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NOTE

from : Presidency
to : Working Party on Substantive Criminal Law

No. initiative : 11497/11 DROIPEN 61 COPEN 152 CODEC 1018

Subject : Proposal for a Directive of the European Parliament and of the Council on the on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest
- General comments / First reading of Articles 1-11

Introduction

1. On 8 June 2011, the Commission adopted a proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer and on the right of notification of custody to a third person in criminal proceedings ¹. This proposal is the third measure ("C, minus legal aid, and D") in application of the Roadmap for strengthening procedural rights of suspected and accused persons in criminal proceedings, which was adopted by the Council on 30 November 2009 ².

¹ 11497/11 (proposal) + ADD 1 REV1 (impact assessment) + ADD 2 REV 1 (summary of impact assessment).

² OJ C 295, 4.12.2009, p. 1. The first measure ("A") was adopted on 20 October 2010 (Directive 2010/64/EU of the European Parliament and of the Council on the rights to interpretation and translation in criminal proceedings, OJ 280, 26.10.2010, p.1). The second measure ("B") is currently under discussion in the ordinary legislative procedure (Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings, 12564/10 + ADD 1 + ADD 2).

2. On 4 and 5 July 2011, the Working Party on Substantive Criminal Law held its first meeting in respect of this new proposal. The Commission firstly introduced the great lines of the proposal, whereupon the delegations expressed their general comments. Subsequently, the first reading of the proposal started with an examination "article-by-article".

General comments

3. Delegations generally welcomed the proposal for a Directive. However, almost all delegations stated that on one or more points of the text adjustments would have to be made so as to make the text agreeable. Reference is made to the comments set out below in respect of the specific articles.
4. Various delegations noted that the text on several points goes beyond the requirements of the European Convention on Human Rights (ECHR), as interpreted in the case-law of the European Court on Human Rights (ECtHR). Delegations also wondered why the issue of legal aid was absent in the proposal, although costs are very important in this matter and according to the Roadmap the issue of legal aid is to be dealt with together with the issue of access to a lawyer.
5. COM replied that although the proposal for a Directive is clearly inspired by the ECHR and the case-law of the ECtHR, the proposal aims to provide added-value by setting higher and more detailed standards. COM underlined however that the text leaves the Member States a substantial margin of manoeuvre for the implementation of the Directive.
6. As regards legal aid, COM pointed out that the Roadmap expressly provides that the order of the rights indicated in the Roadmap is indicative and that the Roadmap only provides an indication of the proposed action. The decision to split Measure C was not taken lightly and more than half of attendees at an experts meeting in October 2010, that included Member States' representatives, favoured this course.

COM said the issue of legal aid is very complex and current information is very patchy, and that it would have required much more time to present the proposal if legal aid had been included. This would not be appropriate given the need for action on the substantive right arising from the Salduz³ line of jurisprudence. Also, dealing with the substantive right alone allows a focus on the complex issue of the interpretation of the Salduz case-law. COM also referred to Article 12 of the proposal, which deals with the issue of legal aid in general terms.

PRES observed in this context that it plans to organise a conference on legal aid on 5-6 December 2011 in Warsaw, which will deal with further works in this regard.

7. Welcoming the positive comments, COM finally stated that it looks forward to working constructively with the Council and the European Parliament⁴ on this file.

Comments regarding Articles 1-11

During the two days meeting on 4-5 July 2011, the Working Party discussed Articles 1-11 of the Proposal for a Directive.

Article 1 - Objective

8. Various delegations indicated that they have problems with the words "and to communicate upon arrest with a third party". According to the delegations, the word "communicate" could give rise to a too broad interpretation of the right concerned. It was proposed to use wording along the following lines: "and to have a third party informed of the arrest", it being understood that this right is further explained in Articles 5 and 6.

³ Judgment (Grand Chamber) of 27 November 2008. COM underlined that the basic principles of this judgment have been confirmed in various other subsequent judgments. To be noted that all case-law of the ECtHR can be found on the ECHR HUDOC search portal, see <http://cmiskp.echr.coe.int/tkp197/search.asp>.

⁴ To be noted that Mrs Antonescu (PPE, Romania) has been appointed rapporteur on this file.

Article 2 - Scope

9. Paragraph 1: Several delegations indicated that this paragraph went beyond the requirements of the ECHR and the case-law of the ECtHR. It was observed that in application of this case-law, the rights mentioned in the Directive would only become available when the person concerned is deprived of his liberty; reference was made to the Zaichenko case⁵. However, the current wording of the proposal would also trigger these rights when there would be no deprivation of liberty involved, e.g. in situations when there is a road check. According to these delegations, such wide scope would not be desirable.

On the same line, several delegations requested to insert in the Directive an exception for "minor offences", as was done in measure A (and as it currently figures in the draft text of measure B), see Article 1(3) and recital 16 of Directive 2010/64/EU.

The question was also raised whether the words "suspected or accused person" were sufficiently precise.

Further, in line with the work on measure B, it was proposed to have the words "by official notification or otherwise" be deleted.

10. Paragraph 2: The question was raised whether the words "subject to *proceedings* pursuant to Framework Decision 2002/584/JHA" were sufficiently clear. It was suggested to replace "proceedings" by "investigation".

