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*Committee on Legal Affairs*

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**2011/0154(COD)**

7.10.2011

# **DRAFT OPINION**

of the Committee on Legal Affairs

for the Committee on Civil Liberties, Justice and Home Affairs

on the 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  
(COM(2011)0326 – C7-0157/2011 – 2011/0154(COD))

Rapporteur: Jan Philipp Albrecht

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## SHORT JUSTIFICATION

### Introduction

While the European Convention on Human Rights and the EU Charter of Fundamental Rights enshrine core defence rights, such as the right to have access to a lawyer, the right to interpretation and translation, the right to be informed of the charge, the right to a regular review of detention and the right to be brought before a court, they offer limited detail about how those rights should be protected in practice.

The Commission proposal currently before the Committee seeks to improve the rights of suspected or accused persons as regards the right of access to a lawyer in criminal proceedings (Articles 3, 4) and on the right to communicate upon arrest with a third person such as a relative, employer or consular authority (Articles 5, 6). A limited number of derogations to these rights are contained in Article 8. The draft directive also covers the right of access to a lawyer in European Arrest Warrant proceedings (Article 11).

It constitutes the third measure of the "Roadmap" for strengthening procedural rights of suspected or accused persons in criminal proceedings<sup>1</sup>, which also includes the right to translation and interpretation<sup>2</sup>, to information about rights in criminal proceedings<sup>3</sup>, to legal aid and special safeguards for suspected or accused persons who are vulnerable and a green paper on pre-trial detention.<sup>4</sup>

Having common minimum standards in relation to the right to have access to a lawyer and the right to communicate upon arrest should provide a proper basis for mutual recognition of judicial decisions in criminal matters, prevent coercion on the part of the investigating authorities, ensure the equality of arms between prosecution and defence and avoid miscarriages of justice.

### Position of the rapporteur for opinion

Your rapporteur for opinion welcomes the Commission's proposal. Prompt access to a lawyer is essential to allow the suspect or accused person to effectively exercise his or her rights of defence and ensure compatibility with the fundamental rights laid down in the Charter and the European Convention on Human Rights.

Access to a lawyer should be granted in person before the start of any questioning by the police or other law-enforcement authorities, since that is the moment from which the suspect

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<sup>1</sup> European Council conclusions, 10-11 December 2009; Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, 2009/C 295/01, 4.12.2009, OJ C 295/1.

<sup>2</sup> Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, 26.10.2010, OJ L 280/1.

<sup>3</sup> COM (2010) 392

<sup>4</sup> 14.6.2011, COM(2011) 327 final, Green Paper on Strengthening mutual trust in the European judicial area – A Green Paper on the, application of EU criminal justice legislation in the field of detention.

or accused person's defence rights may be adversely affected<sup>1</sup>. Your rapporteur also stresses the importance of allowing access to a lawyer before evidence-gathering acts such as the taking of blood or DNA samples or the carrying-out of cavity searches.

Your rapporteur cannot accept the argument according to which the presence of a lawyer and the granting to him or her of a right to meet with suspects, to make representations and to check their welfare is seen as obstructing the investigation. Your rapporteur stresses that any derogations to these rights should be justified by compelling reasons, not solely based on the seriousness of the alleged offence, proportionate, limited in time and should not prejudice the fairness of the proceedings. Furthermore, such derogations should be subject to a duly reasoned decision taken by a judicial authority on a case-by-case basis. Statements made by the suspect or accused person or evidence obtained in breach of his or her right of access to a lawyer, or in case a derogation to this right was authorised, should not be used at any stage of the procedure as evidence against him or her.

The right to communicate upon arrest implies the possibility for a third party to take care of the suspect or accused person's affairs whilst they are in detention. Children should be entitled to the presence of their parent, guardian or appropriate adult to help them understand what is happening. Where appropriate this right should be extended to other vulnerable suspects. All communications between the suspect or accused person and his or her lawyer should be confidential, with no scope for derogations.

Over the last years, the Parliament has frequently expressed its discontent with European Arrest Warrants issued for petty crimes or hearings instead of investigations, and the resulting extended periods of unnecessary pre-trial detention in other Member States.<sup>2</sup> Your rapporteur strongly supports the system of "dual defence" foreseen by Article 11 to make sure minor cases are clarified or settled at the earliest possible stage.

