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Committee on Civil Liberties, Justice and Home Affairs

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DRAFT REPORT

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))

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Elena Oana Antonescu

Symbols for procedures

- * Consultation procedure
- *** Consent procedure
- ***I Ordinary legislative procedure (first reading)
- ***II Ordinary legislative procedure (second reading)
- ***III Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

Amendments to a draft act

In amendments by Parliament, amendments to draft acts are highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the draft act which may require correction when the final text is prepared – for instance, obvious errors or omissions in a language version. Suggested corrections of this kind are subject to the agreement of the departments concerned.

The heading for any amendment to an existing act that the draft act seeks to amend includes a third line identifying the existing act and a fourth line identifying the provision in that act that Parliament wishes to amend. Passages in an existing act that Parliament wishes to amend, but that the draft act has left unchanged, are highlighted in **bold**. Any deletions that Parliament wishes to make in such passages are indicated thus: [...].

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DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

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))

(Ordinary legislative procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to Parliament and the Council (COM(2011)0326),
 - having regard to Article 294(2) and Article 82(2) of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C7-0157/2011),
 - having regard to Article 294(3) of the Treaty on the Functioning of the European Union,
 - having regard to the contributions submitted by the Bulgarian Parliament and the Portuguese Parliament on the draft legislative act,
 - having regard to the opinion of the European Economic and Social Committee of 7 December 2011¹,
 - having regard to the opinion of the Committee of the Regions²,
 - having regard to Rule 55 of its Rules of Procedure,
 - having regard to the report of the Committee on Civil Liberties, Justice and Home Affairs and the opinion of the Committee on Legal Affairs (A7-0000/2012),
1. Adopts its position at first reading hereinafter set out;
 2. Calls on the Commission to refer the matter to Parliament again if it intends to amend its proposal substantially or replace it with another text;
 3. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

¹ Not yet published in the Official Journal.

² OJ C 0, 0.0.0000, p. 0./Not yet published in the Official Journal.

Amendment 1

Proposal for a directive Recital 1 a (new)

Text proposed by the Commission

Amendment

(1a) The European Union has set itself the objective of maintaining and developing an area of freedom, security and justice. According to the conclusions of the European Council in Tampere of 15 and 16 October 1999, and in particular point 33 thereof, the principle of mutual recognition should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union, since enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate cooperation between authorities and the judicial protection of individual rights.

Or. en

Justification

This recital has been added in order to ensure consistency with the previous measures of the Roadmap on procedural rights, namely the Directive on the right to translation and interpretation in criminal proceedings and the Directive on the right to information in criminal proceedings.

Amendment 2

Proposal for a directive Recital 2 a (new)

Text proposed by the Commission

Amendment

(2a) The Implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States have trust in each other's criminal justice systems. The extent of the

mutual recognition exercise is very much dependent on a number of parameters, which include mechanisms for safeguarding the rights of suspected or accused persons and common minimum standards necessary to facilitate the application of the principle of mutual recognition.

Or. en

Justification

This recital has been added in order to ensure consistency with the previous measures of the Roadmap on procedural rights, namely the Directive on the right to translation and interpretation in criminal proceedings and the Directive on the right to information in criminal proceedings.

Amendment 3

**Proposal for a directive
Recital 4 a (new)**

Text proposed by the Commission

Amendment

(4a) Strengthening mutual trust requires detailed rules on the protection of the procedural rights and guarantees stemming from the Charter and the ECHR. It also requires by means of this Directive and other measures, further development within the Union of the minimum standards set out in the ECHR and the Charter. In the implementation of this Directive, Member States should not in any event fall below the standards set out in the Convention and the Charter as developed by the case-law of the European Court of Human Rights.

Or. en

Justification

This recital has been added in order to ensure consistency with the previous measures of the Roadmap on procedural rights, namely the Directive on the right to translation and interpretation in criminal proceedings and the Directive on the right to information in

criminal proceedings.

Amendment 4

Proposal for a directive Recital 4 b (new)

Text proposed by the Commission

Amendment

(4b) Article 82(2) of the Treaty on the Functioning of the European Union provides for the establishment of minimum rules applicable in the Member States to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension. Point (b) of Article 82(2) refers to "the rights of individuals in criminal procedure" as one of the areas in which minimum rules may be established.

Or. en

Justification

This recital has been added in order to ensure consistency with the previous measures of the Roadmap on procedural rights, namely the Directive on the right to translation and interpretation in criminal proceedings and the Directive on the right to information in criminal proceedings.

Amendment 5

Proposal for a directive Recital 4 c (new)

Text proposed by the Commission

Amendment

(4c) Common minimum rules notably linked to fundamental rights and procedural rights in criminal proceedings should lead to increased confidence in the criminal justice systems of all Member States, which in turn should lead to more

efficient judicial cooperation in a climate of mutual trust. Such common minimum rules should apply to access to a lawyer in criminal proceedings.