⁵ Judgment (First Section) of 18 February 2010. Points 47 and 48 read as follows:
"47. Moreover, the Court observes that the present case is different from previous cases concerning the right to legal assistance in pre-trial proceedings [...] because the applicant was not formally arrested or interrogated in police custody. He was stopped for a road check. [...]"
48. Although the applicant in the present case was not free to leave, the Court considers that the circumstances of the case as presented by the parties, and established by the Court, disclose no significant curtailment of the applicant's freedom of action, which could be sufficient for activating a requirement for legal assistance already at this stage of the proceedings."

Article 3 - The right of access to a lawyer in criminal proceedings

In general, it was observed that this Article is very much linked to Article 4 and should hence be read in conjunction with that Article.

11. Paragraph 1, heading: Various delegations questioned the use of the words "as soon as possible". COM underlined that something with inbuilt flexibility along this line was necessary, but stated that it could also accept wording such as "without delay" or "promptly".
12. Paragraph 1(a): various delegations expressed doubts on the use of the word "questioning". Reference was made to the Salduz-case⁶, where the word "interrogation" is used. COM stated that any questioning means questioning which can influence the case, and referred in this context to the Sebalj case⁷.
13. Paragraph 1(b): This paragraph encountered opposition from various delegations. The question was raised what would have to be understood by an "evidence-gathering act". Would this also comprise acts like the collection of DNA, finger prints and intimate body samples? Also, the question was asked if the presence of a lawyer would really make a difference regarding such evidence-gathering acts; the fear was expressed that the obligatory presence of a lawyer in such cases could (only) lead to delays. In any case, if under national law you would have to wait for a lawyer to be called in, this should also be the case under the Directive.

⁶ Judgment (Grand Chamber) of 27 November 2008. Point 55 reads as follows:

"55. Against this background, the Court finds that in order for the right to a fair trial to remain sufficiently "practical and effective" (see paragraph 51 above) Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. [...]."

⁷ Judgment (First Section) of 28 June 2011. Point 257 reads as follows:

"257. Against this background the Court finds that there has been a violation of Article 6 §§ 1 and 3(c) of the Convention on account of the applicant's questioning by the police (...) without the presence of a defence lawyer."

In order to clarify this paragraph, the suggestion was made to distinguish between cases where the presence of a lawyer is obligatory, and cases where the presence of a lawyer is facultative.

Paragraph 1(c): Various delegations stated that the notion "deprivation of liberty" was too broad, or should at least be clarified. It was suggested to use the word "detention".

COM stated that "deprivation of liberty" meant a situation in which you would not be free to go home, and pointed out that it is the notion used in Article 5 of the ECHR.

14. Paragraph 2: The suggestion was made to move this paragraph to Article 4.

Article 4 - Content of the right of access to a lawyer

15. Paragraph 1: Some delegations observed that under their national law, a suspect or accused person could, instead of meeting with the lawyer representing him, make a telephone call with this lawyer.
16. Paragraphs 2-5: It was observed that these paragraphs give rights to the *lawyer*, whereas the rights should actually be granted to the *suspect or accused person*. COM replied that this could be redrafted by using wording such as "The suspect or accused person shall have the right to have his lawyer be present".
17. Paragraph 2: The point was made that a distinction should be drawn in this paragraph between the right of the lawyer to be present and assist his client during the consultation phase prior to the hearing in court on the one hand, and the right of the lawyer to be present and assist his client during the hearing in court on the other hand. While all the rights should be available in the first phase, during the second phase such right should only be available in more complex cases.

It was observed again that the right to have the lawyer present should not lead to great delays in proceedings.

It was suggested to describe the specific rights of the lawyer in more general terms, such as "to participate actively during questioning and hearing".

It was also suggested to clarify that the questioning and hearing should have regard to the questioning and hearing of the suspect or accused person (not of other persons, such as witnesses or victims). This latter suggestion was broadly supported, also by COM.

18. Paragraph 3: Reference is made to the comments made under Article 3(1)(b) regarding evidence-gathering.
19. Paragraph 4: A large majority of delegations felt that this paragraph, which allows the lawyer to check the detention-conditions of the suspect or accused person, does not fit well in this Directive and should better be deleted or at least substantially reworded. COM opined that it has a clear added value and would be used in acute situations on a case-by case basis.
20. Paragraph 5: Various delegations stated that this paragraph, regarding duration and frequency of meetings between the suspect or accused person and his lawyer, is drafted in too broad and generous terms and should hence be made more strict and precise.

It was regretted that this paragraph would not be subject to the derogations under Article 8.

Article 5 - The right to communicate upon arrest

21. Paragraph 1: A large majority of delegations opposed the use of the notion "communicate", which would be too broad: a preference was expressed for the use of wording such as "inform" or "notify". Various delegations also observed that the notification should not be made directly by the suspect or accused person, but by an intermediary, such as the public prosecutor. A passive formulation would therefore be appropriate ("have a third party notified of the deprivation of liberty").

In this context, COM pointed out that "notification of custody" has the advantage of being the vocabulary consistently used by the Committee for the Prevention of Torture in their reports.

