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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. : 5898/12 DROIPEN 9 COPEN 25 CODEC 229

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. At the meeting on 8/9 February 2012, the Working Part on Substantive Criminal Law resumed the work on the draft Directive on the basis of doc 5898/12, containing a revised version of the draft Directive. The replies to the questionnaire¹ were also taken into account.
2. In the light of the discussions at the meeting, the Presidency submitted a draft text and some options to the Member States for comments. In the light of the comments provided, for which the Presidency is most grateful, the Presidency has made a revised text of the draft Directive, which is set out in the Annex. The following explanations can be provided:

¹ See 5897/12 DROIPEN 8 COPEN 24 CODEC 228 + ADD 1 + ADD 2.

Minor offences - Article 2.4

3. Delegations generally welcomed the new exclusion for minor offences in Article 2.4 and recital 10. In the light of the comments submitted by delegations, the wording has been further refined, so that it is clear that in respect of the minor offences concerned the pre-trial stage is excluded.

Right of access to a lawyer - Article 3

4. Delegations generally welcomed the suggestion by the Presidency to distinguish between, on the one hand, situations in which persons are deprived of liberty or in court proceedings and, on the other hand, situations in the pre-trial phase when persons are not deprived of liberty (at large). It was generally felt that in the first category of situations, there should be a tougher obligation on the State, so as to allow the suspect or accused person to be in a position to exercise the right of access to a lawyer. To that end, the State should in such cases make all reasonable efforts, including by providing a lawyer when the person concerned does not have one.
5. In the light of the comments received, the Presidency further refined recitals 15 and 16. It has notably been clarified that in cases when the suspect or accused person is in the trial phase before a court having jurisdiction in criminal matters, the State should provide a lawyer only if this is necessary to ensure the fairness of the proceedings. It has also been clarified that the Directive does not provide rules on legal aid, and that the practical arrangements for the provision of a lawyer, including those on legal aid if appropriate, should be governed by the national laws of the Member States, see new recital 16a.
6. As regards the issue of investigative and other evidence-gathering acts, a majority of Member States indicated that they prefer the solution with the self-determination by Member States and a list. Therefore, the current text has been maintained, it being understood that the text has been refined in the light of the comments by delegations, using the words "at least" instead of "in any event". In recital 19, it has been clarified what is meant by "confrontations".

7. Further to comments by delegations, the Presidency suggests not to provide rules in the Directive on whether the authorities should wait until the lawyer arrives before starting questioning or an investigative or evidence-gathering act. This should be entirely left to the discretion of the Member States; therefore recital 17 has been deleted and recital 19a has been revised.

Confidentiality - Article 4

8. The clarifications on the issue of confidentiality in recital 22 were generally welcomed by delegations.
9. In the light of the comments received, and in view of the clarifications provided in recital 22, the Presidency suggests making some refinements to the text of Article 4. In the first paragraph, the words "relating to the defence and the preparation of the case" have been deleted, since otherwise the derogations of paragraph 2 would become obsolete and since it is difficult in practice to make a distinction as regards the content of the communication between a lawyer and his client (listening in to communication not relating to the defence and the preparation of the case would be allowed, but listening in to communication relating to the defence and the preparation of the case would in principle not be allowed; but how does one know what the object of the communication is without listening in?).

Postponements and derogations - Articles 3(5), 4(2), 5(3) and 8

10. A large majority of delegations welcomed the use of the word "postponement" instead of "derogations" in Articles 3(5) and 5(3). The term "derogations" continues to be used in Article 4(2).
11. Further to comments by delegations, the Presidency has decided to go back in Article 4 to the previous text, in that both postponements and derogations may be decided by a judicial authority or by another competent authority, it being understood that in the latter case the decision may be subject to judicial review. Both postponements and derogations may only be authorised by a duly reasoned decision taken on a case-by-case basis.

Waiver - Article 9

12. Further to comments by delegations, in paragraph 1 "full knowledge" has been replaced with "adequate knowledge". This should avoid litigation on the ground that the information provided was not sufficient to obtain "full knowledge". Language from measure B has been inserted regarding the issue of the recording procedure, as well as in the new accompanying recital 26a.

Persons other than suspects and accused persons - Article 10

13. Many delegations indicated that they would prefer another solution for Article 10. While delegations had differing preferences for the alternative solutions provided, various delegations stated that they would prefer to organise this issue in a recital. The Presidency has therefore transferred the language formerly contained in Article 10 to recital 27.

European Arrest Warrant proceedings - Article 11

14. Further to comments by delegations, the Presidency has revised the wording of Article 11. This Article now takes better account of the specific language used in the context of the European arrest warrant. In order to ensure consistency in the text, the Presidency has inserted a reference to Article 11 in Article 9.
15. Member States are invited to study the new wording of Article 11 carefully, including the cross-references to other articles in Article 11(3), so that this Article can be usefully discussed at the meeting on 15/16 March 2012.

