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**AMNESTY
INTERNATIONAL**



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EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE ON RIGHT OF ACCESS TO A LAWYER IN CRIMINAL PROCEEDINGS AND RIGHT TO COMMUNICATE UPON ARREST

Ahead of the discussion in LIBE on the state of negotiations on the proposed Directive on the right of access to a lawyer and the right to communicate upon arrest (the Directive), Amnesty International is calling on the European Parliament to **pursue its efforts** to ensure that the legislative process is conducted scrupulously and that it defends the positions it expressed in the orientation vote (OV) in July.

Given the human rights issues at stake, it is crucial that this debate is resolved promptly but not hastily to avoid jeopardising the quality of the legislative process. We especially urge Parliament to **remain vigilant** in ensuring that negotiations are carried out transparently, to allow genuine democratic and public debate. This means providing regular information on the revised text and evolving positions, and making public expert opinions on contentious issues. Publishing updated advice from the Council of Europe would be a positive step in that direction.

Considering the fundamental divergences between the Council's general approach (GA) reached in early June and the European Parliament's OV, we anticipated that discussions would not be easy. As discussions proceed, we are concerned that negotiations might in fact undermine the human rights standards upheld by Parliament's OV.

In the attached annex, we highlight several 'red lines' we believe it is essential not to cross at this stage of discussions. Our main concerns relate to the Directive's scope, the right to communicate with a third person and the specific derogations, especially derogations to the principle of confidentiality of lawyer-client communications.

Our comments develop Amnesty International's previous analysis in September 2011 on the Commission's proposal and last June on the Council's and European Parliament's positions. We stand ready to provide further updated and more detailed analysis of the proposals based on the outcome of the trilogue negotiations so far.

We hope this will help you with the discussions.

Yours sincerely,

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ANNEX –MAIN CONCERNS

- **Scope of the Directive**

Safeguards for those not formally designated as suspects or accused persons

Parliament's position maintained the Commission proposal's provision which included in the Directive's body **explicit protection of the rights of people other than those formally designated as suspects or accused**, and the requirement that any statement made by such persons before they are made aware that they are suspected or accused of committing a criminal offence, is not used as evidence against them.

The Council's general approach had left out this last requirement and downgraded the principle of including suspects and accused regardless of their formal designation in the scope of the Directive by placing it in the recitals. **Amnesty International (AI) calls on the Parliament to ensure that the principle and subsequent requirement are both reinstated in the body of the directive as part of the scope and remedies.** There is no logical basis for depriving an individual of such protections on the sole basis that, for instance, officials have suspicions but do not communicate them to the individual, or that the individual was initially detained or otherwise legally required to attend for questioning as a 'witness' rather than an accused person.

No exception for people accused of minor offences

AI is concerned by the Council's attempt to categorically exclude minor offences, including criminal minor offences, from the Directive's scope. Drawing such a distinction in the right of access to a lawyer in criminal proceedings is not contemplated in human rights treaties or instruments. It was never contemplated either by the Commission's proposal or the European Parliament.

The Council also significantly extends the definition of minor offences compared to the exception included in the first two directives adopted on procedural rights in criminal proceedings (right to interpretation & translation, right to information). **The Council justifies its position using the subjective assertion** that it would be "disproportionate" to require the right of access to a lawyer with some minor offences which qualify as criminal in some member states (the Council quotes examples such as ignoring traffic lights, night-time lawn-mowing or public drunkenness), **instead of relying on the objective test applied by the European Court of Human Rights** (Strasbourg Court) to determine whether a particular offence constitutes a criminal charge and therefore triggers full criminal fair trial rights under the European Convention for Human Rights (the Convention). (note the Human Rights Committee's similar approach regarding the International Covenant on Civil and Political Rights). **The Council amendments even go as far as suggesting the exclusion of minor offences "when deprivation of liberty cannot be imposed". Such a definition is at odds with the Strasbourg Court's case law**, which has never said that the benefit of the right to a lawyer is limited to cases of deprivation of liberty.

