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PROGRESS REPORT

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Subject : 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
- Progress report

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 to communicate upon arrest.¹ This proposal is the third measure ("C1 - without legal aid + 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 2009².

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", on interpretation and translation) was adopted on 20 October 2010 (OJ 280, 26.10.2010, p.1). The second measure ("B", on a letter of rights) is currently under discussion in the ordinary legislative procedure (12564/10).

2. The proposal for a Directive has been dealt with at two Council meetings. At the JHA Council meeting on 22/23 September 2011, the Commission presented its proposal at Ministerial level, and Ministers discussed this proposal in general terms. During this discussion reference was made to a position paper that had been submitted by five Member States³, and UK and IE announced their decision not to opt-in to the Directive in application of Article 3 of Protocol 21 to the Lisbon Treaty. At the JHA Council meeting on 27/28 October 2011, the Presidency presented a "state of play" regarding the work that had been carried out in the preparatory bodies since the JHA Council meeting of September 2011⁴.
3. CATS discussed certain specific issues of the draft Directive on 6 September and 7 October 2011. On 25 November, CATS held a discussion on the opinion that had been provided by the Secretariat of the Council of Europe on request by the LIBE Committee of the European Parliament⁵.

Work in the preparatory bodies

4. The Working Party on Substantive Criminal Law discussed the draft Directive during meetings on 4/5 and 26 July, 16 and 27/28 September, 11/12 October and 10/11 November 2011. During these meetings of the Working Party, the text was examined several times in its entirety (except the recitals).
5. Member States also discussed the issue of the approach underpinning the Directive. On the one hand, some Member States take the view that the right of access to a lawyer should give the suspect or accused person a right which results in the actual assistance of a lawyer, if the person has expressed his wish to be assisted by a lawyer. In these systems the responsibility for exercising the right of access to a lawyer lies, at least partially, with the public authorities (*guarantee approach*).

³ 14495/11.

⁴ 15812/11.

⁵ 16633/11 and 17130/11.

6. On the other hand, a number of Member States provide for a different system, whereby the right of access to a lawyer does not necessarily imply that the suspect or accused person will in every case be assisted by a lawyer. Thus, in this system, the responsibility for ensuring access to a lawyer is shifted, at least partially, to the suspect or accused person. According to these Member States, the right of access to a lawyer should give the suspect or accused person the *opportunity* to be assisted by a lawyer (*opportunity* approach).
7. Some Member States and the Commission do not necessarily see a contradiction in these two approaches and claim that agreeable solutions can be found through proper wording, given also that it was commonly agreed that the Directive is intended to provide for "effective rights". Some Member States and the Commission are also of the opinion that this does not imply an obligation for Member States to cover the costs of the presence of a lawyer, since the Directive does not regulate the issue of legal aid. However, other Member States consider that, even when not regulating the issue of legal aid, this Directive will have a financial impact notably on legal aid but also on practical arrangements needed to ensure an effective exercise of this right. In this context they wish to have the analysis of the financial consequences of the Directive more developed.
8. The discussions held so far showed that the delegations are close to reach a compromise on many points of the Directive. However, there are still some issues that require further work to be carried out. The Presidency would like to take stock of the negotiations so far in order to present the results of its work with a view to facilitating the continuation of discussions. The Presidency believes that the package of modifications, as outlined below, could be a point of departure for further works on this file.

The Presidency underlines that the text and explanations set out below constitute the Presidency's view on the state of play of the draft Directive and the possible way forward. It does not necessarily reflect the position of each and every delegation.

Scope – Article 2

9. The issue of the scope of the instrument has been discussed in-depth in the course of the meetings. The debate has shown that there is a difference between legal systems as regards the notification of persons about their status of suspect or accused person and the correlating right to a lawyer during official interviews.
10. Some Member States requested to make it clearer in the Directive when would be the starting point for the rights set out in the Directive to apply. Other Member States and the Commission insisted that any clarification should not make the scope of application of the Directive too narrow. Another important issue discussed in this context was the scope of exclusion for minor offences. These issues have not been finally concluded.
11. The Presidency and the Commission believes that consistency among the measures should be a guiding principle accompanying the works on the consecutive elements of the Roadmap. However, it was also observed that the scope of this measure could be subject to modifications, where such would be justified by the very specificities of this Directive.
12. Concerning the moment from which the rights of the Directive should apply, the Presidency considers that a compromise between the positions of the Member States could consist in providing that the rights should apply from the time a person has been "officially notified or informed otherwise" by the competent authorities of a Member State that he is suspected or accused of having committed a criminal offence.

13. The discussions held on minor offences resulted in the introduction of a clause which is also provided in Measure A and B (Article 2(3) and Recital 10a). Some Member States asked to make the exclusion for minor offences broader and more precise. One delegation underlined in this context that in its judicial system, minor infractions of the traffic code are also considered to be criminal offences.
14. So far, it does not seem that the majority of Member States and the Commission would be ready to support further exclusions. Nevertheless, if the decision would be made to extend the exclusion of minor cases, the Presidency is of the opinion that the criteria thereof should be formulated in a clear and precise way ⁶.
15. The issue of scope needs to be further looked into with a view to finding solutions which would allow this Directive to be applicable under all systems while providing sufficiently developed minimum standards of defense, in line with the ECHR case-law.