Or. en

Amendment 6

Proposal for a directive Recital 5

Text proposed by the Commission

(5) On 30 November 2009, the Council adopted the Roadmap for strengthening the procedural rights of suspected and accused persons in criminal proceedings ('the Roadmap'). In the Stockholm Programme, adopted on 11 December 2009³³, the European Council welcomed the Roadmap and made it part of the Stockholm Programme (point 2.4.). Taking a step-by-step approach, the Roadmap calls for the adoption of measures regarding the right to translation and interpretation the right to information on rights and information about the charges, the right to legal advice and legal aid, the right to communication with relatives, employers and consular authorities, and special safeguards for suspected or accused persons who are vulnerable. The Roadmap emphasises that the order of the rights is indicative, implying that it may be changed according to priorities. It is designed to operate as a whole; only when all its components are implemented will its benefits be felt in full;

Amendment

(5) On 30 November 2009, the Council adopted the Roadmap for strengthening the procedural rights of suspected and accused persons in criminal proceedings ('the Roadmap'). In the Stockholm Programme, adopted on 11 December 2009, the European Council welcomed the Roadmap and made it part of the Stockholm Programme (point 2.4.). ***The European Council underlined the non-exhaustive character of the Roadmap, by inviting the Commission to examine further aspects of minimum procedural rights for suspected and accused persons, and to assess whether other issues, for instance the presumption of innocence, need to be addressed, in order to promote better cooperation in this area.*** Taking a step-by-step approach, the Roadmap calls for the adoption of measures regarding the right to translation and interpretation the right to information on rights and information about the charges, the right to legal advice and legal aid, the right to communication with relatives, employers and consular authorities, and special safeguards for suspected or accused persons who are vulnerable. The Roadmap emphasises that the order of the rights is indicative, implying that it may be changed according to priorities. It is designed to operate as a whole; only when all its components are

implemented will its benefits be felt in full;

Or. en

Justification

The non-exhaustive nature of the Roadmap is a relevant factor which should be stressed.

Amendment 7

**Proposal for a directive
Recital 5 a (new)**

Text proposed by the Commission

Amendment

(5a) Two measures included in the Roadmap have been adopted so far: the Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and to translation in criminal proceedings¹ and Directive 2012/.../EU of the European Parliament and of the Council of ... on the right to information in criminal proceedings².

¹ OJ L 280, 26.10.2010, p. 1.

² OJ L ...

Or. en

Justification

The recital has been added in order to stress out the achievements accomplished so far, namely the adoption of the first two measures of the Roadmap on procedural rights.

Amendment 8

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

Text proposed by the Commission

Amendment

(6a) Reference to a lawyer should be considered to include any person who is qualified in accordance with the national law of the Member State to provide legal

advice and assistance to suspects and accused persons.

Or. en

Justification

As the Directive aims to give suspects and accused persons the right to have access to a lawyer in criminal proceedings, reference to the term "lawyer" should be made.

Amendment 9

Proposal for a directive

Recital 6

Text proposed by the Commission

(6) This Directive sets out minimum rules on the right of access to a lawyer and the right to communicate upon arrest with a third party in criminal proceedings, ***excluding administrative proceedings leading to sanctions such as competition or tax proceedings***, and in proceedings for the execution of an European Arrest Warrant. In doing so, it promotes the application of the Charter, in particular Articles 4, 6, 7, 47 and 48, by building upon Articles 3, 5, 6 and 8 of the ECHR as interpreted by the European Court of Human Rights;

Amendment

(6) This Directive sets out minimum rules on the right of access to a lawyer and the right to communicate upon arrest with a third party in criminal proceedings and in proceedings for the execution of an European Arrest Warrant. In doing so, it promotes the application of the Charter, in particular Articles 4, 6, 7, 47 and 48, by building upon Articles 3, 5, 6 and 8 of the ECHR as interpreted by the European Court of Human Rights.

Or. en

Justification

No exclusions should be made. The recital has been amended in order to be consistent with the Objective of the Directive, as defined in Article 1 which states that the Directive lays down rules concerning the right of suspects and accused persons in criminal proceedings.

Amendment 10

Proposal for a directive

Recital 7 a (new)

Text proposed by the Commission

Amendment

(7a) This Directive should be implemented

taking into account the relevant provisions of the Directive 2012/.../EU [on the right to information in criminal proceedings] that provide that any person who is suspected or accused of having committed a criminal offence is provided promptly with information concerning the right of access to a lawyer and that a person who is arrested or detained is provided promptly with a written "letter of rights", which shall contain information about the right of access to a lawyer.

Or. en

Justification

Procedural rights are interlinked, therefore this Directive should be implemented taking into account the relevant provisions included in the Directive on the right to information in criminal proceedings.

Amendment 11

**Proposal for a directive
Recital 7 b (new)**

Text proposed by the Commission

Amendment

(7b) Member States should ensure that suspects and accused persons have the right of access to a lawyer, promptly, before the person is interviewed by the law enforcement or judicial authorities, as from when the person is formally charged of having committed a criminal offence, as from the outset of deprivation of liberty, including detention and during any hearing. In any case, suspects and accused persons should be granted access to a lawyer during criminal proceedings before a court, if they wish to be assisted by a lawyer.

Or. en

Justification

The recital aims to clarify the scope of the Directive.

Amendment 12

Proposal for a directive Recital 7 c (new)

Text proposed by the Commission

Amendment

(7c) Questioning by the law enforcement or judicial authorities in relation to the commission of a possible criminal act, immediately after the commission of such an act, for example, when a person has been caught red-handed, which relates only to safety issues such as verification of the possession of weapons or which only seeks to identify the person, should not be deemed an "interview".

