



EUROPEAN PARLIAMENT

2009 - 2014

Committee on Legal Affairs

2011/0154(COD)

20.12.2011

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 proceedings¹, which also includes the right to translation and interpretation², to information about rights in criminal proceedings³, to legal aid and special safeguards for suspected or accused persons who are vulnerable and a green paper on pre-trial detention.⁴

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

¹ 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.

² 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.

³ COM (2010) 392

⁴ 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 affected¹. 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.² 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

Title 1

Text proposed by the Commission

Amendment

Proposal for a Directive of the European Parliament and of the Council on the right

does not affect the English version

¹ See *Salduz v Turkey* [2008] ECHR 1542.

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

of access to a lawyer in criminal proceedings and on the right to communicate upon arrest

Amendment 2

Proposal for a directive Title 1

Text proposed by the Commission

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

Amendment

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 *in the event of* arrest

Amendment 3

Proposal for a directive Article 2 – paragraph 1

Text proposed by the Commission

1. This Directive applies *from the time* 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, which is understood to mean the final determination of the question whether the suspected or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal.

Amendment

1. This Directive applies *in cases where* 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, which is understood to mean the final determination of the question whether the suspected or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal.

Amendment 4

Proposal for a directive Article 2 a (new)

Text proposed by the Commission

Amendment

Article 2a

Definitions

1a. The following definitions apply for the purpose of this Directive:

(a) 'child' means a suspect or accused person below the age of 18 years or, where there is no clear evidence relating to age, a suspect or accused person who appears to be below the age of 18;

(b) 'lawyer' means a person who is authorised to pursue his or her professional activities under one of the following professional titles:

Belgium - Avocat/Advocaat/Rechtsanwalt

Bulgaria - Адвокат

Denmark - Advokat

Germany - Rechtsanwalt

Ireland - Barrister/Solicitor

Greece - Δικηγόρος

*Spain - Abogado/Advocat/Avogado/
Abokatu*

France - Avocat

*Italy - Avvocato/praticante avvocato
abilitato*

Luxembourg - Avocat

Netherlands - Advocaat

Austria - Rechtsanwalt

Portugal - Advogado

Romania - Avocat

Finland - Asianajaja/Advokat

Sweden - Advokat

United Kingdom -

Advocate/Barrister/Solicitor

(c) 'interview' means the official questioning of a person regarding their involvement or suspected involvement in a criminal offence or offences by appropriate law enforcement authorities, in a police station or another appropriate place.

This Directive does not cover preliminary questioning by the police or other law enforcement officers, immediately after the apprehension of a suspect, the purpose of which is to determine whether an investigation should be started or if there are any safety issues.

Amendment 5

Proposal for a directive

Article 3 – paragraph 1 – introductory part

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. *If and to the extent that suspects or accused persons request access to a lawyer*, Member States shall ensure that *they have such access* as soon as possible and in any event:

Amendment 6

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 *interview* *whether the person is detained or not*;

Amendment 7

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;***

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 8

Proposal for a directive

Article 3 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. This Directive does not affect the provision of legal advice by telephone in very limited cases relating to non-imprisonable offences, where there is no risk of self-incrimination or police coercion;

Amendment 9

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,

Amendment

2. The lawyer shall have the right to be present at any ***interview*** and hearing, ***whether the person is detained or not***. He ***or she*** shall have the right to ask questions,

which shall be recorded in accordance with national law.

request clarification and make statements, which shall be recorded in accordance with national law.

Amendment 10

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.***

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 11

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. ***If he or she receives indications of maltreatment, the lawyer shall have the right to examine the specific conditions in which the suspect or accused person is detained and to that end shall have access to the place where the person is detained.***

Amendment 12

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 interview 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*.

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 13

Proposal for a directive Article 5 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

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

If a police officer is told in good faith or suspects that the suspect or accused person has a physical or mental disability that would prevent him from being treated as an adult, the police officer shall treat that person in accordance with paragraph 2 in the absence of any clear evidence to

the contrary.

Justification

I support the rapporteur's amendment to Article 5 (2) (a); however, it could be strengthened by widening the protection it provides to people who are suspected of having a physical or mental disability but are unable to prove it immediately, resulting in them being treated as an adult.

Amendment 14

**Proposal for a directive
Article 6**

Text proposed by the Commission

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.

Amendment

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.

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 15

**Proposal for a directive
Article 6 a (new)**

Text proposed by the Commission

Amendment

Article 6a

Information

1. Member States shall ensure that suspects and accused persons are informed, without delay and in an understandable form, about their right of access to a lawyer and the fact that the

right continues to apply at all subsequent stages of the proceedings even if they did not exercise it at an earlier stage.