Remedies - Article 13

16. The decision to move the second paragraph of Article 13 to recital 31a was welcomed by a lot of delegations.

Conclusion

17. The Presidency is very grateful for the comments that were provided by various Member States and the Commission in respect of the earlier draft. This has helped the Presidency in establishing an improved document.
 18. The Presidency hopes that this new text will allow substantial progress to be made at the next meeting of the Working Party on Substantive Criminal Law.
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(DRAFT)

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 arrest²

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 **consulted** the Committee of the Regions⁴,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (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.

² Some Member States maintain a (scrutiny) reservation on the text or on selected parts thereof; in addition, some Member States have a Parliamentary scrutiny reservation. The Commission maintains a reservation on some parts of the text which have been modified in comparison with its original proposal.

³ OJ C , , p. . [opinion given on 7 December 2011, SOC/424]

⁴ The CoR decided not to give an opinion.

- (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')⁵. In the Stockholm Programme, adopted on 11 December 2009⁶, 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 interpretation⁷, the right to information on rights and information about the charges⁸, 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.

⁵ OJ C 295, 4.12.2009, p. 1.

⁶ OJ C 115, 4.5.2010.

⁷ 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).

⁸ 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, in relation to **minor offences which are committed in a prison context, or in relation to minor offences committed in a military context and dealt with in first instance by a commanding officer**. 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 **that are committed on a large scale**, 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 **once the case is** before a court having jurisdiction in criminal matters.

- (11) The European Court of Human Rights has consistently held that **a suspect or accused person, at least when in police custody, has a general right of access to a lawyer from the first interrogation by the police in order to protect the right to a fair trial, and in particular the privilege against self-incrimination and to avoid ill treatment. The Court has also held that this right applies unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right.**
- (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 **its** 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 road-side check. [...]
- (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 [...], **such as** when a person has been caught red-handed, and whose **primary** 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, **as well as, irrespective of whether the suspect or accused person is deprived of liberty or not**, in the trial phase before a court having jurisdiction in criminal matters, Member States should ensure that the person concerned is in a position to exercise his right of access to lawyer, if he has not waived this right. To that end, the State should **in such cases make** all reasonable efforts, including by providing a lawyer when the person concerned does not have one. **However, in cases in the trial phase before a court having jurisdiction in criminal matters when the suspect or accused person is not deprived of liberty, the State should provide a lawyer only if this is necessary to ensure the fairness of the proceedings.**
- (16) **In cases in the pre-trial phase when a suspect or accused person is not deprived of liberty, Member States should ensure that a suspect or accused person is permitted to exercise his right of access to a lawyer. To that end,** Member States should not prevent a suspect or accused person to contact or consult a lawyer, or to be assisted by **that lawyer**, 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 **himself** arranged to be assisted by a lawyer.
- (16a) **This Directive does not provide for rules on legal aid. The practical arrangements for the provision of a lawyer under this Directive, including those on legal aid if appropriate, are governed by national law.**
- (17) [...]

- (18) 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. 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.
- (19) Member States should determine in their national law in respect of which investigative or other evidence-gathering acts the suspect or accused person has the right for his lawyer to attend. The suspect or accused person has the right for his lawyer to attend at least 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, **who has already been examined or questioned, is brought together with** one or more witnesses or victims **when there is disagreement between them on important facts or issues**; 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.
- (19a) The practical arrangements for the presence **and participation** of a lawyer **at official interviews and** at investigative and other evidence-gathering acts **should be left to the Member States**, including regarding the question whether, and if so, how long, the competent authorities should wait until the lawyer arrives before starting **an interview or an** investigative or other evidence-gathering act.

- (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. [...]
- (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, to prevent a substantial jeopardy to ongoing criminal proceedings, **or when it is extremely difficult to provide a lawyer due to the geographical remoteness of the suspect or accused person, e.g. in overseas territories.**
- (22) Confidentiality of communication between a suspect or accused person and his lawyer [...] is key to ensuring the effective exercise of the rights of the defence. Member States should **therefore** 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 [...], **it being understood that rules on confidentiality under this Directive should be without prejudice to mechanisms in place in detention facilities in order to screen correspondence so as to avoid illicit enclosures being sent to detainees, as long as such mechanisms don't allow the competent authorities to read the communication between the suspect or accused person and his lawyer.** However, in limited, exceptional circumstances, it should be possible to make derogations to the principle of confidentiality, it being understood that there should not be other, less restrictive means to achieve the same result, such as, in cases [...] 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 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 when this is justified by compelling reasons in the light of the particular circumstances of the case, in particular 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, or when the provision of information could have serious adverse consequences for the safety of a person.**
- (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 **and derogations** should be authorised by a duly reasoned decision taken on a case-by-case basis, **either** by a judicial authority, or by another competent authority on condition that the decision is **subject** to judicial review. [...]