Right of access to a lawyer – Article 3 (including former Article 4)

16. In line with the wish of a majority of delegations, Articles 3 and 4, which are closely interconnected, have been merged. The discussion concerned situations where the right to a lawyer should be ensured. Common ground exists between the Member States that suspects and accused persons should at least be granted access to a lawyer without undue delay before the suspect or accused person is officially interviewed by the police or other law enforcement authorities, from the outset of deprivation of liberty, and in any case during criminal proceedings before a court. However, certain cases of questioning by the police or other law enforcement authorities in relation to the commission of a possible criminal act should not be deemed to be an "official interview". This has been made clear in recital 8b and 8c.

⁶ The example of such a clause, based on the discussions held, could be the following: "*This Directive does not apply to any questioning or hearing of a suspect or accused person by the police or other law enforcement authorities in the pre-trial phase about the engagement of the person concerned in an offence for which according to national law pre-trial detention is not possible*".

17. At the same time there is no unanimity about ensuring access to a lawyer in the situation where a person has been invited to present himself voluntarily at a police station (or similar place). This issue may therefore require additional work in the Council preparatory bodies.

18. Extensive discussions were also held on whether and, if so, which investigative or other evidence-gathering acts should also be covered by the Directive. While some Member States opposed entirely the idea of granting the right of access to a lawyer in evidence-gathering acts, some others and the Commission supported it. The Presidency proposes to follow a compromise solution, by allowing the Member States to determine in their national legislation the investigative or evidence-gathering acts at which there is the right of access to a lawyer. The Directive would establish a minimum standard, by specifying that the identity parade and the experimental reconstruction of the scene of crime have at least be among these investigative or evidence-gathering acts to be determined in national law, since these acts can have an influence on the position of the person concerned in the criminal proceedings and in effect the lawyer's presence can be beneficial here. These situations have also been identified in the case-law of the ECHR. Recital 9a would further specify that Member States cannot prevent a lawyer, who is present, to attend any other investigative or evidence-gathering act.

19. In light of the improvements referred to above, the Presidency believes that the issue of access to a lawyer during evidence-gathering could gather broad support and invites the delegations to show flexibility in this regard.

Derogations – Articles 3(3), 4(2), 5(3) and 8

20. A substantial part of the discussions focused on derogations. Following a request by a number of delegations, the rules concerning derogations - which were previously included in one provision, Article 8 - are now being dealt with in Articles 3, 4, 5 and 8. In fact, the current text provides a tailored derogation in respect of each right, while Article 8 provides for a common core of general conditions which are applicable in each case when a derogation is made.
21. While the Commission and a small number of Member States opposed any derogation to confidentiality, there was broad agreement that it should be possible, in principle, to make restrictions to the right to confidentiality, but in very strict circumstances only, due to the special character of this right.
22. The definition of "compelling reasons", which is one of the conditions to apply derogations, was extensively discussed. The opinion varied between the mere "life and limb" clause as provided in the original proposal on the one hand, and the open catalogue of such reasons, as called for by some delegations, on the other hand. The Presidency proposes a compromise solution, where the catalogue of compelling reasons - presently set out in Article 3(3) - is broader than before (it now also includes the reference to prevention of a substantial jeopardy to ongoing criminal proceedings), but remains exhaustive.
23. Additionally, in line with the opinion of the Council Legal Service, the Presidency proposes to exclude Article 6 from the derogations at all. In view of some Member States to have that Article adjusted to Article 36(2) of the Vienna Convention on consular relations, the Presidency suggests to make an appropriate reference thereto in the preamble (see recital 13).
24. Finally, the Presidency made certain drafting suggestions in the text, concerning e.g. the possibility to make a derogation from the right to have a third party informed upon deprivation of liberty and regarding judicial review and the (non) extension to the trial stage.
25. It can be assumed that the Council is close to an agreement on the issue of derogations.

Information upon deprivation of liberty – Article 5

26. The discussions on this Article resulted in modifications of the Commission proposal with a view to making it more precise as regards the circle of persons entitled to receive information upon the deprivation of liberty of the suspect or accused person. Some delegations expressed doubts on the necessity to cover issues relating to minors under this Directive, bearing in mind the future instrument on the rights of vulnerable suspects and accused persons envisaged under the Roadmap (measure E). There seemed however to be no major opposition to organise this issue in the text.
27. Discussions were also held on the question whether the notion of "child" or "minor" would be preferable, and whether there should be a definition of the notion chosen. In the course of the negotiations, the term "child" was replaced by the term "minor", which seems better suited in the context of suspects and accused persons as used in the Directive. Indeed, in the EU legal instruments, "child" refers rather to a victim and not to a perpetrator. Moreover, it seems that the understanding of what a minor is should be left to the Member States, since there are different ages of criminal liability under the national laws and it seems difficult, and probably not desirable, to harmonise this element in this Directive. To be noted also that there is no definition of "child" neither in measure A nor measure B of the Roadmap.
28. It can be assumed that the Council is close to an agreement on the substance of this Article.

Waiver – Article 9

29. Very constructive discussions have been held on this Article. It can be assumed that the text presented in this document is very close to be considered as a final compromise.

