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**COMMISSION STAFF WORKING PAPER**

**EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT**

*Accompanying document to the*

**Proposal for a**

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on the rights of access to a lawyer and the right of notification of custody to a third person in criminal proceedings**

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## **EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT**

The impact assessment is for a measure on the rights of access to a lawyer and of notification of custody to a third person for suspects and accused persons in criminal proceedings. This measure aims to set minimum rules governing the right of access to a lawyer and notification of custody across the EU.

### **Problems**

The general problems identified in the IA are that (1) there is insufficient mutual trust between judicial authorities of Member States; (2) there is insufficient level of protection of fundamental rights in criminal proceedings in the EU. The specific problem is that there is insufficient access to a lawyer and notification of custody in many Member States. This presents in various ways. In several Member States there is currently no entitlement for a suspect to see a lawyer before any police questioning and/or no entitlement to have the assistance of a lawyer during the police questioning. The European Court of Human Rights has held that suspects are entitled both to see a lawyer as from the first police questioning and to have a lawyer play an active role in their defence during police questioning (*Salduz v Turkey*, *Brusco v France*). There are discrepancies between Member States about the possibility of waiving one's right to a lawyer. Evidence obtained without a lawyer being present has a different status from one Member State to another. Finally, in European Arrest Warrant proceedings, there are no EU rules governing legal advice for the person sought in both the issuing State and the executing State, which undermines trust further. All this is well illustrated using a number of case studies in the IA. In relation to notification of custody, the Committee for the Prevention of Torture (CPT) in its contact with detainees in the course of its country visits has identified repeated instances where although the right to notification of custody exists in statute, in practice it is not offered to all detainees or is offered with considerable delays (often only after a certain stage is reached – i.e. being brought before a judge) and they identified many instances where there is no feedback to the detainee in respect of the contact made with their nominee.

Subsidiarity: It is considered that there is a need for EU action based on inter alia the cross-border dimension of the problem given a mobile citizenship, including criminals; the shortcomings of ECHR and CPT enforcement mechanisms and the access to the full panoply of EU enforcement mechanisms that would come with EU action

### **Objectives**

Any measure(s) taken at EU level on the access to a lawyer should achieve the following general and specific objectives,

<b>General:</b>	<ul style="list-style-type: none"><li>• To improve judicial cooperation in the EU</li><li>• To ensure an adequate level of protection of fundamental rights in criminal proceedings for all individuals</li></ul>
<b>Specific:</b>	<ul style="list-style-type: none"><li>• To reduce costs of delays, refusals, appeals in the execution of request for judicial cooperation between Member States.</li><li>• To ensure that suspected or accused persons have adequate access to a lawyer throughout criminal proceedings</li></ul>

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|  | <ul style="list-style-type: none"> <li>• To ensure that suspected or accused persons that are deprived of their liberty have the right to have the fact of this deprivation of liberty notified to a third party of their choice,</li> </ul> |
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## Options

The policy options set out in the Impact Assessment are:

- **Policy option 1:** Retention of the status quo. This option would involve taking no action at EU level.
- **Policy option 2:** Recommendation on good practice on suspects' and accused persons' right to access to a lawyer and to notification of custody
- **Policy option 3:** Directive setting minimum rules applying the ECtHR *acquis* on access to a lawyer, (i.e the Convention and the case law of the European Court on Human Rights) and CPT recommendations on notification of custody and reinforcing the application of mutual recognition instruments.
  - This option would cover five specific aspects of the rights of access to a lawyer and notification of custody, and in particular would ensure prompt access to a lawyer, would specify the content of the access and right to feedback on notification of custody, provide for a waiver and remedies and apply to EAW proceedings in the executing and issuing states.
- **Policy option 4:** Directive applying CPT recommendation on notification of custody and setting further rules going beyond the ECtHR *acquis* on access to a lawyer and reinforcing the application of mutual recognition instruments.
  - This option would, in addition to what is described under Option 3 (while providing the same right of notification of custody), ensure that access to a lawyer is granted ahead of (instead of upon) any policy questioning; it would impose mandatory defence across the board, and lay down a prohibition to use evidentiary material obtained in breach of the right to a lawyer.

## IMPACTS

### Effectiveness in meeting objectives:

- **Policy option 1:** As the ECHR and the ECtHR jurisprudence and CPT recommendations are not uniformly implemented by Member States, the level of protection of suspects remains inadequate at present. Additionally, the ECHR and its jurisprudence do not cover certain aspects of the issue which are pivotal to ensure fair trial, e.g. EAW proceedings.
- **Policy option 2:** It is not certain that the non-binding Recommendation would be implemented fully by all Member States, particularly those which do not currently comply with minimum ECtHR standards. and CPT recommendations.
- **Policy option 3:** This option would have all the strengths of the legislative instrument (binding nature, high enforceability). In particular: compliance with the ECtHR *acquis* and CPT recommendations and judicial cooperation will be enhanced by the following specific measures
  1. **Temporal scope:** providing access to a lawyer from the first police interrogation and notification of custody from deprivation of liberty

