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NOTE

from : Presidency
to : Coreper/Council

No. Prop. : 11497/11 DROIPEN 61 COPEN 152 CODEC 1018
No. Prev. doc. : 14861/11 DROIPEN 108 COPEN 258 CATS 86 CODEC 1552

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
- Orientation debate

Introduction

1. On 8 June 2011, the Commission adopted a proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer and on the right to communicate upon arrest ¹. This proposal is the third measure ("C1 - without legal aid + D") in application of the Roadmap for strengthening procedural rights of suspected and accused persons in criminal proceedings, which was adopted by the Council on 30 November 2009 ².

¹ 11497/11 (proposal) + ADD 1 REV1 (impact assessment) + ADD 2 REV 1 (summary of impact assessment).

² OJ C 295, 4.12.2009, p. 1. The first measure ("A") was adopted on 20 October 2010 (Directive 2010/64/EU of the European Parliament and of the Council on the rights to interpretation and translation in criminal proceedings, OJ 280, 26.10.2010, p.1). The second measure ("B") is currently under discussion in the ordinary legislative procedure (Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings, 12564/10 + ADD 1 + ADD 2).

2. The Working Party on Substantive Criminal Law discussed the draft Directive during meetings on 4/5 and 26 July, 16 and 27/28 September, and on 11/12 October 2011.
3. CATS discussed certain specific issues of the draft Directive on 6 September and on 7 October 2011.
4. The Presidency is grateful to the Member States for their constructive input during these works, which has allowed to make substantial progress in reaching an agreement that is acceptable to all Member States. When agreed, the text of the "general approach" will constitute the basis for negotiations with the European Parliament in the context of the ordinary legislative procedure ("co-decision").
5. Some questions remain however outstanding. The Presidency would like to submit two of them to Coreper/Council, with a view to providing guidance for further work.

I : Issue of scope and the understanding of the right of access to a lawyer

6. Article 2 concerns the scope of the Directive. The text as currently drafted is basically identical to the similar text of measures A and B.
7. Article 3 sets out the situations in which the suspect or accused person has the right of access to a lawyer¹. Article 4 complements Article 3, by providing the "content" of the right of access to a lawyer.

¹ Article 3 currently reads as follows (but no agreement has yet been reached on the text):
Member States shall ensure that suspects and accused persons are [at least] granted access to a lawyer without undue delay:

- (a) *before the suspect or accused persons is officially interviewed by the police or other law enforcement authorities;*
- (b) *[upon carrying out any procedural or evidence-gathering act at which the person's presence is required or permitted as a right, in accordance with national law, unless this would prejudice the acquisition of evidence;]*
- (c) *from the outset of deprivation of liberty, including detention.*

8. The Working Party agreed that a suspect or accused person should have a right of access to a lawyer in all situations where he is the subject of criminal proceedings before a court and where he has been arrested. However, it has become clear that there is a difference among Member States concerning the approach as regards other situations. This can be explained by the difference among the legal systems and traditions of the Member States.
9. On one hand, some Member States take the view that the right of access to a lawyer shall translate itself into effective presence and assistance of a lawyer in every case where this right has been granted. In these Member States the national authorities are responsible for ensuring access to a lawyer in all situations where this right exists and the person concerned does not pay for himself.
10. On the other hand, a considerable number of Member States provide for a different system, whereby the right of access to a lawyer does not necessarily imply that the suspect or accused person will in every case be assisted by lawyer. The responsibility for ensuring access to a lawyer lies, in principle, with the suspect or accused person, whilst the constituent component of this system is a legal aid scheme for those who cannot afford to pay for the lawyer themselves.
11. These difference have a bearing on the approach of the Member States towards the scope of the proposed Directive. On one hand, the concern of the first group of Member States is that providing for a broad scope of right to access to a lawyer can entail considerable procedural and financial consequences. On the other hand, the latter group is inclined to provide for a relatively broad set of rights. In their opinion the right of access to a lawyer for suspects and accused persons should be an overarching principle also at an early stage of criminal proceedings, even if this right will not be exercised in every instance.

12. The Presidency seeks to reconcile these approaches with a view to reaching an agreement. Against this background, the Presidency firstly recalls that this Directive is not about legal aid and that this issue will be the subject of a later proposal. This approach was taken to enable, in the first place, the establishment of common minimum rules of access to a lawyer and, subsequently, to tackle the issue of legal aid under the distinct measure, on the basis of the agreed system of access to a lawyer.
13. The Presidency recalls, secondly, that according to Article 67(1) TFEU, the Union shall constitute an area of freedom, security and justice with respect, inter alia, for the different legal systems and traditions of the Member States. Also, Article 82(2) TFEU provides that in the context of establishing minimum rules, the differences between the legal traditions and systems of the Member States should be taken into account.
14. In the light of these facts and principles, the Presidency considers that the Directive should, as far as possible, be able to apply under the systems of **all** Member States as they currently operate, it being understood that the Directive should fully comply with the standards of the European Convention on Human Rights, as interpreted in the case-law of the European Court of Human Rights.
15. This approach needs to be reflected upon in the light of the principles set out in the Roadmap on procedural rights in criminal proceedings and the solutions agreed under measure A and B (which is presumably to be adopted shortly). The Presidency believes that the consistency among the measures should be a guiding principle accompanying works on the consecutive elements of the Roadmap. Nevertheless, it may be the case that the scope of the Directive (as set out in Articles 2, 3 and 4) will need to be modified in comparison to the previously adopted solutions, where it may be justified by differences in legal systems and traditions. In this regard the Presidency wishes to consult the Council whether such modifications with regard to the scope may be adopted in order to respond to the specific needs of this instrument.

16. In any event, the limits of this flexibility shall be drawn by the requirements of the standards of the ECHR and its case-law and the objective of ensuring a high level of safeguards.
17. **In the light of the above the Presidency wishes to consult Coreper/Council on the question of whether the scope of this Directive may be subject to modifications, as compared to solutions agreed under previous measures of the Roadmap, in order to respond to the specific needs of this instrument, it being understood that the Directive shall fully comply with the standards of the ECHR. The detailed drafting would be left to preparatory bodies.**

II : Issue of remedies - Article 13

18. Article 13 concerns the issue of remedies. The original proposal of the Commission provides for the obligation to ensure that effective remedies are in place and proposes that statements or evidence obtained in breach of the right of access to a lawyer may not be used at any stage of the procedure as evidence against the person concerned, while preserving a margin of discretion where the use of such evidence would not prejudice the rights of the defense.
19. Almost all Member States made it clear that they could not accept the text of the Commission proposal. Many Member States also made it clear that no directions whatsoever should be given to judges as to the question of which value has to be given to statements obtained from a suspect or accused person in breach of his right of access to a lawyer, or in cases where a derogation to this right was authorised in accordance with the proposed Directive.
20. However, during this discussion the Council Legal Service underlined that a remedy should be provided for the non-compliance with the provisions on access to a lawyer. It also recalled that all Member States already provide for some measures in this regard. Therefore, a solution could be found, which on one hand would not interfere with the fundamental principles of the criminal justice systems of the Member States, whilst, on the other hand, contribute to enhancing mutual trust among judicial authorities.

21. **In this light the Presidency wishes to consult Coreper/Council on whether the Directive should, in principle, provide for a remedy for a non-compliance with provisions on access to a lawyer as foreseen in the Directive, and if so, what kind of remedy, it being understood that the drafting would be left to preparatory bodies.**
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