

Opinion of the European Economic and Social Committee 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) 326 final — 2011/0154 (COD)

(2012/C 43/11)

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On 1 September 2011 the Council decided to consult the European Economic and Social Committee, under Article 304 of the Treaty on the Functioning of the European Union, 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

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The Section for Employment, Social Affairs and Citizenship, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 8 November 2011.

At its 476th plenary session of 7 and 8 December 2011 (meeting of 7 December), the European Economic and Social Committee adopted the following opinion by 181 votes to 3, with 10 abstentions.

1. Conclusions and recommendations

1.1 The EESC very much welcomes the principle of a directive of this kind. Adopting a legislative text that includes the most recent case-law from the European Court of Human Rights (ECHR) would represent an unquestionable advance in terms of both the requirement for legal certainty and guaranteeing these rights in the different Member States.

1.2 The active assistance of a freely-chosen lawyer from the beginning of criminal proceedings is the guarantee of a fair trial. The EESC shares the Commission's concern as to how to guarantee the effectiveness of this right.

1.3 For this very reason and because the principles established in the proposal for a directive seem ambitious, the EESC is concerned about the difficulties their implementation will entail.

1.4 The EESC deeply regrets the postponement of the measure on legal aid which was linked to the right of access to a lawyer in the Council Roadmap, as this may impact the effectiveness of the rights laid down.

1.5 The proposal for a directive is deemed to be ambitious, first and foremost, because it extends the right to a lawyer to suspects.

1.5.1 Whilst the principle must be that the rights derive from the deprivation of liberty, the EESC recognises that, by virtue of the principle of fairness that governs the search for truth, any persons heard must be accompanied by a lawyer as soon as criminal proceedings are brought against them.

1.5.2 Thus it would appear logical that, by virtue of the right not to self-incriminate, the person against whom proceedings

are brought has access to a lawyer, without whose presence their statements alone cannot serve as a basis for securing their conviction.

1.5.3 In this respect, the EESC would be in favour of changing the terminology to replace 'suspect' with 'person against whom proceedings are brought', since this wording has the advantage of reducing the degree of uncertainty and subjectivity.

1.6 The proposal for a directive is also deemed ambitious in that it extends the right of access to a lawyer who would play an active role on behalf of the person being assisted, particularly during questioning.

1.7 The EESC believes that the right of access to a lawyer, as provided for in the proposal for a directive, is compatible with the requirements of the investigation and, by helping to guarantee the admissibility of the evidence gathered, may even facilitate the smooth progress of the criminal procedure, provided that certain conditions are respected.

1.7.1 Provided that the directive, on the one hand:

— provides for the right for the lawyer to attend any investigative or evidence-gathering act for which the presence of the person concerned is required only when necessary for protecting the rights of the defence;

— provides for a reasonable period of time, beyond which the investigative services may act without the presence of a lawyer. However, justification must be provided that due notice was given;

- provides that each Member State establish reasonable periods of time for the duration and frequency of the talks between lawyers and their clients, *a minima* before each hearing;
- provides that each Member State may implement procedures derogating from certain established principles during both the investigation and the proceedings, particularly when relatively minor acts, relating to commonly-occurring forms of crime, are neither questioned nor questionable;
- points out that lawyers are bound by the confidentiality of the investigation;
- provides for the ‘right to request notification of’ a third party or the consulate instead of ‘communicate with’.

1.7.1.1 The investigating authorities must necessarily retain control of the duration and course of the investigations.

1.7.1.2 In any event, the EESC deems it necessary to provide for a derogation in the event of a foreseeable impediment to the smooth progress of the investigation.

1.7.2 Provided, however, that the States allow for creating emergency structures permitting immediate access to a lawyer in the event of the lawyer of choice not being available immediately.

1.8 Finally, with a view to ensuring balance, the EESC calls on the Council to set guidelines for greater protection of victims’ rights in the light of the new rights granted to the defence. Victims should be able to receive help from a lawyer when they are heard by investigating services, especially when they have to face the accused, who may receive such help.