Without prejudice to national law that requires the mandatory presence or assistance of a lawyer, any waiver of the right to a lawyer referred to in this Directive shall be subject to the following conditions:

(a) the suspect or accused person has received prior legal advice on the consequences of the waiver or has otherwise obtained full knowledge of those consequences;

(b) he has the necessary capacity to understand these consequences; and

(c) the waiver is given voluntarily and unequivocally.

2. A record shall be kept, in accordance with the law of the Member State concerned, of the suspect's or accused person's having been informed about the right of access to a lawyer. The waiver and the circumstances in which it was given shall be recorded in accordance with the law of the Member State concerned.

3. Member States shall ensure that a waiver can be subsequently revoked at any stage of the proceedings.

Justification

Use of the instrument of waiver raises potential further issues and a need for regulation to cover the eventuality of the suspect or accused person changing his mind at a later stage. The relevant article therefore needs to be re-titled, reworded and repositioned in the text.

Amendment 16

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.

Justification

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

Amendment 17

Proposal for a directive Article 8 – paragraph 1 – introductory part

Text proposed by the Commission

Member States shall not derogate from any of the provisions of this Directive save, in exceptional circumstances, from Article 3, Article 4 paragraphs 1 to 3, Article 5 ***and Article 6***. Any such derogation:

Amendment

Member States shall not derogate from any of the provisions of this Directive save, in exceptional circumstances, from Article 3, Article 4(1), (2) and (3) ***and*** Article 5. Any such derogation:

Amendment 18

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***

Justification

These requirements should be cumulative.

Amendment 19

**Proposal for a directive
Article 9**

Text proposed by the Commission

Amendment

1. Without prejudice to national law that requires the mandatory presence or assistance of a lawyer, any waiver of the right to a lawyer referred to in this Directive shall be subject to the following conditions: *deleted*

a) the suspect or accused person has received prior legal advice on the consequences of the waiver or has otherwise obtained full knowledge of these consequences;

b) he has the necessary capacity to understand these consequences and

c) the waiver is given voluntarily and unequivocally.

2. The waiver and the circumstances in which it was given shall be recorded in accordance with the law of the Member State concerned.

3. Member States shall ensure that a waiver can be subsequently revoked at any stage of the proceedings.

Justification

This article, with certain changes, should be repositioned before Article 7.

Amendment 20

Proposal for a directive Article 10 – paragraph 2

Text proposed by the Commission

2. Member States shall ensure that any statement made by such person before he is made aware that he is a suspect or an accused person may not be used against him.

Amendment

2. Without prejudice to national rules on the admissibility of evidence, Member States shall ensure that any statement made by such person before he *or she* is made aware that he is a suspect or an accused person may not be used against him *or her*.

Justification

This directive should not seek to impose a choice between a legalistic system on the admissibility of evidence or a more flexible system where courts have the right to assess the evidence in the light of how it was produced and value it accordingly.

Amendment 21

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.

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 22

Proposal for a directive Article 13 – paragraph 3

Text proposed by the Commission

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.***

Amendment

3. ***Without prejudice to national rules on the admissibility of evidence,*** Member States shall ensure that ***evidence obtained*** in breach of his ***or her*** 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 ***or her.***

Justification

This directive should not seek to impose a choice between a legalistic system on the admissibility of evidence or a more flexible system where courts have the right to assess the evidence in the light of how it was produced and value it accordingly.

PROCEDURE

Title	The right of access to a lawyer in criminal proceedings and the right to communicate upon arrest
References	COM(2011)0326 – C7-0157/2011 – 2011/0154(COD)
Committee responsible Date announced in plenary	LIBE 5.7.2011
Committee(s) asked for opinion(s) Date announced in plenary	JURI 15.9.2011
Rapporteur(s) Date appointed	Jan Philipp Albrecht 11.7.2011
Discussed in committee	10.10.2011
Date adopted	20.12.2011
Result of final vote	+: 21 -: 0 0: 0
Members present for the final vote	Raffaele Baldassarre, Luigi Berlinguer, Sebastian Valentin Bodu, Françoise Castex, Christian Engström, Marielle Gallo, Lidia Joanna Geringer de Oedenberg, Klaus-Heiner Lehne, Antonio López-Istúriz White, Antonio Masip Hidalgo, Alajos Mészáros, Bernhard Rapkay, Evelyn Regner, Francesco Enrico Speroni, Alexandra Thein, Diana Wallis, Rainer Wieland, Cecilia Wikström, Tadeusz Zwiefka
Substitute(s) present for the final vote	Jan Philipp Albrecht, Jean-Marie Cavada, Luis de Grandes Pascual, Vytautas Landsbergis, Kurt Lechner, Eva Lichtenberger, Arlene McCarthy