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NOTE

from : Presidency
to : CATS

No. COM prop : 11497/11 DROIPEN 61 COPEN 152 CODEC 1018

Subject : Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest
- Orientation debate

Introduction

1. On 8 June 2011, the Commission adopted a proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer and on the right to communicate upon arrest¹. This proposal is the third measure ("C, minus legal aid, and D") in application of the Roadmap for strengthening procedural rights of suspected and accused persons in criminal proceedings, which was adopted by the Council on 30 November 2009².

¹ 11497/11 (proposal) + ADD 1 REV1 (impact assessment) + ADD 2 REV 1 (summary of impact assessment).

² OJ C 295, 4.12.2009, p. 1. The first measure ("A") was adopted on 20 October 2010 (Directive 2010/64/EU of the European Parliament and of the Council on the rights to interpretation and translation in criminal proceedings, OJ 280, 26.10.2010, p.1). The second measure ("B") is currently under discussion in the ordinary legislative procedure (Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings, 12564/10 + ADD 1 + ADD 2).

2. During meetings on 4/5 and 26 July 2011, the Working Party on Substantive Criminal Law had a first reading of the entire proposal (except the recitals).
3. Further to this work in the Working Party, the Presidency would like to submit some issues to CATS in order to obtain guidance for further work.

A : Derogations (Article 8 - Derogations, Article 7 - Confidentiality)

4. Article 8 provides the conditions under which Member States may make derogations to the general rules provided in certain Articles. Derogations may only be authorised by a duly reasoned decision taken on a case-by-case basis by a judicial authority.

Issue a): Scope of Article 8

5. The Article currently provides that derogations may be made to Articles 3, 4, 5 and 6. During the work in the Working Party, the question arose whether derogations should also be possible to Article 7 on confidentiality. That Article provides that Member States shall guarantee the confidentiality of communication between the suspect or accused person and his lawyer, without exceptions or derogations being possible.
6. COM observed that the current text of Article 7 was chosen, since the tendency at the European Court of Human Rights (ECtHR) would be to have the lawyer-client relationship fully privileged, without exceptions, as it belongs to the core of fair trial in democratic societies. COM referred in this context to the Sakhnovskiy case³.

³ Judgment (Grand Chamber) of 2 November 2010. Point 97 reads as follows:
"97. An accused's right to communicate with his lawyer without the risk of being overheard by a third party is one of the basic requirements of a fair trial in a democratic society and follows from Article 6 § 3 (c) of the Convention (...). If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective (...)."

7. However, many delegations, while admitting that communication between the suspect or accused person and his lawyer, should as a general rule be confidential, argued that in exceptional circumstances, such as in the case of terrorism, it should be possible to derogate from this rule. In support of this argument, reference was made to the judgment in the Campbell case ⁴.
8. Thus, in exceptional, clearly defined circumstances (including notably cases of terrorism), it could be possible to derogate from the general rule that communication between the suspect or accused person and his lawyer should be confidential. Hence, Article 8 should, as a principle, also provide the possibility of making derogations to Article 7.

CATS is invited to confirm that derogations foreseen under Article 8 should also be possible in relation to the principle of confidentiality.

Issue b): Conditions for making derogations under Article 8

9. Article 8 provides conditions for making derogations. In general, many delegations considered that the Article was drafted in too strict terms. It was observed that according to the case-law of the ECtHR, a derogation to the right of access to a lawyer would only require that there would be "compelling reasons". Reference was made to the Salduz case ⁵.

⁴ Judgment of 25 March 1992. Point 48 reads as follows:
"48. The reading of a prisoner's mail to and from a lawyer, on the other hand, should only be permitted in exceptional circumstances when the authorities have reasonable cause to believe that the privilege is being abused in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature. (...)"

See also Erdem v. Germany, judgment of 5 July 2001, point 65:

"65. Nonetheless, the privilege that attaches to correspondence between prisoners and their lawyers constitutes a fundamental right of the individual and directly affects the rights of the defence. For that reason, as the Court has stated above, that rule may only be derogated from in exceptional cases and on condition that adequate and sufficient safeguards against abuse are in place(...)."

