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**DROIPEN 8
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ADDENDUM TO NOTE

from : General Secretariat
to : Working Party on Substantive Criminal Law
No. Prop. : 11497/11 DROIPEN 61 COPEN 152 CODEC 1018
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
- Compilation of replies to questionnaire

Delegations will find in the Annex the replies to the questionnaire submitted by Luxembourg, to be inserted in document 5897/12 DROIPEN 8 COPEN 24 CODEC 228, page 242.

QUESTIONNAIRE

These questions aim at obtaining a better understanding of the current law and procedures in the Member States as regards the issue of "access to a lawyer". They do not refer to the question how such national laws and procedures should actually be, in the light, in particular, of the European Convention on Human Rights and its case-law.

In the light of the answers to be given by delegations, the Presidency may put forward new drafting proposals in respect of the draft Directive. However, the answers may also provide background information to provisions of the text on which there exist already agreement between (a qualified majority of) the Member States, and which the Presidency does not intend to change.

Introductory observation.

The Luxembourg Code of Penal Proceedings (“Code d’instruction criminelle”) provides since 1989 the right of a person suspected of having committed a crime who is arrested and questioned by the Police to be assisted by a lawyer (Art. 39 (7) of the “Code d’instruction criminelle”).

The Luxembourg law provides since 1929 (currently Art. 81 (2) of the “Code d’instruction criminelle, previously Art. 4 of the law of November 19th 1929 on the adversarial investigation) the right of the accused person to be assisted by a lawyer before the investigating magistrate (“juge d’instruction”).

In the following of the *Salduz* decision of the European Court of Human Rights, the General State Prosecutor (“Procureur general d’Etat”) has given in June 2011 instructions to the Police to extend the right of assistance of suspected persons during Police questioning. This right applies since then to some other cases of Police questioning of a detained suspect person (person arrested by order of an investigating judge and questioned by the Police). The assistance of a lawyer is also accepted in the case of the Police questioning of a suspected person who is not detained. The suspected person is moreover informed of his right to remain silent. These instructions have been executed since then by the Police.

These instructions have been given in order to ensure provisionally, in anticipation of a future law to be rapidly adopted, that the proceeding rules are in the meanwhile compatible with the European Convention on Human Rights as it is construed by the European Court of Human Rights.

In the following the state of the Luxembourg law is explained as it results both of the law and the instructions given to the Police by the General State Prosecutor.

Questioning of suspects and accused persons in the pre-trial phase

1. In your legal order, when a person that is suspected or accused of having committed a criminal offence is arrested (deprived of liberty) and asked by the police or investigating judge to reply to questions concerning the (alleged) crime committed,

a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?
Yes.

ii) In the affirmative: in which situations does this right exist?

In all the situations where a person is deprived of his liberty for being suspected of having committed a crime.

iii) If the person has the right to be assisted by a lawyer before questioning, may this right in your legal order be limited to the person contacting the lawyer by phone? If so, please indicate in which situations this may be the case.

No.

b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?

Yes.

ii) In the affirmative: is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

There are two exceptions concerning police questioning (which do not apply to questionings by the investigating judge, to which no such exceptions apply):

(1) If the Police officer has unsuccessfully tried to contact three different lawyers (who couldn't be joined and/or who could be joined but refused to accept to assist the detained person; this situation is very exceptional as the Luxembourg Bar (of lawyers) has put in place a system of on call lawyers (even during the night or during weekends and holidays) for the purpose of assisting detained persons during questioning).

(2) If the lawyer (who has accepted to assist the detained person) does not arrive within two hours after he has been informed.

A further exception exists concerning minor offences, so called "contraventions".

See answers to question 6.

- c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?

Yes (if the person to be questioned is detained, but no if he is not detained).

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?

Information is given to the (detained) person of his right to be assisted by a lawyer. If he then decides to be assisted, a list of possible lawyers is given to him. In the case of a police questioning the Police officer tries to contact the chosen lawyer. In the case of questioning by the investigating judge a lawyer is necessarily given to the person if he asks to be assisted.

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?
 - **Police questioning: If he then decides to be assisted, a list of possible lawyers is given to him. This list is updated every week by the Bar council and the lawyers on this list have the obligation to be reachable. The person deprived of liberty can choose 3 lawyers of this list and the police officer then tries to contact this lawyers.**
 - **Questioning by the investigating judge: a list of possible lawyers is given to him; if none of the chosen lawyers accepts to assist or can be joined, the judge designates a lawyer.**

d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police or investigating judge to wait until the arrival of the lawyer before the questioning starts?

- **Police questioning: Normally one hour is given to the lawyer to arrive. But if the lawyer asks for a longer delay because of professional reasons, this delay can be extended to 2 hours.**
- **Questioning by the investigating judge: the questioning will not begin before the arrival of the lawyer.**

ii) In the affirmative, how long (how many hours) do the police or investigating judge have to wait until the arrival of the lawyer?

