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NOTE

from : Presidency
to : Working Party on Substantive Criminal Law

No. Prop. : 11497/11 DROIPEN 61 COPEN 152 CODEC 1018
No. Prev. doc. : 18240/11 DROIPEN 153 COPEN 357 CODEC 2347

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
- Revised text

Introduction

1. Since July 2011, substantial progress has been made on this file and solutions for various problems have been found. Some issues are however still outstanding.
2. The replies to the questionnaire ¹ have been a very useful source of information for the Presidency to understand the problems that remain on the table. The Presidency is very grateful that the Member States have replied to the questionnaire within such a short deadline and in so much detail.

¹ See 5897/12 DROIPEN 8 COPEN 24 CODEC 228.

Right of access to a lawyer - Article 3

3. The replies *inter alia* underline that the Member States have different approaches as regards the question whether, and if so at what stage, the right of access to a lawyer means that the suspect or accused person should be provided with legal assistance. This reflects the impression emerging from meetings in the Working Party that Member States have differing views about what the notion of "access to a lawyer" actually entails, or should entail.
4. In order to find a solution that could be commonly acceptable, the Presidency considers it appropriate, firstly, to clarify in the text what should be understood by "access to lawyer" and, secondly, to combine the differing views of the Member States in the draft instrument. Such combination of views means however that all Member States have to make compromises in order to arrive at a text that is commonly acceptable.
5. To this end, it appears useful that more focus should be given to the situation when the suspect or accused person is deprived of liberty, which is the situation that is also of special concern in ECHR and the case law of the ECtHR.²
6. When a person is deprived of liberty, and the person wants to be assisted by a lawyer, the State should actively pursue that the person will be provided with legal assistance by a lawyer (including, where the interests of justice so require, by providing a lawyer if the person concerned does not have one).
7. When there is no deprivation of liberty, the suspect or accused person would still have the right to contact and consult a lawyer, and to be assisted by him, i.a. during questioning and investigative and other evidence-gathering acts, but – in as much as the person remains free – the State does not have to actively pursue that the suspect or accused person will be assisted by a lawyer and does not have to provide one (although the State may help the person in obtaining a lawyer).

² It is submitted to the consideration of delegations whether the situation when the suspect or accused person is in the trial phase before a court should be treated in the same manner as when he is deprived of liberty.

8. Another difference in these cases concerns the issue of waiting until the lawyer arrives before questioning. In cases when a suspect or accused person is deprived of liberty, it could be provided that the authorities should, at least during a reasonable period of time, wait the arrival of the lawyer before they can start questioning. In cases when a suspect or accused person is not deprived of liberty, the authorities could be encouraged to wait the arrival of the lawyer before they can start questioning, but they are not obliged to do so. This is however put to delegations for consideration (see footnotes 15 + 16)
9. This line of reasoning has been set out in the attached text, see in particular the redrafted Article 3 and accompanying recitals 15, 16 and 18.

Other issues

Minor offences - Article 2.4

10. In Article 2.4 and recital 10, a new exclusion for minor offences has been inserted, which aims at addressing the situation of a few Member States who deal with minor infractions of the law by imposing criminal penalties - and not, like other Member States, by administrative procedures.

Articles 2.3 and 2.4, together with recitals 9, 10 and 19, now provide a set of exclusions for minor cases which hopefully makes the other provisions easier to accept.

Postponements and derogations - Articles 3.5, 4.2 and 5.3

11. The former derogations have been split into postponements and derogations (see Articles 3.5, 4.2 and 5.3). Postponements better describe the reduced legal effects of the provisions in Article 3.5 and 5.3. Further, in recital 25 it has been recalled that in accordance with the case-law of the European Court of Justice, Member States should make a restricted use of the possibility to postpone or derogate from a right set out in the Directive. As a consequence, it was possible to transfer the examples formerly set out in Article 3.5 to recital 21.

