COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 9 November 2011

OPINION

of the Secretariat

on

the Commission's Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

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

I. Introduction

1. On 8 November 2011, the LIBE Secretariat of the European Parliament invited the Council of Europe Secretariat to provide comments on the proposal for a Directive of the European Parliament and of the Council on the right to access to a lawyer in criminal proceedings and on the right to communicate upon arrest (document COM(2011)0326 of 8 June 2011). The following provisional observations respond to this request. It is however understood that this opinion may evolve as the discussion on the Directive proceeds.

2. The Council of Europe Secretariat is grateful for this opportunity to give comments on a draft legal instrument of the European Union that will directly influence the way in which the European Convention on Human Rights (ECHR) is applied by EU member states. This provisional opinion is based on the ECHR and the way it has been interpreted by the European Court of Human Rights (hereinafter "the Court") in its case-law, without prejudice to any interpretation given by the Court in future cases.

3. The Council of Europe Secretariat fully recognises the importance of minimum standards in procedural rights as a necessary precondition for mutual trust in the legal systems of EU member states. It is indeed our common goal to ensure the fairness of criminal proceedings all over Europe, and that new legal instruments are fully consistent with ECHR standards, not only with regard to the wording of the draft, but also as regards their implementation at domestic level. The present Directive is however not only important to safeguard the minimum standards for the right of access to a lawyer, but may also have the effect to protect persons from ill-treatment during detention.

4. As a general comment on the draft Directive, the Council of Europe Secretariat considers it desirable to have a provision in the substantive text of the document – rather than in the preamble - which requires the interpretation of the corresponding rights in accordance with the ECHR and the case-law of the Court and the clear identification of any standards which go beyond the ECHR. Moreover, as already indicated in our previous opinions on other instruments of the "Roadmap for strengthening the procedural rights of suspected and accused persons in criminal proceedings", we would like to recall that repeated reference to national law may affect the effectiveness of these instruments as regards the harmonisation of the legal systems of EU member states and, ultimately, the consistency of the rules with the ECHR standards as implemented in member states. Lastly, it is important to ensure consistency, as regards the scope of application and the standards applied, between the present draft directive and any other instrument contained in the "Roadmap".

II. Comments on the questions posed by the European Parliament

Scope of the Directive and in particular: - starting moment in which the presence of the lawyer should be granted: according to the ECHR and the ECtHR case law: the right to access to a lawyer should be granted as from the moment the person has been made aware that he is suspected or accused of having committed a criminal offence or as from the moment the person is deprived of liberty (the latest being the position of the CNS) or from when?

5. In its recent judgment of *Nechiporuk and Yonkalo v. Ukraine* (no. 42310/04, judgment of 21 April 2011, para. 262), the Court held that:

> "[…] although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial (see *Krombach v. France*, no. 29731/96, § 89, ECHR 2001-II). As a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right (see *Salduz v. Turkey* [GC], no. 36391/02, § 55, 27 November 2008). The right to defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction (ibid)."

6. It follows from the above that the right to access to a lawyer exists from the moment when Article 6 ECHR is applicable, *i.e.* when a person can be considered "charged with a criminal offence" within the meaning of Article 6 (3) ECHR. This is the moment when that person has been made aware by public authorities that he is suspected or accused of having committed a criminal offence. In practice, this will often coincide with a deprivation of liberty, but the latter is not a *conditio sine qua non* (see the cases of *Brusco v. France*, no. 1466/07, judgment of 14 October 2010, para. 47; and *Nechiporuk and Yonkalo v. Ukraine*, cited above, para. 264). Conversely, the Directive should equally apply from the moment a person is deprived of his liberty, whether or not he is to undergo interrogations. .

- should the situation in which the suspect/accused voluntarily presents himself in order to be questioned by law enforcement authorities or judicial authorities be covered?

