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NOTE

from : Belgian Delegation
to : Working Party on Substantive Criminal Law

No. Prop. : 11497/11 DROIPEN 61 COPEN 152 CODEC 1018
No. Prev. doc. : 7337/12 DROIPEN 25 COPEN 49 CODEC 574

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
- Comments by the Belgian delegation

Delegations will find attached comments by the Belgian delegation on the draft Directive (ref.: doc. 7337/12).

**DRAFT DIRECTIVE ON THE RIGHT OF ACCESS TO A LAWYER IN CRIMINAL PROCEEDINGS AND ON
THE RIGHT TO COMMUNICATE UPON ARREST**

BELGIAN COMMENTS

First of all, we would like to thank the Presidency for the fruitful and constructive discussions led so far on this instrument and their efforts to reach compromises.

Nevertheless, Belgium still has major concerns with regard to Article 3, and, more particularly, the assistance of a lawyer during any official interview.

This obligation for the Member States to provide for a right for the suspect or accused person to be assisted by a lawyer during any official interview does not seem to take into account the particularities of our criminal justice system because it does not consider other procedural guarantees that can be offered to fulfil the requirement of the right to a fair trial and the safeguard of the rights of defence. Stating minimum rules can not have as effect that it pushes Belgium to change the fundamentals of its criminal justice system where the pre-trial stage is characterised by an inquisitorial system.

We hereby would like to point out four essential elements of our criminal justice system which we think would be threatened by the current Article 3.3:

- Firstly, in our system, the investigation is led by the investigative judge. The role of the investigative judge, who is independent and impartial, is to lead the investigation ‘*à charge et à décharge*’. Both public prosecutor and investigative judge have the legal obligations to ensure the legality of the evidence and the loyalty by which the evidences are gathered.

- Moreover, the pre-trial stage is, in principle, characterised by a non-contradictory nature. Therefore, in principle, an official interview of a suspect or accused person is organised on this non-contradictory basis. However, at any stage of the proceeding that requires a contradictory debate, such contradictory debate is provided for with the right of the suspect or accused person to be assisted by the lawyer.

- In addition, the suspect or accused person, and his lawyer, has a complete access to the case-file from the provisional detention. In practice, it means that the judge, investigative judge, public prosecutor, suspect or accused person, and his lawyer, all receive the same and identical hard or (more and more) electronic copy of the complete case-file. Furthermore, the suspect or accused person who is not deprived of liberty may also have access to the case-file.

- Lastly, the suspect or accused person who is not deprived of liberty has an effective right to communicate with his lawyer prior this formal questioning. It has to be noted that, in this situation, even during questioning, the suspect or accused person has the liberty to stop the interrogation and to leave in order to consult a lawyer.

The right of access to a lawyer, and *a fortiori*, the right of a suspect or accused person to have his lawyer present during official interview, is one of the important guarantee, amongst others, to safeguard the fairness of proceedings. It must therefore be seen within the context of all the existing procedural guarantees.

Taking *inter alia* the above mentioned elements into consideration, Belgian criminal justice system offers many guarantees to ensure the respect of the right to a fair trial. The presence and participation of a lawyer during official interview is one of the procedural rights which is provided for in Belgium where necessary to safeguard the fairness of the proceedings.

However, the proposal as it stands, when setting out a right for the suspect or accused person to have his lawyer present and participating during any official interview, can result in undermining the principle of non-contradictory nature of the pre-trial stage and would mean that we have to review other procedural guarantees provided for in our criminal justice system such as a broad access to the case-file.

In consequence, we would urge for the following changes in Article 3, paragraphs 3 and 4:

3. The right of access to a lawyer shall entail the following:
 - (b) Member States shall ensure that the suspect or accused person has the right, in accordance with procedures in national law, for his lawyer to be present and participate when he is officially interviewed. When a lawyer participates during an official interview this shall be recorded in accordance with national law;

Justification: Belgium suggests moving this reference to the procedures of national law in order to be applied to both the presence and the participation of a lawyer. This modification maintains the obligation for the Member States to provide for in the national law the right of a suspect or accused person to have his lawyer present during official interview. Nevertheless, the procedures and modalities for the presence and participation of a lawyer should depend on the Member States systems taking into account the particularities of the criminal justice systems and the overall guarantees existing in national law to ensure the right for a fair trial.

4. Notwithstanding provisions of national law concerning the mandatory presence of a lawyer, in all cases where the suspect or accused person is deprived of liberty, and in any event during the trial stage before a court having jurisdiction in criminal matters, Member States **shall ensure that a suspect or accused person is in a position to exercise his right of access to a lawyer, unless he has waived this right in accordance with Article 9.**

In cases in the pre-trial phase when a suspect or accused person is not deprived of liberty, Member States shall ensure that a suspect or accused person is permitted to ~~exercise his right of access to a lawyer~~ contact or consult a lawyer or to be assisted by that lawyer.

Justification: Belgium suggests specifying the content of the right of access to a lawyer in cases in the pre-trial phase when a suspect or accused person is not deprived of liberty; the proposed wording is taken from recital 16.