Or. en

Justification

In order to effectively and efficiently conduct the criminal proceedings, when the competent authorities are trying to clarify the circumstances of the commission of a possible criminal act, the immediate questioning by the law enforcement or judicial authorities, after the commission of such an act should not be considered as an "interview".

Amendment 13

Proposal for a directive Recital 8 a (new)

Text proposed by the Commission

Amendment

(8a) In some Member States an authority other than a court having jurisdiction in criminal matters has competence for imposing sanctions in relation to relatively minor offences. That may be the case, for example, in relation to traffic offences which are committed on a large scale and which might be established following a traffic control. In such situations, it would be unreasonable to require that the competent authority

ensure all the rights under this Directive. Where the law of a Member State provides for the imposition of a sanction regarding minor offences by such an authority and there is a right of appeal or the possibility for the case to be otherwise referred to a court having jurisdiction in criminal matters, this Directive should therefore apply only to the proceedings before that court following such an appeal or referral.

Or. en

Justification

This amendment aims to align the recital to the amendment tabled to Article 2 paragraph 3.

Amendment 14

Proposal for a directive

Recital 9

Text proposed by the Commission

(9) A similar right to the presence of a lawyer should be granted every time that national law expressly allows or demands the presence of the suspected or accused person at a procedural step or evidence gathering such as a search; in these cases, in fact, the presence of the lawyer can strengthen the rights of the defence without affecting the need to preserve the confidentiality of certain investigative acts, since the presence of the person excludes the confidential nature of the acts in question; this right should be without prejudice to the need to secure evidence which by its very nature is liable to be altered, removed or destroyed if the competent authority was to wait until the arrival of a lawyer;

Amendment

(9) A similar right to the presence of a lawyer should be granted every time that national law expressly allows or demands the presence of the suspected or accused person at a procedural step or evidence gathering such as a search; in these cases, in fact, the presence of the lawyer can strengthen the rights of the defence without affecting the need to preserve the confidentiality of certain investigative acts, since the presence of the person excludes the confidential nature of the acts in question. ***Once appointed, the lawyer should be able to ask for the notification of the carrying out of such acts. If once notified he does not attend, the competent authorities should not be prevented from carrying out the investigative measures.*** This right should be without prejudice to the need to secure evidence which by its very nature is liable to be altered, removed

or destroyed if the competent authority was to wait until the arrival of a lawyer.

Or. en

Justification

This amendment aims to align the recital to the amendment tabled to Article 4 paragraph 3.

Amendment 15

Proposal for a directive

Recital 10

Text proposed by the Commission

(10) To be effective, access to a lawyer should entail the possibility for the lawyer to carry out all the wide range of activities which pertain to legal counselling, as the European Court of Human Rights has held. This should include active participation in any ***interrogation or*** hearing, meetings with the client to discuss the case and prepare the defence, the search for exculpatory evidence, support to a distressed client ***and control of detention conditions***;

Amendment

(10) To be effective, access to a lawyer should entail the possibility for the lawyer to carry out all the wide range of activities which pertain to legal counselling, as the European Court of Human Rights has held. This should include active participation in any hearing ***or any interview conducted by law enforcement or judicial authority*** meetings with the client to discuss the case and prepare the defence, the search for exculpatory evidence ***and*** support to a distressed client.

Or. en

Justification

This amendment aims to align the recital to the amendments made to Article 4 paragraph 2 and to Article 4 paragraph 4.

Amendment 16

Proposal for a directive

Recital 12

Text proposed by the Commission

(12) Suspects or accused persons deprived of their liberty should have the right ***promptly to communicate upon arrest with a person*** of their choice, such as a

Amendment

(12) Suspects or accused persons deprived of their liberty should have the right ***to have at least one person*** of their choice, such as a family member or employer

family member or employer, ***in order to inform them of the detention;***

promptly informed that they have been deprived of their liberty.

Or. en

Justification

This amendment aims to align the recital to the amendments made to Article 5.

Amendment 17

Proposal for a directive

Recital 15

Text proposed by the Commission

(15) Derogations from the right of access to a lawyer and the right to communicate upon arrest should be permitted only in exceptional circumstances, in line with case law of the European Court of Human Rights, where there are compelling reasons relating to the urgent need to avert serious adverse consequences for the life or physical integrity of ***another*** person and where there are no other less restrictive means to achieve the same result, ***such as, in cases of a risk of collusion, replacement of the lawyer chosen by the suspect or accused person or nomination of a different third party to communicate with;***

Amendment

(15) Derogations from the right of access to a lawyer and the right to communicate upon arrest should be permitted only in exceptional circumstances, in line with case law of the European Court of Human Rights, where, ***in view of the particular circumstances of the case*** there are compelling reasons relating to the urgent need to avert serious adverse consequences for the life, ***liberty*** or physical integrity of ***a*** person and where there are no other less restrictive means to achieve the same result.

Or. en

Justification

This amendment aims to align the recital to the amendment made to Article 8.

Amendment 18

Proposal for a directive

Recital 15 a (new)

Text proposed by the Commission

Amendment

(15a) Where there is a risk of collusion, this should not result in a derogation from the right of access to a lawyer and from the right to have a third person informed upon arrest, but should lead to the replacement of the lawyer or to the nomination of a different third party to communicate with. The suspect or accused person should not be left without a lawyer but should instead have access to another lawyer independent of the investigative or prosecuting authorities.

