



ASSEMBLEIA DA REPÚBLICA
EUROPEAN AFFAIRS COMMITTEE

Written Opinion

COM(2011) 326 final

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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PART I - INTRODUCTORY NOTE

In accordance with the terms of Articles 6 and 7 of Law 43/2006 of 25 August, on monitoring, assessment and pronouncement by the Assembleia da República within the scope of the construction of the European Union, and in line with the procedures for the scrutiny of European draft acts approved on 20 January 2010, the European Affairs Committee received 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].

In view of its object, the above draft act was referred to the Committee on Constitutional Affairs, Rights, Freedoms and Guarantees, which analysed the draft act and approved the Report annexed to this Written Opinion, of which it forms an integral part.

PART II – RECITALS

1 – This proposal for a Directive of the European Parliament and the Council aims to set common minimum standards, applicable throughout the European Union, on the rights of suspects and accused persons in criminal proceedings to have access to a lawyer and to communicate upon arrest with a third person.

2 – The proposal is the next step in the series of measures laid down in the Resolution of the Council of 30 November 2009 on a Roadmap for strengthening the procedural rights of suspects and accused persons in criminal proceedings, appended to the Stockholm Programme approved by the European Council of 10-11 December 2010.



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3 – This proposal should therefore be considered as part of a comprehensive package of legislation to be presented over the next few years, which will provide a minimum set of procedural rights in criminal proceedings in the European Union.

4 – This proposal seeks to strengthen the rights of suspects and accused persons. Having common minimum standards governing these rights should boost mutual trust between judicial authorities and thus facilitate the application of the principle of mutual recognition.

5 – A certain degree of compatibility between the legislation of Member States is therefore pivotal to improving judicial cooperation in the EU.

Having regard to the provisions of the proposal, attention is drawn to the following matters:

a) Legal Basis

The legal basis of the proposal is Article 82(2) of the Treaty on the Functioning of the European Union (TFEU), which provides that: *‘to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.*

They shall concern:

- (a) mutual admissibility of evidence between Member States;*
- (b) the rights of individuals in criminal procedure;***
- (c) the rights of victims of crime;*
- d)[...].’*



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a) Principle of Subsidiarity

1– The Principle of Subsidiarity requires that the European Union shall not adopt measures in areas of shared competence unless ‘the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level’, pursuant to Article 5(3) of the Treaty on European Union (TEU).

2 – Under the terms of Article 4(2)(j) and Article 82(2)(b) of the Treaty on the Functioning of the European Union (TFEU), the EU has shared competence with Member States as regards the area of liberty, security and justice.

3 – The objective of the proposal cannot be sufficiently achieved by Member States alone, since there is still significant variation in the precise method and timing of the right of access to a lawyer in criminal proceedings across the European Union.

4 – As the aim of the proposal is to promote mutual trust, only action taken by the European Union will establish consistent common minimum standards that apply throughout the whole of the European Union.

5 – The proposal will approximate Member States’ procedural rules regarding the time and manner of access to a lawyer for suspects and accused persons, the aim being to enhance mutual trust.

6 – The proposal under consideration here therefore complies with the principle of subsidiarity.

c) Content of the draft act

1 – The draft act establishes minimum common rules, applicable to all Member States of the EU, on the right of access to a lawyer in criminal proceedings and the right to communicate upon arrest with a third person.



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2 – It forms part of the Stockholm Programme adopted by the European Council on 10-11 December 2009 and is the next step in the series of measures laid down in the Resolution of the Council of 30 November 2009 on a Roadmap for strengthening the procedural rights of suspects and accused persons in criminal proceedings.

3 – The proposal seeks to improve the rights of suspects and accused persons. Having common minimum standards governing these rights should boost mutual trust between judicial authorities and thus facilitate the application of the principle of mutual recognition.

4 – Although the draft act complies with the principle of subsidiarity, there are some issues which call for further consideration as regards certain provisions mentioned in the Report of the Committee on Constitutional Affairs, Rights, Freedoms and Guarantees annexed to this Written Opinion, namely the apparent contradiction between Article 8 of the proposal for a Directive and Article 143(4) of the Portuguese Criminal Proceedings Code.

PART III – OPINION

The present written opinion has been drawn up in accordance with the terms of Law 43/2006 of 25 August, which determines the Portuguese Parliament's powers of *monitoring, assessment and pronouncement within the scope of the construction of the European Union*.

In the light of the above considerations and having regard to the Report of the Committee on Constitutional Affairs, Rights, Freedoms and Guarantees 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, the European Affairs Committee is of the opinion that:



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1 – This draft act **does not breach the principle of subsidiarity in that the proposed objective will be more effectively achieved through action at EU level;**

2 – As regards the issues raised in the recitals, the European Affairs Committee will continue to monitor the legislative process related to this draft act, in particular through the exchange of information with the Government.

