

Judicial cooperation in criminal matters: right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and right to communicate upon arrest

2011/0154(COD) - 08/06/2011 - Legislative proposal

PURPOSE: to set common minimum standards on the rights of suspects and accused persons in criminal proceedings throughout the EU to have access to a lawyer and to communicate upon arrest with a third person, such as a relative, employer or consular authority.

PROPOSED ACT: Directive of the European Parliament and of the Council.

BACKGROUND: the Charter of Fundamental Rights of the European Union stipulates the right to a fair trial. The right of access to a lawyer is enshrined in Article 6 of the European Court of Human Rights (ECHR) and in Article 14(2) of the ICCPR. The right to communicate with a third party is one of the important safeguards against ill treatment prohibited by Article 3 ECHR and the right to have one's consulate informed of detention builds upon the 1963 Vienna Convention on Consular Relations.

The European Court of Human Rights has consistently held that the suspect or accused person should have access to a lawyer at the initial stages of police questioning, and in any event from the start of detention, to protect the right to a fair trial, and in particular the privilege against self-incrimination and to avoid ill treatment. Derogations from the right of access to a lawyer and the right to communicate upon arrest should be permitted only in exceptional circumstances.

The Council recognised that to date, not enough had been done at European level to safeguard the fundamental rights of individuals in criminal proceedings.

The proposal is the next step in the series of measures laid down in the Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspects and accused persons in criminal proceedings, appended to the Stockholm Programme approved by the European Council of 10-11 December 2010. The Roadmap invites the Commission to put forward proposals on a 'step-by-step' basis.

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This proposal should therefore be considered as part of a comprehensive package of legislation to be presented over the next few years, which will provide a minimum set of procedural rights in criminal proceedings in the European Union. The issue of legal aid, which was conflated with that of access to a lawyer in the Roadmap, warrants a separate proposal owing to the specificity and complexity of the subject.

- the first step is [Directive 2010/64/EU](#) on the right to interpretation and translation;
- the second step will be a [Directive](#), currently under negotiation on the basis of a Commission proposal, on the right to information, which will set out minimum rules on the right to receive information on one's rights, and on the charges, as well as on the right of access to the case file.

Having common minimum standards governing these rights should boost mutual trust between judicial authorities and thus facilitate the application of the principle of mutual recognition.

IMPACT ASSESSMENT: no impact assessment was carried out.

LEGAL BASIS: Article 82(2) of the Treaty on the Functioning of the European Union (TFEU).

CONTENT: the objective of the Directive is to lay down rules governing the rights of suspected and accused persons and persons subject to an European Arrest warrant to have access to a lawyer in criminal proceedings against them, and rules governing the right of suspects and accused persons who are deprived of their liberty to communicate upon arrest with a third party, such as a relative, employer or consular authority.

The Directive applies from the time that a person is made aware by the competent authorities of a Member State, by official notification or otherwise, that he is suspected or accused of having committed a criminal offence until the conclusion of the proceedings (including any appeal).

The main elements of this proposal are the following:

The right of access to a lawyer in criminal proceedings: the proposal lays down the general principle that all suspected and accused persons in criminal proceedings should have access to a lawyer as soon as possible, in time and in a manner that allows them to exercise their defence rights. Access to a lawyer must be granted at the latest upon deprivation of liberty, as soon as possible in the light of the circumstances of each case. Irrespective of any deprivation of liberty, access to a lawyer must be granted upon questioning.

Content of the right of access to a lawyer: the proposal sets out the activities that a lawyer representing an accused or suspected person must be entitled to carry out to ensure effective exercise of defence rights, including meeting with the suspect or accused person for an adequate duration and frequency to ensure the effective exercise of the rights of defence; attending any questioning or hearing.

The right to communicate upon arrest: the proposal provides for the right of persons deprived of their liberty in criminal proceedings to communicate as soon as possible upon arrest with one person nominated by them, which is most likely to be a relative or employer, so as to inform him of the detention. Legal representatives of children deprived of their liberty should be notified as soon as possible of the child's custody and the reasons pertaining thereto, unless it is against the best interests of the child. Where it is not possible to communicate with or notify the person designated by the detained person despite best endeavours to do so, the detained person is to be informed of the fact that the notification did not occur. Any consequences are left to national law.

The right to communicate with consular or diplomatic authorities: this provision confirms the right to communicate with consular authorities. It places a duty on Member States to ensure that all foreign detainees are able to have the consular authorities of their State of nationality informed of the detention if they so wish.

Confidentiality: defence rights are protected by the obligation to ensure that all communications, in whatever form they take, between a suspected and accused person and his lawyer are entirely confidential, with no scope for derogations.

Derogations: given the paramount importance of the rights enshrined in this Directive suggests that derogations for Member States should not be possible, in principle. Limited scope for derogations, however, is admitted by the ECtHR jurisprudence as concerns the initial stages of criminal proceedings. Member States may be allowed to derogate from the right of access to a lawyer only in exceptional circumstances, subject to necessity and to procedural safeguards. Any derogation must be justified by compelling reasons pertaining to the urgent need to avert danger for the life or physical integrity of one or more people.

BUDGETARY IMPLICATIONS: this proposal has no implications for the Union budget.