

Meijers Committee

Standing committee of experts on
international immigration, refugee
and criminal law

Secretariat

p.o. box 201, 3500 AE Utrecht/The Netherlands
phone 0031 30 297 43 28/43 21
fax 0031 30 296 00 50
e-mail cie.meijers@forum.nl
<http://www.commissie-meijers.nl>

Aan De leden van de Commissie voor Immigratie & Asiel/JBZ-Raad en de Commissie voor Veiligheid & Justitie van de Eerste Kamer der Staten-Generaal
Postbus 20017
2500 EA DEN HAAG

Kenmerk CM1109
Betreft Voorstel voor een richtlijn over het recht op een advocaat en communicatie in strafrechtelijke procedures (COM(2011)326) i.v.m. overleg op 13 september a.s.
Datum Utrecht, 9 september 2011

Geachte leden van de Eerste Kamer,

In verband met de behandeling van het voorstel voor een richtlijn over het recht op een advocaat en communicatie in strafrechtelijke procedures (COM(2011)326) door uw Kamer op 13 september a.s. vraagt de Commissie Meijers uw aandacht voor de bijgevoegde notitie. In de notitie worden opmerkingen gemaakt ten aanzien van de rol van de advocaat in strafrechtelijke procedures.

De notitie wordt tevens aan de Europese Commissie verstuurd en is daarom in het Engels opgesteld.

Tot nadere toelichting steeds bereid,

Vriendelijk groetend,



Prof. mr. C.A. Groenendijk
Voorzitter

Note on the rights of access to a lawyer in criminal proceedings

With a view to the future 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, the Standing Committee of Experts on International Immigration, Refugee and Criminal Law (Meijers Committee) wishes to call to your attention the following remarks, in particular on the role of the lawyer during the questioning and hearing of his client.

1. The question whether or not a lawyer should be entitled to be present during any questioning and hearing, and if so, what his precise role should be, is approached differently in several Member States of the European Union. The various viewpoints alternately emphasize the importance of fact-finding in criminal procedure and the need to strengthen procedural rights of suspected and accused persons in criminal proceedings. Contrasting these two aspects of criminal justice systems would, however, be fruitless; the daily practice of combating crime in modern times requires that both aspects are balanced against each other time and again, and from case to case. Likewise, there is no question that the presence and participation of a lawyer during the questioning and hearing of his client would affect the position of the police and the prosecution to direct the examination.
2. As a result of Strasbourg case-law, a minimum level has been established concerning the rights to legal advice and legal aid. With regard to the future directive, the Meijers Committee would like to encourage the European Commission to exceed this established minimum level. In view of the fact that all EU Member States – and in due time even the EU itself – joined the ECHR, the Meijers Committee strongly believes that the EU constitutes the perfect platform to surpass the minimum standards required by the ECHR for all 47 Council of Europe Member States. Article 52(3) of the Charter of Fundamental Rights of the EU explicitly allows Union law to provide more extensive protection than the ECHR.
3. In view of this, it is commendable that the draft directive proposes to lay down a right for the individual to have his lawyer present during any questioning or hearing, starting from the earliest stage of criminal proceedings. Such would indeed exceed the minimum level established by the ECtHR. After all, the Court has not yet unambiguously held that Article 6 ECHR entails the right to have a lawyer present during police interrogation; it assesses whether or not the procedure as a *whole* has been fair.¹ However, this leaves unaffected that within the entire EU such a right could be established.
4. That the draft directive explicitly refers to an *actively participating* lawyer during questioning and hearing has to be welcomed enthusiastically. Discussions on the exact role of the lawyer during questionings and hearings have shown that there are differences of opinion as to whether or not a passive presence would suffice. However, it has to be emphasized that only an active participation enables the suspected or accused person to conduct an effective defense. Though it is true that a passive presence does enable the lawyer to fight statements obtained during questionings and hearings and to question the mode of operation followed by the questioning authorities, these options apply afterwards. By then, the alleged damage has been done already. The ECtHR has

¹ Recently, the ECtHR held that evidence statements obtained during police custody in the absence of a lawyer cannot be used as the primary source to a conviction, see *Sebalj v. Croatia*, 28 June 2011, Appl. No. 4429/09 (First Section), par. 262. At this time, the decision has not become final yet; it remains to be seen whether appeal will be lodged with the Court's Grand Chamber.

held that the position a suspect is in when being interrogated, is a vulnerable one, especially when he is deprived of his liberty and the interrogation takes place in a very early stage.² This vulnerable position can only effectively be balanced if the participation of a lawyer during the interrogation is an active one.

