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NOTE

from :	Presidency
to :	Working Party on Substantive Criminal Law
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 - Questionnaire

The Commission proposal and the accompanying impact assessment ¹ contain some information on the legal systems of the Member States concerning the issue of "access to a lawyer". In order to support the current work on the draft Directive, the Presidency considers however that it would be helpful to have additional, more extensive information on the practical application of the Member States' criminal law systems on the issue of "access to a lawyer".

To that end, the Presidency has established a questionnaire, which is set out in the Annex. Member States are kindly requested to submit their replies to this questionnaire by e-mail **before Wednesday 25 January 2012** to the following e-mail addresses: hen@jm.dk (Helle Næsager, DK Presidency) and steven.cras@consilium.europa.eu (Steven Cras, CGS). It would be highly appreciated if the answers could be provided in the same language as that used in this questionnaire.

¹ 11497/11 DROIPEN 61 COPEN 152 CODEC 1018 ADD 1 REV 1.

QUESTIONNAIRE

These questions aim at obtaining a better understanding of the current law and procedures in the Member States as regards the issue of "access to a lawyer". They do not refer to the question how such national laws and procedures should actually be, in the light, in particular, of the European Convention on Human Rights and its case-law.

In the light of the answers to be given by delegations, the Presidency may put forward new drafting proposals in respect of the draft Directive. However, the answers may also provide background information to provisions of the text on which there exist already agreement between (a qualified majority of) the Member States, and which the Presidency does not intend to change.

Questioning of suspects and accused persons in the pre-trial phase

1. In your legal order, when a person that is suspected or accused of having committed a criminal offence is arrested (deprived of liberty) and asked by the police or investigating judge to reply to questions concerning the (alleged) crime committed,
 - a)
 - i) Does this person have the right to be assisted by a lawyer *before* such questioning?
 - ii) In the affirmative: in which situations does this right exist?
 - iii) If the person has the right to be assisted by a lawyer before questioning, may this right in your legal order be limited to the person contacting the lawyer by phone? If so, please indicate in which situations this may be the case.
 - b)
 - i) Does this person have the right to be assisted by a lawyer *during* such questioning?
 - ii) In the affirmative: is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

- c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?
- ii) In the affirmative,
- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?
 - what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?
- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police or investigating judge to wait until the arrival of the lawyer before the questioning starts?
- ii) In the affirmative, how long (how many hours) do the police or investigating judge have to wait until the arrival of the lawyer?
- e) i) In your legal order, is there a possibility of making derogations to the right of a person to be assisted by a lawyer before and/or during questioning in the pre-trial phase? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police or investigating judge to proceed with the questioning without the presence of a lawyer, or without the lawyer having been contacted in advance by phone?
- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

2. In your legal order, when a person is officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence and is asked to come 'voluntarily' to a police station in order to be questioned by the police in relation to that crime,
- a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?
ii) In the affirmative: in which situations does this right exist?
iii) If the person has a right to be assisted by a lawyer before questioning, is he informed of this right in the convocation for the questioning? If so, in what way?
- b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?
ii) In the affirmative, is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.
iii) If the person has a right to be assisted by a lawyer during questioning, is he informed of this right in the convocation for the questioning? If so, in what way?
- c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?
ii) In the affirmative,
- does this obligation exist automatically in all cases, or is it only 'activated' further to a request of the person concerned?
- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?
- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?
ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

- e) i) In your legal order, is there a possibility of making derogations to the right to be assisted by a lawyer before and/or during the questioning? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer?
- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.
3. In your legal order, when a person is stopped on the street by the police and, after having been officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence, is asked by the police to reply to questions concerning the (alleged) crime committed,
- a) What kind of questions could be asked to this person? Is it possible to question the person regarding the alleged crime?
- b) i) Does this person have the right to be assisted by a lawyer during such questioning?
- ii) In the affirmative, in which situations does such a right exist?
- iii) If the person has the right to be assisted by a lawyer, may this right be limited to the person contacting the lawyer by phone before questioning starts? If so, please indicate in which situations this may be the case.
- c) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there an obligation in your legal order for the police or any other competent authorities to facilitate or assist the person in exercising this right?
- ii) In the affirmative,
- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?
 - what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority?

- d)
 - i) If the person has a right to be assisted by a lawyer during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?
 - ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

- e)
 - i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there a possibility of making derogations to this right in your legal order? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer or without contact by phone having been made?
 - ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

Evidence-gathering and investigating acts in the pre-trial stage

- 4. Questions regarding evidence-gathering or investigating acts in the pre-trial stage:
 - a)
 - i) In your legal order, does the suspect or accused person have a right for his lawyer to be present at evidence-gathering or investigating acts?
 - ii) In the affirmative, which evidence-gathering or investigating acts are concerned?