Or. en

Amendment 19

Proposal for a directive Recital 16

Text proposed by the Commission

Amendment

(16) Any such derogation should only lead to a deferral, as limited as possible, of the initial access to a lawyer and should not affect the substance of this right. It should be subject to a case-by-case assessment by the competent judicial authority, which should give reasons for its decision;

(16) Any such derogation should only lead to a deferral, as limited as possible, of the initial access to a lawyer and should not affect the substance of this right. It should be subject to a case-by-case assessment by the competent judicial authority, which should give reasons for its decision, ***or by another competent authority on condition that its decision may be subject to judicial review.***

Or. en

Justification

This amendment aims to align the recital to the amendment made to Article 8.

Amendment 20

Proposal for a directive Recital 18

Text proposed by the Commission

(18) The *suspect* or accused person should be allowed to waive the right to a lawyer, as long as they are fully aware of the consequences of the waiver, notably because ***they have met with a lawyer before making this decision*** and have the necessary capacity to understand these consequences and provided that the waiver is given freely and unequivocally. The suspect or accused person should be able to revoke the waiver at any time in the course of the proceedings;

Amendment

(18) The suspect or accused person should be allowed to waive the right to a lawyer, as long as they are fully aware of the consequences of the waiver, notably because ***they have been provided, orally or in writing, with sufficient and clear information about these consequences*** and have the necessary capacity to understand these consequences and provided that the waiver is given freely and unequivocally. The suspect or accused person should be able to revoke the waiver at any time in the course of the proceedings. ***If the suspect or accused person has waived his right to a lawyer referred in this Directive, at the beginning of the proceedings before a court he should be asked whether he maintains the waiver or whether he revokes it.***

Or. en

Justification

The amendment aims to align the recital to the amendments made to Article 9.

Amendment 21

Proposal for a directive Recital 19

Text proposed by the Commission

19) Any person heard by the competent authority in a different capacity than that of suspect or accused person, e.g. as a witness, should be ***immediately*** given access to a lawyer if the authority considers that he has become a suspect in the course of the ***questioning***, and any statements made before he became a suspect or an

Amendment

(19) Any person heard by the competent authority in a different capacity than that of suspect or accused person, e.g. as a witness, should be ***promptly*** given access to a lawyer if the authority considers that he has become a suspect in the course of the ***interview***, and any statements made before he became a suspect or an accused

accused person should not be used against him;

person should not be used against him.

Or. en

Justification

The amendment aims to align the recital to the amendment made to Article 10.

Amendment 22

Proposal for a directive

Recital 22

Text proposed by the Commission

(22) That person should also have the possibility to have a lawyer in the issuing Member State to assist the lawyer in the executing Member State in specific cases during the surrender proceedings without prejudice to the deadlines set out in Council Framework Decision 2002/584/JHA; that lawyer should be able to assist the lawyer in the executing Member State when exercising the person's rights under the Council Framework Decision 2002/584/JHA in the executing State, in particular in respect of the grounds of refusal under its Articles 3 and 4; since the European Arrest Warrant is predicated upon the principle of mutual recognition, this should not entail any right to question the merits of the case in the executing Member State; *as* there is no incompatibility between defence rights and mutual recognition; enhancing fair trial rights both in the executing and in the issuing Member State will boost mutual trust;

Amendment

(22) That person should also have the possibility to have a lawyer in the issuing Member State to assist the lawyer in the executing Member State in specific cases during the surrender proceedings without prejudice to the deadlines set out in Council Framework Decision 2002/584/JHA; that lawyer should be able to assist the lawyer in the executing Member State when exercising the person's rights under the Council Framework Decision 2002/584/JHA in the executing State, in particular in respect of the grounds of refusal under its Articles 3 and 4; since the European Arrest Warrant is predicated upon the principle of mutual recognition, this should not entail any right to question the merits of the case in the executing Member State. *Moreover* there is no incompatibility between defence rights and mutual recognition. Enhancing fair trial rights both in the executing and in the issuing Member State will boost mutual trust.

Or. en

Amendment 23

Proposal for a directive Recital 24

Text proposed by the Commission

(24) In the absence to-date of EU legislative instrument on legal aid, Member States should continue to apply their domestic provisions on legal aid, which should be in line with the Charter, the ECHR and the case-law of the European Court of Human Rights. ***Whenever new domestic provisions, enacted to implement this Directive, grant a broader right of access to a lawyer than was previously available under national law, the rules currently in place on legal aid should apply with no distinction between the two situations;***

Amendment

(24) In the absence to-date of EU legislative instrument on legal aid, Member States should continue to apply their domestic provisions on legal aid, which should be in line with the Charter, the ECHR and the case-law of the European Court of Human Rights.

Or. en

Justification

This amendment aims to align the recital to the amendment made to Article 12.