⁵ Judgment (Grand Chamber) of 27 November 2008. In point 55 one can read as follows:
"55. [...] Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction - whatever its justification - must not unduly prejudice the rights of the accused under Article 6 [...]"

10. Some delegations suggested that conditions (a)-(e) set out in Article 8 could simply be replaced by a mere reference to "compelling reasons". COM replied however that this was precisely a point where the Directive could provide added value to the 1950 ECHR and the case-law of the ECtHR.
11. The Presidency shares the view of the delegations that the Article should be drafted in more flexible terms. The Presidency sees however also merit in the considerations of COM that it would be good to provide added value in this context.
12. Therefore, the Presidency suggests to maintain the principle of setting conditions for derogations in Article 8. However, it seems appropriate to make these conditions more flexible. The Presidency presents at this stage the following two suggestions in this regard:
13. Firstly, in Article 8(a), the "compelling reasons" should not be narrowed down exclusively to "the urgent need to avert serious adverse consequences for the life or physical integrity of a person", as proposed in the COM proposal. This ground could, however, be left as an example in the text, to stress an exceptional and overriding nature of circumstances which may justify a derogation in a given case.
14. Secondly, the Presidency suggests to adapt Article 8(b), which provides that the derogations "shall not be based exclusively on the type or seriousness of the alleged offence". Indeed, whilst the type of the offence itself may not always justify a derogation, its seriousness could be taken into account as an appropriate criterion. Therefore the Presidency suggests deleting the reference to "seriousness of the alleged offence" in this condition.

CATS is invited to confirm that the conditions for making derogations should remain strict, but more flexible than in the current draft; 'compelling reasons' should not be interpreted narrowly, and 'seriousness of the alleged offence' could be an appropriate criterion for making derogations.

Issue c): Use of "judicial authority" in Article 8

15. According to the proposal of COM, "*Derogations may only be authorised by a duly reasoned decision taken on a case-by-case basis by a judicial authority.*"
16. Various delegations suggested to replace "judicial authority" by "competent authority", so as to allow more flexibility.
17. The Presidency suggests a compromise solution consisting of giving the competence in question not only to judicial authorities, but also to other competent non-judicial authorities.

CATS is invited to confirm that a decision to authorise a derogation may also be taken by a competent authority other than a judicial authority.

B : Use of evidence (Article 10 - Persons other than suspects and accused persons, Article 13 - Remedies)

18. According to Article 10(2), Member States shall ensure that any statement made by a person who is heard by the police or other enforcement authority in the context of criminal proceedings while he has not the capacity of a suspect or accused person (such as a witness), may not be used against this person when he subsequently (e.g. because of the statement made as a witness) obtains such capacity.
19. Under the Directive, suspects and accused persons have a right to a lawyer, but other persons, such as witnesses, have not. Statements made by a witness may therefore not be used as evidence against that person when he becomes subsequently suspected or accused of a criminal act.

20. Many delegations posed questions in respect of the rule provided for in Article 10(2). They considered that this line of reasoning would only make sense in the case of abuse by the proceeding authorities. However, in situations when there would not be such abuse, the proceedings authorities should be free to use a statement made by a person other than a suspect or accused person (notably a witness) when this person becomes subsequently suspected or accused of a criminal act.
21. COM observed that following the considerations of the delegations would trigger questions whether in a particular situation the proceedings authorities acted in bad faith when they questioned a person - who later became a suspect or accused person - as a witness, without giving him the right of access to a lawyer.
22. The Presidency observes that Article 10(2) seems to create a “fair trial” rule that relates to the question of the admissibility of evidence, rather than to access to a lawyer. Hence, it must be considered, whether such rule should be inserted in the draft Directive, bearing in mind its objective, as defined in Article 1.

CATS is invited to answer following questions :

- **Does a prohibition under Article 10(2) to use any statement made by a person other than a suspect or accused person against him comply with the objective of the Directive?**
- **Taking into account the answer to the previous question, should the prohibition under Article 10(2) in principle remain in the Directive or should it be deleted?**
- **If Article 10(2) is in principle to be maintained, should the evidence ban be used only in the case of abuse by the proceeding authorities or – as the general rule – in all cases?**

Where the answers will imply modifications to be made to Article 10, they will be examined at a technical level by the Working Party.