 - b)
 - i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the competent authorities to facilitate or assist the person in exercising this right?
 - ii) In the affirmative, what are the concrete act(s) concerned that have to be taken by the competent authorities?

- c)
 - i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before starting the evidence-gathering or investigating act?
 - ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer? Please specify as appropriate.

- d)
 - i) In your legal order, is there a possibility of making derogations to the right of the suspected or accused person for his lawyer to be present at evidence-gathering or investigating act? In other words, if the person concerned wants to be assisted by a lawyer during such acts, is there nevertheless a possibility for the competent authorities to proceed with the evidence-gathering or investigating act without the lawyer being present?
 - ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

Questioning in the pre-trial stage of persons who are initially not suspected or accused of having committed an offence but obtain this status during questioning

5. In your legal order, when a person that is initially not suspected or accused of an alleged crime, such as a witness, is questioned by the police or an investigating judge:
- a) Does this person have the right to be assisted by a lawyer during questioning?

 - b) When, during the questioning, such a person becomes suspected or accused of having committed a criminal offence, do the competent authorities have to inform the person concerned of this change of status?

- c) If the answer to question b) is positive:
- i) When precisely do the competent authorities have to inform the person concerned?
 - ii) In what manner do the competent authorities have to inform the person concerned (notification, information, ...)?
 - iii) Do the competent authorities have to stop the questioning?
 - iv) Does the person concerned obtain the right to be assisted by a lawyer (when he did not have it before)? If so, as from which moment in time?
 - v) May the statements made by the person before he was informed of the change of status be used in the ensuing criminal proceedings against him? If so, in which circumstances? Please specify as much as possible.

Minor offences

6. Questions regarding exclusions / minor offences:

- a) In your legal order, are there any categories of offences (in particular so-called "minor offences"), in respect of which the right to be assisted by a lawyer does not exist or is restricted, totally or partially, in the pre-trial phase?
- b) In the affirmative, please describe the category or categories of exclusions as precisely as possible, defining the category by a common denominator, e.g.
 - where the offence is initially dealt with in an administrative manner;
 - where pre-trial detention is not possible in relation to the offence concerned;
 - where deprivation of liberty cannot be imposed as a sanction in relation to the offence concerned;
 - where the fine that may be imposed as a sanction in relation to the offence concerned does not exceed a certain amount;
 - other definition.

- c) In case your legal order contains one or more categories of exclusions: please indicate the consequence of each category of exclusion, e.g. is there a total or partial exclusion from the right to be assisted by a lawyer, does the exclusion entail different modalities for the assistance by a lawyer, etc. ...

Lawyer provided by the State / Payment of lawyer's fees

7. The proposed Directive does not deal with the question of legal aid; even so the Presidency believes that the following questions regarding the payment of a lawyer's fee could have an impact on the formulation and application of the Directive.

With this in mind delegations are kindly invited to respond to the following questions:

- a) i) In your legal order, does an obligation exist for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *but cannot afford to pay a lawyer or cannot afford to pay the lawyer that he has chosen?*
- ii) If so, in which situations and under which conditions does such obligation exist?
When answering this question, please take into account the situations mentioned under questions 1-4.
- b) i) In your legal order, does there exist an obligation for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *even if he could himself afford to pay a lawyer, or the lawyer that he has chosen?*
- ii) If so, in which situations and under which conditions does such obligation exist?
When answering this question, please take into account the situations mentioned under questions 1-4.

Principle of confidentiality

8. a) In your legal order, can any derogations be made to the principle of confidentiality of communication between the suspected or accused person and his lawyer?
- b) In the affirmative, in which situations can such derogations be made? Please specify as much as possible, and make a distinction, if appropriate, between oral and written communication, and between communication in the pre-trial phase and in the trial phase.

Waiver

9. a) In your legal order, does a suspect or accused person has the right to waive his right to be assisted by a lawyer?
- b) In the affirmative,
- i) What, if any, information has to be given to the person concerned prior to making the waiver?
 - ii) If such information has to be given:
 - which person(s) or authorities may / should give that information?
 - how is that information to be given (oral, writing,) ? Please specify.
 - iii) How is the waiver noted/registered? What are the formalities, if any?
 - iv) May a decision to waive the right to a lawyer be revoked, and if so,
 - may this be done at any stage of the proceedings?
 - are there any (other) limitations to the possibility of revoking a waiver?
- c) Are the answers to the questions under a) and b) different if the person concerned is a minor? If so, please specify.

Remedies

10. a) Does your national law provide for remedies in case of breach of the right of access to a lawyer?
- b) In the affirmative:
 - i) which are those remedies?
 - ii) do the remedies also include the possibility for the (judicial) authorities to exclude evidence that has been obtained in breach of the right of access to a lawyer?

General concerns regarding the proposed Directive

11. Are there any other aspects of your legal order that could be of importance for the further discussions on this proposed Directive? If so, please highlight them.
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