Amendment 24

Proposal for a directive Recital 30

Text proposed by the Commission

(30) This Directive promotes the rights of the child and takes into account the Guidelines of the Council of Europe on child friendly justice, in particular its provisions on information and advice. The Directive ensures that children cannot waive their rights under this Directive when they lack the capacity to understand the consequences of the waiver. ***Legal representatives*** of a *suspect* or accused child should be always notified ***as soon as possible*** of his custody and be informed about the reasons for the custody, ***unless it***

Amendment

(30) This Directive promotes the rights of the child and takes into account the Guidelines of the Council of Europe on child friendly justice, in particular its provisions on information and advice. The Directive ensures that children cannot waive their rights under this Directive when they lack the capacity to understand the consequences of the waiver. ***The legal representative*** of a *suspected* or accused child should be always notified ***promptly*** of his custody and be informed about the reasons for the custody. ***If providing such***

is against the best interests of the child;

information to the child's legal representative is contrary to the best interests of the child, another suitable adult, such as a guardian or a relative should be informed instead. In accordance with the provisions of national law, Member States should ensure that specified authorities with competence for the protection of children should also be informed that a child has been deprived of his or her liberty.

Or. en

Justification

It is in the best interest of the child for the specific authorities with competence for the protection of children to be informed about the deprivation of the liberty of the child.

Amendment 25

**Proposal for a directive
Recital 30 a (new)**

Text proposed by the Commission

Amendment

(30a) When providing the suspected or accused person the rights granted in this Directive, competent authorities should pay particular attention to suspected or accused person who cannot understand or follow the content or the meaning of the rights, owing for example, to their mental or physical condition.

Or. en

Justification

This amendment aims to align the recital to the amendment made to art 5.3

Amendment 26

Proposal for a directive Article 1

Text proposed by the Commission

The Directive lays down rules concerning the **right** of suspects and accused persons in criminal proceedings and of persons subject to proceedings pursuant to Council Framework Decision 2002/584/JHA to have access to a lawyer and to **communicate upon arrest with** a third party.

Amendment

The Directive lays down rules concerning the **rights** of suspects and accused persons in criminal proceedings and of persons subject to proceedings pursuant to Council Framework Decision 2002/584/JHA **of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States ("European arrest warrant proceedings")** to have access to a lawyer and to **have** a third party **informed of the deprivation of liberty**.

Or. en

Justification

As this Directive refers to two rights, the word "right" should be used in plural. The last part of the article has been changed in order to be consistent with the Directive on the right to information in criminal proceedings.

Amendment 27

Proposal for a directive Article 2 – paragraph 3 (new)

Text proposed by the Commission

Amendment

3. Where the law of a Member State provides for the imposition of a sanction regarding minor offences by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed to such a court, this Directive shall apply only to the proceedings before that court following such an appeal.

Or. en

Justification

This paragraph has been added in order to be consistent with the previous measures of the Roadmap on procedural rights, namely the Directive on the right to interpretation and translation in criminal proceedings and the Directive on the right to information in criminal proceedings.

Amendment 28

Proposal for a directive Article 3 – paragraph 1

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***:

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

(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;

(c) from the outset of deprivation of liberty.

Amendment

1. Member States shall ensure that suspects and accused persons are ***promptly*** granted access to a lawyer, ***at least***:

(a) before the start of any ***interview*** by the law enforcement ***or judicial*** authorities, ***irrespective of whether the person is detained or not***;

(b) upon carrying out any ***investigative*** 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.

(c) from the outset of deprivation of liberty, ***including detention***;

(d) at any hearing;

(e) from the moment the person is summoned to appear before a court having jurisdiction in criminal matters, whichever the earliest

Or. en

Justification

The suspect or accused person should be granted access to a lawyer in any case from the first interview carried out by law enforcement or other competent authorities. Taking in consideration that in some Member States, the first questioning/interview could be carried out by a judicial authority, this case should also be covered. The right to a lawyer should not be

dependent on the state of deprivation of liberty, as any interview may lead to self-incriminating statements and abuses and ill-treatment are possible even vis-a-vis people not deprived of their liberty. The presence of a lawyer is even more important during hearings.

Amendment 29

Proposal for a directive Article 4 – paragraph 1

Text proposed by the Commission

1. The suspect or accused person shall have the right to meet with the lawyer representing him.

Amendment

1. The suspect or accused person shall have the right to meet **and to communicate** with the lawyer representing him.

Or. en

Justification

Both the right to meet and to communicate should be granted to the suspect and accused person.

Amendment 30

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 suspect or accused person shall have the right for his lawyer** to be present at any **law enforcement or judicial authorities interview** and **at any** hearing.. He shall have the right to ask questions, request clarification and make statements, which shall be recorded in accordance with national law.

Or. en

Justification

This Directive aims to set rights for the suspect or accused person, not for the lawyer. As it has been affirmed in the previous amendment, the lawyer should be entitled to attend any interview carried out by a law enforcement or judicial authority and any hearing.

Amendment 31

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. Whenever a lawyer has already been appointed, he may ask to be notified of any 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.

Whenever the lawyer has been notified, this shall be recorded using the recording procedure of the law of the Member State concerned.

If once notified he does not attend, this should not prevent the carrying out of the investigative measure.

The lawyer's presence shall be recorded in accordance with the recording procedure of the law of the Member State concerned.

Or. en

Justification

In order to ensure the exercise of the suspect or accused person's right to have the lawyer present during an investigative or evidence gathering act and at the same time to avoid any delay of the proceedings, the lawyer should be able to ask for the notification of the carrying out of such acts. The lawyer's absence shall not avert the competent authorities from carrying out such acts if the notification has been correctly done.

