



Krzysztof Kwiatkowski
Minister of Justice
Polish Presidency of the Council of the European Union

Brussels, 25 October 2011
Our Ref: B1110

Dear Minister,

Justice and Home Affairs Council, 27-28 October 2011: 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

Amnesty International has welcomed the Commission's directive proposal on the right of access to a lawyer in criminal proceedings and the right to communicate on arrest. We noted that the text builds on European Court of Human Rights (EctHR) case-law, providing a solid basis for establishing minimum standards across the EU and safeguarding essential elements of the fundamental right of all people to a fair trial. Please see our observations on the proposal on our website.¹

We are therefore concerned that the negotiations in the Council appear to weaken the proposal and call into question the role of EU legislation as a means of ensuring better implementation and enforcing progressive human rights standards across Europe.

As the JHA Council of 27-28 October is set to present the state of play of the Council negotiations on the directive, we would like to highlight our concerns.

In our comments on the proposal, we insisted on the importance of the principle of confidentiality between lawyers and their clients and welcomed the fact that there were absolutely no exceptions to this rule in the proposal. Any attempt to introduce exceptions for particular crimes such as terrorism would constitute a set-back in the development of international human rights standards. It would negate all the lessons learnt from the excesses in terrorism-related trials over the past decade. It would give credit to the false assumption that access to communications between suspects and their lawyers are vital to providing intelligence or avoiding imminent danger. It risks subsuming into law the notion that lawyers collude with their clients in criminal activities.

More generally, we have warned against any widening of the scope of the derogations to the right to access to a lawyer, which we believe is already too wide in the Commission proposal. Given the crucial role that access to an independent lawyer plays in ensuring a fair trial right and as a fundamental safeguard against torture and other cruel, inhuman or degrading treatment or punishment while in police custody, we believe the directive should not allow for any exceptions to be made to the right of suspects to have their lawyer present from the outset of any

¹ www.amnesty.eu/content/assets/Doc2011/AI_observations_on_the_draft_directive_Sept2011Final.pdf

deprivation of liberty. If the Directive did retain a derogation provision, additional criteria should be added to restrict its scope as far as possible, rather than introducing more flexibility in its interpretation. We especially welcome the proposal's stipulation that derogations are not based exclusively on the type or seriousness of the alleged offence. We are concerned that this may instead become a leading consideration when deciding on derogations. We believe that proceedings against terrorist suspects are often precisely those which are most susceptible to human rights violations or allegations thereof. Miscarriages of justice in these cases have a major impact on public confidence in the rule of law and may lead to alienation in certain sectors of society which feel that they are unfairly targeted in the fight against terrorism.

We reiterate the importance of the right to communication with the outside world as a recognised safeguard against torture and other cruel and inhuman treatment and consider that the provision stating that the lawyer shall have the right to check the conditions in which a suspect or accused person is detained and to this end have access to the place where the person is detained an important asset to the Directive which the Council should be eager to retain. Doing otherwise would appear incoherent with other EU commitments to address the issue of poor detention conditions in the Union.

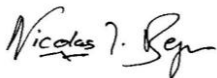
Related to these specific (non-exhaustive) concerns, we are extremely disturbed that some member states have openly and fundamentally called into question the Commission's definition of the scope and content of the right of access to a lawyer and to communicate on arrest. Please see the letter from Amnesty International and other organisations working on justice and human rights to the justice ministers of Belgium, France, Ireland, the Netherlands and the UK on our website.²

Some member states believe that a debate on these issues of principle is essential to progress in the negotiations. We disapprove of this approach, and stress that the issues at stake are not political, but pertain to international human rights law and fair trial standards. As such, they constitute binding principles for every EU member state and cannot be disregarded. We also stress that, given EU accession to the European Convention on Human Rights and effective implementation of the EU Charter on Fundamental Rights, meeting these obligations in EU law is essential to ensuring EU compliance with the European Convention and the Charter.

In this respect, the objective of the Commission's proposal and the consequent obligations on member states are clear. The directive aims to incorporate the Strasbourg court's abundantly clear jurisprudence and use it as the basis to enforce minimum standards on fair trial rights in a forward-looking and prudent manner. Instead of challenging the actual interpretation of international and European human rights law, the Council should use this directive to ensure the progressive development of existing human rights standards.

We urge the Council to discuss the content and details of the proposed directive on the right of access to a lawyer without challenging or altering its principles and with the aim of safeguarding the highest possible protection for human rights. We particularly look to the Polish presidency to use the next two months to play the lead in shaping the debate along these lines at Council level.

Yours sincerely,



Dr. Nicolas J. Beger
Director
Amnesty International European Institutions Office



Draginja Nadazdin
Director
Amnesty International Poland

² www.amnesty.eu/content/assets/Doc2011/Open_Letter_regarding_Proposal_for_Directive_on_rights_to_lawyer.pdf.