## AMENDMENTS

The Committee on Legal Affairs calls on the Committee on Civil Liberties, Justice and Home Affairs, as the committee responsible, to incorporate the following amendments in its report:

### Amendment 1

#### Proposal for a directive Article 2 a (new)

*Text proposed by the Commission*

*Amendment*

**Article 2a**

**Definition**

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<sup>1</sup> See *Salduz v Turkey* [2008] ECHR 1542.

<sup>2</sup> Plenary debate of 8 June 2011 on the European Arrest Warrant available [here](#).

***For the purpose of this Directive, "child" means a person below the age of 18 years.***

Or. en

*Justification*

*Consistency with other measures negotiated under the roadmap on procedural rights.*

**Amendment 2**

**Proposal for a directive**

**Article 3 – paragraph 1 – introductory wording**

*Text proposed by the Commission*

1. Member States shall ensure that suspects and accused persons are granted access to a lawyer as soon as possible and in any event:

*Amendment*

1. Member States shall ensure that suspects and accused persons are granted access to a lawyer ***in person*** as soon as possible and in any event:

Or. en

*Justification*

*Effective legal representation cannot be offered over the telephone. The lawyer has to be physically present.*

**Amendment 3**

**Proposal for a directive**

**Article 3 – paragraph 1 – point a**

*Text proposed by the Commission*

(a) before the start of any questioning by the police or other law enforcement authorities;

*Amendment*

(a) before the start of any questioning by the police or other law enforcement authorities, ***irrespective of whether or not the suspect or accused person is detained;***

Or. en

### *Justification*

*Protection against self-incrimination is triggered as soon as the suspect is questioned by the police.*

#### **Amendment 4**

##### **Proposal for a directive Article 3 – paragraph 1 – point b**

###### *Text proposed by the Commission*

(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;***

###### *Amendment*

(b) upon carrying out any procedural or evidence gathering act, ***save where and only in so far as the person carrying out that procedural or evidence gathering act reasonably believes that evidence will be altered, removed or destroyed pending the lawyer's arrival;***

Or. en

### *Justification*

*Certain evidence gathering acts such as taking blood or DNA samples or doing cavity searches are highly intrusive, in these cases access to a lawyer cannot be made subject to national law.*

#### **Amendment 5**

##### **Proposal for a directive Article 4 – paragraph 2**

###### *Text proposed by the Commission*

2. The lawyer shall have the right to be present at any questioning and hearing. ***He*** shall have the right to ask questions, request clarification and make statements, which shall be recorded ***in accordance with national law.***

###### *Amendment*

2. The lawyer shall have the right to be present at any questioning and hearing ***irrespective of whether or not the suspect or accused person is detained. The lawyer*** shall have the right to ask questions, request clarification and make statements, which shall be recorded.

Or. en

### *Justification*

*Protection against self-incrimination is triggered as soon as the suspect is questioned by the police.*

### **Amendment 6**

#### **Proposal for a directive Article 4 – paragraph 3**

##### *Text proposed by the Commission*

3. The lawyer shall have the right to be present at any other investigative or evidence-gathering act ***at which the suspect or accused person's presence is required or permitted as a right, in accordance with national law, unless this would prejudice the acquisition of evidence.***

##### *Amendment*

3. The lawyer shall have the right to be present at any other investigative or evidence gathering act, ***save where and only in so far as the person carrying out that investigative or evidence gathering act reasonably believes that evidence will be altered, removed or destroyed pending the lawyer's arrival.***

Or. en

### *Justification*

*Certain evidence gathering acts such as taking blood or DNA samples or doing cavity searches are highly intrusive, in these cases access to a lawyer cannot be made subject to national law.*

### **Amendment 7**

#### **Proposal for a directive Article 4 – paragraph 4**

##### *Text proposed by the Commission*

4. The lawyer shall have the right to check the conditions in which the suspect or accused person is detained and to this end shall have access to the place where the person is detained.

##### *Amendment*

4. The lawyer shall have the right to check the conditions in which the suspect or accused person is detained and to this end shall have access to the place where the person is detained. ***That right shall be extended to an appropriate adult where the suspect or accused person is a child or another vulnerable suspect or accused person needing similar assistance, such as a person with physical or mental***

*disabilities.*

Or. en

*Justification*

*The paragraph should specify the right of an appropriate adult to check on detention conditions in accordance with article 24 and 26 of the Charter of Fundamental Rights.*

**Amendment 8**

**Proposal for a directive  
Article 5 – paragraph 2**

*Text proposed by the Commission*

2. Where the person is a child, Member States shall ensure that the child's legal representative or another adult, depending on the interest of the child, is informed as soon as possible of the deprivation of liberty and the reasons pertaining thereto, unless it would be contrary to the best interests of the child, in which case another appropriate adult shall be informed.