12. In order to limit further the possibility of making derogations to the principle of confidentiality, it has been underlined in Article 8 that any derogations to that principle may only be authorised by a duly reasoned decision taken on a case-by-case basis by a judicial authority (and not by another competent authority).

Persons other than suspects and accused persons - Article 10

13. At the last meeting, the Presidency had suggested to state that when a person other than a suspect or accused person is questioned by the police (or other enforcement authorities) and, during such questioning, such person becomes suspected or accused of having committed a criminal offence, the competent authorities should immediately have to inform that person thereof, thus triggering the application of the rights set out in this Directive.

In view of the luke-warm respons to this text, the Presidency decided to return to the text of the Commission proposal.

Conclusion

14. The Presidency hopes that this text can constitute the basis for a very fruitful discussion and, eventually, for reaching a compromise on the draft Directive.

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 Committee³,

Having regard to the opinion of the Committee of the Regions⁴,

Acting in accordance with the ordinary legislative procedure,

Whereas: ⁵

- (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.

³ OJ C , , p. . [opinion asked]

⁴ OJ C , , p. . [opinion asked]

⁵ **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')⁶. In the Stockholm Programme, adopted on 11 December 2009⁷, 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 interpretation⁸, the right to information on rights and information about the charges⁹, 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.
- (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) 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.

⁶ OJ C 295, 4.12.2009, p. 1.

⁷ OJ C 115, 4.5.2010.

⁸ 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).

⁹ Directive 2011/XXX/EU of the European Parliament and of the Council on the right to information in criminal proceedings.

- (8) 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.
- (9) 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 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.** 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.

- (10) In some Member States, relatively minor offences, such as minor traffic offences like parking a car where this is not allowed or driving moderately faster than allowed, are considered to be criminal offences. Where, in relation to such an offence, the law of a Member State provides that only a fine can be imposed as the main sanction - that means, independent from any custodial sanction that may be imposed when the fine is not paid - and deprivation of liberty is not possible as such a sanction, this Directive should only apply to the proceedings before a court having jurisdiction in criminal matters.**
- (11) 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.
- (12) 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.
- (13) 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 primary 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 roadside check concerning possible traffic offences, including but not limited to speeding offences and driving under influence of alcohol or drugs.

- (14) An official interview means the official questioning by competent authorities of a suspect or accused person regarding his involvement in a criminal offence, irrespective of the place where it is conducted or the stage of the proceedings when it takes place. This notion should not encompass preliminary questioning by the police or other law enforcement authorities that takes place immediately after the commission of an offence, e.g when a person has been caught red-handed, and whose sole purpose is the identification of the person concerned or the verification of the possession of weapons or other similar safety issues.**
- (15) In cases when a suspect or accused person is deprived of liberty, [and in the trial phase before a court having jurisdiction in criminal matters,] the State should ensure that the person can effectively benefit from the legal assistance of a lawyer, if the person concerned wants to be assisted by a lawyer. To that end, the State should do all reasonable efforts, including, where the interests of justice so require, by providing a lawyer when the person concerned does not have one. [In these cases, the competent authorities should wait the arrival of the lawyer before they can start questioning, at least during a reasonable period of time.]**
- (16) In cases [in the pre-trial phase] when a suspect or accused person is not deprived of liberty, Member States should not prevent a suspect or accused person to contact or consult his own lawyer, or to be assisted by him, although the State may help the person in obtaining a lawyer. However, Member States would not need to actively pursue that the suspect or accused person will be assisted by a lawyer if the person concerned has not arranged himself to be assisted by a lawyer. [In these cases, the competent authorities should be encouraged to wait the arrival of the lawyer during a reasonable period of time before they can start questioning, but they are not obliged to do so.]**