Also, the use of the words "at least one person named by him", was opposed, since it would be too broad and, moreover, could give rise to abuse (communication with a colleague-criminal). It was suggested to specify this in line with the explanation in the Roadmap⁸.

22. Paragraph 2: Regarding the special situation of deprivation of liberty of a child, the question was raised why this situation was only given special attention in this Article. It was also suggested to clarify the wording.

Article 6 - The right to communicate with consular or diplomatic authorities

23. As regards this Article, the advisability of the use of the word "communicate" was again contested.

⁸ The Roadmap uses the following short explanation for Measure D (Communication with Relatives, Employers and Consular Authorities):

"A suspected or accused person who is deprived of his or her liberty shall be promptly informed of the right to have at least one person, such as a relative or employer, informed of the deprivation of liberty, it being understood that this should not prejudice the due course of the criminal proceedings. In addition, a suspected or accused person who is deprived of his or her liberty in a State other than his or her own shall be informed of the right to have the competent consular authorities informed of the deprivation of liberty."

It was also observed that the compatibility of this provision with the 1963 Vienna Convention on Consular Relations, in particular its Article 36(1)⁹, should be further examined.

Article 7 - Confidentiality

24. Many delegations admitted that meetings between the suspect or accused person and his lawyer should as a general rule be confidential. However, they argued that in exceptional circumstances, such as in the case of terrorism, it should be possible to derogate from this rule.

In support of this argument, reference was made to the judgment in the Campbell case¹⁰, where the ECtHR held that the lawyer-client relationship is, "in principle", privileged.

⁹ The 1963 Vienna Convention on Consular Relations, provides in its Article 36(1) regarding "Communication and contact with nationals of the sending State" as follows:

"1. *With a view to facilitating the exercise of consular functions relating to nationals of the sending State:*

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action."

¹⁰ Judgment of 25 March 1992. Point 46 reads as follows:

"46. *It is clearly in the general interest that any person who wishes to consult a lawyer should be free to do so under conditions which favour full and uninhibited discussion. It is for this reason that the lawyer-client relationship is, in principle, privileged. (...)"*

COM observed that the current text of Article 7 was chosen, since the tendency in Strasbourg would be to have the lawyer-client relationship fully privileged, without exceptions, as it belongs to the core of fair trial in democratic societies. COM referred in this context to the Sakhnovskiy case¹¹. This being, several delegations insisted on derogations to this Article being made possible. It was suggested to add Article 7 to the Articles to which, under Article 8, a derogation could be made.

Article 8 - Derogations

25. This Article called for many comments from delegations, who all considered that the Article was drafted in far too broad terms.

As regards the form, some delegations suggested that the Article could best be split into two sections, one regarding derogations concerning Articles 3-4 (and possibly Article 7), and one regarding derogations concerning Articles 5-6, since these two sets of Articles would be of different nature. Some delegations indicated that they would present drafting suggestions in this respect.

As regards the content, it was observed that according to the case-law of the ECtHR, a derogation to the right of access to a lawyer would only require that there would be "compelling reasons". Reference was made in this respect to the Salduz case¹².

¹¹ Judgment (Grand Chamber) of 2 November 2010. Point 97 reads as follows:
"97. An accused's right to communicate with his lawyer without the risk of being overheard by a third party is one of the basic requirements of a fair trial in a democratic society and follows from Article 6 § 3 (c) of the Convention (...). If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective (...)."

¹² Judgment (Grand Chamber) of 27 November 2008. In point 55 one can read as follows:
"55. [...] Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction - whatever its justification - must not unduly prejudice the rights of the accused under Article 6 [...]"

Some delegations suggested that the whole article could simply be replaced by a reference to such "compelling reasons". COM replied however that this was precisely a point where the Directive could provide added value to the 1950 ECHR and the case-law of the ECtHR. Other delegations stated that the Article should at least be completely reworded.

On a general level, questions were put regarding the interaction of this Article 8 with Article 13(3), regarding "evidence". When use is made of a derogation under Article 8, could evidence obtained still be used in court? If not, what would be the use of such derogation? It was felt that the draft Directive should be further clarified on this point.

COM explained that Article 13 makes it clear that evidence obtained in the absence of a lawyer in such cases should not be used as evidence against the person, unless the use of such evidence would not prejudice the rights of the defence.

26. Heading: It was suggested to add Article 4(4) (if this Article were not deleted), Article 4(5) and Article 7 to the Articles to which derogations could be made under application of Article 8.
27. Paragraph (a): Many delegations felt that this condition, relating to the life or physical integrity of a person, was far too strict. Often, a derogation would be necessary for investigative reasons.
28. Paragraph (b): Some delegations wondered why a derogation could not be based exclusively on the type or seriousness of the alleged offence.
29. Final paragraph: One delegation asked whether "judicial authority" would also encompass public prosecutors. COM stated that the interpretation of the notion of "judicial authority" is left to national law.

Various delegations suggested to replace "judicial authority" by "competent authority", so as to allow more flexibility.

Article 9 - Waiver

30. Delegations were a bit puzzled by this Article, and felt that it was confusingly drafted, e.g. regarding the apparent requirement to obtain "legal advice" prior to being able to waive the right to legal advice. Critical comments were also made regarding the apparent bureaucratic system created by the Article. It was observed that suspects and accused persons could also "simply" decide not to make use of their right to have access to a lawyer, without formally waiving this right.