*Amendment*

2. Where the ***suspect or accused*** person is a child, Member States shall ensure that the child's legal representative or another adult, depending on the interest of the child, is informed as soon as possible of ***any*** deprivation of liberty and the reasons pertaining thereto ***may visit the child and may attend any questioning of the child and any proceedings***, unless it would be contrary to the best interests of the child, in which case another appropriate adult shall be informed ***and granted the right to visit the child and be present during questioning and proceedings.***

Or. en

*Justification*

*The paragraph should specify the right of assistance by an appropriate adult in accordance with Article 24 of the Charter of Fundamental Rights on the rights of the child.*



## Amendment 9

### Proposal for a directive

#### Article 5 – paragraph 2 a (new)

*Text proposed by the Commission*

*Amendment*

***2a. Where appropriate the rights set out in paragraph 2 shall be extended to other vulnerable suspects or accused persons needing similar assistance, such as persons with physical or mental disabilities.***

Or. en

*Justification*

*In accordance with Article 26 of the Charter of Fundamental Rights on integration of persons with disabilities.*

## Amendment 10

### Proposal for a directive

#### Article 6

*Text proposed by the Commission*

*Amendment*

Member States shall ensure that persons ***to whom Article 2 refers***, who are deprived of their liberty and who are non-nationals have the right to have consular or diplomatic authorities of their State of nationality informed of the detention as soon as possible and to ***communicate*** with the consular or diplomatic authorities.

Member States shall ensure that ***suspects or accused*** persons, who are deprived of their liberty and who are non-nationals have the right to have consular or diplomatic authorities of their State of nationality informed of the detention as soon as possible and to ***meet*** the consular or diplomatic authorities.

Or. en

*Justification*

*In accordance with Article 36(c) of the Vienna Convention on Consular Relations, the consular official has a right to visit suspects or accused persons thus enabling a check on their physical and detention conditions.*

## Amendment 11

### Proposal for a directive Article 7

#### *Text proposed by the Commission*

Member States shall ensure that the confidentiality of meetings between the suspect or accused person and his lawyer is guaranteed. They shall also ensure the confidentiality of correspondence, telephone conversations and other forms of communication permitted under national law between the suspect or accused person and his lawyer.

#### *Amendment*

Member States shall ensure that the confidentiality of meetings between the suspect or accused person and his lawyer is guaranteed ***without exception***. They shall also, ***without exception***, ensure the confidentiality of correspondence, telephone conversations and other forms of communication permitted under national law between the suspect or accused person and his lawyer.

Or. en

#### *Justification*

*All communications between the suspect or accused person and his or her lawyer should be confidential, with no scope for derogations.*

## Amendment 12

### Proposal for a directive Article 8 – point d

#### *Text proposed by the Commission*

(d) shall be limited in time as much as possible and in any event not extend to the trial stage;

#### *Amendment*

(d) shall be limited in time as much as possible and in any event not extend to the trial stage; ***and***

Or. en

#### *Justification*

*These requirements should be cumulative.*

## Amendment 13

### Proposal for a directive

#### Article 11 – paragraph 5 a (new)

*Text proposed by the Commission*

*Amendment*

***5a. Where appropriate, the right of access to a lawyer under paragraph 1 shall be extended to other types of judicial cooperation in criminal matters which adversely affect the rights of suspects or accused persons.***

Or. en

*Justification*

*The same need for dual representation will exist once the European Supervision Order and Transfer of Sentenced Persons are implemented as well as future instruments like the European Investigation Order.*

## Amendment 14

### Proposal for a directive

#### Article 13 – paragraph 3

*Text proposed by the Commission*

*Amendment*

3. Member States shall ensure that statements made by the suspect or accused person or evidence obtained in breach of his right to a lawyer or in cases where a derogation *to this* right was authorised in accordance with Article 8, *may not be* used at any stage of the procedure as evidence against him, ***unless the use of such evidence would not prejudice the rights of the defence.***

3. Member States shall ensure that statements made by the suspect or accused person or evidence obtained in breach of his right to a lawyer or in cases where a derogation *from that* right was authorised in accordance with Article 8, *are not* used at any stage of the procedure as evidence against him *or her*.

Or. en

*Justification*

*Statements made by the suspect or accused person or evidence obtained in breach of his or her right of access to a lawyer, or in case a derogation to this right was authorised, should*

*not be used at any stage of the procedure as evidence against him or her.*