Right of access to a lawyer in European arrest warrant proceedings – Article 11

30. Delegations were divided as to whether the Directive should cover the right of access to a lawyer both in the executing and issuing State. The majority, however, felt that whilst the rules regarding the right to access to 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. Following discussions in the COPEN Working Party as well as the clear guidance given by CATS, the Presidency deleted paragraphs 3-5 of this Article (concerning assistance in the issuing State) and suggested continuing working on paragraphs 1 and 2 (concerning assistance in the executing State). This approach was also confirmed by the COPEN Working Party (EAW experts) held on 4 November 2011. The Commission strongly opposed this deletion.
31. In the light of the discussions, the Presidency included a reference to Articles 4, 5, 6, 9 and 12 in Article 11 in order to make it clearer which other rights envisaged in the Directive apply to the European arrest warrant proceedings in the executing State.
32. The final wording of Article 11(2) will be determined in accordance with the still on-going discussions on Article 3. Otherwise, the text may be considered as widely supported, subject to the technical modifications referred to above.

Legal aid – Article 12

33. Various delegations observed that, in any case, in the absence of substantial rules on legal aid in this Directive, it should be avoided to pose principles that could preclude substantial rules that would be the object of a future Directive. Hence, it was suggested to delete Article 12, or at least its paragraph 2, paragraph 1 being a mere declaration of something that would be "evident".

34. In the light of the discussions the Presidency decided to delete paragraph 2, bearing in mind that the majority of Member States feared that this provision could have serious financial implications for their systems. The Presidency took also into consideration the Commission's decision to split Measure C ("right to legal advice and legal aid") which would allow the Commission to have more time to analyse the issue of legal aid, which is extremely complex. The Commission strongly opposed the deletion of paragraph 2.
35. To be noted further that the Presidency has organised a conference on legal aid on 5-6 December 2011 in Warsaw, in view of further initiatives in this regard.

Remedies – Article 13

36. Almost all Member States were opposed to the original text of the Commission proposal, which was strongly defended by the Commission during the work in the preparatory bodies . Many Member States also made it clear that no directions whatsoever should be given to judges as to the question of which value to be given to statements obtained from a suspect or accused person in breach of his right of access to a lawyer, or in cases where a derogation to this right was authorised in accordance with the proposed Directive.
37. The Presidency compromise solution consists of a provision according to which the value to be given to statements obtained from a suspect or accused person in breach of his right of access to a lawyer should be examined by a court having jurisdiction in criminal matters who would ensure the overall fairness of the proceedings. This solution has the advantage of not interfering with the systems of the Member States and not giving instructions to national judges, while at the same time ensuring that the issue of assessing the value of statements obtained in breach of the right of access to a lawyer is addressed, which will contribute to enhancing mutual trust among judicial authorities.

38. This solution, which is the result of a difficult compromise, has been supported by a majority of delegations. Although some Member States and the Commission questioned the added value of this compromise text, the Presidency considers that the text maintains such value, since the Directive clarifies that the issue of giving value to statements obtained in violation of the Directive has to be addressed. The Presidency therefore pleads to keep the text in its current form in the Directive.

Transposition – Article 15

39. Various delegations observed that this Directive will entail substantial modifications to be made in national law. Therefore they pleaded for a longer period for implementation of this Directive.
40. In the light of these calls, the Presidency has provisionally modified 24 into 36 months.

Concluding remarks

41. In view of the comments made during the meetings of the Working Party and of CATS, and following informal consultations, the Presidency has refined the text of the Directive. The text as it currently stands, with these refinements, is set out in the Annex. The Presidency considers that this text constitutes a solid basis for further work to be carried out on the draft Directive under the next Presidency.
42. The Presidency is grateful to all delegations for their constructive input during the work carried out in the preparatory bodies, which has allowed making substantial progress in reaching an agreement that is acceptable to all Member States.

43. The Presidency is hopeful that on the basis of the annexed text, it will be possible in the near future to reach a "general approach" on the draft Directive, constituting the basis for negotiations with the European Parliament in the context of the ordinary legislative procedure ("co-decision").
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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)(b) 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 Committee⁷,

Having regard to the opinion of the Committee of the Regions⁸,

Acting in accordance with the ordinary legislative procedure,

Whereas:⁹

- (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.

⁷ OJ C , , p. . [opinion asked]

⁸ OJ C , , p. . [opinion asked]

⁹ The recitals have not yet been examined. Changes are tentative suggestions by the Presidency. Order of recitals is open for discussion.

- (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')¹⁰. In the Stockholm Programme, adopted on 11 December 2009¹¹, 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 interpretation¹², the right to information on rights and information about the charges¹³, 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.

¹⁰ OJ C 295, 4.12.2009, p. 1.

¹¹ OJ C 115, 4.5.2010.

¹² 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).