- **Police questioning: Maximum 2 hours.**
- **Questioning by the investigating judge : no time limit is defined.**

e) i) In your legal order, is there a possibility of making derogations to the right of a person to be assisted by a lawyer before and/or during questioning in the pre-trial phase? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police or investigating judge to proceed with the questioning without the presence of a lawyer, or without the lawyer having been contacted in advance by phone?

No (with the exception of the before mentioned rules of the maximum “waiting time” of two hours and the maximum number of three attempts to contact a lawyer concerning Police questionings).

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made. /

2. In your legal order, when a person is officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence and is asked to come 'voluntarily' to a police station in order to be questioned by the police in relation to that crime,

a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?
Yes.

ii) In the affirmative: in which situations does this right exist?

In all the situations this person asks for assistance.

iii) If the person has a right to be assisted by a lawyer before questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

No, the (not detained) person is not informed of such a right before questioning by the Police (in the current practice).

b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?
Yes.

ii) In the affirmative, is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

The same exceptions apply as described above under question 1.b).ii)

iii) If the person has a right to be assisted by a lawyer during questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

No.

- c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?

Yes, if the person asks to be assisted by a lawyer (but not if he doesn't ask this assistance).

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only 'activated' further to a request of the person concerned?

This obligation doesn't exist automatically. It is only "activated" if the person requests the assistance of a lawyer.

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

The acts are the same as those imposed in case of the questioning of a detained person by the Police: if the non detained person decides to be assisted, a list of possible lawyers is given to him. He can choose three lawyers of this list and the police officer then tries to contact this lawyers.

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?

Yes.

ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

The Police must wait during one hour, with possibility to extend the delay on demand of the lawyer for professional reasons, for one supplementary hour.

- e) i) In your legal order, is there a possibility of making derogations to the right to be assisted by a lawyer before and/or during the questioning? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer?

No (with the exception of the before mentioned rules of the maximum “waiting time” of two hours and the maximum number of three attempts to contact a lawyer).

- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

No.

3. In your legal order, when a person is stopped on the street by the police and, after having been officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence, is asked by the police to reply to questions concerning the (alleged) crime committed,

- a) What kind of questions could be asked to this person? Is it possible to question the person regarding the alleged crime?

Yes.

- b) i) Does this person have the right to be assisted by a lawyer during such questioning?

Yes. If the person is detained, he is informed of this right. If he is not detained, the presence of a lawyer is accepted, but he is not officially informed about such a right.

ii) In the affirmative, in which situations does such a right exist?

The right exists insofar as the person is suspected of having committed a criminal offence.

iii) If the person has the right to be assisted by a lawyer, may this right be limited to the person contacting the lawyer by phone before questioning starts? If so, please indicate in which situations this may be the case.

No.

c) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there an obligation in your legal order for the police or any other competent authorities to facilitate or assist the person in exercising this right?

Yes.

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only 'activated' further to a request of the person concerned?

It depends whether the person is or isn't detained. If he is detained, the obligation exists automatically. If he isn't detained, the obligation exists only further to a request of the person concerned.

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority? :

A list of possible lawyers is given to him. He can choose three lawyers of this list and the police officer then tries to contact this lawyers.

- d) i) If the person has a right to be assisted by a lawyer during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?

Yes.

- ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

The Police must wait during one hour, with possibility to extend the delay on demand of the lawyer for professional reasons, for one supplementary hour.

- e) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there a possibility of making derogations to this right in your legal order? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer or without contact by phone having been made?

No (with the exception of the before mentioned rules of the maximum “waiting time” of two hours and the maximum number of three attempts to contact a lawyer).

- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

No.

Evidence-gathering and investigating acts in the pre-trial stage

4. Questions regarding evidence-gathering or investigating acts in the pre-trial stage:

- a) i) In your legal order, does the suspect or accused person have a right for his lawyer to be present at evidence-gathering or investigating acts?

Yes, but only at certain acts ordered or executed by an investigating judge.

- ii) In the affirmative, which evidence-gathering or investigating acts are concerned?

Visit of the investigating judge to the crime scene (reconstruction of the crime on the crime scene); in exceptional cases, the hearing of witnesses in the presence of the accused; the confrontation between the accused and witnesses; investigating acts posed by legal experts on request of the investigating judge.

- b) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the competent authorities to facilitate or assist the person in exercising this right?

Yes.

- ii) In the affirmative, what are the concrete act(s) concerned that have to be taken by the competent authorities?

The lawyer has to be informed before, at the latest, the day before the execution of the acts.

- c) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before starting the evidence-gathering or investigating act?