2. The proposal for a directive and its background

2.1 The Council has recognised that, to date, not enough has been done at European level to safeguard the fundamental rights of individuals in criminal proceedings. On 30 November 2009, the Justice Council adopted a resolution on a Roadmap for reinforcing these rights. This Roadmap, appended to the Stockholm Programme, called on the Commission to put forward proposals on the following measures:

- (A) right to translation and interpretation;
- (B) information about rights and the charges;
- (C) right to legal advice and legal aid;
- (D) communication with relatives, employers and the consular authorities;

- (E) special guarantees for suspected and accused persons who are vulnerable.

2.2 The first step is Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation (measure A).

2.3 The second step will be a Directive, currently under negotiation on the basis of a Commission proposal, on the right to information ⁽¹⁾, which will set out minimum rules on the right to receive information on one’s rights, and on the charges, as well as on the right of access to the case file (measure B).

2.4 This proposal for a directive relates to the third measure in this legislative package. It reflects the Commission’s choice to deal with the right to legal advice and the right to communicate (D) together. By contrast, legal aid, which was linked to the right to legal advice in the Council Roadmap, has been postponed to a later date (2013). As with the previous measures, the Commission has decided to extend these rights to persons arrested under a European arrest warrant.

2.5 This proposal for a directive aims to ensure implementation of the EU Charter of Fundamental Rights – and particularly Articles 4, 6, and 47 – on the basis of Articles 3 and 6 of the European Convention of Human Rights and Fundamental Freedoms relating particularly to the prohibition of ill treatment and the right of access to a lawyer, as they are interpreted by the ECHR.

2.6 It makes provision for all suspects and accused persons to have access to a lawyer as quickly as possible. Irrespective of any deprivation of liberty, access to a lawyer must be granted upon questioning (Article 3).

2.6.1 The lawyer plays an active part (questions, statements) in the questioning and hearings and has the right to attend any investigative or evidence-gathering act for which the presence of the suspect or accused person is expressly requested or authorised, unless the evidence is liable to be altered, removed or destroyed because of the time that has elapsed before the lawyer arrives. The lawyer has access to the place where the person is being detained to check the detention conditions (Article 4).

2.7 The proposal also provides for the right to communicate with a third party or the consulate following arrest (Articles 5 and 6) so as to inform them of the detention.

⁽¹⁾ OJ C 54, 19.2.2011, p. 48-50.

2.8 Derogation from the rights set out in the proposal for a directive (Article 8) is only possible in exceptional circumstances. The decision, taken by a legal authority, must be reached *in concreto* and cannot be based exclusively on the seriousness of the offence.

3. General comments

3.1 The EESC welcomes the policy shift contained in the Roadmap adopted by the Council on 30 November 2009 which seeks to strengthen fundamental rights in the context of criminal proceedings.

3.2 This proposal for a directive is part of the ongoing ECHR case-law advances and whilst it sets out *a minima* rules – since Member States are free to go further – it is actually aimed at a top-down harmonisation of national criminal procedures.

3.3 National legislations still offer very varying levels of protection of defence rights. Defining common rules applicable throughout the Union is essential for establishing a common rights framework and strengthening mutual trust between national judicial authorities. The EESC attaches particular importance to achieving these objectives, which are both a necessary condition for and consequence of the free movement of persons.

3.4 The EESC also emphasises the urgency of reducing the number of cases blocking up the ECHR and which result in financial penalties for the States.

3.5 However, the EESC would point out that such rules can only be applied and fully implemented if they take account of the differences between the Member States' traditions and legal systems (accusatorial or inquisitorial systems) in accordance with Article 82.2 of the Treaty on the Functioning of the European Union. It believes that this aspect should be examined in greater detail.

3.6 On the method and legislative timetable

3.6.1 The EESC is not convinced about the added value to be derived from linking the right to legal advice to the right to communicate with a third party. The latter does not, properly speaking, pertain to the protection of defence rights.

3.6.2 By contrast, the EESC regrets that the right to legal advice:

- has not been linked to the right to information in the context of criminal proceedings (B)
- should be treated separately from legal aid, which was linked to it in the Council Roadmap.

3.6.3 Whilst the EESC understands the reasons for deferring the issue of legal aid, it questions the Commission's choice of

establishing the principles before considering the financial resources needed for their implementation. Although the financial aspect cannot, in itself, justify non-compliance with Article 6 of the European Convention of Human Rights and Fundamental Freedoms – as interpreted by the ECHR – there is nevertheless a risk that the effectiveness of the rights enshrined therein may be impaired.