7. The Secretariat of the Council of Europe is not aware of any case-law by the Court covering this issue. Applying the principles which the Court has established, it should depend on whether this person is to be considered as charged with a criminal offence within the meaning of Article 6 (3) ECHR, despite the voluntary origin of its interrogation. Ultimately, the question will depend on the circumstances of the case. However, the voluntary presentation to the enforcement authorities should not be

considered automatically as an implicit waiver of that right and thus lead to its exclusion.[1]

- to what activities should the lawyer be present: should the access to a lawyer be granted during all evidence gathering acts (for example fingerprints, breathalyser)? Article 3.2 of COM's proposal stipulates that "Member States shall ensure that suspects and accused persons are granted access to a lawyer as soon as possible and in any event 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 the evidence." Is this in line with the ECHR and the ECtHR case law?

8. The leading case in this context, the case of *Salduz v. Turkey* ([GC], no. 36391/02, judgment of 27 November 2008), is about the presence of a lawyer during the first interrogation of a suspect. Its rationale is mainly the protection of an accused against ill-treatment and uninformed self-incrimination. What comes after that first interrogation is a matter to be considered in light of the general rights to effective legal assistance (see Article 6 (3) (c) ECHR), to adversarial proceedings and to a fair trial. It will therefore often have to be decided on a case-by-case basis. For a better understanding, one should basically distinguish access to a lawyer from the continued assistance by a lawyer.

- what type of crime should be covered by the Directive (all crimes or some could be out?)

9. There exists yet hardly any case-law by the Court in this respect, for the simple reason that in nearly all cases the applicants had already been arrested. Arrest presupposes an offence of a seriousness which would justify the deprivation of liberty. On the other hand, the Court noted in *Zaichenko v. Russia* (no. 39660/02, judgment of 18 February 2010, para. 39), a case concerning a road-check based on the suspicion of theft:

> "The general requirements of fairness contained in Article 6 apply to all criminal proceedings, irrespective of the type of offence at issue."

Pending further clarifications of this issue by the Court, it is safe to assume that in any event the Directive should always apply if the offence the applicant is charged with – irrespective of its classification as an administrative or criminal offence – is one for which deprivation of liberty is a possible sanction (see, for example, the case of *Dayanan v. Turkey*, no. 7377/03, judgment of 13 October 2009, para. 31).

[1] See generally on the requirements for a waiver of the guarantees for a fair trial: *Sharkunov and Mezentsev v. Russia*, no. 75530/01, judgment of 10 June 2010, para. 106.

Should the right of access to a lawyer be granted always in person or could we take in account the possibility of other means of communication between the lawyer and the suspected/accused person, such as telephone or videoconference?

10. To the extent that the case-law requires the presence of a lawyer during an interrogation, telephone and videoconference can hardly be seen as a sufficient substitution. As the Committee for the Prevention of Torture of the Council of Europe has pointed out in a situation in which "duty lawyers" were reluctant to attend the police station outside business hours and where it was common practice that they provided advice to detainees only by telephone except in cases of serious crime such as rape or murder:

> " […] In the CPT's experience, it is during the period immediately following the deprivation of liberty that the risk of intimidation and ill-treatment is greatest. The possibility for persons taken into police custody to have access to a lawyer during that period will have a dissuasive effect on those minded to ill-treat detained persons; moreover, a lawyer is well placed to take appropriate action if ill-treatment actually occurs. In the Committee's view, for this right to act as an effective safeguard against ill-treatment, it should include the lawyer's presence at the police station, preferably also during questioning. […]"[2]

If a lawyer is prevented from attending, authorities should rather arrange for a replacement. In other contexts, the Court has considered the appointment of another lawyer by the authorities as a means to secure the rights of the accused under Article 6 ECHR (see, for example, *Sevastyanov v. Russia*, no. 37024/02, judgment of 22 April 2010, para. 73).

Should the lawyer be entitled to check the conditions in which the suspect or accused persons is detained according to the ECHR and the ECtHR case law?

11. To the extent that ill-treatment of a person in pre-trial detention is involved, this is a matter relevant under Article 3 ECHR. Access to a lawyer is one of the means through which such ill-treatment can be prevented or unveiled and stopped. In *Salduz v. Turkey* (cited above, para. 54), the Court stressed the vulnerable position of an accused person in pre-trial detention and also noted the recommendations of the Committee for the Prevention of Torture of the Council of Europe, in which the latter stated that the right of a detainee to have access to legal advice is a fundamental safeguard against ill-treatment. On the other hand, the Court has not found a general entitlement of access to a defence counsel under Article 6 ECHR to check detention conditions. However, the acknowledged entitlement of the accused to regular contacts with his or her lawyer for the sake of ensuring an effective defence may have the same effect.