Further to comments made by delegations, COM pointed out that the suspect or accused person would not necessarily need to have received "prior legal advice" on the consequences of the waiver, but that he/she can also have obtained "otherwise" full knowledge of these consequences.

COM also stated that if the suspect or accused person would ask "prior legal advice" regarding a waiver, the rules of the Member State concerned regarding the possibility to obtain legal aid, if any, for such legal advice, would apply.

Following the comments by delegations, the Presidency invited delegations to have a further look at this Article and to examine whether such a formalised system should be provided.

Article 10 - Persons other than suspects and accused persons

While some delegations felt that this Article was perfectly understandable, many delegations put questions in its respect.

31. Paragraph 1: Various delegations wondered what the added value would be of this paragraph, which seemed superfluous in the light of Article 2. Deletion was suggested. COM stated that the Article was necessary in order to avoid miscarriage of justice, and referred in this context to the Brusco-case¹³.

¹³ Judgment (Fifth Section) of 14 October 2010, in particular from paragraph 44.

32. Paragraph 2: Many delegations posed questions on the added value of this paragraph. They considered that this paragraph should in any case not apply to cases in which the proceeding authorities, without making abuse in any way whatsoever, would use a statement made by a person who was originally not suspected or accused of a criminal act, such as a witness, as evidence in the context of subsequent criminal proceedings against that person. These delegations hence requested to delete this paragraph, or at least to clarify it.

Article 11 - The right of access to a lawyer in European Arrest Warrant proceedings

33. Some delegations expressed fears regarding any modification that would be made to the system of the European arrest warrant. They observed that Article 11 of Framework Decision 2002/584/JHA provided already in Article 11(2)¹⁴ the right to a lawyer in the executing State. It would not be necessary to add anything to this system, which would work satisfactorily.

Other delegations felt that whilst the rules regarding the assistance of a lawyer in the executing State could be improved, it would not be necessary to add rules on the legal assistance in the issuing State.

COM underlined that the proposed assistance of a lawyer in the issuing State would only have as its purpose to assist the work of the lawyer in the executing State.

It was agreed that this Article needed further reflection.

¹⁴ Article 11(2) of Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (JO L 190, 18.7.2002, p. 1), provides as follows :

"Rights of a requested person

1. (...)

2. *A requested person who is arrested for the purpose of the execution of a European arrest warrant shall have a right to be assisted by a legal counsel and by an interpreter in accordance with the national law of the executing Member State."*

Final remarks

34. The Presidency thanked the delegations and the Commission for their constructive approach.
35. In the light of the debate, the Presidency made some drafting suggestions to the text. The text also contains some linguistic improvements suggested by the legal-linguists. Changes are indicated by **bold** type (or, in the case of headings, by underlined type) and by ~~strike-through~~ in the text in the Annex.
36. Delegations are kindly invited to present (oral/written) comments at the next meeting, scheduled for 26 July 2011, and/or to send any written comments before 31 August 2011 at the latest to the following addresses:

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2011/0154 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on the right of access to a lawyer in criminal proceedings and European arrest warrant proceedings and on the right to communicate upon arrest

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 82(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee¹⁵,

Having regard to the opinion of the Committee of the Regions¹⁶,

Acting in accordance with the ordinary legislative procedure,

Whereas:¹⁷

- (1) Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter referred to as "the Charter"), Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the ECHR") and Article 14 of the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR") enshrine the right to a fair trial. Article 48 of the Charter guarantees respect for the rights of the defence;

¹⁵ OJ C , , p. .

¹⁶ OJ C , , p. .

¹⁷ The recitals have not yet been examined.

- (2) The principle of mutual recognition of judgments and judicial decisions is the cornerstone of judicial cooperation in criminal matters in the Union;
- (3) Mutual recognition can only operate effectively where there is mutual trust, which requires detailed rules on the protection of procedural rights and guarantees stemming from the Charter, the ECHR and the ICCPR. Common minimum rules should increase confidence in the criminal justice systems of all Member States, which in turn should lead to more efficient judicial cooperation in a climate of mutual trust and to the promotion of a fundamental rights culture in the Union. They should also remove obstacles to the free movement of citizens. Such common minimum rules should apply to the right of access to a lawyer and the right to communicate upon arrest;
- (4) Although Member States are parties to the ECHR and the ICCPR, experience has shown that this in itself does not always provide a sufficient degree of trust in the criminal justice systems of other Member States;
- (5) On 30 November 2009, the Council adopted the Roadmap for strengthening the procedural rights of suspected and accused persons in criminal proceedings ('the Roadmap')¹⁸. In the Stockholm Programme, adopted on 11 December 2009¹⁹, the European Council welcomed the Roadmap and made it part of the Stockholm Programme (point 2.4.). Taking a step-by-step approach, the Roadmap calls for the adoption of measures regarding the right to translation and interpretation²⁰, the right to information on rights and information about the charges²¹, the right to legal advice and legal aid, the right to communication with relatives, employers and consular authorities, and special safeguards for suspected or accused persons who are vulnerable. The Roadmap emphasises that the order of the rights is indicative, implying that it may be changed according to priorities. It is designed to operate as a whole; only when all its components are implemented will its benefits be felt in full;

¹⁸ OJ C 295, 4.12.2009, p. 1.

