

# SENATE OF THE ITALIAN REPUBLIC

16th PARLIAMENT

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## RESOLUTION OF THE 14TH STANDING COMMITTEE

(European Union Policies)

(*Rapporteur FLERES*)

*approved at the session of 21 March 2012*

ON THE

**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  
(COM(2011) 326 FINAL)**

*pursuant to Article 144(1)(5) and (6) of the Rules of Procedure*

**Notified to the President's Office on 28 March 2012**

The Committee, having examined the document COM(2011) 326 final,

whereas the proposal in question aims to set common minimum standards on the rights of suspects and accused persons in criminal proceedings and of persons subject to a European arrest warrant to have access to a lawyer and to communicate upon arrest with a third person, such as a relative, employer or consular authority;

whereas the European Commission initiative is one of a series of measures laid down in the Council Resolution of 30 November 2009 on a Roadmap for strengthening procedural rights of suspects and accused persons in criminal proceedings, appended to the Stockholm Programme approved by the European Council of 10-11 December 2009;

whereas the main regulatory instruments in this field at European level are the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the Charter of Fundamental Rights of the European Union which, on entry into force of the Treaty of Lisbon, acquired the same legal value as the Treaties;

whereas, finally, the Italian Constitution states that ‘Defence is an inviolable right at every stage and instance of legal proceedings. The poor are entitled by law to proper means for action or defence in all courts’ (Article 24 paragraphs 2 and 3) and ‘In criminal law trials, the law provides that the alleged offender shall be promptly informed confidentially of the nature and reasons for the charges that are brought and shall have adequate time and conditions to prepare a defence...’ (Article 111, paragraph 3),

comments favourably on the proposals, for matters within its remit, highlighting the following points:

1. The Commission takes as the legal basis for its proposal Article 82(2) of the Treaty on the Functioning of the European Union: ‘To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules.’ Such directives may also concern ‘the rights of individuals in criminal procedure’ (Article 82(2)(b)) and do not prevent Member States from maintaining or introducing a higher level of protection for individuals. Although Article 82(2) limits the European Union’s jurisdiction to ‘criminal matters having a cross-border dimension’, it appears that the European Commission is extending the scope of the proposal for a Directive to include any type of criminal proceedings, regardless of whether or not a cross-border dimension exists. In support of this, the Commission states that the adoption of common standards applicable to all criminal proceedings is necessary to guarantee mutual trust between the judicial authorities of the Member States. Otherwise an unreasonable distinction would be drawn within the legal systems of individual Member States between the rights of those accused in domestic criminal proceedings and those facing proceedings with a cross-border dimension.

The fact that the proposal departs in part from the legal basis of Article 82 of the Treaty appears to be offset by the adherence to the more general principle of equality. However, given the Community nature of the proposal and hence the fact that it takes precedence over provisions of national law, the Committee considers that further consideration should be given to the possible implications of any legal challenge to such an extension of the measure’s scope;

2. the proposal appears to comply with the principles of subsidiarity and proportionality in that only action taken by the European Union will establish consistent common minimum standards that apply throughout the whole of the European Union. The objective of the proposal cannot be sufficiently achieved by Member States alone, since there is still significant variation in the precise method and timing of the right of access to a lawyer in criminal proceedings across the European Union. It is also clear that the existence of minimum guarantees of access to a lawyer in all Member States will ultimately increase mutual trust in the various systems and facilitate the recognition and enforcement of decisions taken in other States;

3. the Committee welcomes the fact that the proposal helps to solve the problems relating to the lack of mutual trust between the judicial authorities of the Member States and to eliminate the pertinent differences that still exist between national judicial systems with regard to certain rights of suspects and accused persons in criminal proceedings (the right to confidentiality of communications between a suspect or an accused person and his or her lawyer, the possibility of waiving one's right to a lawyer, the system of access to legal aid, the use of evidence obtained where access to a lawyer was denied);

consideration should, however, be given to the merits of stipulating that the right of access to a lawyer in criminal proceedings – which Member States must guarantee for suspects and accused persons within the meaning of Article 3 of the proposal – can also include the right of an accused person who has failed to appoint a lawyer of his or her own choice or who has been denied such a lawyer to be assisted by a lawyer appointed by the court;

with reference to Article 8, in which the Commission proposes to derogate from the right of access to a lawyer in exceptional circumstances, stipulating that any derogation must be justified by compelling reasons pertaining to the urgent need to avert a threat to the life or physical integrity of one or more people, consideration should be given to whether or not a special clause is needed specifying that this is without prejudice to the provisions of national law that provide greater protection of the rights of the accused;

this initial examination of the provisions of the proposal for a Directive has not revealed any provisions that would require the Government to apply the 'emergency brake' provided for in Article 82(3) of the Treaty on the Functioning of the European Union for cases where a Member State considers that a draft directive 'in criminal matters having a cross-border dimension' ... 'would affect fundamental aspects of its criminal justice system'.