¹³ 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.
- (6a) Reference to a lawyer in this Directive includes a reference to any person who is qualified (for example by accreditation by an authorised body) to provide legal advice and assistance to suspects or accused persons.**
- (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.
- (8a) Member States should therefore ensure that suspects and accused persons have the right of access to a lawyer without undue delay before the person concerned is officially interviewed by the police or other law enforcement authorities and from the outset of deprivation of liberty. In any case, suspects and accused persons should be granted access to a lawyer during criminal proceedings before a court, if they wish to be assisted by a lawyer.**

- (8b) **This Directive gives rights to suspects and accused persons: as long as a person is not, or not yet, suspected or accused of a criminal offence, it does not apply. Questioning by the police or other law enforcement authorities which has as primary¹⁴ purpose to acquire elements for establishing whether an investigation should be started, is not covered by this Directive. This could be the case, for example, in respect of questions put by police in the course of a road-side check concerning possible traffic offences, including but not limited to speeding offences and driving under influence of alcohol or drugs.**
- (8c) **An official interview, which can be held at any stage of the proceedings, will normally take place in a police station, but it can also be held in another appropriate place.¹⁵ Questioning by the police or other law enforcement authorities in relation to the commission of a possible criminal act, including immediately after the commission of such an act, e.g when a person has been caught red-handed, and whose primary purpose is relating to safety issues, such as verification of the possession of weapons, should not be deemed as being an "official interview".¹⁶**
- (9) **Member States should ensure that suspects and accused persons have the right of access to a lawyer without undue delay upon carrying out certain investigative or other evidence-gathering acts at which the person's presence is required or permitted as a right under national law. Member States should determine in their national law which investigative or other evidence-gathering acts are concerned, provided the identity parade, at which the suspect or accused person figures among other persons in order to be identified by a victim or witness, is included, as well as the experimental reconstruction of the scene of crime.¹⁷**

¹⁴ The word "sole" was replaced with "primary".

¹⁵ The suggestion was made to merge recitals 8b and 8c and to delete the first sentence of 8c.

¹⁶ Language contained in this and the following recitals might also be put in the operative part.

¹⁷ Concerns were expressed in respect of this recital, which has not yet been examined.

- (9a) Member States should not prevent a lawyer, who is present, from attending any other kind of investigative or other evidence-gathering acts at which the person's presence is required or permitted as a right under national law, which could for example be the case in respect of fingerprints, bloodtest, dna-tests, and any kind of searches, including house searches. In these cases, the presence of a lawyer does not have to be guaranteed (and therefore the authorities do not have to wait for the lawyer to arrive, unless otherwise stipulated under national law); however, when a lawyer is present, the authorities may not prevent this lawyer from participating during the said acts, it being understood that this should not prevent the acquisition of evidence.** ¹⁸
- (10) (deleted)
- (10a) In some Member States an authority other than a court having jurisdiction in criminal matters has competence for imposing sanctions in relation to relatively minor offences. That may be the case, for example, in relation to traffic offences which are committed on a large scale and which might be established following a traffic control, or in relation to offences which are committed in a prison or in military context** ¹⁹. In such situations, it would be unreasonable to require that the competent authority ensure all the rights under this Directive. Where the law of a Member State provides for the imposition of a sanction regarding minor offences by such an authority and there is a right of appeal or the possibility for the case to be otherwise referred to a court having jurisdiction in criminal matters, this Directive should therefore apply only to the proceedings before that court following such an appeal or referral. ²⁰

¹⁸ Concerns were expressed in respect of this recital, which has not yet been examined.

¹⁹ The suggestion was made to delete the words "*or in military*" and add in exchange the following new text after "context.": "*In addition, some Member States operate within their armed forces a system of military jurisdiction, for example one exercised by commanding officers, to deal with minor examples of criminal offending. This is necessary in order to maintain high standards of discipline amongst members of the armed forces while avoiding the serious effect on operations which can result from the delay involved in bringing the case before a court.*"

²⁰ The suggestion was made to place this recital before recital 8.

- (11) **The right of the suspect or accused person to communicate with his lawyer includes the right of the person concerned to meet his lawyer, including where the suspect or accused person is deprived of liberty.** The duration and frequency of **any such** meetings depend on the circumstances of every proceeding, notably on the complexity of the case and the procedural steps applicable. ²¹
- [(11a) Although the right of the suspect or accused person to communicate with his lawyer should not be limited in a general way, as this could prejudice the effective exercise of the rights of defence, Member States may in their national law set limitations on this right in the context of cases concerning minor offences. However, even in those cases, and subject to the derogations set out in this Directive, the suspect or accused person should always have the possibility to communicate with his lawyer by other means, e.g. by making a telephone call.]** ²²
- (11b) When the lawyer participates in an interview of the investigating authorities with the suspect or accused person, he may ask questions, request clarification and make statements, which shall be recorded in accordance with national law.** ²³ **This also applies to the European arrest warrant proceedings in the executing state.**

²¹ Concerns were expressed on this draft recital, which has not yet been examined.

²² Some Member States expressed concerns on this draft recital, which has not yet been examined. The following alternative drafting was presented for a new recital 11, replacing both recitals 11 and 11a :

"Member States should ordinarily ensure that suspects or accused persons have the opportunity to obtain legal assistance by meeting a legal representative in person. However, Member States may in their national law set limitations on the right of the suspect or accused person to communicate with his lawyer, including the duration and frequency of any such communications, provided such limitations do not prejudice the effective exercise of the rights of defence. Such limitations may include restricting the right to obtaining legal assistance by telephone."