¹⁹ OJ C 115, 4.5.2010.

²⁰ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the rights to interpretation and translation in criminal proceedings (OJ L 280, 26.10.2010, p. 1).

²¹ Directive 2011/XXX/EU of the European Parliament and of the Council on the right to information in criminal proceedings.

- (6) This Directive sets out minimum rules on the right of access to a lawyer and the right to communicate upon arrest with a third party in criminal proceedings, excluding administrative proceedings leading to sanctions such as competition or tax proceedings, and in proceedings for the execution of an European Arrest Warrant. In doing so, it promotes the application of the Charter, in particular Articles 4, 6, 7, 47 and 48, by building upon Articles 3, 5, 6 and 8 of the ECHR as interpreted by the European Court of Human Rights;
- (7) The right of access to a lawyer is enshrined in Article 6 of the ECHR and in Article 14(2) of the ICCPR. The right to communicate with a third party is one of the important safeguards against ill treatment prohibited by Article 3 ECHR and the right to have one's consulate informed of detention builds upon the 1963 Vienna Convention on Consular Relations. This Directive should facilitate the practical application of those rights, with a view to safeguarding the right to fair proceedings;
- (8) The European Court of Human Rights has consistently held that the suspect or accused person should have access to a lawyer at the initial stages of police questioning, and in any event from the start of detention, to protect the right to a fair trial, and in particular the privilege against self-incrimination and to avoid ill treatment;
- (9) A similar right to the presence of a lawyer should be granted every time that national law expressly allows or demands the presence of the suspected or accused person at a procedural step or evidence gathering such as a search; in these cases, in fact, the presence of the lawyer can strengthen the rights of the defence without affecting the need to preserve the confidentiality of certain investigative acts, since the presence of the person excludes the confidential nature of the acts in question; this right should be without prejudice to the need to secure evidence which by its very nature is liable to be altered, removed or destroyed if the competent authority was to wait until the arrival of a lawyer;
- (10) To be effective, access to a lawyer should entail the possibility for the lawyer to carry out all the wide range of activities which pertain to legal counselling, as the European Court of Human Rights has held. This should include active participation in any interrogation or hearing, meetings with the client to discuss the case and prepare the defence, the search for exculpatory evidence, support to a distressed client and control of detention conditions;

- (11) The duration and frequency of meetings between the suspect or accused person and their lawyer depend on the circumstances of every proceeding, notably on the complexity of the case and the procedural steps applicable. It should therefore not be limited in a general way, as this could prejudice the effective exercise of the rights of defence;
- (12) Suspects or accused persons deprived of their liberty should have the right promptly to communicate upon arrest with a person of their choice, such as a family member or employer, in order to inform them of the detention;
- (13) Suspects or accused persons deprived of their liberty should also have the right to communicate with any relevant consular or diplomatic authorities. The right to consular assistance is enshrined by Article 36 of the 1963 Vienna Convention on Consular Relations where it is a right conferred on States to have access to their nationals. This Directive confers the right on the detained person, subject to their wishes;
- (14) Since confidentiality of communication between a suspect or accused person and their lawyer is key to ensuring the effective exercise of the rights of the defence, Member States should be required to uphold and safeguard the confidentiality of meetings between the lawyer and the client and of any other form of communication permitted under national law. Confidentiality should not be subject to any exception;
- (15) Derogations from the right of access to a lawyer and the right to communicate upon arrest should be permitted only in exceptional circumstances, in line with case law of the European Court of Human Rights, where there are compelling reasons relating to the urgent need to avert serious adverse consequences for the life or physical integrity of another person and where there are no other less restrictive means to achieve the same result, such as, in cases of a risk of collusion, replacement of the lawyer chosen by the suspect or accused person or nomination of a different third party to communicate with;

- (16) Any such derogation should only lead to a deferral, as limited as possible, of the initial access to a lawyer and should not affect the substance of this right. It should be subject to a case-by-case assessment by the competent judicial authority, which should give reasons for its decision;
- (17) Derogations should not prejudice the right to a fair trial and in particular should never lead to statements made by the suspect or accused person in the absence of his lawyer to be used to secure his conviction;
- (18) The suspect or accused person should be allowed to waive the right to a lawyer, as long as they are fully aware of the consequences of the waiver, notably because they have met with a lawyer before making this decision and have the necessary capacity to understand these consequences and provided that the waiver is given freely and unequivocally. The suspect or accused person should be able to revoke the waiver at any time in the course of the proceedings;
- (19) Any person heard by the competent authority in a different capacity than that of suspect or accused person, e.g. as a witness, should be immediately given access to a lawyer if the authority considers that he has become a suspect in the course of the questioning, and any statements made before he became a suspect or an accused person should not be used against him;
- (20) In order to improve the functioning of judicial cooperation in the European Union, the rights provided for in this Directive should also apply, *mutatis mutandis*, to proceedings for the execution of a European Arrest Warrant according to the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States²²;
- (21) The person subject to a European Arrest Warrant should have the right of access to a lawyer in the executing Member State in order to allow him to exercise his rights effectively under the Council Framework Decision 2002/584/JHA;

²² OJ L 190, 18.7.2002, p. 1.