2. **Material scope:** specific regulation of the activity a counsel can carry out and the right to notification reinforced by the obligation to provide feedback
  3. **Waiving the right to a lawyer:**
  4. **Consequences of violations:** stipulating that Member States must set up legal remedies in case of violations of the right to a lawyer
  5. **EAW cases:** The person subject to the warrant is assisted by a lawyer in both the issuing and the executing Member States.
- **Policy option 4:** Under this option, the Directive would, in addition to what is described under Option 3 (while providing the same right of notification of custody), ensure that access to a lawyer is granted *ahead of* (instead of *upon*) any policy questioning; it would impose mandatory defence across the board; it would lay down a prohibition to use evidentiary material obtained in breach of the right to a lawyer. Therefore, these three additional elements (aspects 1, 3 and 4 respectively) would enhance judicial cooperation as follows:
    1. **Temporal scope:** to provide access to a lawyer already before the first police interrogation would ensure that the suspect can prepare his defence ahead of the interrogation.
    2. **Mandatory defence:** the requirement that a suspect must be always assisted by a lawyer would represent the single biggest trust-boosting measure for judicial authorities.
    3. **Consequences of violations:** to provide at EU level that evidence obtained in breach of the right to a lawyer may not be used in court

### **Impact on fundamental rights**

- **Policy option 1:** The fundamental rights will continue to be protected in a different manner according to each national system. The Charter of Fundamental Rights will be applied only when EU law is involved, for example under the regime of the European Arrest Warrant.
- **Policy option 2:** The impact of this option and the enhancement of the right to a fair trial, the right to defence of the suspect and accused and the protection against ill-treatment would depend on how Member States would implement EU recommendation.
- **Policy option 3:** The **right to liberty and security** (article 6 EU Charter; article 5 ECHR), **Right to an effective remedy and to a fair trial** (article 47 EU Charter; articles 6 and 13 ECHR) as well as **the presumption of innocence and right of defence** (article 48 EU Charter; article 6 ECHR) would all be enhanced. Both the right of access to a lawyer and the right to notification of custody provide formal safeguards against ill-treatment and thus protect against a potential breach of **prohibition of ill-treatment** (article 4 Charter and article 3 ECHR). The right to notification of custody promotes the **right to respect for private and family life** (article 7 Charter and article 8 ECHR)
- **Policy option 4:** The **right to liberty and security** (article 6 EU Charter; article 5 ECHR), **Right to an effective remedy and to a fair trial** (article 47 EU Charter; articles 6 and 13 ECHR) and **the presumption of innocence and right of defence** (article 48 EU Charter; article 6 ECHR) would all be enhanced. The right to an effective remedy would be further safeguarded by the introduction of the prohibition to use evidentiary material obtained in violation of the right to legal advice at trial.

- **Financial and economic impact**

- **Policy option 1:** Although there are no immediate new financial burdens associated with this option, it will not lead to a reduction in the costs to Member States' law enforcement budget and costs to individual suspects or accused persons incurred by appeals, aborted/delayed prosecutions linked to insufficient access to a lawyer.
- **Policy option 2:** depends on the level of Member States' implementation of all or some of the provisions contained in the Recommendation.
- **Policy option 3:** The financial burden for the average Member State will be in the region of **about €300,000 for a large Member State and between €4,100 and €70,950 for a small Member State**. There will also be an economic and financial impact on individuals. This is quantified (roughly) in the IA at about **1,500 €** per person subject to an EAW.
- **Policy option 4:** The financial impact of this option on Member States can be estimated as high as **€179 million** for a large Member State and about **€110 million** for a medium-sized Member State. As regards the financial costs for individuals, they are estimated between **4,170 €** and **5,200 €** per suspect/accused person per case (individuals subject to criminal proceedings) and about **1,500 €** per person per case (individuals subject to EAW).

**Impact on domestic justice systems**

- **Policy option 1:** The need to implement certain ECtHR rulings and CPT recommendations may even augment the existing divergence, in particular as there are indications that Member States interpret ECtHR pronouncements in different ways.
- **Policy option 2:** It is unlikely that this effect would be any more significant than the effect of ECtHR rulings and CPT recommendations alone.
- **Policy option 3:** This option would ensure that domestic justice systems are broadly brought in line with the precepts of the ECHR and the ECtHR jurisprudence and CPT recommendations, for which some legislative reforms will be needed.
- **Policy option 4:** Significant legislative reforms will need to be carried out to comply with the requirements of the Directive. Some Member States may have problems to accept some of these requirements posited by this option.
- Comparison of options:

Policy option 3 demonstrates the best combination of costs and effectiveness in meeting the objectives. **It is therefore the preferred option:**

