

Meijers Committee

Standing committee of experts on
international immigration, refugee
and criminal law

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To (by email) European Parliament
Civil Liberties, Justice and Home Affairs Committee
Rue Wiertz
BE-1047 Bruxelles

Reference CM1211
Regarding Note on the proposal for a Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest (2011/0154 COD)
Date 30 May 2012

Dear members of the Civil Liberties and Justice Home Affairs Committee,

The Meijers Committee has taken note of the recent developments on the proposal for a Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest.¹ The proposal is an important next step on the road to strengthen the procedural rights of suspected and accused persons in criminal proceedings within the EU. The Meijers Committee therefore very much welcomes this initiative.

However, in view of the adoption of the orientation vote in the LIBE Committee, the Meijers Committee would like to raise a few specific concerns with respect to the proposal. These concerns refer to the suggestions made in the recent text by the Council.² In light of these concerns, the Meijers Committee suggests to accept or reject amendments proposed in the Draft report and its accompanying amendments.³

In the following, first the issue is addressed shortly, then it is advised whether the related amendments of the proposal should be accepted or rejected.

1. Our first concern relates to the scope of the proposed directive. **In general, The Meijers Committee advises to support Amendment 84, which relates to Article 2(1).**
2. A further remark on the scope of this draft directive relates to Article 2(3) and 2(4). As appears, the rights covered by the draft directive would apply where the suspicion or the accusation later appears to concern minor offences. The main question in this regard is what ought to be considered as minor offences. It is recommended to clarify this in the draft directive, instead of leaving it to the Member States. After all, it may differ from Member State to Member State which offences are considered minor offences; to leave the interpretation to the national level would result in unequal protection of the rights covered by the draft directive in hand.
The Meijers Committee therefore advises to reject Amendment 27.
3. The Meijers Committee also would like to express its concerns on the effects of Article 2(3) in practice. This draft provision proposes to exclude procedures whereby a sanction is imposed by authorities other than a court having jurisdiction in criminal matters. Only in the case of appeal to such a court, the rights covered in the draft directive would apply. This may be quite problematic in practice, due to the fact that a number of suspects or accused persons might initially prefer out-of-court-settlements on the assumption that such a settlement would have advantages over procedures before a criminal court. An example is the assumption that the outcomes will not be recorded in a criminal records system. Without the opportunity to contact a lawyer their decision to prefer an out of court settlement will not be based on informed consent.
These concerns constitute a further reason to reject Amendment 27.

¹ COM (2011) 326

² Council document 10324/12 of 25 May 2012 (General approach)

³ Draft Report on the proposal for a directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest of 7 February 2012 and Amendments 44-177 of 22 March 2012 (PE474.063v02-00).

4. Another point concerns the reference to national law in Article 3(3)(b). The suspect or accused person's right to have his lawyer participating during any official interview appears to depend on 'procedures in national law'. It remains unclear what such national procedures may entail and to what extent the current provision allows derogation of the right to have a lawyer not only present, but also participating when officially interviewed. Furthermore, the current text lacks a clear description of the lawyer's role as a participator during interviews. The Meijers Committee recommends to add a provision in the text of the directive (in line with the preamble) that the lawyer may ask questions, request clarification and make remarks.

Amendment 30 contains such a description and should therefore be supported, in combination with amendment 110 which provides the right in hand irrespective of whether the suspected or accused person is detained or not.

5. Clarification is also strongly recommended with respect to Article 3(3)c. This Article contains the obligation for the Member States to determine in their national law in respect of which investigative or other evidence-gathering acts the suspect or accused person has the right for his lawyer to attend, but only under the condition that ensuring this right would 'not unduly delay these [investigative or evidence-gathering] acts' and would 'not prejudice the acquisition of evidence'. To what extent will this provision allow derogation of the covered right? And, who will determine whether ensuring this right would result in an undue delay or would prejudice the acquisition of evidence? **It is recommended that such decisions remain exclusively in the hands of judicial authorities. Hence, it is strongly recommended to reject Amendment 115. On the contrary, the Meijers Committee suggests to support Amendment 31 in combination with Amendments 117 and 123.**

6. Article 3(5) allows the Member States to temporarily postpone the exercise of the right of access to a lawyer in the pre-trial stage, provided that such a temporal postponement is justified by compelling reasons in the light of the circumstances of the case. As appears from recital 21 (preamble) such compelling reasons exist i.a. 'when substantial jeopardy to ongoing criminal proceedings' must be prevented. The Meijers Committee finds it difficult to think of a situation where the sole presence of a lawyer would cause 'substantial jeopardy to ongoing criminal proceedings' and must not be admitted to the interview. The presence of a lawyer during an interview is of fundamental importance to guarantee the right to a fair trial as protected by Article 6 ECHR. Exceptions to this right should not be too broad to avoid possible violations of the right to a fair trial. Although we recognize that postponement may under circumstances be justified, we believe that 'to prevent a substantial jeopardy to ongoing criminal proceedings' must be considered to be too broad.

Taking into account this concern, the Meijers Committee suggests to reject Amendment 37, but to support Amendment 149.

7. With regard to the confidentiality of communication between a suspect or accused person and his lawyer, the Meijers Committee would like to stress the fundamental importance of the principle of confidentiality. It is therefore recommended to support Amendment 136. According to the Meijers Committee, derogation of the principle of confidentiality can only be accepted under very limited circumstances and considers the wording of Article 4(2)(a) "an urgent need to prevent serious crime" to be too broad.

Because Amendments 137 and 140 contains too broad formulations either, it is recommended to reject these.

We hope you will find these comments useful. Should any questions arise, the Meijers Committee is prepared to provide you with further information on this subject.

Yours sincerely,



Prof. dr. C.A. Groenendijk
Chairman