cannot be held incommunicado, a situation known to facilitate ill-treatment.

Finally, whilst recital 13 of the Roadmap confirms that EU legislative acts should be consistent with minimum standards set out in the ECHR jurisprudence; this does not mean it should be *limited* to the ECHR. The EU carries its own obligations to procedural rights in the Charter on Fundamental Rights and has the jurisdiction to facilitate mutual recognition by the establishment of minimum rules pursuant to Article 82(2) of the TFEU. As such there is no need to provide a clear basis in ECHR jurisprudence. The Commission Explanatory Memorandum provides a sound empirical basis for all the articles contained in the Directive.

III. Taking account of the different ways in which Member State systems secure the right to a fair trial.

Where the fundamental rights to freedom from ill-treatment and to a fair trial are concerned, our organisations do not accept the contention in your joint note that "different rights will be applicable to different stages of criminal proceedings".

Article 3 of the European Convention on Human Rights is non-derogable and expressed in absolute terms. Everyone who is obliged to remain with law enforcement officials has the right to benefit from safeguards against ill-treatment, including the right to have access to a lawyer from the very outset of their time in custody, and the right not to be held incommunicado.

As regards Article 6 of the ECHR, the case law of the European Court of Human Rights is clear that prompt access to legal advice is crucial to ensure that fair trial protections are fully effective in practice and that any period in custody is lawful. In many jurisdictions, persons eventually charged with serious offences make a "procedural journey" through various legal stages of "holding" by the police before they are formally arrested or charged. In the interests of justice, it is particularly crucial that access to a lawyer be granted before any form of police questioning occurs.

In practice, as Commissioner Reding has recently noted « nous avons d'ailleurs constaté que dans les Etats membres, où ce droit est déjà en pratique depuis plusieurs années, comme par exemple en Allemagne ou en Pologne, la justice arrive à concilier les impératifs de sécurité et de liberté. »[2]

[2] Tribune par Viviane Reding, Commissaire à la justice et Vice-présidente de la Commission européenne, Le droit d'accès à un avocat, un élément essentiel à un procès équitable. Unofficial translation: "In addition, we have noted that in those Member States where this right [of access to a lawyer] has already been in place for several years, for example in Germany and Poland, the justice system still manages to reconcile the imperatives of security with those of freedom".

It should also be noted that, in recent times, there has been a proliferation of mutual recognition instruments at EU level (European Arrest Warrant, European Investigation Order, European Supervision Order etc.). In this respect, our organisations consider that the proposed Directive is necessary to ensure equality of arms between prosecution and defence.

Our organisations consider that the Commission's proposals are pitched at a sufficiently high level of principle to permit their application in the diverse range of systems through which Member State systems seek to secure the right to a fair trial.

IV. Impact assessment and legal aid

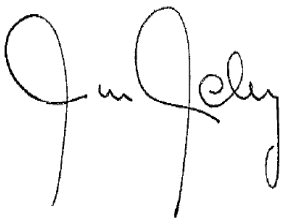
Your joint note expresses reservations regarding the delineation between legal aid and access to a lawyer. Our organisations agree that adequate legal aid provision is a precondition to rendering the right of access to a lawyer effective in practice. We specifically welcome the reference to the importance of free legal aid in the Explanatory Memorandum issued by the Commission. The European Court of Human Rights has found that the right of access to a lawyer from the very first moment of interrogation must be protected, and that legal aid must also be adequately resourced to ensure the effectiveness of this fundamental safeguard for those who do not have the means to pay for the services of a lawyer.

As such, our organisations do not agree that "the relationship between rules on access to a lawyer and rules on legal aid needs thorough political discussion" before the rules on access to a lawyer can be settled. Given the diversity of legal aid systems operated in Member States, if this approach were to be adopted, it could cause intractable delays in the adoption of the Directive.

The Commission has adopted the pragmatic approach of seeking to settle the framework of principles within which the right of access to a lawyer should apply before considering the issue of legal aid. Once the framework of principles surrounding that right of access to a lawyer has been settled, it will be far more straightforward for Member States to determine the likely consequential costs and implications for their legal aid systems of carrying those principles into practice.

In conclusion, our organisations consider that the enactment of a Directive of the European Parliament and of the Council on the rights of access to a lawyer and of notification of custody to a third person in criminal proceedings represents an important step towards full mutual recognition within the common European justice space. It is also an opportunity for your Governments to demonstrate their genuine commitment to the more effective protection of these key procedural rights.

The case law of the European Court of Human Rights and other relevant regional and global instruments provide a starting point from which the co-legislators can develop the highest possible standards in this area; they should be seen as a floor on which to build, not a ceiling beyond which we cannot pass.



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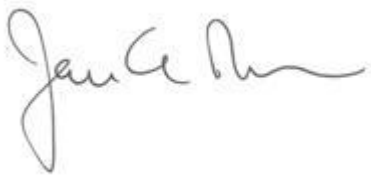

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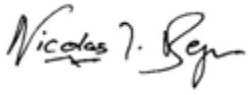

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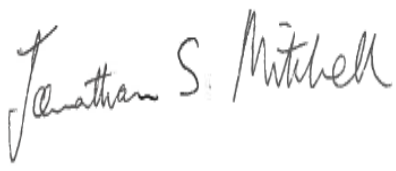

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