By denying protections that appear to be required under the Convention, the Directive will at best confuse member states, and at worst expose individuals to the risk that their right to a fair trial is violated.



- **Principle of confidentiality of communications between lawyer and client**

Amnesty International has welcomed Parliament's strong stand on the principle of confidentiality of communication between a suspect or accused person and his lawyer. **In its orientation vote, Parliament insisted that: "Confidentiality is absolute and shall not be subject to any exception".**

This principle is of the utmost importance for the effective exercise of the rights provided by Articles 6 of the ECHR and 48 of the Charter of Fundamental Rights of the EU, and has been firmly recognised in ECtHR case-law as "part of the basic requirements of a fair trial in a democratic society" (see *S v Switzerland*, 28 November 1991, *Brennan v United Kingdom* 16 October 2001, and *Castravet v Moldova*, 13 March 2007, affirmed by Grand Chamber *Saknovskiy v Russia* 2 November 2010, *et al*). It is also recognised in a range of UN international standards.

We look to Parliament to maintain its line robustly by defending a principle of confidentiality without exceptions.

Any attempt to introduce derogations would constitute a serious set-back to developing international human rights standards, undermining the right to a fair trial provided by the ECHR.

- **Right to communicate upon arrest**

Contact with the outside world is not only a fundamental right to which everyone deprived of liberty is entitled but an essential safeguard against human rights violations such as torture, ill-treatment and enforced disappearance, and vital to the process of obtaining a fair trial. The right not merely to have relatives notified, but to communicate with and receive visits from them and others outside the place of detention, is already recognised across a range of European and international instruments and jurisprudence

Amnesty International has welcomed acknowledgment of this right at EU-level and warned against any attempt to alter its meaning by converting the general right to communicate with family members and others into a minimum right to have a third person informed upon deprivation of liberty.

In contrast to the European Parliament (which in fact reinforced the content of the right to communicate by explicitly mentioning the right to receive visits), **the Council proposes exactly that**, introducing a new distinction between the right to have a person "informed of deprivation of liberty" which "should be ensured without due delay" and the "right to communicate with at least one person" which is now made conditional on a sweeping series of exceptions which extend to excluding informing holders of parental responsibility of their child's deprivation of liberty.



- **Derogations**

We are extremely concerned by proposals from the Council providing for a very wide scope for derogations under the Directive.

From the outset Amnesty International has opposed including any derogation provision in the Directive while noting that if the Commission's derogation provision were maintained, it would need to be more precise and narrow to properly reflect international legal standards.

While we had welcomed some improvements proposed by Parliament, we are concerned that current proposals by the Council go in the other direction and actually widen the possibilities for derogations to several relevant articles of the Directive (such as the right to access a lawyer, the right to confidentiality between lawyer and client and the right to communicate with a third person) by, for example:

- Referring to possible derogation grounds that exceed those internationally recognised as a valid basis for derogation.
- Including no ultimate or substantive time-limit on derogations [despite prevailing international standards indicating 48 hours may be the outer limit for denial of access to a lawyer, and that denial of communication with family not exceed a matter of days"]
- Failing to explicitly require that the grounds and criteria for derogations should be clearly set out in national law

Allowing for such wide temporary derogations could during the period of derogation leave a person without access to any lawyer at all. This would notably contravene standards set out by the European Committee for Prevention of Torture (CPT): *The CPT fully recognises that **it may exceptionally be necessary to delay for a certain period a detained person's access to a lawyer of his choice. However, this should not result in the right of access to a lawyer being totally denied during the period in question. In such cases, access to another independent lawyer who can be trusted not to jeopardise the legitimate interests of the investigation should be organised. It is perfectly feasible to make satisfactory arrangements in advance for this type of situation, in consultation with the local Bar Association or Law Society.***¹

¹ "The CPT Standards", CPT/Inf/E (2002) 1 - Rev. 2011, Extract from the 21st General Report [CPT/Inf (2011) 28, page 16, para 22. <http://www.cpt.coe.int/en/documents/eng-standards.pdf>