²³ Some Member States have expressed concerns about the meaning of "making statements" and whether it could potentially lead to a situation whereby the lawyer routinely speaks on behalf of his client during police questioning.

- (12) Suspects or accused persons deprived of their liberty should have the right to **to have at least one** person of their choice, such as a family member or employer, **informed of the deprivation of liberty as soon as possible, it being understood that this should not prejudice the due course of the criminal proceedings against the person concerned, nor any other criminal proceedings.**
- (13) A suspect or accused person who is deprived of his liberty **and who is not a national of the Member State of detention** should also have the right **to communicate with** 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. **This right shall be exercised in conformity with the national law of the Member States, subject to the condition, however, that such national law must enable full effect to be given to the purposes for which this right are intended.**²⁴
- (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. **In limited, exceptional circumstances, it should however be possible to make derogations to this principle.**
- [(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.]²⁵

²⁴ In view of the wish expressed by some Member States to have here a similar possibility as provided for in Article 36(2) of the Vienna Convention, the Presidency inserted the last sentence, which is based on the said Article of the Vienna Convention.

²⁵ Recital to be put in line with final text of Articles 3, 4, 5 and 8.

- (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.²⁶
- (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.²⁷
- (18) **Without prejudice to national law that requires the mandatory presence or assistance of a lawyer**, the suspect or accused person should be allowed to waive a right granted under this Directive, as long as he **has been given sufficient information enabling him to obtain full knowledge about the content of the right concerned and the possible consequences of waiving it. While providing the information, the specific conditions of the person concerned should be taken into account, including the age of the person, and his mental and physical condition.**
- (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 given the right of access to a lawyer if the authority considers that he has become a suspect or accused person in the course of the questioning.
- (20) In order to improve the functioning of judicial cooperation in the European Union, **certain** 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 States.²⁸
- (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.

²⁶ Recital to be put in line with final text of Article 8.

²⁷ Recital to be put in line with final text of Articles 8 and 13.

²⁸ OJ L 190, 18.7.2002, p. 1.

- (22) (deleted)
- (23) (deleted)
- (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.
- (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) (deleted)
- (27) (deleted)
- (27a) Disciplinary proceedings do not fall within the scope of this Directive as it only applies to 'criminal proceedings' and to European arrest warrant proceedings²⁹.**
- (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.

²⁹ Some Member States expressed concerns on this draft recital, which has not yet been examined.

- (30) This Directive promotes the rights of minors 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 minors cannot waive their rights under this Directive when they lack the capacity to understand the consequences of the waiver. Member States should determine in their national law who is considered to be a minor for the purpose of this Directive. The legal representative of a suspect or accused minor should always be notified as soon as possible of his deprivation of liberty and the reasons pertaining thereto. If providing such information to the minor's legal representative is contrary to the best interests of the minor, another suitable adult such as a guardian or a relative should be informed instead. **This should be without prejudice to provisions of national law which require that specified authorities with competence for the protection of minors should also be informed of the deprivation of liberty of a minor.**
- (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) 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.³⁰

³⁰ UK and IE announced their decision not to opt-in to the Directive, at this stage, in application of Article 3 of Protocol 21 to the Lisbon Treaty, although they may consider opting in at a later stage under Article 4 of the Protocol and are participating fully in the negotiations.

- (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:

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 States³¹ ("European arrest warrant proceedings") to have access to a lawyer and to have a third party informed of the deprivation of liberty.

³¹ OJ L 190, 18.7.2002, p. 1.

Article 2

Scope

1. This Directive applies to suspects or accused persons in criminal proceedings from the time a person has been **officially notified or informed otherwise**³² by the competent authorities of a Member State 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. **Article 11**³³ of this Directive applies to persons subject to European arrest warrant proceedings from the time they are arrested in the executing State.³⁴

³² On request by various Member States, the words "*in any other way*" after "*informed*" have been deleted. The Presidency has however not inserted the word "*officially*" before "*informed*", as requested by some Member States. Instead the Presidency reintroduced the word "*otherwise*", which is more in line with the original draft; opposition has however been voiced against this word. On the other hand, there are still some Member States who prefer the original text, which was in line with the agreed text in measure B. COM insists that access to a lawyer should be provided from the earliest moment possible in the proceedings and including suspects and accused persons that are not deprived of liberty. The Presidency considers that the text as it currently stands provides a good compromise between the positions of the Member States.

³³ Further to comments from delegations, the Presidency has made cross references to other Articles in Article 11, see over there.

³⁴ Some delegations have a scrutiny reservation on this paragraph.

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.

[³⁵]

³⁵ Some delegations requested for an extension of the exclusion of minor cases. The following drafting suggestion was made: *"This Directive does not apply to any questioning or hearing of the suspect or accused person by the police or other law enforcement authorities about his engagement in a minor offence."* Reference is made to the observations presented by this delegation (see doc 13899/11, pages 14 and 15). Opposition was however voiced against this approach. Another suggestion was to set a limit at penalties of 500 euros. The following text suggestion was also presented: *"This Directive shall not apply to any questioning of a suspect or accused person by the police where the offence is not punishable by a sentence of imprisonment"*. See the cover note, in particular footnote 6, for a possible alternative drafting.

