



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 30 January 2012

5894/12

**Interinstitutional File:
2011/0154 (COD)**

**DROIPEN 7
COPEN 23
CODEC 226**

NOTE

from : General Secretariat
to : Delegations

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
- Main outcome on Access to a lawyer - Consultative Forum 16.12.2011

Delegations will find attached a document containing the main outcome of the general discussion on the draft Directive following the meeting of the Consultative Forum of prosecutors general and directors of public prosecutions of the Member States of the European Union, held at Eurojust on 16 December 2011.



Prosecution General
Republic of Poland



MEETING OF THE CONSULTATIVE FORUM
OF PROSECUTORS GENERAL AND DIRECTORS OF PUBLIC PROSECUTIONS
OF THE MEMBER STATES OF THE EUROPEAN UNION

The Hague, 15-16 December 2011

MAIN OUTCOME OF THE GENERAL DISCUSSION ON THE DRAFT DIRECTIVE ON THE RIGHT OF
ACCESS TO A LAWYER IN CRIMINAL PROCEEDINGS

The Members of the Consultative Forum welcomed the opportunity to exchange views on the *Draft Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest* which they consider of particular relevance as the Directive will affect their daily practice as prosecutors. They asked the Prosecutor General of Poland, as Chair of the meeting, to bring the following remarks and concerns of the Consultative Forum to the attention of the relevant EU institutions:

1. Wider consultation with prosecutorial and police authorities at the early stage of the drafting of the Directive would have been beneficial. Further consultation shall remain possible in the following stages.
2. In general, the latest version of the draft Directive, as it stands in the Progress Report of 6 December 2011 (doc. 18215/11), seems to be better balanced compared to its initial version.
3. The general discussion showed that criminal justice systems vary considerably and the same concerns are not always shared by all the Members of the Consultative Forum.
4. For this reason, a flexible instrument is important to encompass the different national systems and allow for a correct balance between the effective conduct of criminal proceedings and the defendant's right to a fair trial. The public interest is important as well: crimes must be prosecuted and prosecutors are responsible for that role.
5. A significant number of Members of the Consultative Forum are seriously concerned by the draft Directive in its current version. They believe that the draft Directive does not sufficiently consider the need to safeguard the effectiveness of criminal investigations and proceedings and that the practical implications of the proposed measures have not been duly taken into account.



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They observe that respect for the defendant's fundamental rights can be achieved by other means contemplated in the criminal justice systems, such as the presence of the investigating judge or the recording of interrogations in the absence of a lawyer. They consider the need to establish legal safeguards for investigations conducted in the absence of the lawyer where the latter was duly informed about the activities to be performed. They also note that the Directive may have a negative impact on the length of proceedings and therefore could entail breaches of the right to a fair trial.

Taking into account the specificities of the relevant criminal justice systems, one Member State proposed a clearer distinction between the investigation phase and the judicial phase of the proceedings, understanding that the provisions of the Directive should affect only the latter.

Finally, concerns were also expressed with regard to the costs of legal aid and the possibility in practice to ensure effective rights to all concerned persons. Some Members of the Consultative Forum were of the opinion that the separation of the issue of the access to a lawyer from legal aid may weaken the standards proposed by the draft Directive.

6. Other Members of the Consultative Forum, while noting that the Directive would have a minimum impact on their criminal justice system as the main provisions of the draft text are in accordance with their national criminal procedure, have expressed similar concerns (e.g. budgetary aspect, length of proceedings, limitations on the admissibility of evidence).

With respect to the linking of access to a lawyer under the Directive to subsequent admissibility of evidence by a national court at trial, some Members of the Consultative Forum questioned the necessity of including a prohibition on evidence in the draft Directive, indicating that it should be a matter for the trial court in the national jurisdiction depending on the nature and consequences of the breach, while others proposed a reference to the national laws of the Member States.

7. Several Members of the Consultative Forum stressed the need to better define and limit the scope of the Directive, which cannot encompass all possible criminal behaviours. In particular, derogations should be possible for minor offences.



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8. Finally, some Members of the Consultative Forum pointed out that, although some provisions of the draft Directive reflect the case law of the European Court of Human Rights, some proposed solutions go beyond such case law – which is in constant evolution – and the current requirements of the European Convention on Human Rights.

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