5. Audiovisual recordings would not suffice to address these problems. Although the Meijers Committee advocates a standard audiovisual recording of questioning and hearing suspected and accused persons, such a measure should not replace the proposal to establish a right to have a lawyer actively present as it provides material to the defense which can only be put forward afterwards.
6. Anticipating on the possible adoption of a provision on the right of a suspected and accused person that his lawyer be present at any occasion when he is questioned or heard, it is up to the Member States to implement this provision and to guarantee the effective exercise of this right in practice. This may entail major changes, in particular for those jurisdictions in which a lawyer is currently not allowed to be present (not even passively) during any questioning or hearing (e.g. The Netherlands). At least where it comes to manpower, the question arises whether the current number of lawyers is sufficient to handle the future workload. A negative answer to this question would include a serious threat to the effectuation of the right at stake, and should thus be addressed during negotiations already.
7. Another urgent question that arises regards the financial side of the topic. The right to have a lawyer present during the questioning and hearing would remain a dead letter for those suspects who cannot afford a lawyer for financial reasons. In view of the obligation for Member States under the ECHR to guarantee rights that are practical and effective, the Meijers Committee takes the line that suspected and accused persons without means should explicitly be able to exercise this right free of charge. This issue also needs to be addressed.
8. Closely connected to the issue of costs, is the issue of quality of legal aid. The right to have a lawyer present during any questioning or hearing would be an empty vessel if at the national and individual level these lawyers appear to be of poor quality, which may particularly happen in those Member States where such a right does not exist today (see paragraph 6). It is therefore suggested that a mechanism will be introduced for the safeguarding of lawyers of sufficient quality, also in view of criminal cases with a cross-border element. Such a mechanism should include the requirement of professional training and permanent education.
9. The EU legislator should also take a position on the issue of legal professional privilege. An effective system of legal aid requires that any person in need for such assistance and advice should be encouraged to full disclosure of information to his lawyer without fearing that this information is possibly made public in the future (e.g. because his lawyer would be obliged to act as a witness in any judicial procedure). The Meijers Committee strongly recommends that legal professional privilege should be guaranteed throughout the entire European Union.
10. In addition, it would be helpful for the future to design a formula on the division of costs related to the effectuation of this right in cross-border cases. After all, it may happen that a certain Member

² See amongst others *Salduz v. Turkey*, 27 November 2008, appl.no.36391/02, *Panovits v. Cyprus*, 11 December 2008, appl.no.4268/04, *Dayanan v. Turkey*, 13 October 2009, appl.no.7377/03, *Brusco v. France*, 14 October 2010, appl.no.1466/07 and *Sebalj v. Croatia*, 28 June 2011, appl.no. 4429/09.

State needs the help of another Member State, for instance in the context of surrender. In such situations, the Meijers Committee suggests that the issuing Member State will in principle be obliged to reimburse the executing Member State for the expenses made for the effectuation of the right to have a lawyer present during the questioning and hearing. Would the executing Member State be held to pay these costs, the securing of this right is likely to be undermined in practice, given that a state will be less eager to pay fair amounts of money in criminal cases without any national interest. Of course, only those costs necessary to suffice the minimum guarantees of the directive would be reimbursable.

11. In this context, the opportunity could be taken to discuss the introduction of an EU fund for the effectuation of procedural rights in the European Union.
12. Last but not least, the current version of the draft directive lacks a position on the right of access to a lawyer in cases where the principle of mutual recognition applies. In such cases, this right should explicitly apply in both Member States involved: the issuing Member State as well as the executing Member State. Not only would this better protect the individual who is in a vulnerable position, it would also contribute to faster mutual recognition procedures (e.g. surrender procedures); it would surely facilitate the exchange of information and, where it concerns the transfer of persons, these persons are expected to be more likely to consent to their transfer.

Utrecht, 9 September 2011

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