- (22) That person should also have the possibility to have a lawyer in the issuing Member State to assist the lawyer in the executing Member State in specific cases during the surrender proceedings without prejudice to the deadlines set out in Council Framework Decision 2002/584/JHA; that lawyer should be able to assist the lawyer in the executing Member State when exercising the person's rights under the Council Framework Decision 2002/584/JHA in the executing State, in particular in respect of the grounds of refusal under its Articles 3 and 4; since the European Arrest Warrant is predicated upon the principle of mutual recognition, this should not entail any right to question the merits of the case in the executing Member State; as there is no incompatibility between defence rights and mutual recognition; enhancing fair trial rights both in the executing and in the issuing Member State will boost mutual trust;
- (23) In order to make the right of access to a lawyer in the issuing Member State effective, the executing judicial authority should promptly notify the issuing judicial authority of the arrest of the person and of his request to have access to a lawyer in the issuing Member State;
- (24) In the absence to-date of EU legislative instrument on legal aid, Member States should continue to apply their domestic provisions on legal aid, which should be in line with the Charter, the ECHR and the case-law of the European Court of Human Rights. Whenever new domestic provisions, enacted to implement this Directive, grant a broader right of access to a lawyer than was previously available under national law, the rules currently in place on legal aid should apply with no distinction between the two situations;
- (25) The principle of effectiveness of EU law should require that Member States put in place adequate, effective remedies in the event of a breach to a right conferred upon individuals by Union law;
- (26) The European Court of Human Rights has consistently held that any adverse consequences deriving from a breach of the right to a lawyer must be undone by placing the person in the same position they would have found themselves had the breach not occurred. This may require retrial or equivalent measures if a final conviction was made in breach of the right to a lawyer;

- (27) Since the European Court of Human Rights has established that irretrievable damage to the rights of the defence results from the use of an incriminating statement made by the suspect or accused person without access to a lawyer, Member States should be required in principle to prohibit the use of any statements given in breach of the right of access to a lawyer as evidence against the suspect or accused person unless the use of such evidence would not prejudice the rights of the defence. This should be without prejudice to the use of statements for other purposes permitted under national law, such as the need to execute urgent investigative acts or to avoid the perpetration of other offences or serious adverse consequences for any person;
- (28) This Directive sets minimum rules. Member States may extend the rights set out in this Directive in order to afford a higher level of protection in situations not explicitly dealt with in this Directive. The level of protection should never go below the standards provided by the Charter and by the ECHR, as interpreted in the case law of the European Court of Human Rights;
- (29) This Directive upholds the fundamental rights and principles recognised by the Charter of Fundamental Rights of the European Union, including the prohibition of torture and inhuman and degrading treatment, the right to liberty and security, respect for private and family life, the right to the integrity of the person, the rights of the child, integration of persons with disabilities, the right to an effective remedy and to a fair trial, the presumption of innocence and the right of defence. This Directive must be implemented according to these rights and principles;
- (30) This Directive promotes the rights of the child and takes into account the Guidelines of the Council of Europe on child friendly justice, in particular its provisions on information and advice. The Directive ensures that children cannot waive their rights under this Directive when they lack the capacity to understand the consequences of the waiver. Legal representatives of a suspect or accused child should be always notified as soon as possible of his custody and be informed about the reasons for the custody, unless it is against the best interests of the child;

- (31) Member States should ensure that the provisions of this Directive, where they correspond to rights guaranteed by the ECHR, are implemented consistently with those of the ECHR and as developed by case law of the European Court of Human Rights;
- (32) Since the aim of achieving common minimum standards cannot be achieved by Member States acting unilaterally, either at national, regional or local level, and can only be achieved at European Union level, the European Parliament and the Council may adopt measures in accordance with the principle of subsidiarity as referred to in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in the latter Article, this Directive does not go beyond what is necessary in order to achieve that objective;
- (33) [In accordance with Articles 1, 2, 3 and 4 of the Protocol on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, the United Kingdom and Ireland have notified their wish to participate in the adoption and application of this Directive] OR [without prejudice to Article 4 of the Protocol on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, the United Kingdom and Ireland will not participate in the adoption of this Directive and will not be bound by or be subject to its application]²³;
- (34) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark will not participate in the adoption of this Directive, and is therefore not bound by it or subject to its application,

HAVE ADOPTED THIS DIRECTIVE:

²³ The final wording of this recital will depend on the position of the United Kingdom and Ireland taken in accordance with the provisions of protocol (No 21). The deadline for UK and Ireland to "opt-in" in the work on the Directive, as mentioned in Article 3.1 of Protocol (21) to the Lisbon Treaty, expires on Thursday 29 September 2011 at 24h00.