São Bento Palace, 20 September 2011

Opinion drawn up by MP – João Lobo

Chairman of the Committee – Paulo Mota Pinto



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PART IV – ANNEX

Report and opinion of the Committee on Constitutional Affairs, Rights,
Freedoms and Guarantees



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REPORT AND OPINION

COM(2011) 326 final – 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

1 – Introductory Note

Under the process of monitoring, assessment and pronouncement by the Assembleia da República within the scope of the construction of the European Union, European draft act COM(2011) 326 final – 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 was distributed to the Committee on Constitutional Affairs, Rights, Freedoms and Guarantees for the purposes envisaged in Protocol No. 2 on the Principle of Subsidiarity annexed to the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

Objectives and content of the proposal

The draft act establishes minimum common rules, applicable to all Member States of the EU, on the right of access to a lawyer in criminal proceedings and the right to communicate upon arrest with a third person.

It forms part of the Stockholm Programme adopted by the European Council on 10-11 December 2009 and is the next step in the series of measures laid down in the Resolution of the Council of 30 November 2009 on a Roadmap for strengthening the procedural rights of suspects and accused persons in criminal proceedings.



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This proposal for a Directive builds upon and consolidates in legislation the case-law of the European Court of Human Rights, in particular through the application of Article 6 (Right to a fair trial) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and Articles 6 (Right to liberty and security), 47 (Right to an effective remedy and to a fair trial) and 48 (Presumption of innocence and right of defence) of the Charter of Fundamental Rights. We note that in the explanatory memorandum of the draft act it is stated that *'the number of complaints about the right of access to a lawyer has been growing steadily over the last few years'*.

The draft act under consideration therefore makes the following proposals:

- Suspects or accused persons should have access to a lawyer at the following stages: before the start of any questioning by the police or other law enforcement authorities; upon carrying out any procedural or evidence-gathering act at which the person's presence is required or permitted as a right in accordance with national law, unless this would prejudice the acquisition of evidence; and from the outset of deprivation of liberty (Article 3);

- The draft act establishes a series of acts which the lawyer may perform in exercising the right of defence; to meet with the suspect or accused person for the time necessary and with the frequency required for such exercise; to be present at any questioning and hearing; to be present at any other investigative or evidence-gathering act at which the 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; to have access to the place where the person is detained to check the conditions in which the suspect or accused person is detained (Article 4);

- The right of the suspect or accused person upon arrest to communicate as soon as possible with a person named by him; where the person is a child, the child's legal representatives must be informed of the reasons for the deprivation of liberty, unless it would be contrary to the best interests of the child (Article 5);



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- The right of non-nationals who are deprived of their liberty to have the consular or diplomatic authorities of their State of nationality informed of the detention as soon as possible and to communicate with the consular or diplomatic authorities (Article 6);

- A duty to ensure the confidentiality of meetings between the suspect or accused person and his lawyer and the confidentiality of correspondence, telephone conversations and other forms of communication permitted under national law between the suspect or accused person and his lawyer (Article 7);

- The possibility, subject to certain conditions, of derogating from the following provisions: the right of access to a lawyer in criminal proceedings (Article 3); the content of the right of access to a lawyer (Article 4); the right to communicate upon arrest (Article 5); and the right to communicate with consular or diplomatic authorities (Article 6). However, any such derogation: shall be justified by compelling reasons pertaining to the urgent need to avert serious adverse consequences for the life or physical integrity of a person; shall not be based exclusively on the type or seriousness of the alleged offence; shall not go beyond what is necessary; shall be limited in time as much as possible and in any event not extend to the trial stage; shall not prejudice the fairness of the proceedings;

- The waiver of the right to a lawyer must be given voluntarily and unequivocally and in full knowledge of the consequences, on the basis of legal or other advice on such consequences. The person must also have the necessary capacity to understand these consequences (Article 9);

- The right of a person other than a suspect or accused person, for example a witness, to be granted access to a lawyer if, in the course of questioning, interrogation or hearing, he becomes suspected or accused of having committed a criminal offence;

- The right of access to a lawyer in European Arrest Warrant proceedings (Article 11);

- Member States shall not apply less favourable provisions on legal aid than those currently in place in respect of access to a lawyer provided pursuant to this Directive (Article 12);



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- The right of a suspect or accused person to effective remedy in instances where his right of access to a lawyer has been breached. Statements made by the suspect or accused person in breach of such right may not be used in evidence (Article 13).

3 – Portuguese context

We give below a brief summary of the Portuguese legislative framework on the right of access to a lawyer in criminal proceedings and the right to communicate upon arrest.