Amendment 32

Proposal for a directive Article 4 – paragraph 4

Text proposed by the Commission

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.* **deleted**

Or. en

Justification

The control of detention conditions should be left up to the public authorities.

Amendment 33

Proposal for a directive Article 4 – paragraph 5

Text proposed by the Commission

Amendment

5. The duration and frequency of meetings between the suspect or accused person and his lawyer shall **not** be limited in any way that may prejudice the exercise of his rights of defence.

5. **Neither** the duration and frequency of meetings between the suspect or accused person and his lawyer, **nor the communication between them** shall be limited in any way that may prejudice the exercise of his rights of defence.

Or. en

Justification

Any limitations of the meetings and communication between the suspect or accused person and his/her lawyer are unnecessary and restrictive and would avert from an effective exercise of the right of access to a lawyer.

Amendment 34

Proposal for a directive Article 5 Title

Text proposed by the Commission

The right to **communicate** upon arrest

Amendment

The right **to have a third person informed** upon arrest

Or. en

Justification

The wording has been changed in order to be consistent with the relevant provisions of the Directive on the right to information in criminal proceedings.

Amendment 35

**Proposal for a directive
Article 5**

Text proposed by the Commission

1. Member States shall ensure that a person to whom Article 2 refers and who is deprived of his liberty has the right **to communicate with** at least one person named by him as soon as possible.

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

1. Member States shall ensure that a person to whom Article 2 refers and who is deprived of his liberty has the right to **have** at least one person, **such as a relative or employer** named by him, **informed of the deprivation of liberty** as soon as possible.

2. **If** the person is **less than 18 years old and therefore, for the purposes of this Directive, considered to be** 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 suitable adult shall be informed.

3. **Where appropriate, the rights applicable to children in accordance with paragraph 2 of this article shall be extended to other vulnerable suspects or accused persons needing similar assistance, such as physically or mentally disabled persons.**

Justification

The wording has been changed in order to be consistent with the relevant provisions of the Directive on the right to information in criminal proceeding. It should be clarified that for the purposes of this Directive a child is a person aged less than 18. Vulnerable suspects and accused persons should be granted appropriate safeguards as well.

Amendment 36**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 **all** meetings between **a person to whom Article 2 applies** 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.

Justification

It should be clarified that the confidentiality between a lawyer and his client applies to all the meetings between them. The provision should apply to all persons covered by the scope of the Directive, including persons subject to EAW proceedings.

Amendment 37**Proposal for a directive****Article 8***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:

(a) shall be justified by compelling reasons

Amendment

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, **and** Article 5. Any such derogation:

(a) shall be justified by compelling reasons

pertaining to the urgent need to avert serious adverse consequences for the life or physical integrity of a person;

(b) shall not be based exclusively on the type or seriousness of the alleged offence;

(c) shall not go beyond what is necessary;

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

(e) shall not prejudice the fairness of the proceedings.

Derogations may only be authorised by a duly reasoned decision taken by a judicial authority **on a case-by-case basis**.

drawn from the particular circumstances of the case, pertaining to the urgent need to avert serious adverse consequences for the life, **liberty** or physical integrity of a person;

(b) shall not be based exclusively on the type or seriousness of the alleged offence;

(c) shall not go beyond what is necessary;

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

(e) shall not prejudice the fairness of the proceedings.

Derogations may only be authorised by a duly reasoned decision taken **on a case-by-case basis** by a judicial authority **or by another competent authority on condition that the decision may be subject to judicial review**.

Or. en

Justification

The right to inform consular authorities should not be open to derogation, as the corresponding right of States under the Vienna Convention is not subject to exceptions Besides life and physical integrity, liberty should be a reason for derogation as well. The amendment also aims to interlink the situations that should give rise to derogation, while at the same time stressing out that derogations should be based on a case by case assessment The last part of the amendment aims to allow authorities other than judicial, to derogate provided that their decision is subject to judicial review.

Amendment 38

Proposal for a directive Article 9 – paragraph 1 – point a

Text proposed by the Commission

(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;***

Amendment

(a) the suspect or accused person has ***been provided with clear, precise and sufficient information about the content of the right concerned and the consequences of waiving it, orally or in writing and in an***

understandable way.

Or. en

Justification

Imposing a prior legal advice to those refusing a lawyer might be excessive. On the other side, it is of the utmost importance that the suspect or accused person receives clear and full information on the consequences of his/her choice.

Amendment 39

**Proposal for a directive
Article 9 – paragraph 3 a (new)**

Text proposed by the Commission

Amendment

3a. If the suspect or accused person has waived his right to a lawyer referred in this Directive, he shall be asked at the beginning of the proceedings before a court whether he maintains the waiver or whether he wishes to revoke it.

Or. en

Justification

Having regard to the particular importance of the proceeding before the Court, the suspect or accused person should be reminded of his/her right of access to a lawyer before the beginning of this procedure.

Amendment 40

**Proposal for a directive
Article 10 – paragraph 1**

Text proposed by the Commission

Amendment

1. Member States shall ensure that any person other than a suspect or accused person who is heard by the ***police or other*** enforcement authority in the context of a criminal procedure is granted access to a lawyer if, in the course of questioning, interrogation or hearing, he becomes

1. Member States shall ensure that any person other than a suspect or accused person who is heard by the ***law*** enforcement ***or judicial*** authority in the context of a criminal procedure is ***promptly*** granted access to a lawyer if, in the course of questioning, interrogation or hearing, he

suspected or accused of having committed a criminal offence.

becomes suspected or accused of having committed a criminal offence.

