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NOTE

from : Presidency
to : Working Party on Cooperation in Criminal Matters

No. Prop. : 11497/11 DROIPEN 61 COPEN 152 CODEC 1018
No. Prev. doc. : 15120/11 DROIPEN 112 COPEN 265 CODEC 1604

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
- The right of access to a lawyer in European Arrest Warrant proceedings

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 ("C1 - without legal aid + 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.
2. The Working Party on Substantive Criminal Law discussed the draft Directive during meetings on 4/5 and 26 July, 16 and 27/28 September, and on 11/12 October 2011.

¹ 11497/11 + ADD 1 REV 1 + ADD 2 REV 1.

² OJ C 295, 4.12.2009, p. 1. The first measure ("A", on interpretation and translation) was adopted on 20 October 2010 (OJ 280, 26.10.2010, p.1). The second measure ("B", on a letter of rights) is currently under discussion in the ordinary legislative procedure (12564/10).

3. CATS discussed certain specific issues of the draft Directive on 6 September and on 7 October 2011.
4. CATS decided to forward certain issues regarding the right of access to a lawyer during European arrest warrant proceedings to the Working Party on Cooperation in Criminal Matters, with a view to obtaining guidance from EAW experts.

Context

5. According to Article 1, the draft Directive lays down minimum 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 States³ ("European arrest warrant proceedings") to have access to a lawyer and to have a third party informed of the deprivation of liberty.
6. Article 4 of the draft Directive sets out the scope of the right of access to a lawyer in criminal proceedings, whereas Article 11(2) sets out this scope in respect of European arrest warrant proceedings.
7. Article 4, which is still under discussion in the Working Party on Substantive Criminal Law and on which no agreement has yet been reached, currently reads as follows:

³ OJ L 190, 18.7.2002, p. 1.

Article 4

Scope of the right of access to a lawyer

1. *The suspect or accused person shall be granted access to a lawyer in such a time and manner as to allow him to exercise his rights of defence effectively.*
- 1a. *The suspect or accused person shall have the right to communicate with the lawyer representing him.* ⁴
2. *The suspect or accused person shall have the right for his lawyer to be present when he is officially interviewed. The suspect or accused person shall have the right for his lawyer to participate during the interview which shall be recorded in accordance with national law.* ⁵
3. *[The suspect or accused person shall have the right for his lawyer to be present at any other investigative or evidence-gathering act at which 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.]*
4. *(deleted)* ⁶
5. *The duration and frequency of communications between the suspect or accused person and his lawyer shall not be limited in a way that may prejudice the exercise of his rights of defence.*

⁴ Paragraph to be read in conjunction with draft recital 11 (not yet agreed);
"(11) The right of the suspect or accused person to communicate with his lawyer includes the right of the person concerned to meet his lawyer, including where the suspect or accused person is deprived of liberty. The duration and frequency of any such meetings depend on the circumstances of every proceeding, notably on the complexity of the case and the procedural steps applicable."

⁵ Paragraph to be read in conjunction with recital 11a (not yet agreed):
"(11a) When the lawyer participates during an interview of the investigating authorities with the suspect or accused person, he may ask questions, request clarification and make statements, which shall be recorded in accordance with national law."

⁶ Reference is made to the first sentence of recital 11.

8. Article 11 of the Directive as proposed by the Commission not only clarifies, in paragraphs 1 and 2, the right to a lawyer in the executing State, as provided for in Article 11 of the EAW Framework Decision, but also adds in its paragraphs 3-5 a new right to a lawyer in the issuing State.
9. During discussions in the Working Party and in CATS, a large majority of Member States stated that they were reluctant to making substantial modifications to the good working EAW Framework Decision, and that they hence did not want to introduce rules to the EAW scheme on the right of access to a lawyer in the issuing State. The point was made that the right of access to a lawyer is provided anyway during criminal proceedings in the issuing State and that thus no specific rules on European arrest warrant proceedings would be needed.
10. In view of the large opposition by Member States, the Presidency decided to delete paragraphs 3-5 of Article 11 from the text of the draft Directive. No further amendments were introduced to Article 11.
11. Therefore, Article 11, paragraphs 1 and 2, still reads as in the original Commission proposal:

Article 11

The right of access to a lawyer in European Arrest Warrant proceedings

1. *Member States shall ensure that any person subject to proceedings pursuant to Council Framework Decision 2002/584/JHA has the right of access to a lawyer promptly upon arrest pursuant to the European Arrest Warrant in the executing Member State.*

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 with⁷ 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.⁸*

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.

⁷ The word "meet" was originally also used in Article 4(2). In that context, Member States agreed to include also other forms of communication with the lawyer, and hence the word "meet" was replaced by the word "communicate". An explanation of the term "communicate" has been included in the preamble (recital 11, see above).

⁸ A similar right was envisaged in Article 4(4). In that context, a great majority of Member States decided that it should be deleted as it was considered to go beyond the scope of the Directive.

Issue

12. It seems appropriate to align Article 11(2) with the text of Article 4, once the discussions on that latter Article have been finalised.
13. However, during the discussions in the Working Party on Substantive Criminal Law, it was pointed out that the scope of the right of access to a lawyer should be different in criminal proceedings from the scope of the same right in European arrest warrant proceedings. The differences would stem from the specificities of the latter proceedings, which are not aimed at establishing criminal responsibility, but have "only" as purpose to obtain the surrender of a person in view of conducting a criminal prosecution or executing a custodial sentence or detention order.
14. To some extent, these differences have already be taken into account in the Commission proposal. While Article 11(2) provides for similar rights as those envisaged in Article 4 (paragraphs 1, 1a, 2 and 5), it does not contain a similar provision as the one set out in Article 4(3), concerning the right that the lawyer may be present at investigative or evidence gathering act. As regards Article 4(4), concerning the issue of the lawyer checking the conditions of detention, it should be pointed out that that provision was deleted after opposition voiced by a large majority of Member States, who felt that it would go beyond the aim of the directive.

Questions

15. In view of the above, the Presidency would like EAW experts to give guidance on the following questions:
 - a. **Does Article 11(2) of the draft Directive as it currently stands provide for rights that are practicable in European arrest warrant proceedings?**
 - b. **Which modifications, if any, should be made to Article 11(2)?**