The right of access to a lawyer ³⁷ in criminal proceedings

1. Member States shall ensure that suspects and accused persons **have the right of access ³⁸ to a lawyer in such a time and manner ³⁹ as to allow the person concerned to exercise his rights of defence. Accordingly, the suspect or accused person shall have access to a lawyer without undue delay at least ⁴⁰:**
 - (a) before **he** is officially interviewed by the police or other law enforcement authorities; ⁴¹
 - (b) **upon the carrying out by investigative or other competent authorities of an investigative or other evidence-gathering act in accordance with paragraph 2(c); ⁴²**

³⁶ This Article has been redrafted quite substantially since the last meeting of the Working Party. All Member States have therefore a scrutiny reserve on this Article, which the Presidency has tried to make more precise further to comments by delegations and COM. A large majority of Member States agreed to merge former Article 4 into this Article 3. Furthermore, with regard to this Article and the right of access to a lawyer during official interviews, it is reflected whether wording on the line of Article 6(3) under c) ECHR (referring to the notion of "interest of justice") could be used.

³⁷ Several Member States suggested replacing "*right of access to a lawyer*" with "*right to legal assistance*". It was observed that the Roadmap does not use the expression "*right of access to a lawyer*", but "*right to legal advice (through a legal counsel)*", and that Article 6 ECHR provides that a person has the right to defend himself in person or through "legal assistance".

³⁸ The Presidency replaced the phrase "*shall ensure that (...) are granted access to a lawyer*" with the phrase "*shall ensure that (...) have the right of access to a lawyer*" in order to ensure consistency with other provisions of the Directive, which provide rights for the suspects and accused persons.

³⁹ This paragraph includes former Article 4 paragraph 1.

⁴⁰ The suggestion was made to delete the words "*at least*".

⁴¹ Paragraph to be read in conjunction with recital 8a and following.

⁴² Paragraph to be read in conjunction with recital 9. The text of former Article 3(2), which was heavily contested by several Member States, has been reflected in recital 9a. Some delegations have a reservation on this provision.

- (c) from the outset of deprivation of liberty, including detention;⁴³
- (d) **from the moment the person is summoned to appear before a court having jurisdiction in criminal matters**⁴⁴.

2. **The right of access to a lawyer shall entail the following**⁴⁵:

- (a) Member States shall ensure that a suspect or accused person can communicate with the lawyer representing him. The duration and frequency⁴⁶ of communications between the suspect or accused person and his lawyer **may be regulated in national law and procedures, provided that the suspect or accused person shall have the possibility to exercise his rights of defence effectively;**⁴⁷
- (b) Member States shall ensure that the suspect or accused person has the right for his lawyer to be present **and participate** when he is officially interviewed. When a lawyer participates during an official interview this shall be recorded in accordance with national law;⁴⁸

⁴³ The suggestion was made to put "*from the outset of deprivation of liberty at a police station or similar place of detention*".

⁴⁴ Concerns were raised in respect of this addition.

⁴⁵ In some Member States there are cases where communication with a lawyer before an official interview can take place by phone (minor cases where there is very little risk of self-incrimination). In this light, wording along the following line could be considered to be included in paragraph 2 of this Article: "*In minor cases [to be determined in national law], Member States may provide that the suspect or accused person can receive legal advice by phone prior to any official interview, if he wishes to receive such advice*". See also tentative recital 11a and the relating footnote.

⁴⁶ The suggestion was made to regulate also the *means* of communication in national law and procedures.

⁴⁷ Former Article 4(5) – modified in the light of the discussions. Paragraph to be read in conjunction with recital 11 as modified.

⁴⁸ Paragraph to be read in conjunction with recitals 11a and 11b. Opposition has been voiced against this paragraph and recital 11b.

(c) Member States shall ensure that the suspect or accused person has the right for his lawyer to attend **certain** investigative or other evidence-gathering acts at which the person's presence is required or permitted as a right under national law, **provided that this does not unduly delay these acts** and does not prejudice the acquisition of evidence. **The investigative or other evidence-gathering acts which are concerned by this provision shall be determined by the Member States in their national law, but shall at least include the identity parade and the experimental reconstruction of the scene of crime**^{49 50}.

3. Member States may derogate from this Article in exceptional circumstances only when this is justified by compelling reasons in the light of the particular circumstances of the case, pertaining to the urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person, or to prevent a substantial jeopardy to ongoing criminal proceedings.⁵¹

⁴⁹ It was observed that the experimental reconstruction of the scene of crime is basically intended to question the suspect of accused person "*in situ*" and may therefore be duplicating the provisions on official interviewing.

⁵⁰ Paragraph to be read in conjunction with recital 9. See also recital 9a.

⁵¹ Some Member States opposed any derogation to Article 3. Some other Member States, on the contrary, oppose a closed list of compelling reasons. The suggestion was made to put the words "*such as relating*" instead of "*pertaining*", or to put a full stop after "*particular circumstances of the case*" and mention some examples in the recitals. It was stated that derogations should also be possible if it would be impossible to provide access because of geographical distance (e.g. when in overseas operations or in far away territories).