3.6.4 The EESC is particularly concerned by the fact that the impact study accompanying the proposal for a directive seems to underestimate the costs involved in implementing such a directive.

3.6.5 In particular, the EESC is wondering about the resources for financing access to two lawyers under a European arrest warrant (one in the issuing country and the other in the executing country), even though it does not question the justification.

3.7 Substance

3.7.1 Right of access to a lawyer extended to suspects (Articles 2 and 3)

3.7.1.1 The main contribution of the proposal for a directive is to extend the right of access to a lawyer to suspects.

3.7.1.2 There are often contradictions in the ways in which recent developments in ECHR case law are currently being interpreted; the EESC feels that access to a lawyer must be understood to apply from the time when a person is deprived of their liberty.

3.7.1.3 The only exception would be when proceedings were brought against the person being heard who thus, in implementing the principle of fairness in seeking out the truth, could no longer be heard as merely a witness and has the right to be assisted by a lawyer.

3.7.1.4 This approach would seem to be in line with the most recent developments in case law.

3.7.2 Substance of the right of access to a lawyer (Article 4)

3.7.2.1 Active participation of the lawyer during questioning (Article 4(2))

3.7.2.1.1 The EESC is aware of the fact that the proposal for a directive places emphasis on the effectiveness of the presence of a lawyer who may raise questions, request clarifications and make statements during questioning and hearings. As regards the particular characteristics of the different legal systems, the EESC feels that the conditions for exercising these rights could be regulated by each Member State.

3.7.2.1.2 It considers that it would be helpful also to provide lawyers with the option of requesting that their comments be appended to the record of the questioning in order to avoid any difficulties with the investigating authorities.

3.7.2.1.3 However, in the case of suspects – if the term ‘suspect’ is retained – the EESC points out that the assistance of the lawyer will run into practical difficulties, particularly as regards submitting the dossier in real time ⁽²⁾. In fact, for the range of most commonly-committed offences, the investigating authorities do not have a file drawn up before the suspect is taken in for questioning.

3.7.2.2 Lawyer’s right to attend any investigative or evidence-gathering act in the presence of the defendant (Article 4(3))

3.7.2.2.1 Whilst this right is an unquestionable advance in terms of protecting defence rights, the EESC nevertheless believes that a distinction should be made between the types of measures. The defendant must be able to call on a lawyer for assistance in the event of a search.

3.7.2.2.2 However, in the case of technical and scientific measures (fingerprints, taking body samples, etc.), for which the lawyer has no special skills, the EESC believes that such a right would have no added value. A form signed by the person informing them of the consequences of their refusal should be enough.

3.7.2.2.3 The EESC is nevertheless aware of the constraints such a right could impose on the course of the investigation. It believes that it is fundamental not to jeopardise the smooth progress of the investigation. Evidence should be collected as quickly as possible in the interests of the suspects themselves. The EESC suggests that the directive set a time limit beyond which the investigating authorities could act despite the absence of a lawyer, in which case evidence must be provided that due notice was given.

3.7.2.2.4 In certain cases only where the fairness of the procedure cannot be compromised, the EESC considers that it could be left to the national jurisdictions to decide on the admissibility of evidence obtained without the presence of a lawyer.

3.7.2.3 Talks between lawyers and their clients (Article 4(5))

3.7.2.3.1 Whilst there must be sufficient talks with the lawyer in terms of duration and frequency, the EESC feels

⁽²⁾ Article 7 of the proposal for a directive concerning the right to information in the context of criminal proceedings stipulates that any suspect or accused person or his/her lawyer has access to the case file.

that the absence of any restriction other than ‘prejudicing the exercise of rights of defence’, which is a vague and subjective concept, will be a source of dispute between lawyers and the police services.

3.7.2.3.2 Indeed, the EESC has questions about the length of time needed to exercise these rights (lawyer’s opinion, effective presence, familiarisation with the file, interview with the client, attendance during questioning and certain investigations, etc.) in the context of an investigation restricted to a time-frame that has become too short to allow it to be effective.