Or. en

Justification

This Paragraph needs to be put in line with the amendment proposed on Article 3.1.

Amendment 41

Proposal for a directive Article 11 – paragraph 2

Text proposed by the Commission

2. With regard to the content of the right of access to a lawyer, this person shall have the following rights in the executing Member State:

- the right of access to a lawyer in such a time and manner as to allow him to exercise his rights effectively;
- the right to meet with the lawyer representing him;
- the right that his lawyer is present at any **questioning** and hearing, including the right to ask questions, request clarification and make statements, which shall be recorded in accordance with national law;

– the right that his lawyer has access to the place where the person is detained in order to check the conditions of detention.

The duration and frequency of meetings between the person and his lawyer shall **not** be limited in any way that may prejudice the exercise of his rights under Council Framework Decision 2002/584/JHA.

Amendment

2. With regard to the content of the right of access to a lawyer, this person shall have the following rights in the executing Member State:

- the right of access to a lawyer **promptly, in order** to allow him to exercise his rights effectively;
- the right to meet **and to communicate** with the lawyer representing him;
- the right that his lawyer is present at any **law enforcement and judicial authorities interview** and **at any** hearing, including the right to ask questions, request clarification and make statements, which shall be recorded in accordance with national law.

Neither the duration and frequency of meetings between the person and his lawyer, **nor the communication between them** shall be limited in any way that may prejudice the exercise of his rights under Council Framework Decision 2002/584/JHA.

Or. en

Justification

This Paragraph needs to be put in line with the amendments proposed on Articles 3 and 4.

Amendment 42

**Proposal for a directive
Article 11 - paragraph 4**

Text proposed by the Commission

4. The lawyer of this person in the issuing Member State shall have the right to carry out activities **limited to what is** needed to assist the lawyer in the executing Member State, with a view to the effective exercise of the person's rights in the executing Member State under that Council Framework Decision, in particular under its Articles 3 and 4.

Amendment

4. The lawyer of this person in the issuing Member State shall have the right to carry out activities **that are** needed to assist the lawyer in the executing Member State, with a view to the effective exercise of the person's rights in the executing Member State under that Council Framework Decision, in particular under its Articles 3 and 4.

Or. en

Amendment 43

**Proposal for a directive
Article 12 – paragraph 2**

Text proposed by the Commission

2. Member States shall not apply less favourable provisions on legal aid than those currently in place in respect of access to a lawyer provided pursuant to this Directive.

Amendment

deleted

Or. en

Justification

Legal aid is not within the scope of this Directive and this paragraph might have an important impact on the legal systems of a number of Member States. Any step on this subject should be taken in a future separate instrument dedicated to legal aid.

EXPLANATORY STATEMENT

The European Parliament has called for a stronger protection of the rights of the victims of crime from one side and of the suspect and accused person from the other side for a long time. After the failure of the adoption of the Framework Decision on certain procedural rights in criminal proceedings tabled by the European Commission in 2004, with the Pagano report adopted on 7 May 2007, the Plenary strongly called for an ambitious legal instrument on procedural safeguards in criminal proceedings.

The message by the European Parliament was followed up and, on the initiative of the Swedish Presidency, in November 2009 the Council adopted a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings which changes the initial approach of the European Commission, aiming at the adoption of a horizontal and comprehensive instrument, to a less ambitious but maybe more realistic step by step approach covering the following measures:

- A. Translation and interpretation;
- B. Information on rights and information about the charges;
- C. Legal advice and legal aid;
- D. Communication with relatives, employers and consular authorities;
- E. Special safeguards for suspected or accused persons who are vulnerable;
- F. Green paper on pre-trial detention;

The Roadmap has become an integral part of the Stockholm Programme. It clearly states that the list of measures is not exhaustive.

The measures included in the Roadmap have partly already been put in place. The Directive on the right to interpretation and translation in criminal proceedings has been adopted on 20 October 2010 and the Directive on the right to information in criminal matters is now finalised awaiting to be published in the Official Journal.

The proposal for a Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest was adopted by the European Commission on 12 July 2011 and is the third step in the implementation of the Roadmap. It brings together the part of measure C concerning the right to legal advice and measure D on the right to communication with relatives, employers and consular authorities.

The proposal lays down the main principle that every suspect or accused person should be given the right of access to a lawyer as soon as possible and in a manner that allows them to exercise their defence rights effectively. It also specifies that in any event these rights should be granted before the start of any questioning, upon carrying out any procedural or evidence gathering act and in case of deprivation of liberty. The proposal further identifies the content

of the right, stresses that meetings between the suspect or accused person and the lawyer should be confidential, lists the derogations allowed to the general principles and provides for rules in case of waiver of the right to a lawyer.

From the point of view of the remedies, the proposal aims to ensure that effective remedies are granted and in particular that in case of breach of the right of access to a lawyer, the suspect or accused person is placed in the same position as if the breach had not occurred and notably that every statement made or evidence gathered in breach of the right to a lawyer may not be used unless this would not prejudice the rights of the defence.

The same principle applies to persons other than suspects and accused persons, in case they become accused or suspected while heard by the police or the law enforcement authority.