*Article 4*⁵²

Confidentiality

1. Member States shall guarantee the confidentiality of communication between a suspect or accused person and his lawyer, including meetings, correspondence, telephone conversations and any other forms of communication permitted under national law.

- 2.⁵³ In exceptional circumstances only, Member States may derogate from paragraph 1,
 - (a) where this is justified by a **compelling** need to prevent a serious crime;
 - (b) when there is a **serious** threat to **prison** safety or security; or
 - (c) when there is sufficient reason to believe that the lawyer concerned is involved in a criminal offence with the suspect or accused person.⁵⁴

⁵² This Article on confidentiality (formerly numbered 7) has been placed here, directly after Article 3, which seems a more suitable place given the substance matter.

⁵³ Various delegations are still scrutinising this paragraph, which has been further refined by the Presidency in view of comments by delegations. Some other Member States are against any exception to the principle of confidentiality.

⁵⁴ Some Member States requested to delete the words "*with the suspect or accused person*". Other delegations considered that that would open up the provision too much, and vowed support for the text as it currently stands.

Article 5

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

1. Member States shall ensure that a suspect or accused person who is deprived of his liberty has the right to have at least one person, such as a relative or employer, named by him, informed of the deprivation of liberty as soon as possible, **if he so wishes**.
- 2.⁵⁵ If the person is minor ⁵⁶ Member States shall ensure that the minor's legal **guardian** 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 minor, in which case another suitable adult shall be informed. ⁵⁷ ⁵⁸
- 3.⁵⁹ Member States may derogate from paragraphs 1 and 2 when the provision of information could prejudice the due course of the criminal proceedings against the suspect or accused person concerned or of any other criminal proceedings. ⁶⁰

⁵⁵ Some Member States requested to delete this paragraph and deal with it in the future measure on vulnerable persons (measure "E"). COM, supported by a majority of Member States, pleaded however to keep this provision in the text, as an exception to other provisions, so as to fill this gap in legal protection.

⁵⁶ Some Member States and COM prefer reverting to "*child*". Reference is made to the introductory part, point 27.

⁵⁷ See also recital 30 regarding informing an "institution for the protection of minors".

⁵⁸ It was requested to delete the words "*and the reasons pertaining thereto*" as well "*as in which case another suitable adult shall be informed*".

⁵⁹ Some Member States would like to delete this paragraph, but a majority of delegations is in principle happy with the text.

⁶⁰ Some Member States noted that even when there are no criminal proceedings (yet) against the suspect or accused person concerned, nor any other criminal proceedings, there may be a necessity to derogate, e.g. to prevent a serious crime to take place. The request was made to add a reference to the specific needs of the minor.

Article 6

The right to communicate with consular or diplomatic authorities

Member States shall ensure that suspects or accused persons who are deprived of their liberty and who are non-nationals have the right to have consular or diplomatic authorities of their State of nationality informed of the detention as soon as possible and to communicate with the consular or diplomatic authorities, **if he so wishes.** ⁶¹

Article 7

Confidentiality

[renumbered as new Article 4]

⁶¹ This amendment has not been discussed at the meeting of the Working Party and may therefore be subject to further examination. Some Member States stated that it should be possible to make derogations to the right of the person concerned to communicate with the consular or diplomatic authorities. Alternatively, the suggestion was made to add at the end of this paragraph the words: "*Member States may set the terms of such communication.*" The Presidency refers to the introductory part, point 23, and the wording added in recital 13.

General conditions for applying derogations ⁶³

1. Any derogation **under Articles 3(3), 4(2) and 5(3)**,
 - (a) shall not go beyond what is necessary;
 - (b) shall be limited in time as much as possible;
 - (c) shall not be based exclusively on the type of the alleged offence; ⁶⁴
 - (d) shall not extend to the trial stage, **except when the derogation is based on Article 4(2) under b)** ⁶⁵; and
 - (e) shall not prejudice the **overall** fairness of the proceedings.

2. Derogations **under Articles 3(3) and 4(2)** may only be authorised by a duly reasoned decision taken on a case-by-case basis by a judicial authority, or by another competent authority on condition that the decision **may be** subject to judicial **review** ⁶⁶.

⁶² Some Member States are opposed to any derogations and expressed concerns on this Article. In case the possibility of making derogations remains in the text, it was requested to modify in paragraph 3, third line, the word "*may*" by "*shall*". On the other hand, it was considered that more attention should be paid to the practical consequences of limiting the derogations.

⁶³ This Article now only sets general conditions for applying derogations which are set out on a "tailor made basis" in other provisions of this Directive.

⁶⁴ A policy decision still has to be made on the question whether this condition also has to apply to derogations made under Article 4(2).

⁶⁵ Derogations to the principle of confidentiality taken in view of a serious threat to prison safety or security should also be allowed in the trial stage. The opinion was also voiced that the requirement not to extend to the trial stage should be abandoned all together. Some delegations have a scrutiny reservation on point d). COM requested the words "*except when the derogation is based on Article 4(2) under b)*" to be deleted.

⁶⁶ The following suggestions were made: modifying "*subject to judicial review*" into "*subject to judicial supervision*", putting "*subject to supervision by a judicial authority*", and revisiting the advisability of the use of the words "*judicial authority*".