3.7.2.3.3 The EESC considers it necessary to make provision for each Member State to establish a reasonable period for the duration and frequency of talks between lawyers and clients to avoid jeopardising the smooth course of the investigation whilst ensuring that these rights can be effectively exercised. It believes that these talks should take place at least before each new session of questioning.

3.7.2.4 Detention conditions (Article 4(4))

3.7.2.4.1 The impact of detention conditions on a person deprived of their liberty requires no proof. For obvious reasons relating to human dignity, the EESC stresses the urgency of devoting the necessary resources to improving these conditions. The EESC feels that, whilst it is not part of a lawyer’s duty to ‘check’ the detention conditions of the person in question, it might, nevertheless, be envisaged that the lawyers could ‘check up’ ⁽³⁾ on the conditions and ask for their comments to be recorded. The EESC proposes making it clear that a lawyer should have access as quickly as possible to the place of detention.

3.7.2.5 Principle of free choice of the lawyer

3.7.2.5.1 The right of access to a lawyer cannot be dissociated from its corollary, the principle of the free choice of lawyer, pursuant to Article 6.3 c) of the European Convention of Human Rights. Having noted that the proposal for a directive makes no reference to this, the EESC proposes reiterating this principle. A derogation might be provided for in cases of terrorism and organised crime at the request of the judicial authority; the lawyer could then be appointed by the relevant professional body.

3.7.2.5.2 In order to apply the principle of freely choosing a lawyer, the future instrument governing legal aid must make provision for all European lawyers to be able to have their services paid for by legal aid.

⁽³⁾ Term which most faithfully translates ‘to check up’.

3.7.2.5.3 In order to guarantee the effectiveness of the rights established by the directive, the EESC calls on the Member States to give urgent consideration to setting up emergency structures making it possible to have immediate access to a lawyer in the event of the lawyer of choice not being immediately available.

3.7.2.6 Confidentiality of the investigation

3.7.2.6.1 The EESC wishes to point out that lawyers are bound by the confidentiality of the investigation. The EESC believes that this obligation will help to guarantee that extending the rights established in the proposal for a directive will not jeopardise the smooth progress of the investigation.

3.7.3 Right to communicate with a third party (Articles 5 and 6)

3.7.3.1 The EESC recognises the importance of ensuring that third parties are informed, but is concerned to prevent the risks that communicating directly might have on the investigation, and thus advises the following wording: 'Right to request notification of' or 'Request to notify' a third party or the person's consulate.

3.7.4 Scope (Article 2) and derogations (Article 8)

3.7.4.1 Fearing that excessive formality in criminal proceedings might jeopardise the effectiveness of the investigation, the EESC considers it necessary to allow each Member State the option of implementing procedures derogating from certain established principles during both the investigation and the proceedings, particularly when relatively minor acts, relating to commonly-committed offences, are neither questioned nor questionable.

3.7.4.2 The EESC believes that it is essential not to jeopardise the smooth progress of the investigation and would, in any

event, suggest providing for a derogation if this appeared likely. It thus proposes amending Article 8 a) to this effect (see specific comments).

4. Specific comments

4.1 Replacing 'suspects and accused persons' throughout the proposal by 'persons against whom proceedings are brought'.

4.2 Article 3, point 1 a): add 'or hearing' after 'questioning'.

4.3 Article 4, point 1: replace 'representing' with 'assisting'.

4.4 Article 4, point 2: clarify as follows: 'any questioning or hearing of the persons against whom proceedings are brought' and add 'and have their comments appended to the record'.

4.5 Article 4, point 4, replace 'check' with 'check up on' and add after 'where the person is detained' 'as quickly as possible' and 'to have their comments recorded'.

4.6 Article 5, title and point 1: replace 'communicate with' by 'request notification of'.

4.7 Article 5, point 2: replace 'child' with 'minor'.

4.8 Article 6, replace 'communicate with' with 'request notification of'.

4.9 Article 8 a), add at the end 'and not jeopardise the smooth progress of the investigation'.

4.10 Article 8, second paragraph, replace 'judicial authority' with 'competent authority'.

4.11 Article 11, point 2, 3rd indent, add 'and have their comments appended to the record'.

Brussels, 7 December 2011.

The President
of the European Economic and Social Committee
Staffan NILSSON