[2] Report of the CPT to the United Kingdom Government on the visit to the Bailiwick of Jersey (CPT/Inf(2010)35), para. 35.

Would derogations in cases of exceptional circumstances to the confidentiality of meetings, correspondence, telephone conversation and other forms of communication between the suspect and the lawyer be compliant with the ECHR and the ECtHR case law? What could be considered as exceptional circumstances?

12. In *Sakhnovskiy v. Russia* (no. 21272/03, judgment of 2 November 2010 [GC], para. 97), the Grand Chamber of the Court stated:

> "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 (see *Castravet v. Moldova*, no. 23393/05, § 49, 13 March 2007). 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 (see *inter alia* the *Artico* judgment, cited above, § 33)."

In *Lanz v. Austria* (no. 24430/94, judgment of 31 January 2002, para. 52), the Court held that surveillance by the investigating judge of the contacts of a detainee with his defence counsel was a serious interference with the former's defence rights and very weighty reasons should be given for its justification. Those reasons must however go beyond the reasons for the pre-trial detention: where the domestic courts essentially relied on a risk of collusion and this already formed the very reason for which detention on remand had been ordered, the Court considered that further arguments were needed to justify the additional measure of restriction on contacts with the accused person's defence counsel.

13. Note in this respect also the recommendation of the Committee of Ministers to Member States of the Council of Europe on the European Prison Rules (Rec (2006)2), adopted on 11 January 2006 at the 952nd meeting of the Ministers' Deputies, which also applies to persons who have been remanded in custody by a judicial authority:

> "23.1 All prisoners are entitled to legal advice, and the prison authorities shall provide them with reasonable facilities for gaining access to such advice.
>
> 23.2 Prisoners may consult on any legal matter with a legal adviser of their own choice and at their own expense. […]
>
> 23.5 A judicial authority may in exceptional circumstances authorise restrictions on such confidentiality to prevent serious crime or major breaches of prison safety and security."

What is the opinion of the CoE regarding the provision of the directive which gives the right to a person subject to the proceedings pursuant to the Council Framework Decision on the European Arrest Warrant to have the right of access to a lawyer in the issuing Member State?

14. The provision concerned by this question is Article 11 (4) of the draft Directive which addresses the right to a lawyer in the state which issues the European Arrest Warrant (EAW). The Council of Europe Secretariat suggests that the provision is phrased

in a slightly different way, as its current wording ("The lawyer of this person … shall have the right…") grants the right to the lawyer as opposed to the person directly concerned by the EAW.

15. As to the content of the provision, it should be noted that the Court has already considered applications regarding the EAW, such as the decision of *Stapleton v. Ireland* (no. 56588/07, decision of 4 May 2010) which concerned the extradition of the applicant under the EAW from Ireland to the United Kingdom. However, that decision was only addressed against the executing state (Ireland), and not against the issuing state (the United Kingdom). Consequently, the Court did not consider the rights of the applicant under Article 6 ECHR in the issuing state. The Court only discussed whether an extradition to the issuing state would have exceptionally raised an issue under Article 6 ECHR for the executing state, which would have been the case if the applicant had risked suffering a flagrant denial of a fair trial in the issuing state (see *Stapleton v. Ireland*, para. 25).

16. In order to properly assess the compatibility of Article 11 (4) of the draft Directive with the Convention, one would perhaps have to wait for further decisions by the Court on the EAW addressed against both the issuing and the executing state which are currently pending (see, for example, the case of *Pianese v. Italy and the Netherland*s, no. 14929/08, communicated on 15 June 2010).

17. The Council of Europe Secretariat however suggests to rethink the wording of Article 11 (4) of the draft Directive ("limited to what is needed") which appears unduly restrictive, and not to limit the effective exercise of the applicant's rights to the executing member state, but also to the issuing state.

