



BUNDESRECHTSANWALTSKAMMER

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on the current state of trilogue negotiations 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 (COM [2011] 326 of 08.06.2011)

Members of the European Affairs Committee

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The Bundesrechtsanwaltskammer (The German Federal Bar) is the umbrella organisation of the self-regulation of the German *Rechtsanwälte*. It represents the interests of the 28 German Bars and thus of the entire legal profession in the Federal Republic of Germany, which currently consists of approximately 160,000 lawyers, vis-à-vis authorities, courts and organisations at national, European and international level.

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Position

I.

On 8 June 2011 the European Commission presented a 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 of 08.06.2011). This Proposal is the third measure of the so-called Roadmap for strengthening procedural rights of suspected and accused persons in criminal proceedings which was adopted by the Council on 30 November 2009.

Following the Council's agreement on the text of the proposal on 8 June 2012, the Committee on Civil Liberties, Justice and Home Affairs (LIBE) of the European Parliament adopted a total of 82 amendments on 10 July 2012. The trilogues between Council, Commission and Parliament which were initiated in September 2012 were suspended in November 2012 since apparently no compromise on the text of the Proposal could be reached. Negotiations are to continue under the Irish Presidency at the beginning of 2013. In order to prepare the continuation of the negotiations and to assess the current state of play in the deliberations, the Council presented a progress report on 3 December 2012 which will in all likelihood form the basis of future negotiations.

II.

The German Federal Bar has very much welcomed 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 and has expressed its interest in a swift and adequate implementation of the Roadmap for strengthening procedural rights of suspected and accused persons in criminal proceedings. The German Federal Bar notes with concern, however, that the state of play set out in the progress report does not contribute to a strengthening of civil rights in the EU, but follows a tendency to agree on the lowest common denominator and thus significantly falls short of even the ECHR's legal standards and ECtHR jurisprudence. The current state of negotiations thus jeopardizes mutual trust in the minimum standards in criminal proceedings under the rule of law in the EU instead of promoting it.

III.

In The German Federal Bar's view, the current state of negotiations as it is laid down in the progress report is not acceptable, particularly in the following areas:

- **Exception of minor offences from the scope of the Directive (Article 2 (3) of the Proposal)**

In respect of minor offences in which sanctions may also be imposed outside the courts (e.g. by the police), or where deprivation of liberty cannot be imposed, the Directive shall apply only to judicial proceedings before a criminal court.

The limitation of the right of access to a lawyer which accompanies such a far-reaching restriction is not acceptable and incompatible with the guarantees provided by the ECHR. This was also pointed out by the Secretariat of the Council of Europe in a position on the Proposal published on 20 September 2012 with reference to the ECtHR judgment in *Jussila v Finland*.

Especially with regard to proceedings in which sanctions may be imposed outside court proceedings, it is not in the interest of an effective safeguarding of the accused person's interests to inform the accused person that he has access to a lawyer in ensuing proceedings before a court. Furthermore, it does not serve the purpose of promoting mutual trust in the minimum standards in criminal proceedings under the rule of law in the EU if the individual measures contained in the Roadmap do not have to be applied uniformly.

Therefore, minor offences must not be exempt from the scope of the Directive.

- **The lawyer's rights (Article 3 (3) and Recital 20 of the Proposal)**

The accused person's lawyer shall only have the right to be present at the questioning of the accused. Any further-reaching rights (such as the lawyer's right to ask questions or to make statements) shall only be granted if this is provided for according to the national law applicable in the concrete case. The current text does not provide for a right of presence during searches.

The limitation of the lawyer's rights to a right of presence during questioning of the accused person does not allow adequate assistance and therefore has to be rejected. Only if the lawyer is also granted the right to ask questions or to make statements can he safeguard the accused person's interests and - even at an early stage of pre-trial procedure - protect him from a loss of rights.

In its position on the Proposal of 20 September 2012, the Secretariat of the Council of Europe, too, warned that any reference to national laws will not promote but jeopardize the uniform application of laws and respective standards of the rule of law in Europe.

The Directive must therefore explicitly guarantee that a lawyer who is present at the accused person's questioning has the right to ask questions and make statements. It must furthermore ensure the lawyer's right of presence during searches.

- **The possibility to suspend access to a lawyer (Article (3) (5) (b) of the Proposal)**

Access to a lawyer may be limited if this is necessary to avert adverse consequences for the life, liberty or physical integrity of a person or where giving access to a lawyer or delaying the investigation would jeopardize the ongoing investigation.