The proposal of the Commission does not set out specific rules on legal aid. It contains only a general reference to legal aid and a provision which states that Member States shall not apply less favourable provisions on legal aid than those currently in place in respect of access to a lawyer provided pursuant to this Directive.

Two provisions deal with the right to communicate upon arrest and the right to communicate with consular or diplomatic authorities.

POSITION OF THE RAPPORTEUR

Despite the existence of common principles and minimum standards stemming both from the ECHR and the EU Charter, provisions governing access to a lawyer vary significantly from one Member State another.

Access to effective defence in criminal proceedings has a different extension in the Member States depending both on the specific legal system and its practical application and this has an indirect but significant implication on the EU policy of mutual trust and recognition.

The provisions of the European Convention on Human Rights and the case law of the European Court of Human Rights are not uniformly implemented and respected by the Member States which gives rise to diverging standards throughout the European Union.

The Parliament has called several times for the need of strengthening procedural rights of the suspect and accused persons, stressing out the need to strike the right balance between freedom justice and security.

The need to enhance mutual trust became even more imperative with the implementation of the mutual recognition programme of judicial decision in criminal proceedings. Legislation adopted at EU level over the last few years has improved the effectiveness of prosecutions and enforcement of sentences across the EU, yet there is a consensus that the absence of measures at EU level to promote the rights of citizens as suspects or accused in criminal proceedings in another Member State has created a sense of imbalance in EU justice policies.

In my view such instruments should had been adopted before the implementation of the principle of mutual recognition and of the measures linked to it.

Citizens have to be confident that their rights are fully respected and their security is provided when they are travelling and that they have the same guarantees in all the Member States.

The scope of this Directive should be broad enough in order to avoid any abuses but at the same time to ensure that the effective and efficient administration of justice is not affected. The right of access to a lawyer for suspects and accused persons should be an overarching principle since the earliest stage of criminal proceedings.

The need for a suspect or accused person to have access to a lawyer and for that legal access to be effective is a key element in placing suspected or accused citizens in a position to defend themselves properly in front of the investigating authorities and at trial.

Without proper access to a lawyer, the effective exercise of other defence rights may remain illusory.

The Directive will be implemented in all the Member States irrespective of their legal systems ensuring the same standards all over Europe.

In the implementation of this Directive Member States should not in any event fall below the standards set out in the Convention and the Charter as developed by the case-law of the European Court of Human Rights.

My draft report builds on the following ideas:

- a certain level of consistency should be kept with the already adopted measures A and B, that is the reason why I proposed the amendment to Article 2.3.

- the right to a lawyer should be broad and should be granted at an early stage of the proceedings without entailing the carrying over of the investigation. As stressed within the amendments proposed on Article 3, it should be granted irrespective of the deprivation of liberty, in case the person is interviewed by law enforcement or other competent authorities and, in any case from the moment the person is summoned to appear before a court having jurisdiction in criminal matters. In addition, the suspect or accused person should have the right to meet and to communicate with the lawyer (amendment to Article 4.1).

- as concerns the participation of the lawyer at any investigative or evidence gathering acts at which the person's presence is required or permitted as a right in accordance with national law, whenever the lawyer has been appointed, he should be able to ask for the notification of carrying out of such acts, which shall be recorded using the recording procedure in accordance with the law of the Member State. The absence of the lawyer should not however avert the competent authorities from carrying out such acts, once the notification has been correctly done.

- in the view of the effective exercise of the rights of defence of a suspect or accused person, there shouldn't be any limitation in the duration and the frequency of the meetings between him/her and his/her lawyer (amendment to Article 4.5) as well as to their confidentiality (amendment to Article 7). The same principle should apply to Article 8, while at the same time authorising a competent authority other than judicial to derogate from the right of access to a lawyer on condition that the decision is subject to judicial review. The right to inform

consular authorities should not be open to derogations.

- with regard to the provisions referring to the waiver, the draft report aims to eliminate the prior legal advice on the consequences of the waiver, which might be excessive and could lead to delays in the proceedings.

- the duty to check the detention conditions should be exercised by the public authorities and not by the lawyer, as stressed with the amendment tabled on Article 4.4.

- for the sake of clarification, for the purposes of this Directive, a child should be considered as somebody less than 18 (amendment to Article 5). Mainstreaming the rights of vulnerable suspects and accused persons in this proposal is of utmost importance, therefore the rights applicable to children in accordance with the provisions of this Directive should be extended to this particular category of persons.

- in order to ensure consistency with the relevant provisions of the Directive on the right to information in criminal proceedings the right to communicate upon arrest has been replaced with the right to have a third party informed. Therefore the suspect or accused person who is deprived of liberty shall have the right to have at least one person, such as a relative or employer named by him informed of the deprivation of liberty.

- Taking in consideration that paragraph 2 of Article 12 which refers to legal aid might have an important impact on the legal systems of a number of Member States, it seems more appropriate to deal with this issue in the context of the future measure on legal aid.

In the absence of substantial rules on legal aid in this Directive it should in fact be avoided to set principles that could prejudice such substantial rules that would be the object of a future instrument. The Commission has stated that the issue of legal aid is extremely complex and current information is very patchy. Therefore, it would have required much more time to present the proposal if legal aid had been included, which would have not been appropriate, given the need for action on the substantive right.