Under the terms of Article 32(3) of the Constitution of the Portuguese Republic, *‘Accused persons have the right to choose counsel and to be assisted by him in relation to every procedural act. The law shall specify those cases and phases of procedure in which the assistance of a lawyer is mandatory.’* Article 64 of the Criminal Proceedings Code establishes that the assistance of a lawyer is mandatory in the following cases: in questioning of a suspect or accused person who has been arrested or detained; at the evidentiary debate stage and at the trial, except in the case of proceedings that do not carry a sentence of imprisonment or the imposition of an involuntary commitment measure; in any procedural act, except the indictment of the defendant, where the suspect or accused person is blind, deaf, dumb, illiterate, unable to understand Portuguese, or under the age of 21, or where the person is not criminally responsible or is of diminished responsibility; in ordinary and extraordinary appeals in cases of depositions by persons who may not be available to testify at trial; at trials in the absence of the defendant; in other cases established by law. If the suspect or accused person has not instructed a lawyer and does not have a court-appointed defence counsel, it is mandatory to appoint a defence counsel when charges are brought against him (Article 64(3)).

The Portuguese Criminal Proceedings Code (CPP) permits the defence counsel to exercise all the rights of the suspect or accused person, except those reserved personally to him (Article 63). The rights reserved personally to the suspect or accused person consist of acts in which he waives fundamental procedural rights, such as the right not to be present at the evidentiary debate, in which case he is represented by his instructed or appointed defence counsel.



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In relation to the right to communicate upon arrest, Portuguese law enshrines the right of the arrested person to communicate immediately with a lawyer (Article 260 and 143(4) of the CPP) and the right of the arrested person to communicate with a relative or friend. Neither the Public Prosecutor's Office nor the judge may decide to the contrary (Articles 260 and 143(4) of the CPP).

4 – Principle of subsidiarity

The Principle of Subsidiarity requires that the European Union shall not adopt measures in areas of shared competence unless *'the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level'*, pursuant to Article 5(3) of the Treaty on European Union (TEU). Under the terms of Article 4(2)(j) and Article 82(2)(b) of the Treaty on the Functioning of the European Union (TFEU), the Union has shared competence with Member States as regards the area of liberty, security and justice.

This proposal for a directive complies with the principle of subsidiarity for two basic reasons. Firstly, it aims to strengthen judicial cooperation in criminal matters within the scope of the area of liberty, security and justice of the European Union. Its legal basis is Article 82(2) of the Treaty on the Functioning of the European Union, which provides that the European Parliament and the Council may establish minimum rules on the rights of individuals in criminal procedure in order to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation. Establishing a minimum degree of compatibility between the legislations of Member States is pivotal to attaining that objective, which can only be effectively pursued and achieved by EU action rather than by action by individual Member States.

In addition, Article 14 of the proposal contains a non-regression clause, under which no provision of the Directive may be interpreted as constituting a limitation on the procedural rights and guarantees contained in the legislation of any Member State which offers a higher level of protection.



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Secondly, the draft act seeks to consolidate and build upon European legislation and case law. In particular, it develops more fully the rules on this matter in the Charter of Fundamental Rights of the European Union and the European Convention on the Protection of Human Rights and Fundamental Freedoms, as well as the case law of the European Court of Human Rights.

5 – Rapporteur's remarks¹

Although the principle of subsidiarity is complied with, there are some issues regarding certain of the provisions which call for further consideration.

Under the terms of Article 8 of the proposal for a Directive, no derogation from the provisions on the right to communicate upon arrest may be based exclusively on the type or seriousness of the alleged offence. However, Article 143(4) of the Portuguese Criminal Proceedings Code provides that during the period between arrest and the first non-judicial questioning of the arrested person, the Public Prosecutor's Office may decide that the arrested person shall not be allowed to communicate with anybody except his defence counsel in cases of terrorism or violent or organised crime. This provision conflicts with the provisions of the draft act. Nevertheless, the particular seriousness of these cases and the complexity of investigating them may justify restricting the rights of an arrested person. In my view, the prohibition provided for in Article 8(b) of the draft act may be excessive.

In addition, Article 13(2)¹ provides that the remedy in instances where a person's right of access to a lawyer has been breached shall have the effect of placing the suspect or accused person in the same position in which he would have found himself had the breach not occurred. However, such remedy could be made more effective by, for example, providing that the entire proceedings are invalid and ineffective as a consequence.

¹ *The Rapporteur's remarks are personal and it won't make part of the opinion of the Portuguese Parliament.*



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6 – Opinion

In the light of the foregoing, the Committee on Constitutional Affairs, Rights, Freedoms and Guarantees is of the opinion that COM(2011) 326 final – Proposal for a Regulation 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 complies with the principle of subsidiarity and that this Report should be referred to the European Affairs Committee.

São Bento Palace, 13 September 2011

MP acting as Rapporteur – Isabel Moreira

Chairman of the Committee – Fernando Negrão