- (17) **Subject to the conditions laid down in this Directive**, suspects and accused persons have the right of access to a lawyer without undue delay upon carrying out investigative or other evidence-gathering acts at which the person's presence is required or permitted as a right under national law.
- (18) Member States should ensure that suspects and accused persons have the right of access to a lawyer upon carrying out investigative or other evidence-gathering acts at which the lawyer'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. **Member States should determine which investigative or other evidence-gathering acts are concerned by this provision, it being understood that the right of access to a lawyer should at least be provided in respect of any of the following acts, if they exist in the national law concerned: identity parades, at which the suspect or accused person figures among other persons in order to be identified by a victim or witness, confrontations, where a suspect or accused person is confronted with one or more witnesses or victims, and experimental reconstructions of the scene of crime, where the circumstances of a crime are reconstructed in order to better understand the manner and conditions in which a crime was committed and be able to ask specific questions to the suspect or accused person. Member States should lay down the practical arrangements for the presence of a lawyer at investigative and other evidence-gathering acts [, including regarding the question whether, and if so, how long, the competent authorities should wait until the lawyer arrives before starting an investigative or other evidence-gathering act].**

- (19) **The right of the suspect or accused person to communicate with his lawyer should ordinarily include the opportunity of the person concerned to meet his lawyer, including where this person is deprived of liberty. Member States may in their national law set reasonable 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. In respect of certain relatively minor cases, such limitations may include restricting the right to obtaining legal assistance by telephone. However, limiting the right in this way should be restricted to cases where there is very limited risk of self incrimination, such as where the person will not be questioned by police or other law enforcement authorities.**
- (20) When the lawyer participates in an interview of the investigating authorities with the suspect or accused person, he may **inter alia**, in accordance with **procedures in** national law, ask questions, request clarification and make statements, which shall be recorded in accordance with national law. This also applies to the European arrest warrant proceedings in the executing state.
- (21) **Member States should be permitted to temporarily postpone the right of access to a lawyer in exceptional circumstances only where there are compelling reasons in the light of the particular circumstances of the case. Such postponements could in particular be justified when there is an 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.**

- (22) 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, it being understood that there should not be 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.**
- (23) 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. **In limited, exceptional circumstances, it should be possible to postpone this right temporarily.**
- (24) 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.**

- (25) **In accordance with the case-law of the European Court of Justice, Member States should make a restricted use of the possibility provided in this Directive to postpone or derogate from a right set out in this Directive. Any postponements or derogations allowed under this Directive should be proportional, be limited in time as much as possible, not be based exclusively on the type of the alleged offence, and not prejudice the overall fairness of the proceedings. All postponements should 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 might be subject to judicial review; derogations may only be authorised by a duly reasoned decision taken on a case-by-case basis by a judicial authority.**
- (26) **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.**
- (27) 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.
- (28) 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.¹⁰

¹⁰ OJ L 190, 18.7.2002, p. 1.

- (29) 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.
- (30) 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.
- (31) 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.
- (32) Disciplinary proceedings do not fall within the scope of this Directive as it only applies to 'criminal proceedings' and to European arrest warrant proceedings.
- (33) 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.
- (34) 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.

- (35) 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.
- (36) 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.
- (37) 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.

- (38) 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.¹¹
- (39) 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:

¹¹ 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.

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 States¹² ("European arrest warrant proceedings") to have access to a lawyer and to have a third party informed of the deprivation of liberty.

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 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. This Directive applies to persons subject to European arrest warrant proceedings from the time they are arrested in the executing State **in accordance with Article 11.**
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.
4. **In relation to minor offences, where the law of a Member State provides that only a fine can be imposed as the main sanction and deprivation of liberty cannot be imposed as such a sanction, this Directive shall only apply to the proceedings before a court having jurisdiction in criminal matters.**¹³

¹² OJ L 190, 18.7.2002, p. 1.

¹³ See also recital 10.