The obligation doesn't apply to the Police but only to the investigating judge or the legal expert and concerning the limited acts enumerated before. It applies only during the investigation procedure ("instruction préparatoire") at stages where a lawyer, insofar he has been requested by the accused, has already been appointed. The lawyer has to be informed, at the latest, the day before the execution of the acts. If he doesn't accept to appear, the acts are executed without his presence.

- ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer? Please specify as appropriate.

See c) i).

- d) i) In your legal order, is there a possibility of making derogations to the right of the suspected or accused person for his lawyer to be present at evidence-gathering or investigating act? In other words, if the person concerned wants to be assisted by a lawyer during such acts, is there nevertheless a possibility for the competent authorities to proceed with the evidence-gathering or investigating act without the lawyer being present?

Assistance of a lawyer during evidence-gathering can only take place during the investigating procedure and concerning the above mentioned acts. There are a few exceptions: The visit of the investigating judge to the crime scene can take place without the accused and his lawyer if there is an urgent risk of imminent loss of the evidence (Art. 63 (2) of the "Code d'instruction criminelle"). Evidence-gathering by legal experts appointed by the investigating judge can take place without the presence of the accused and his lawyer if there is an urgent risk of imminent loss of the evidence (Art. 87 (9) of the "Code d'instruction criminelle").

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

See d) i)

Questioning in the pre-trial stage of persons who are initially not suspected or accused of having committed an offence but obtain this status during questioning

5. In your legal order, when a person that is initially not suspected or accused of an alleged crime, such as a witness, is questioned by the police or an investigating judge:

a) Does this person have the right to be assisted by a lawyer during questioning?

No.

b) When, during the questioning, such a person becomes suspected or accused of having committed a criminal offence, do the competent authorities have to inform the person concerned of this change of status?

Yes.

c) If the answer to question b) is positive:

i) When precisely do the competent authorities have to inform the person concerned?

The person has to be informed when it appears that there are serious reasons that the person has committed a criminal offence (these reasons may arise from the answers given by the witness during the questioning or from any other evidence).

ii) In what manner do the competent authorities have to inform the person concerned (notification, information, ...)?

The person has to be informed.

iii) Do the competent authorities have to stop the questioning?

Yes. They have to stop the questioning of the person as a witness.

iv) Does the person concerned obtain the right to be assisted by a lawyer (when he did not have it before)? If so, as from which moment in time?

A distinction has to be made between questioning by Police and by the investigating judge.

- **Concerning Police questioning:**

- **If the crime is as serious as to imply the arrest of the questioned person, the latter has to be informed of his right to be assisted by a lawyer.**
- **If the crime is not as serious as to imply an arrest, the questioned person is informed of his “change of status” (from a witness to an accused) and is allowed, if he so desires, to be assisted by a lawyer, but he is not informed of such a right.**

- **Concerning questioning by the investigating judge :**

The person can't any more be questioned as witness (a status which implies no right to be assisted by a lawyer); a further questioning is only conceivable as accused, a status which implies the right to be assisted by a lawyer (this right exists irrespective of the seriousness of the crime which forms the subject of the investigating procedure (it should however be noted that the investigating procedure is not possible for minor offences)).

- v) May the statements made by the person before he was informed of the change of status be used in the ensuing criminal proceedings against him? If so, in which circumstances? Please specify as much as possible.

According to existing legislation and case law:

- **It is formally prohibited to question on purpose in order to violate his rights of defence as witness a person against whom serious reasons exist that he has committed a crime (Art. 73 of the “Code d’instruction criminelle”). The statements made in this context could not be used.**
- **Spontaneous statements made to the Police outside a formal questioning (for example on a crime scene) could however be used.**
- **Statements made in a formal questioning by a witness at a time when there are no serious reasons to suspect the witness to have committed the crime could also be used.**

Minor offences

6. Questions regarding exclusions / minor offences:

- a) In your legal order, are there any categories of offences (in particular so-called "minor offences"), in respect of which the right to be assisted by a lawyer does not exist or is restricted, totally or partially, in the pre-trial phase?

Yes.

- b) In the affirmative, please describe the category or categories of exclusions as precisely as possible, defining the category by a common denominator, e.g.
- where the offence is initially dealt with in an administrative manner;
 - where pre-trial detention is not possible in relation to the offence concerned;
 - where deprivation of liberty cannot be imposed as a sanction in relation to the offence concerned;
 - where the fine that may be imposed as a sanction in relation to the offence concerned does not exceed a certain amount;
 - other definition.

The right to be assisted by a lawyer in the pre-trial phase is not granted for “contraventions”: these are minor offences that are exclusively sanctioned by sanctions other than deprivation of liberty (they are especially sanctioned by fines, confiscation and the prohibition to drive a motor car for a certain time) (Art. 25 of the Luxembourg Penal Code).