Are derogations provided for in Article 8 compliant with the ECHR and with ECtHR case law?

18. In referring to "compelling reasons", letter (a) is in principle in accordance with the jurisprudence of the Court in *Salduz v. Turkey*. In order to be in line with the Court's case-law, Article 8 (a) should however refer to "compelling reasons in the light of the particular circumstances" as it found in para. 55 of the *Salduz* judgment:

> " […] the Court finds that in order for the right to a fair trial to remain sufficiently "practical and effective" (see paragraph 51 above) Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated **in the light of the particular circumstances** of each case that there are compelling reasons to restrict this right." [Emphasis added]

The requirement to assess the existence of compelling reasons "in the light of the particular circumstances of the case" is also confirmed by recent jurisprudence of

national courts, such as the French Cour de Cassation[3]. The fact that the last sentence of Article 8 refers to "a duly reasoned decision taken on a case-by-case basis by a judicial authority" may not fully compensate for this departure from the *Salduz* standard, as it appears to separate these two components (see also their appearance in different paragraphs in the preamble, paras. 32 and 33). As it appears that these two components should be kept together, the Council of Europe Secretariat thus proposes to either include in letter a) the words "in the light of the particular circumstances of the case" or move the last sentence to a different place, e.g. at the beginning of the second sentence.

19. By qualifying the compelling reasons ("pertaining to the urgent need…"), Article 8 (a) however limits the scope of what could be considered compelling reasons, thereby setting a different, possibly higher standard than *Salduz*.

20. On the other hand, the formulations in Article 8 (c) and (d) appear laxer than what would fit in the context of "compelling reasons". In particular, it would be desirable if Article 8 (c) would mention explicitly the possibility to appoint an alternative lawyer, as does para. 32 of the preamble. Appointing another lawyer is also in line with the view of the Committee for the Prevention of Torture of the Council of Europe, which stated (also cited by the Court in the judgment of *Salduz v. Turkey*, cited above, para. 39):

> "The CPT recognises that in order to protect the legitimate interests of the police investigation, it may exceptionally be necessary to delay for a certain period a detained person's access to a lawyer of his choice; however, in such cases, access to another independent lawyer should be arranged."[4]

What is the opinion of the CoE on Articles 10.2 and 13.3?

21. The Grand Chamber of the Court has stated in the *Salduz v. Turkey* judgment (cited above, para. 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 (see, mutatis mutandis, Magee, cited above, § 44). The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction."

In light of this passage[5], Article 10 (2) seems to duly reflect that jurisprudence. The last sentence of Article 13 (3), on the other hand, appears to be somewhat circular in the light of the above-cited quotation of the *Salduz* judgment: if there is in principle an irrefutable

[3] Judgments nos. 5699(10-82.902), 5700 (10-82.306) and 5701 (10-82.051) of 19 October 2010 (Chambre criminelle) which state: "[…] sauf exceptions justifiées par des raisons impérieuses tenant **aux circonstances particulières** de l'espèce, et non à la seule nature du crime ou délit reproché […]") (Emphasis added)

[4] Report of the CPT after its visit to Turkey in July 2000, 8 November 2001 (CPT/Inf(2001)25), para. 61.

[5] On this issue, see also the cases of *Pavlenko v. Russia* (no.42371/02, judgment of 1 April 2010 para. 118), *Pishchalnikov v. Russia* (no. 7025/04, judgment of 24 September 2009, paras. 85 and 91) and *Lopata v. Russia* (no. 72250/01, 13 July 2010, para. 144).

presumption that the use of evidence will prejudice the right of access to a lawyer, it is difficult to apply a provision which prohibits the use of such evidence unless defence rights are not prejudiced. In this regard, it should be mentioned that the corresponding paragraph in the preamble (para. 17: “Derogations […] should never lead to statements […] to be used to secure […] conviction”) appears to be stronger than Article 13 (3). For the sake of consistency, it is suggested that para. 17 be amended as to also cover breaches of the right of access to a lawyer (as opposed to merely referring to authorised derogations from that right).