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NOTE

from : Presidency
to : Working Party on Cooperation in Criminal Matters

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
- Questions on Article 11 on the right of access to a lawyer in European Arrest Warrant proceedings

1. On 4 November 2011, the COPEN Working Party discussed Article 11 of the above draft Directive, regarding the right of access to a lawyer in European Arrest Warrant proceedings, on the basis of doc. 15826/11. Further to that discussion, the Presidency modified this Article; small changes were also made in Article 2(2) of the draft Directive, and in Article 9(1) a reference to Article 11 was inserted. These modifications are reflected in doc. 7337/12.
2. On 15/16 March 2012, the DROIPEN Working Party discussed these modifications. A large majority of Member States could accept the modifications made in Articles 2(2) and 9(1), as well as those in Article 11, subject to small refinements. However, in view of comments made by some delegations, the Presidency decided that it would be advisable to ask the COPEN Working Party for its opinion on the text.

3. The text of Article 11 of the draft Directive currently reads as follows:

Article 11

The right of access to a lawyer in European Arrest Warrant proceedings

1. *Member States shall ensure that a person requested for surrender in accordance with Council Framework Decision 2002/584/JHA has the right of access to a lawyer promptly upon arrest pursuant to the European Arrest Warrant in the executing Member State.*
2. *With regard to the content of the right of access to a lawyer, the requested person shall have the following rights in the executing Member State:*
 - *the right of access to a lawyer in such a time and manner as to allow him to exercise his rights effectively and in any event as soon as practically possible from the outset of deprivation of liberty;*
 - *the right to communicate with the lawyer representing him. The duration, frequency and means of communications between the requested person and his lawyer may be regulated in national law and procedures, provided the requested person shall have the possibility to exercise his rights of defence under Council Framework Decision 2002/584/JHA effectively;*
 - *the right for his lawyer to be present and, in accordance with procedures in national law, participate¹ during a hearing of the requested person by the executing judicial authority. When the lawyer participates during the hearing this shall be recorded in accordance with national law.*
3. *The rights provided for in this Directive under Articles 4, 5, 6, 9, 13 and - when a derogation under Article 4(2) or a postponement under Article 5(3) is applied - Article 8 shall apply, mutatis mutandis, to European arrest warrant proceedings.*

¹ The Commission suggested enlarging the scope of this indent by inserting the words "*during questioning, if any, and*".

4. Although a large majority of Member States could agree to the text of Article 11 as it currently stands, some questions were raised. These questions concern notably Article 11(3), as a result of which some provisions of the Directive regarding suspects and accused persons apply *mutatis mutandis* to EAW-proceedings, but they concern also other aspects of Article 11.
5. The first question is whether in Article 11(3) reference should be made to Article 5², regarding the right to have a third person informed upon deprivation of liberty. As a result of this reference, Article 5 applies *mutatis mutandis* in EAW-proceedings: requested persons who are arrested in the executing State shall have the right to have a third person informed of such arrest.
6. In the DROIPEN Working Party a large majority of Member States considered that it would be appropriate for requested persons in EAW-proceedings to have this right. One Member State however expressed doubts in this respect, and referred in this context to the specific nature of EAW-proceedings.

² Article 5 currently reads as follows:

Article 5

The right to have a third person informed upon deprivation of liberty

1. *Member States shall ensure that a suspect or accused person who is deprived of his liberty has the right to have at least one person, such as a relative or employer, named by him, informed of the deprivation of liberty without undue delay, if he so wishes.*
2. *If the person is a minor Member States shall ensure that the minor's legal guardian is informed as soon as possible of the deprivation of liberty and the reasons pertaining thereto, unless it would be contrary to the best interests of the minor, in which case another suitable adult shall be informed.*
3. *Member States may temporarily postpone the application of the rights set out in paragraphs 1 and 2 when this is justified by compelling reasons in the light of the particular circumstances of the case.*

7. The second question is whether it would be appropriate that the rules on "waiver" set out in Article 9³ apply *mutatis mutandis* to EAW-proceedings. It is understood that the case-law of the ECtHR in respect of Article 6 ECHR, in which the conditions of making a waiver are set out and which has served as basis for drafting Article 9, does not apply to EAW-proceedings. However, nothing in law seems to prevent the application of the conditions on waiver to be made applicable to EAW-proceedings.
8. In the DROIPEN Working Party a large majority of Member States considered that in order to provide consistency in the text of the Directive and with a view to adding value to the text, it would be appropriate that the rules on "waiver" set out in Article 9 apply also to the EAW-proceedings referred to in Article 11.