- c) In case your legal order contains one or more categories of exclusions: please indicate the consequence of each category of exclusion, e.g. is there a total or partial exclusion from the right to be assisted by a lawyer, does the exclusion entail different modalities for the assistance by a lawyer, etc. ...

For “contraventions”, as defined above, there is no right to be assisted by a lawyer during the pre-trial phase. The accused has however the right be assisted by a lawyer during the trial phase.

Lawyer provided by the State / Payment of lawyer’s fees

7. The proposed Directive does not deal with the question of legal aid; even so the Presidency believes that the following questions regarding the payment of a lawyer’s fee could have an impact on the formulation and application of the Directive.

With this in mind delegations are kindly invited to respond to the following questions:

- a) i) In your legal order, does an obligation exist for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *but cannot afford to pay a lawyer or cannot afford to pay the lawyer that he has chosen?*

Yes.

- ii) If so, in which situations and under which conditions does such obligation exist?

When answering this question, please take into account the situations mentioned under questions 1-4.

The State must pay for the fees of a lawyer each time the person cannot afford to pay the lawyer by virtue of the national law on legal aid.

- b) i) In your legal order, does there exist an obligation for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *even if he could himself afford to pay a lawyer, or the lawyer that he has chosen?*

No.

- ii) If so, in which situations and under which conditions does such obligation exist?

When answering this question, please take into account the situations mentioned under questions 1-4.

Principle of confidentiality

8. a) In your legal order, can any derogations be made to the principle of confidentiality of communication between the suspected or accused person and his lawyer?

No.

- b) In the affirmative, in which situations can such derogations be made? Please specify as much as possible, and make a distinction, if appropriate, between oral and written communication, and between communication in the pre-trial phase and in the trial phase.

Waiver

9. a) In your legal order, does a suspect or accused person have the right to waive his right to be assisted by a lawyer?

Yes.

- b) In the affirmative,
i) What, if any, information has to be given to the person concerned prior to making the waiver?

- Police questioning :

- **If the person is detained, he has to be informed of his right to be assisted by a lawyer and (what is especially important if he refuses such assistance) of his right to be silent. The refusal has to be made voluntarily.**
- **If he is not detained, he can be assisted, if he so desires, by a lawyer, but he is not informed of such a right. Consequently there is no formal refusal of such a right in this context.**

- **Questioning by the investigating judge : The accused is informed of his right to be assisted by a lawyer. He is allowed to choose a lawyer. If he doesn't want to choose himself, a lawyer is appointed for him if such is his desire. Consequently there is no formal refusal of such a right in this context either.**

ii) If such information has to be given:

Information has only to be given (as seen above) by the Police in the context of the detention of a suspect person.

- which person(s) or authorities may / should give that information?

Police officers.

- how is that information to be given (oral, writing,) ? Please specify.

In an oral form.

iii) How is the waiver noted/registered? What are the formalities, if any?

The refusal is noted in a Police report that forms a part of the criminal proceedings.

iv) May a decision to waive the right to a lawyer be revoked, and if so,

- may this be done at any stage of the proceedings?

Yes.

- are there any (other) limitations to the possibility of revoking a waiver?

No.

- c) Are the answers to the questions under a) and b) different if the person concerned is a minor? If so, please specify.

Yes.

- A minor, if accused of criminal offences, has to be assisted by a lawyer if he appears before the competent judge (a specialized judge for minors) (Art. 18 of the Law of August 10th 1992 on the protection of minors). It is not possible to renounce to this right.
- In the present state of the law, this specific obligation does not apply to Police questioning of minors. The ordinary law as above exposed applies however.

Remedies

10. a) Does your national law provide for remedies in case of breach of the right of access to a lawyer?

Yes.

- b) In the affirmative:

- i) which are those remedies?

- **Police questioning**: The remedy consists in asking the annulment of the questioning and the consecutive acts of the procedure before the Chamber of Council of the District Court (Art. 48-2 of the “Code d’instruction criminelle”).
- **Questioning by the investigating magistrate**: The remedy consists similarly in asking the annulment of the questioning and the consecutive acts of the procedure before the Chamber of Council of the District Court (Art. 126 of the “Code d’instruction criminelle”). The obligation for the investigating judge to inform the accused of his right to be assisted by a lawyer and his obligation to designate a lawyer if so desired by the accused (Art. 81 (2) of the “Code d’instruction criminelle”) is formally sanctioned by the nullity of the questioning (Art. 81 (12) of the “Code d’instruction criminelle”).

ii) do the remedies also include the possibility for the (judicial) authorities to exclude evidence that has been obtained in breach of the right of access to a lawyer?

Yes. The remedy has as effect the annulment of the questioning and the consecutive acts of the procedure. Thus it implies necessarily the exclusion of the questioning as evidence.

General concerns regarding the proposed Directive

11. Are there any other aspects of your legal order that could be of importance for the further discussions on this proposed Directive? If so, please highlight them.