Objectives/costs	Policy option 1	Policy option 2:	Policy option 3:	Policy option 4:
Savings due to better judicial cooperation	0	√	√√	√√[√]
<b>Impact on fundamental rights</b>	Low	Low	Medium to high	High
<b>Financial and Economic impact</b> (see tables in Annexes V and VI for full explanation)	0 <sup>1</sup>	Variable, depending on the extent to which Member States would implement the provisions of the Recommendation	<p><b>For Member States:</b></p> <p>The cost of providing access to a lawyer in EAW proceedings in the executing Member State is estimated at about <b>€300,000</b> for a large Member State and between € 4,100 and € 70,950 for a small Member State [subject to the caveats mentioned in the table in § 5.3.3 ].</p> <p><u>NB.</u> All other additional requirements imposed by the Directive in excess of Option 1 have been found to be cost-neutral. (see further analysis of all these data in the table under Annex V)</p>	<p><b>For Member States:</b></p> <p>The cost of this option as concerns the <u>start-date</u> would be as high as <b>€ 179 million</b> for a large Member State and about as <b>€ 110 million</b> for a medium-sized Member State [subject to the caveats mentioned in the table in § 5.3.4]. .</p> <p>The cost of this option as regards the <u>end-date</u> would range between <b>€ 309 million</b> for a large Member State with a generous legal aid regime <b>and €137,046</b> for a medium-sized member State with more restrictive access to legal aid.</p> <p>The cost of providing access to a lawyer in <u>EAW proceedings</u> in the executing Member State is estimated at about <b>€ 300,000</b> for a large Member State and between <b>€4,100 and € 70,950</b> for a small Member State.</p> <p><u>NB.</u> All other additional requirements imposed by the Directive in excess of Option 1 have been found to be cost-neutral. (see further analysis of all these data in the table</p>

<sup>1</sup> As explained in § 5.3.1 above, however, this option will entail significant costs for Member States who are not compliant with the requirements of the ECHR.

				in Annex VI)
	<b>For individuals:</b> none	<b>For individuals:</b> none	<b>For individuals:</b> about 1,500 € per person subject to an EAW	<b>For individuals:</b> 1. Individuals subject to criminal proceedings: about 4,170 € and 5,200 € per suspect/accused person per case. 2. Individuals subject to EAW: about 1,500 € per person subject to an EAW.
<b>Impact on domestic justice system</b>	0	Low to medium	Medium to high	High

Option 4 is evidently the most effective in achieving all the general and specific objectives; nonetheless Option 3 is only marginally less effective. In terms of efficiency, however, the costs for the Member States associated with Option 4 (in the region of several hundreds of millions Euros) are incomparably bigger than those likely to be incurred as a result of Option 3 (€ 300,000 per Member State). Therefore, the different magnitude of costs does not appear to be offset by the marginal gain in terms of reaching the objectives. As concerns the financial impact on individuals, there is also a marked difference between options 3 and 4, with the latter costing up to several thousands Euros per individual per criminal case.

#### **EU ADDED VALUE AND PROPORTIONALITY OF THE PREFERRED OPTION**

The preferred option will guarantee that all suspects and accused persons across the EU have a right to adequate and effective access to a lawyer. In addition all suspects and accused persons who are deprived of their liberty will have the right to have the fact of their custody notified to a third person. The Directive will create obligations on Member States which, on implementation, will be enforceable in Member States' courts. The European Court of Justice will provide a remedy for non-compliance, and this, together with the Commission's power to launch infringement proceedings against Member States, will create strong incentives for Member States to comply with their obligations under the Directive.

The right to access to a lawyer and to notification of custody should be explicitly in the legal order of the EU given that articles 4, 7, 47 and 48 of the Charter of the EU provide for the protection against ill-treatment, the right to privacy and family life, right to an effective remedy and a fair trial, as well as rights of defence and the presumption of innocence. Article 82(2) of TFEU provides a clear legal basis for the establishment of minimum EU-wide rules in respect of the rights of individuals in criminal matters.

In addition, the preferred option is expected to lead to savings owing to a reduction in the number of appeals, condemnations by the ECtHR or delay in judicial cooperation proceedings. Such savings can be estimated for all Member States for the next ten years in the region of **€3.73 million to €11.19 million** EUR.

## **MONITORING AND EVALUATION**

As the Directive, at least to a certain extent, mirrors existing ECHR obligations or obligations that already exist in some form in a number of Member States, it is expected that a two-year deadline would provide Member States with sufficient time to effect necessary changes to their respective national laws and practice. The combination of right of access to a lawyer and notification of custody in one measure with the same implementation date will facilitate Member States as in 21 Member States; their statutory provisions on access to a lawyer and notification of custody are currently in the same piece of domestic legislation. In addition for many Member States, this will not be their first consideration of this issue as they can draw on responses many of them have already made to CPT recommendations on notification of custody. Judicial reforms recently carried out in some Member States with a view to aligning domestic legislation with the ECHR jurisprudence show that very substantial changes can be effected within even a shorter time-frame.

In addition to an Implementation Plan accompanying the proposal for the Directive, the Directive will stipulate that Member States' should report on the effective implementation of legislative or non-legislative measures based on the nature of the proposed changes. The Commission envisages carrying out a specific empirical study with emphasis on data collection three to five years into the implementation of the proposal.