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THE EUROPEAN UNION**

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NOTE

from : Presidency
to : Delegations

No. Prop. : 11497/11 DROIPEN 61 COPEN 152 CODEC 1018
No. Prev. doc. : 13360/11 DROIPEN 87 COPEN 197 CODEC 1299

Subject : 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
- Question by the Presidency on "scope"

Further to requests made by certain delegations in CATS and discussions in the meetings of the Working Party, the Presidency would like to exchange views with delegations on the issue of the desired scope of the draft Directive, notably in the initial stages of the criminal proceedings.

The scope of the draft Directive is organised in Articles 2, 3 and 4. Leaving aside the evidence-gathering acts foreseen in Article 3(1)(b), the Directive currently foresees in Article 3 that suspects and accused persons are granted (non-mandatory) access to a lawyer without delay and, in any event,

- before being officially interviewed by the police or other law enforcement authorities;
- from the outset of deprivation of liberty (including detention).¹

¹ See doc 13360/11, page 33.

In results from the foregoing that the notion of "officially interviewed" is very important. In this context, it should be noted that measure B contains a draft recital 18b reading currently¹ as follows:

"(18 b) The notion of "official interview" should encompass all questioning to which a suspected or accused person is subjected by law enforcement or other competent authorities, irrespective of the term used under national law and of the place where it takes place, and regardless of whether the person is obliged to take part in the questioning or reply to questions, provided that the outcome of such questioning is formally recorded and may be used as evidence in the course of the proceedings. This official interview may take place at any stage of the proceedings, including at an early stage; however, informal questioning by the police or other law enforcement authorities which takes place immediately after the commission of a possible criminal act, and whose only purpose is to acquire elements for establishing whether an investigation should be started, should not be deemed as being an "official interview". This is the case, for example, for questions put by police in the course of a road-side check concerning possible traffic offences."

With a view to discussing, and subsequently defining, the desired scope of the Directive, the Presidency would appreciate it if delegations could reflect on the question in which of the following - or other, to be identified - situations the Directive should apply, and give their opinion at the next meeting of the Working Party:

- a) In the situation where the suspect or accused person has been arrested (deprived of liberty) in order to be questioned by investigating authorities;
- b) In the situation where the suspect or accused person has been invited to present himself voluntarily in order to be questioned by investigating authorities;
- c) In the situation where the suspect or accused person has been stopped in the street and is asked to respond to questions by investigating authorities.

¹ Text submitted in view of the trilogue on 22 September 2011, not yet agreed.

Delegations are also invited to reflect whether within these three situations a distinction has to be made between minor offences and other offences, or whether a distinction has to be made following other criteria, and, if so, how this has to be done.

Finally, delegations are invited to reflect upon the question whether in these situations there should or should not be a possibility of confining the right of access to a lawyer (in relation to questioning by investigative authorities) to consulting with a lawyer – by telephone or in person – prior to the questioning by investigative authorities.

The Presidency would like to remind that this draft Directive does not provide for rules on the mandatory presence of a lawyer, but only rules on the right to have access to a lawyer. In order to avoid any doubts concerning this issue, the Presidency suggests inserting a new recital into the text¹. The Presidency invites the delegations to express their views whether this explanation is sufficient to dispel their doubts concerning the presence of a lawyer, especially during police investigation.

The Presidency would like the debate to be held in the light of the circumstances of the Zaichenko case (judgment of 18.02.2010, First Section, nr 39660/02) in which the European Court of Human Rights stated the following in point 42:

¹ Such a recital could read as follows: "*This Directive does not create any obligation upon the Member States to make the presence of a lawyer mandatory, as it is focused on the right of access to a lawyer, which may, but does not have to be exercised by the suspect or accused person, depending on his will.*"

“(…) article 6 of the Convention comes into play as soon as a person is “charged”; this may occur on a date prior to the case coming before the trial court, such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when preliminary investigations were opened (Eckle v. Germany, 15/0/1982, § 73, Series A no. 51, O’Halloran and Francis v. the United Kingdom [GC], nos. 15809/02 and 25624/02, § 35, ECHR 2007-...). “Charge”, for the purposes of Article 6 § 1, may be defined as “the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence”, a definition that also corresponds to the test whether “the situation of the [person] has been substantially affected” (Shabelnik v. Ukraine, 19/02/ 2009; Deweer v. Belgium, 27/02/ 1980, § 46, Series A no. 35; and Saunders v. the United Kingdom, 17/12/1996, §§ 67 and 74, Reports of Judgments and Decisions 1996-VI). Given the context of the road check and the applicant's inability to produce any proof of the diesel purchase at the moment of his questioning by the police, the Court considers that there should have been a suspicion of theft against the applicant at that moment.”