23. In this connection, attention should also be paid to Article 13(3). According to this Article, *"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."*
24. Many delegations expressed doubts about the subjective scope of the evidence ban. The Commission's proposal comprises the statements of the suspect or accused person and other evidence, i.e. material evidence. Extending its scope to material evidence might undermine the efficacy of the criminal proceedings. For example, the ban could be used in respect of material evidence obtained, e.g. during a derogation period, by means of search and seizure. During the Working Party meeting of 26 July, many delegations observed that such an extensive interpretation of the evidence ban might not be in compliance with the objective of the draft Directive, as set out in Article 1.
25. For these reasons, the Presidency considers to confine the evidence ban provided for in the Article 13(3) only to the statements made by suspects or accused persons, but not to prohibit the use of other evidence.

CATS is invited to confirm that the scope of the evidence ban under Article 13(3) should be limited only to statements made by suspects or accused persons.

C : Article 11 - The right of access to a lawyer in European Arrest Warrant proceedings

26. Article 11 deals with the right of access to a lawyer in European Arrest Warrant proceedings. The Article not only clarifies the right to a lawyer in the executing State (see paragraphs 3-5 of Article 11) as provided under Article 11(2)⁶ of Framework Decision 2002/584/JHA, but it also adds the new right to an (assisting) lawyer in the issuing State (see paragraphs 3-5 of Article 11).
27. Some delegations expressed fears regarding any modification that would be made to the system of the European arrest warrant. According to these delegations, it would not be necessary to add anything to this system, which would work satisfactorily.
28. Other delegations felt that whilst the rules regarding the assistance of a lawyer in the executing State could be improved or clarified, it would not be necessary to add rules on legal assistance in the issuing State.
29. There were also delegations who could in principle agree to the proposed text.

CATS is therefore invited to indicate its preferred option on this matter:

- 1) No modification whatsoever should be made to the system of the European arrest warrant regarding the right to a lawyer in European arrest warrant proceedings. Article 11 of the proposed Directive should be deleted.**

⁶ Article 11(2) of Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (JO L 190, 18.7.2002, p. 1), provides as follows :

"Rights of a requested person

- 1. (...)*
- 2. A requested person who is arrested for the purpose of the execution of a European arrest warrant shall have a right to be assisted by a legal counsel and by an interpreter in accordance with the national law of the executing Member State."*

- 2) **The rules regarding the right to a lawyer in European arrest warrant proceedings in the executing State may be clarified, but no rules should be added regarding legal assistance in the issuing State. Work on Article 11(1) and (2) should be continued, Article 11(3), (4) and (5) should be deleted.**

- 3) **It is appropriate both to clarify the rules regarding the right to a lawyer in European arrest warrant proceedings in the executing State, and to add rules regarding legal assistance in the issuing State. The Working Party should continue its work on Article 11.**

D : Other strategic issues

Delegations are invited to address any other strategic issues, that are in their opinion of the special importance for the further course of the negotiations.

E : Final remarks

30. On the basis of the guidance to be provided by CATS, the Presidency will, where appropriate, make drafting suggestions to be discussed by the Working Party.

31. For ease of reference, delegations will find in the Annex to this note some drafting suggestions by the Presidency on Articles 8 and 13, as the text could result from the decision of CATS on these Articles along the suggestions by the Presidency mentioned above, it being understood that the technical drafting be left to the Working Party.

32. Where appropriate, CATS will be re-consulted on this file with a view to giving further guidance.

Drafting suggestions by the Presidency on Articles 8 and 13, as they could result from the decision of CATS on these Articles along the suggestions by the Presidency mentioned above, it being understood that the technical drafting of be left to the Working Party.

"Article 8

Derogations

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, Article 6 **and Article 7**. Any such derogation:

- (a) shall be justified by compelling reasons **such as** ~~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 on a case-by-case basis by a judicial authority **or another competent authority.**"

"Article 13

Remedies

1. Member States shall ensure that a person to whom Article 2 refers has an effective remedy in instances where his right of access to a lawyer has been breached.
 2. The remedy shall have the effect of placing the suspect or accused person in the same position in which he would have found himself had the breach not occurred.
 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."
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