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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
- State of play

Introductory remarks

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 2009².

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", on interpretation and translation) was adopted on 20 October 2010 (OJ 280, 26.10.2010, p.1). The second measure ("B", on a letter of rights) is currently under discussion in the ordinary legislative procedure (12564/10).

2. At the JHA Council meeting on 22/23 September 2011, the Commission presented its proposal for a Directive at Ministerial level, and Ministers discussed this proposal in general terms. During this discussion reference was made to a position paper that had been submitted by five Member States ¹, and UK and IE announced their decision not to opt-in to the Directive in application of Article 3 of Protocol 21 to the Lisbon Treaty.
3. The Presidency would like to keep the Council updated on the ongoing work on this important file. Therefore, it has decided to submit this "state of play" regarding the work that has been carried out in the preparatory bodies since the meeting of 22/23 September.

Work in the preparatory bodies

4. Subsequently to the debate in the September Council, the Working Party on Substantive Criminal Law discussed the draft Directive during meetings on 27/28 September and on 11/12 October 2011, and CATS discussed certain specific issues of the draft Directive on 7 October 2011 ².
5. The latest outcome of proceedings, containing a number of not yet examined Presidency proposals, is set out in doc 15120/11. After the October Council meeting, a new text will be distributed, reflecting the work carried out in the meeting of the Working Party on Substantive Criminal Law on 11/12 October 2011.
6. The Presidency is grateful to all delegations for their constructive input during the works in the preparatory groups, 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").

¹ 14495/11.

² 14861/11.

Brief overview of the work that has been carried out

7. During the works, it was confirmed that a lot of Articles are closely connected. It is therefore difficult for delegations to clearly state on a position on one Article, without yet knowing what the outcome will be on one or more other Articles. The Presidency is aware of this problem and takes this into account when directing the works on the draft Directive.

A brief overview of the work carried out so far (selected issues):

Scope - Article 2

8. Article 2, which together with Articles 3 and 4 forms the "heart" of the Directive, has been the subject of intense debate in the Working Party ¹ and in CATS.
9. The current text of Article 2 is very similar to corresponding texts in Measures A and B. Some delegations have however raised the question whether the text of this Article should be refined so as to make the point at which the rights of the Directive start to apply more concrete. In particular, the question was put whether the words "are made aware", as used in the text of this Article, should be made more precise ².
10. The Presidency believes that consistency among the measures should be a guiding principle accompanying the works on the consecutive elements of the Roadmap. Nevertheless, it was also observed that the "scope" as used for the earlier measures could be subject to (minor) adaptations where such would be justified given the very specificities of this Directive.
11. Another issue which was widely discussed in the context of this Article concerns exceptions for minor cases and for other cases, e.g. for disciplinary proceedings and for cases in relation to offences which are committed in a prison or in military context.

¹ 14470/11

² See e.g. 15351/11.

Articles 3 and 4 - Right of access to a lawyer

12. These Articles, which are closely interlinked, have been discussed at length. In which situations should the subject or accused person be given the right of access to a lawyer?
13. During the discussions in the preparatory bodies, it appeared that there exists a broad agreement on the understanding that such right should at least be given in all situations where a suspect or accused person is the subject of criminal proceedings before a court, and where he has been arrested (deprived of liberty).
14. However, there was no unanimity concerning the situation where a person has been invited to present himself voluntarily at a police station (or similar place) in order to be questioned by investigating or other competent authorities ¹, and the situation where a person has been stopped in the street and is asked to respond to questions by such authorities. These situations need to be further looked at, in the light also of the scope of the Directive as set forth in Article 2.
15. The "procedural or evidence-gathering acts" have been discussed at several occasions. In view of the far-reaching proposal of the Commission on this point, many delegations requested these acts to be deleted from Articles 3 and 4. The Commission, supported by several other delegations, would like to maintain the provisions, subject possible to modification of the text.

¹ In the situation of "voluntary" questioning at the police station, the person concerned isn't always from the outset a suspect or accused person. In fact, he can be questioned as a witness (who are not covered by this directive) and then during the interview become suspected or accused of having committed a criminal crime. It could be examined whether this "grey zone" could be addressed by clarifying the scope of the Directive.

Articles 7 and 8 - Confidentiality and derogations

16. Articles 7 and 8, on "confidentiality" and "derogations" respectively, have been the subject of dedicated debates in the Working Party ¹ and in CATS. As a result of these debates, a specific, strict possibility of making derogations to the principle of confidentiality will be inserted in Article 7. In Article 8, Member States agreed to enlarge the concept of "compelling reasons".
17. An outstanding issue relates to the scope of application of Article 8 in respect of Articles 5 and 6. In respect of the latter case (the right to communicate with consular or diplomatic authorities), the question was put whether derogations are needed at all.

Article 13 - Remedies

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.

¹ 14568/11.

20. In order to find a compromise, the Presidency currently reflects on a solution whereby it would be provided that Member States should have remedies under national law, whilst, on the other hand, stating that the issue of the value to be given to statements obtained from a suspect or accused person in breach of his right of access to a lawyer should be examined by a court having jurisdiction in criminal matters. This solution would have the advantage of not interfering with the systems of the Member States and not giving instructions to national judges, while at the same time ensuring that the issue of assessing the value of statements obtained in breach of the right of access to a lawyer is addressed, which will contribute to enhancing mutual trust among judicial authorities.

Horizontal issues

21. During the discussions, several horizontal questions popped up. One of these questions concerns the basic understanding of what is meant by the right of access to a lawyer. Although it is not easy to "classify" the systems of the Member States, the following remarks can be made:
22. On the one hand, some Member States take the view that the right of access to a lawyer should give the suspect or accused person a right which results in the actual assistance of a lawyer, if the person has expressed his wish to be assisted by a lawyer. In these systems the responsibility for exercising the right of access to a lawyer lies, at least partially, with the public authorities (*guarantee* approach).
23. 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. Thus, in this system, the responsibility for ensuring access to a lawyer is shifted to the suspect or accused person. According to these Member States, the right of access to a lawyer should give the suspect or accused person the *opportunity* to be assisted by a lawyer (*opportunity* approach).

24. This difference of systems has a bearing on the approach of the Member States towards the scope of the proposed Directive. On the one hand, the concern of the first group of Member States is that providing for a broad scope of the right of 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. Some other Member States and the Commission do not necessarily see a contradiction in these approaches and claim that agreeable solutions can be found through a proper wording.
25. In the view of the Presidency, this issue should be further discussed, so as to allow to make it clear in the Directive what the right of access to a lawyer will actually entail and dispel concerns about concrete ways in which it can be exercised (e.g. a house search does not need to be treated in the same way as questioning). This will avoid that at a later stage problems of interpretation arise, or problems regarding the question of whether the Directive has correctly been implemented in national law.

Concluding remarks

26. 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. 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.
27. In this light, 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 provide a high level of safeguards which 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.

28. The Presidency is grateful for the excellent collaboration on this file with all actors involved, and for the active and constructive approach that delegations have shown from the very start of the works. The Presidency would call upon the Commission and on the Member States to continue their constructive approach and to demonstrate flexibility where possible, so that tangible results can be reached on this important file in the coming period, to the benefit of all of us.
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