³ The texts of this Article currently reads as follows:

Article 9
Waiver

1. *Without prejudice to national law that requires the mandatory presence or assistance of a lawyer, Member States shall ensure that, in relation to any waiver of a right referred to in Article 3 and 11 of this Directive:*
- (a) *the suspect or accused person has been provided with sufficient information so as to allow him to have adequate knowledge about the content of the right concerned and the possible consequences of waiving it; and*
- (b) *the waiver is given voluntarily and unequivocally.*
2. *The waiver and the circumstances in which it was given shall be noted, using the recording procedure in accordance with the law of the Member State concerned.*
3. *Member States shall ensure that a waiver can be subsequently revoked at any point during the pre-trial stage or, subject to judicial discretion, during the trial. In case of revocation this Directive shall apply from that point in time onwards.*

9. One Member State however objected. This Member State underlined the difference between criminal proceedings and EAW-proceedings and advocated that, given the specialities of EAW-proceedings, an approach different than a "waiver" should be considered. Therefore, a reference in Article 9 to Article 11 (and in Article 11(3) to Article 9) would not be advisable: it would be better to insert in the three indents of Article 11(2) words like "if the requested person so wishes".
10. The third question is whether Article 13 on remedies ⁴ should also apply to EAW-proceedings. In the DROIPEN Working Party a majority of Member States was of the opinion that this should indeed be the case, since it would be appropriate if an effective remedy would also be available in case of a breach of a right foreseen in the Directive in EAW-proceedings, it being understood that it should be left to Member States to determine what such a remedy should effectively be. However, two Member State considered that this issue should be further discussed.
11. A fourth question is whether the right foreseen in Article 11(2), third indent, for a requested person in EAW-proceedings to have his lawyer be present and, in accordance with procedures in national law, participate should be limited to the hearing of the requested person by the executing judicial authority, or whether it should be extended to questioning, if any, e.g. by the police. The Presidency would very much appreciate it to obtain the opinion of the EAW experts on this point.
12. A fifth and last question is whether the EAW experts have any additional suggestions in respect of Article 11 and the related Articles.

⁴ Article 13 currently reads as follows:

Article 13
Remedies

Member States shall ensure that a suspected or accused person has an effective remedy in instances where his right of access to a lawyer has been breached.

13. Summarizing, the Presidency would like to profit from the expertise of the EAW experts to make progress on the issue of Article 11. Therefore, the Presidency:

- would appreciate it if the COPEN Working Party could confirm the following:
 - a) it is appropriate to make reference in Article 11(3) to Article 5, so that the rules on "having a third person informed upon deprivation of liberty" also apply *mutatis mutandis* in EAW-proceedings;
 - b) it is appropriate to make reference in Article 9(1) to Article 11, and in Article 11(3) to Article 9, so that the rules on "waiver" set out in Article 9 also apply *mutatis mutandis* in EAW-proceedings;
 - c) it is appropriate to make reference in Article 11(3) to Article 13, so that an effective remedy should also be available in case of a breach of a right foreseen in the Directive in EAW-proceedings;
- would appreciate it if the COPEN Working Party could indicate whether:
 - d) in Article 11(2), third indent, the right for a requested person in EAW-proceedings to have his lawyer be present and, in accordance with procedures in national law, participate should be limited to the hearing of the requested person by the executing judicial authority, or whether it should be extended to any questioning;
 - e) they have any other suggestions on Article 11 of the draft Directive and the related Articles.