- (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 **adequate** 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.
- (26a) A waiver and the circumstances in which it was given should be noted, using the recording procedure in accordance with the law of the Member State concerned. This should not lead to any additional obligation for Member States to introduce new mechanisms or to any additional administrative burden.**
- (27) **Any person other than a suspect or accused person, such as a witness, who is officially interviewed by the police or other enforcement authority in the context of a criminal procedure, should 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.**
- (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.⁹

⁹ 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. **When the lawyer participates in a hearing of the requested person by an executing judicial authority, 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.**
- (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.
- (31a) Once a case has been referred to a court having jurisdiction in criminal matters, Member States should 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 temporary postponement or derogation of this right was authorised in accordance with this Directive, should be determined by that court being responsible for ensuring the overall fairness of the proceedings, in accordance with national legal procedures.**
- (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 **guardian** 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 **guardian** is contrary to the best interests of the minor, another suitable adult [...] 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.¹⁰
- (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:

¹⁰ 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 States¹¹ ("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 **once the case is** before a court having jurisdiction in criminal matters.¹²

¹¹ OJ L 190, 18.7.2002, p. 1.

¹² 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 exercise his rights of defence practically and effectively.

2. The suspect or accused person shall have access to a lawyer without undue delay. In any event, the suspect or accused person shall have access to a lawyer 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) as soon as practicably possible from the outset of deprivation of liberty, including detention;

 - (d) in due time before the suspect or accused person, who has been summoned to appear before a court having jurisdiction in criminal matters, appears before that court.

3. 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 is 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) ¹³ Member States shall determine in their national law in respect of which investigative or other evidence-gathering acts the suspect or accused person has the right for his lawyer to attend, provided that this does not unduly delay these acts and that it does not prejudice the acquisition of evidence. [...] The suspect or accused person shall **at least** 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.

¹³ Provision to be read in conjunction with recital 19.

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 in a position to exercise his right of access to a lawyer, unless he has waived this right in accordance with Article 9.** ¹⁴

In cases in the pre-trial phase when a suspect or accused person is not deprived of liberty, Member States shall ensure that a suspect or accused person is permitted to exercise his right of access to a lawyer. ¹⁵

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. ¹⁶

¹⁴ Provision to be read in conjunction with recitals 15 and 16a.

¹⁵ Provision to be read in conjunction with recital 16.

¹⁶ Provision to be read in conjunction with 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.

- 2.¹⁷ In exceptional circumstances only Member States may derogate from paragraph 1, when, in the light of the particular circumstances, this is justified by **one of the following** compelling reasons:
 - (a) there is an urgent need to prevent a serious crime; or

 - (b) there is sufficient reason to believe that the lawyer concerned is involved in a criminal offence with the suspect or accused person.

¹⁷ Provision to be read in conjunction with recital 22.

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 **without undue delay**, if he so wishes.
2. If the person is a 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 this is justified by compelling reasons in the light of the particular circumstances of the case.** ¹⁸

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.** ¹⁹

Article 7

Confidentiality

[renumbered as new Article 4]

¹⁸ Provision to be read in conjunction with recital 23.

¹⁹ Provision to be read in conjunction with recital 24.

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) shall not prejudice the overall fairness of the proceedings.

2. Postponements under Article 3(5) **and derogations under Article 4(2)** may only be authorised by a duly reasoned decision taken on a case-by-case basis, **either** by a judicial authority, or by another competent authority on condition that the decision may be subject to judicial review.

3. [...]

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 **and 11** of this Directive:
 - (a) the suspect or accused person has been provided with sufficient information so as to allow him to have **adequate** knowledge about the content of the right concerned and the possible consequences of waiving it; and ²⁰
 - (b) the waiver is given voluntarily and unequivocally.
2. The waiver and the circumstances in which it was given shall be **noted, using the recording procedure in accordance with the law of the Member State concerned.** ²¹
3. Member States shall ensure that a waiver can be subsequently revoked at any point during **the pre-trial stage or, subject to judicial discretion, during the trial. In case of revocation this Directive shall apply from that point in time onwards.**

Article 10

Persons other than suspects and accused person

[transferred to recital 27]

²⁰ Provision to be read in conjunction with recital 26 as modified.

²¹ Provision to be read in conjunction with new recital 26a.

Article 11

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

1. Member States shall ensure that **a person requested for surrender in accordance with 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, the **requested 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 **and in any event as soon as practically possible from the outset of deprivation of liberty**;
 - the right to communicate with the lawyer representing him, if he so wishes. The duration, frequency **and means** of communications between the **requested** person and his lawyer may be regulated in national law and procedures, provided the **requested** 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 and, **in accordance with procedures in national law, participate during a hearing of the requested person by the executing judicial authority. When the lawyer participates during the hearing this** shall be recorded in accordance with national law.
3. The rights provided for in this Directive under Articles 4, 5, 6, 9, 13 **and - when a derogation under Article 4(2) or a postponement under Article 5(3) is applied - Article 8** shall 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. [transferred to recital 31a]

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
