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NOTE

from : Presidency
to : Working Party on Substantive Criminal Law

No. Prop. : 11497/11 DROIPEN 61 COPEN 152 CODEC 1018
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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
- Derogations: discussion paper by the Presidency on Articles 7 and 8

The first reading of Article 8 of the draft Directive, which relates to the question of derogations, showed that this issue required an in-depth debate. Consequently, after the first examination of the text by the Working Party, the matter was submitted to the CATS Committee, which provided guidance in this field.

The discussion at CATS level showed that the vast majority of the Member States tended towards a more flexible approach to derogations than has been provided for in the proposal of the Commission. Most delegations also recognized a need for introducing a derogation with regard to confidentiality, albeit with necessary adaptations reflecting its special significance for the rights of the defense.

A new draft was presented to the Working Party on 16 September 2011 ¹. Many delegations expressed their concerns about the open-ended scope of derogations, as provided for in the document concerned, and gave their preference for a more restrictive approach. A majority of delegations were of the opinion that a derogation to the principle of confidentiality should be dealt with in a separate Article. Some of them suggested also a tailored approach towards all the rights which could be subject to derogations, i.e. providing a separate derogation clause in every substantive Article of the draft Directive.

In the light of these debates, the Presidency would like to present a new compromise drafting.

The Presidency took into account the opinion of many delegations and the Commission that the list presented under Article 8 (a) should be exhaustive, whilst the given examples should provide for more flexibility than in the original proposal. Consequently, the open clause "such as" has been removed. Simultaneously, a new example of compelling reasons, i.e. "the urgent need to prevent jeopardizing ongoing criminal proceedings" has been added.

Concerning the issue of separation of the system of derogations, the Presidency proposes a middle-way approach, whereby the right of confidentiality should be dealt with under a separate Article, since it is a core element of the right of access to a lawyer and thus deserves a distinct treatment.

However, the Presidency believes that the rights referred to in the chapeau of Article 8, namely Articles 3 – 6 of the draft Directive, should remain to be treated jointly under a general rule. Another solution risks to lead to a fragmentation of the system and to an uneven enjoyment of different elements of the right of access to a lawyer, which could undermine the overall standards of the rights of defense.

¹ Doc. 13360/11

Therefore, Article 7 comprises new grounds for application of derogations, which should be read in conjunction with general conditions established under Article 8. To ensure a high level of protection of confidentiality, the derogations may only apply to the communications other than meetings between a lawyer and his client.

The amendment in the last indent of Article 8 results from the concerns of certain delegations which found the notion "judicial supervision" was unclear. The term "judicial review" should dispel these doubts.

Hence, the Presidency suggests redrafting Articles 7 and 8 as follows:

Article 7

Confidentiality

1. *Member States shall guarantee the confidentiality of meetings between the suspect or accused person and his lawyer.*
2. *Member States shall also guarantee the confidentiality of correspondence, telephone conversations and other forms of communication permitted under national law between the suspect or accused person and his lawyer.*
3. ***If a suspect or an accused person is deprived of liberty, Member States may exceptionally derogate from paragraph 2, in accordance with Article 8 b) - e), where this is justified by the urgent need to prevent a serious crime or a threat to public security.***

Article 8
Derogations

*Member States shall not derogate from any of the provisions of this Directive save, in exceptional circumstances, from Article 3, Article 4, Article 5 **and** Article 6 (...). Any such derogation:*

- (a) shall be justified by compelling reasons, ~~such as~~ pertaining to the urgent need to avert serious adverse consequences for the life or physical integrity of a person **or to prevent a substantial jeopardy to ongoing criminal proceedings**;*
- (b) shall not be based exclusively on the type of the alleged offence;*
- (c) shall not go beyond what is necessary;*
- (d) shall be limited in time as much as possible and in any event not extend to the trial stage;*
- (e) shall not prejudice the fairness of the proceedings.*

Derogations may only be authorised by a duly reasoned decision taken on a case-by-case basis by a judicial authority, or by another competent authority on condition that the decision is subject to judicial ~~supervision~~ review.

Delegations are invited to reflect upon this Presidency compromise proposal and express their views on it at the next meeting of the Working Party on Substantive Criminal Law.