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NOTE

from : General Secretariat
to : Delegations

No. Prop.: 11497/11 DROIPEN 61 COPEN 152 CODEC 1018

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
- Note by the French Delegation

Delegations will find in the Annex a note by the French Delegation.

Note of the French delegation

Proposal for a Directive on the right of access to counsel in criminal proceedings and the right to communicate after the arrest

Article 2 - Scope

The French delegation wishes to reiterate its reservations about the scope of the proposed directive on the right of access to lawyer in criminal proceedings and the right to communicate after the arrest.

The French delegation notes that the question of the scope has already been addressed under the proposed directive on the right to information in criminal proceedings and has repeatedly stressed the need to define a field application specific and unique to each measure of the roadmap on procedural safeguards.

As such, the French delegation notes that changes have been made to this proposal (Measure B), in the direction of greater accuracy in relation to Measure A, confirming the need for a “case by case” basis.

The Commission proposal provides for the application of rights "from the moment a person is informed by the competent authorities of a Member State, by official notification or otherwise, is suspected of having committed a criminal offence."

This proposal takes the concept of suspect that is not subject to any definition in several Member States. In practice anyway, the notion of a suspect is particularly vague and can be applied to a variety of situations, such as the status of a person:

- arrested in a drunken state after causing a traffic accident;
- questioned as part of a neighborhood dispute;
- returned to court after being heard as part of a police investigation.

Such a variety of situations creates legal uncertainty high, especially in the context of a directive and may weaken the legal proceedings (including the admissibility of statements defendant or evidence).

Moreover, the precise definition, the rest in full compliance with the requirements of the ECHR will ensure that high standards will be set up and effectively guaranteed to enhance mutual trust.

Also, the French delegation would like that article 2 of the proposed directive could be amended in the direction of greater precision in defining the scope of the right of access to a lawyer:

Article 2 :

"This Directive applies (...) in criminal proceedings from the time a person is made aware by official notification, by the competent authorities (...) of a Member State that he is (...) accused of having committed a criminal offence or that he is deprived of liberty for being suspected of having committed a criminal offence. It applies until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspected or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal."

This wording would thus cover only situations that have been officially notified by competent authorities or those resulting from a deprivation of liberty. It is also about situations where access to lawyer should be considered as a priority particularly in crossborder situations: indeed, it appears essential to ensure effective rights especially in the case where a defendant is arrested and detained in a country other than that of his nationality or residence.

Also, this clarification is likely to help strengthen the legal security of the instrument and provide a clear framework for practitioners responsible for implementing them. These details will also be likely to strengthen the guarantees provided by this directive.