A risk of jeopardizing the purpose of investigations perceived by investigation authorities must not be a reason to exclude the right of access to a lawyer in criminal proceedings since this would make the right of access to a lawyer subject to the investigation authority's discretion.

The possibilities to limit the right of access to a lawyer to avert a particular danger must be kept to a minimum.

Even if the possibility to limit contacts with a lawyer does exist under German law ("contact ban"/*Kontaktsperre*) (Articles 31 et seq. of the Introductory Act to the Courts Constitution Act, *EGGVG*), this measure - together with further limiting conditions - is limited to the narrow field of terrorist crimes and serious crimes of criminal organisations (§ 38 a *EGGVG*). As far as we can see, such a measure has never been applied. The relatively vague wording used in the progress report does however give rise to the concern that the restriction of access to a lawyer will not be limited to extremely exceptional cases.

The Secretariat of the Council of Europe, too, had warned against frictions with the legal standards of the ECHR in its position of 20 September 2012 on the draft Directive with reference to the decision in *Salduz v Turkey*.

Exceptions from access to a lawyer should therefore be admissible at most in cases which are comparable to the provisions of Art. 31 et seq. *EGGVG*. There have to be strict time limits and they must be ordered by a collegiate court only after approval of the judge.

- **The possibility to suspend the confidentiality of communication with a lawyer (Article 4 (2) of the Proposal)**

Confidentiality of communication between a lawyer and an accused person does not have to be guaranteed if this is required to prevent a particularly serious crime (such as e.g. terrorism), or if there is serious reason to believe that the lawyer is involved with the accused person in a criminal offence and criminal proceedings may be opened against both of them.

The state of negotiations that has been reached needs urgent correction. Restrictions of the confidentiality of lawyer-client communication not only contradict the ECHR and ECtHR jurisprudence, they also undermine fundamental principles of the rule of law which form the basis of all European democracies. It is impossible to effectively represent a client's interests if he cannot rely on the absolute confidentiality of his lawyer. Confidentiality is a constituent part of a lawyer's professional activity and of a fair trial in a democratic society. Investigative measures which interfere with the relationship of trust between an accused person and his defence lawyer are not permitted according to the German Code of Criminal Procedure (§ 148 StPO). Should knowledge that was acquired through a breach of confidentiality be gained accidentally, this knowledge must not be used (§ 100 (c) (6) StPO).

Exceptions from the confidentiality of communication between a lawyer and an accused person are therefore absolutely unacceptable and must not be included in the Directive. In cases where there is serious reason to believe, based on certain factual circumstances, that a lawyer and the accused person abuse the confidentiality of communication in order to commit or to plan a criminal offence, the lawyer can – as provided under German law in §§ 138 (a) et seq. StPO - be excluded. At the same time, however, access to another lawyer has to be granted and this new lawyer's confidentiality of communication with the accused person has to be guaranteed without restriction.

- **Contacting relatives or a third person in the event of deprivation of liberty (Article 5 (3) Proposal)**

An accused person shall have the right to communicate with a relative or another third person at the latest 48 hours after he has been deprived of liberty.

The possibility to deny communication of an accused person deprived of liberty with his wife, parents, children or his employer for 48 hours constitutes a serious interference which will be justifiable only in rare exceptional cases. The Directive must therefore contain a provision that the possibility of such communication has to be granted without delay, as soon as this does not prejudice the investigation.

- **Ensuring enforcement of the rights set out in the Directive (Article 11 (2) Proposal)**

The legal effects of a violation of the Directive shall be determined without prejudice to national rules and systems of the admissibility of evidence.

Such a provision is not appropriate to ensure compliance with the Directive. It is rather to be feared that in the absence of sufficient sanctions the Directive will only be applied inadequately.

A violation of the right of access to a lawyer in criminal proceedings must therefore – as provided in the original draft Directive – lead to a ban on the use of statements which were made by an accused person in instances where the Directive was violated. This ban must not be made dependent on whether the violation of the right has affected the entire proceedings.

In a report of 29 September 2012 the European Parliament Legal Service found that the ban on the use of information contained in the original draft Directive complies with the Treaties as well as the existing legal instruments in the area of criminal law. There are thus no understandable reasons to depart from the original draft Directive.