Article 9

Waiver

1. Without prejudice to national law that requires the mandatory presence or assistance of a lawyer, Member States shall ensure that, in relation to any waiver of a right referred to in **Article 3** of this Directive:
 - (a) the suspect or accused person has **been provided with sufficient information so as to allow him to have** full knowledge about the content of the right concerned and the possible consequences of waiving it; and ⁶⁷
 - (b) 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 ⁶⁸, in which case this Directive shall apply from the point in time at which the revocation was made onwards.

(⁶⁹)

⁶⁷ Provision to be read in conjunction with recital 18 as modified.

⁶⁸ Despite the redrafting of this paragraph, some delegations consider that the revocation of the waiver could lead to substantial problems in court proceedings. Fearing abuse, they would like this paragraph to be tightened, e.g. by adding after the word "*proceedings*" the following: "*, at least until the start of the proceedings in court,*".

⁶⁹ It was suggested to stipulate that a child cannot waive any right under this Directive.

*Article 10*⁷⁰

Persons other than suspects and accused person

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 will be granted the rights provided under this Directive for suspects and accused persons if, in the course of questioning, interrogation or hearing, he becomes suspected or accused of having committed a criminal offence.^{71 72}

⁷⁰ Further to a call from a large majority of Member States, former paragraph 2 of this Article has been deleted. COM opposed such deletion.

⁷¹ Various delegations suggested deleting this Article or transferring the text into the recitals (if current recital 19 is not yet sufficient), since the provision only states the obvious and could lead to confusion when kept in the operative part of the text. COM, supported by several other delegations, would like to keep it in the operative part of the text. The Presidency notes that it has to be verified if this wording would be compatible with the wording to be finally agreed in Article 2 (currently reading: "*officially notified or otherwise informed*").

⁷² It was suggested to point out in the recitals that the purpose of Article 10 is to make sure that a witness who in the course of his interrogation by the police or other enforcement authority becomes suspected of having committed a criminal offence, is entitled to the rights of suspects and accused persons laid down in this Directive. Article 10 does not lay down a right to legal assistance for witnesses as such. This means, inter alia, that when the witness is interrogated by the trial judge in criminal proceedings against another person, and this witness starts making self-incriminating statements, this does not activate an obligation to grant access to a lawyer in the criminal proceedings against that other person and – for that purpose – postpone the hearing of the case against that other person.

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

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 State⁷⁴:
 - 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 communicate with the lawyer representing him, if he so wishes. The duration and frequency of communications between the suspect or accused person and his lawyer may be regulated in national law and procedures, provided the suspect or accused person shall have the possibility to exercise his rights of defence under Council Framework Decision 2002/584/JHA effectively;**
 - **the right for his lawyer to be present when he is officially interviewed, if he wishes to be assisted by a lawyer. Member States shall ensure that the suspect or accused person has the right for his lawyer to participate during the official interview which shall be recorded in accordance with national law.**
3. **The rights provided for in this Directive under Articles 4, 5, 6, 9 and 12 shall also apply, *mutatis mutandis*, to European arrest warrant proceedings.**⁷⁵

⁷³ COM and some delegations have a scrutiny reserve on the deletion of (former) paragraphs 3, 4 and 5, regarding the right to a lawyer in the issuing State. COM insisted that the innovative provisions of paragraphs 3, 4 and 5 have the potential to bring added value to the EAW system. The Presidency reminds that these paragraphs were deleted following a request by a large majority of delegations in CATS.

⁷⁴ These rights have been aligned to the rights in Article 3.

⁷⁵ It was requested that the question whether reference should be made through this paragraph to other articles and, if so, which articles, should be dealt with by the COPEN Working Party after agreement has been reached on the other articles.

Article 12

Legal aid

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.

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.⁷⁶

- 2.⁷⁷ **When criminal proceedings have been initiated and the case has been referred to a court having jurisdiction in criminal matters**, Member States shall ensure that the question of which value to be given to statements obtained from a suspect or accused person in breach of his right of access to a lawyer, or in cases where a derogation to this right was authorised in accordance with this Directive, shall be determined by **that** court being responsible for ensuring the overall fairness of the proceedings, in accordance with national legal procedures.⁷⁸

⁷⁶ COM observed that the deletion of Articles 10(2) and 13(2), and the dilution of Article 13(3) would remove the key in the Commission's proposal to making the rights of the Directive effective.

⁷⁷ Some Member States have a scrutiny reservation on this paragraph.

⁷⁸ This text was acceptable to various Member States. Some other Member States wondered what the added value would be of this text, which has been substantially modified compared to the original Commission text. The suggestion was made to put the text in the recitals or delete it entirely. COM suggested putting "judicial authority" instead of "court"; there was support for this suggestion.

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

Transposition⁷⁹

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [36 months after publication of this Directive in the *Official Journal*]⁸⁰ 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.

⁷⁹ Irrespective as to whether or not this can be solved in the text of the Directive, it was requested to provide that the rules of this Directive would only start to apply at the same time as the rules of the future Directive on legal aid.

⁸⁰ Further to a request by several delegations, and in view of the substantial modifications that are likely to be made in national law because of this Directive, the Presidency suggests putting 36 months instead of 24.

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