Article 1

Objective

This Directive lays down **minimum** rules concerning the rights of suspects and accused persons in criminal proceedings and of persons subject to proceedings pursuant to Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States²⁴ ("European arrest warrant proceedings") to have access to a lawyer and to have a third party informed of the deprivation of liberty ~~to communicate upon arrest with a third party.~~

Article 2

Scope

1. This Directive applies **to suspects and accused persons in criminal proceedings** from the time a person is made aware by the competent authorities of a Member State, ~~by official notification or otherwise,~~ that he is suspected or accused of having committed a criminal offence. **It applies** until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspected or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal.
2. This Directive applies to persons subject to **European arrest warrant** proceedings ~~pursuant to Framework Decision 2002/584/JHA,~~ from the time they are arrested in the executing State.
3. **[Where the law of a Member State provides for the imposition of a sanction regarding minor offences by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed to such a court, this Directive shall apply only to the proceedings before that court following such an appeal.]**

²⁴ OJ L 190, 18.7.2002, p. 1.

Article 3

The right of access to a lawyer in criminal proceedings²⁵

1. Member States shall ensure that suspects and accused persons are granted access to a lawyer **without delay** ~~as soon as possible~~ and in any event :
 - (a) before the start of any **formal** questioning by the police or other law enforcement authorities;
 - (b) [upon carrying out any procedural or evidence-gathering act at which the person's presence is required or permitted as a right in accordance with national law, unless this would prejudice the acquisition of evidence;]²⁶
 - (c) from the outset of deprivation of liberty.
2. [moved to Article 4(1)]

Article 4

Scope ~~Content~~ of the right of access to a lawyer²⁷

1. **The suspect or accused person shall be granted access to a lawyer in such a time and manner as to allow him to exercise his rights of defence effectively.**
 - 1a. The suspect or accused person shall have the right to ~~meet~~ **communicate** with the lawyer representing him.

²⁵ PRES draws the attention of the delegations to the fact that this draft Directive does not provide for the conditions of obligatory access to a lawyer, but only of the right to such access. The issue of obligatory access to a lawyer will be dealt with by the future instrument on the legal aid.

²⁶ PRES is reflecting on the drafting of this paragraph in order to respond to comments by delegations. Delegations who have a drafting suggestion are kindly invited to present this at the next meeting or in writing (see point 36 of the cover note).

²⁷ See footnote 1 above.

2. The **suspect or accused person shall have the right that his** lawyer shall have the right to be present at **any occasion when he is questioned or and heard. The suspect or accused person shall have the right that his** lawyer shall have the right to **participates actively during the questioning and hearing, such as by asking** questions, requesting clarification and **makinge** statements, which shall be recorded in accordance with national law.
3. The **suspect or accused person shall have the right that his** lawyer shall have the right to be present at any other investigative or evidence-gathering act at which the suspect or accused person's presence is required or permitted as a right, in accordance with national law, **unless this would prejudice the acquisition of evidence.**²⁸
- ~~4. The lawyer shall have the right to check the conditions in which the suspect or accused person is detained and to this end shall have access to the place where the person is detained.~~
45. The duration and frequency of communications between the suspect or accused person and his lawyer shall not be limited in the way that may prejudice the exercise of his rights of defence.

Article 5

The right to ~~communicate~~ have a third person informed upon deprivation of liberty ~~arrest~~

1. Member States shall ensure that a person **as referred to in** ~~to whom~~ Article 2 refers and who is deprived of his liberty has the right to **have communicate with** at least one person, **such as a relative or employer, informed of the deprivation of liberty** ~~named by him~~ as soon as possible.

²⁸ Delegations are invited to consider whether this restriction in **bold**-type eliminates their concerns about unreasonable exercise of this right. See also the footnote under Article 3(1)(b).

2. ~~If~~ ~~Where~~ the person is a child, **as defined in national law**, Member States shall ensure that the child's legal representative or another adult, depending on the interest of the child, is informed as soon as possible of the deprivation of liberty and the reasons pertaining thereto, unless it would be contrary to the best interests of the child, in which case another ~~appropriate~~ **suitable** adult shall be informed.

Article 6

The right to ~~communicate with~~ have consular or diplomatic authorities informed

Member States shall ensure that ~~a persons to whom~~ **as referred to in Article 2**, who ~~is~~ **are** deprived of ~~his~~ **their** liberty and who ~~is a not~~ a national of the Member State **where he is detained** has the right to have consular or diplomatic authorities of **the** State of **his** nationality informed of the detention as soon as possible ~~and to communicate with the consular or diplomatic authorities.~~

Article 7

Confidentiality

Member States shall ~~guarantee ensure that~~ the confidentiality of meetings between the suspect or accused person and his lawyer ~~is guaranteed~~. They shall also ~~guarantee ensure~~ the confidentiality of correspondence, telephone conversations and other forms of communication permitted under national law between the suspect or accused person and his lawyer. ²⁹

²⁹ The Presidency currently reflects on making a reference to this Article in Article 8, concerning derogations. When appropriate, PRES will prepare a new draft of this Article, following (written) comments of the delegations and the guidance to be provided by CATS on 5-6 September.

Article 8
Derogations³⁰

Member States shall not derogate from any of the provisions of this Directive save, in exceptional circumstances, from Article 3, Article 4 paragraphs 1 to ~~45~~, Article 5 and Article 6. Any such derogation:

- (a) shall be justified by compelling reasons pertaining to the urgent need to avert serious adverse consequences for the life or physical integrity of a person;
- (b) shall not be based exclusively on the type or seriousness of the alleged offence;
- (c) shall not go beyond what is necessary;
- (d) shall be limited in time as much as possible and in any event not extend to the trial stage;
- (e) shall not prejudice the fairness of the proceedings.