Article 3

The right of access to a lawyer in criminal proceedings

1. Member States shall ensure that suspects and accused persons have the right of access to a lawyer in such a time and manner as to allow the person concerned to **practically and effectively** exercise his rights of defence.
2. In accordance with paragraph 1, the suspect or accused person shall have access to a lawyer without undue delay and in any event from the following moments in time, whichever is the earliest:
 - (a) before he is officially interviewed by the police or other law enforcement authorities;
 - (b) upon the carrying out by investigative or other competent authorities of an investigative or other evidence-gathering act in accordance with paragraph 3(c);
 - (c) **without undue delay** from the outset of deprivation of liberty, including detention;
 - (d) **in due time after the person is summoned to appear before a court having jurisdiction in criminal matters.**
3. In accordance with paragraph 1, the right of access to a lawyer shall entail the following:
 - (a) Member States shall ensure that a suspect or accused person can communicate with the lawyer representing him, **including prior to an official interview with the police or other law enforcement authorities**. The duration, frequency **and means** 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 be able to exercise his rights of defence effectively;

- (b) Member States shall ensure that the suspect or accused person has the right for his lawyer to be present and, **in accordance with procedures in national law**, participate when he is officially interviewed. When a lawyer participates during an official interview this shall be recorded in accordance with national law;
- (c) Member States shall ensure that the suspect or accused person has the right for his lawyer to attend 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. **Member States shall determine in their national law in respect of which investigative or other evidence-gathering acts this right exist. In any event, the suspect or accused person shall have the right for his lawyer to attend the following investigative or other evidence-gathering acts, if they exist in the national law concerned:**
- i) **identity parades ;**
 - ii) **confrontations ;**
 - iii) **experimental reconstructions of the scene of crime.**¹⁴

¹⁴ Provision to be read in conjunction with recital 18.

4. **Notwithstanding provisions of national law concerning the mandatory presence of a lawyer, in all cases where the suspect or accused person is deprived of liberty [and in any event during the trial stage before a court having jurisdiction in criminal matters], Member States shall ensure that a suspect or accused person is provided with the legal assistance of a lawyer, when he wants to be assisted by a lawyer.** ¹⁵

[¹⁶]

5. In exceptional circumstances **and in the pre-trial stage only** Member States may **temporarily postpone the application of the rights foreseen in this Article** when this is justified by compelling reasons in the light of the particular circumstances of the case.¹⁷

¹⁵ Provision to be read in conjunction with recitals 15 + 16.

¹⁶ It is submitted to the consideration of delegations whether to include the following text as a new paragraph 4a:

"In all cases where the suspect or accused person is deprived of liberty [and in any event during the trial stage before a court having jurisdiction in criminal matters], the competent authorities shall wait, at least during a reasonable period of time, until the lawyer arrives before starting an official interview in accordance with paragraph 3b.

In cases [in the pre-trial stage] where the suspect or accused person is not deprived of liberty, the competent authorities are encouraged, but not obliged, to wait during a reasonable period of time until the lawyer arrives before starting an official interview."

¹⁷ See also recital 21.

Article 4

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. In exceptional circumstances only **when this is justified by compelling reasons in the light of the particular circumstances**, Member States may derogate from paragraph 1,
 - (a) where this is justified by an **urgent** 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.

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. If the person is minor 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.
3. Member States may **temporarily postpone the application of the rights** set out in 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.

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. Member States may set the terms of such communication, provided the person concerned can exercise his right effectively.**

Article 7

Confidentiality

[renumbered as new Article 4]

Article 8

General conditions for applying postponements and derogations

1. Any **postponement or** derogation under Articles 3(5), 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; and
 - (d) [**deleted** ¹⁸]
 - (e) shall not prejudice the overall fairness of the proceedings.
2. **Postponements under Article 3(5) and 5(3) 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.**
3. **Derogations under Article 4(2) may only be authorised by a duly reasoned decision taken on a case-by-case basis by a judicial authority.**

¹⁸ But see Article 3(5).

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 ¹⁹
 - (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, in which case this Directive shall apply from the point in time at which the revocation was made onwards.

Article 10

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.

¹⁹ Provision to be read in conjunction with recital 26 as modified.

Article 11

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 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 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, 8, 9 and 13 shall also apply, *mutatis mutandis*, to European arrest warrant proceedings.

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 suspected or accused person has an effective remedy in instances where his right of access to a lawyer has been breached.
2. 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.

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 [36 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