Derogations may only be authorised by a duly reasoned decision taken on a case-by-case basis by a judicial authority.

³⁰ PRES will prepare a new draft of this Article, following (written) comments of the delegations and the guidance to be provided by CATS on 5-6 September.

Article 9
Waiver³¹

1. Without prejudice to national law that requires the mandatory presence or assistance of a lawyer, any waiver of the right to a lawyer referred to in this Directive shall be subject to the following conditions:
 - (a) the suspect or accused person has received prior legal advice on the consequences of the waiver or has otherwise obtained full knowledge of these consequences;
 - (b) he has the necessary capacity to understand these consequences and
 - (c) the waiver is given voluntarily and unequivocally.
2. The waiver and the circumstances in which it was given shall be recorded in accordance with the law of the Member State concerned.
3. Member States shall ensure that a waiver can be subsequently revoked at any stage of the proceedings.

Article 10
Persons other than suspects and accused person³²

1. Member States shall ensure that any person other than a suspect or accused person who is heard by the police or other enforcement authority in the context of a criminal procedure is granted access to a lawyer if, in the course of questioning, interrogation or hearing, he becomes suspected or accused of having committed a criminal offence.
2. Member States shall ensure that any statement made by such person before he is made aware that he is a suspect or an accused person may not be used against him.

³¹ During the meeting on 26 July the delegations will be invited to answer the question whether introduction of the formal system of waiver of right to a lawyer is indispensable for the proper execution of the suspect or accused person's procedural rights.

³² PRES will prepare a new draft of this Article, following (written) comments of the delegations and the guidance to be provided by CATS on 5-6 September.

Article 11

The right of access to a lawyer in European Arrest Warrant proceedings³³

1. Member States shall ensure that any person subject to proceedings pursuant to Council Framework Decision 2002/584/JHA has the right of access to a lawyer promptly upon arrest pursuant to the European Arrest Warrant in the executing Member State.
2. With regard to the content of the right of access to a lawyer, this person shall have the following rights in the executing Member State:
 - the right of access to a lawyer in such a time and manner as to allow him to exercise his rights effectively;
 - the right to meet with the lawyer representing him;
 - the right that his lawyer is present at any questioning and hearing, including the right to ask questions, request clarification and make statements, which shall be recorded in accordance with national law;
 - the right that his lawyer has access to the place where the person is detained in order to check the conditions of detention.

The duration and frequency of meetings between the person and his lawyer shall not be limited in any way that may prejudice the exercise of his rights under Council Framework Decision 2002/584/JHA.

³³ PRES will prepare a new draft of this Article, following (written) comments of the delegations and the guidance to be provided by CATS on 5-6 September.

3. Member States shall ensure that any person subject to proceedings pursuant to Council Framework Decision 2002/584/JHA, upon request, also has the right of access to a lawyer promptly upon arrest pursuant to a European Arrest Warrant in the issuing Member State, in order to assist the lawyer in the executing Member State in accordance with paragraph 4. This person shall be informed of that right.
4. The lawyer of this person in the issuing Member State shall have the right to carry out activities limited to what is needed to assist the lawyer in the executing Member State, with a view to the effective exercise of the person's rights in the executing Member State under that Council Framework Decision, in particular under its Articles 3 and 4.
5. Promptly upon arrest pursuant to a European Arrest Warrant, the executing judicial authority shall notify the issuing judicial authority of the arrest and of the request by the person to have access to a lawyer also in the issuing Member State.

Article 12

Legal aid

1. This Directive is without prejudice to domestic provisions on legal aid, which shall apply in accordance with the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights.
2. Member States shall not apply less favourable provisions on legal aid than those currently in place in respect of access to a lawyer provided pursuant to this Directive.

Article 13

Remedies

1. Member States shall ensure that a person to whom Article 2 refers has an effective remedy in instances where his right of access to a lawyer has been breached.
2. The remedy shall have the effect of placing the suspect or accused person in the same position in which he would have found himself had the breach not occurred.
3. Member States shall ensure that statements made by the suspect or accused person or evidence obtained in breach of his right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 8, may not be used at any stage of the procedure as evidence against him, unless the use of such evidence would not prejudice the rights of the defence.

Article 14

Non-regression clause

Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards enshrined in the Charter of Fundamental Rights of the European Union, the European Convention of Human Rights and Fundamental Freedoms, other relevant provisions of international law or the laws of any Member State that provides a higher level of protection.

Article 15

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [24 months after publication of this Directive in the *Official Journal*] at the latest.
2. They shall communicate the text of those provisions and a correlation table between those provisions and this Directive to the Commission.

3. When Member States adopt these provisions they shall contain a reference to this Directive or be accompanied by such a reference when the provisions are officially published.
Member States shall determine how such reference is to be made.

Article 16

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 17

Addressees

This Directive is addressed to the Member States in accordance with the Treaties.

Done at Brussels,

For the European Parliament

The President

For the Council

The President
