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PROGRESS REPORT

From : Presidency
To : Council (Justice and Home Affairs)

No. Prop. : 11497/11 DROIPEN 61 COPEN 152 CODEC 1018
No. Prev. doc. : 16290/12 DROIPEN 162 COPEN 248 CODEC 2692

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 [First reading]
- Progress report

Introduction

1. On 8 June 2011, the Commission presented 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 2009.²

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

² OJ C 295, 4.12.2009, p. 1. The first measure ("A", on interpretation and translation) was adopted on 20 October 2010 (OJ 280, 26.10.2010, p.1). The second measure ("B", on the right to information and a letter of rights) was adopted on 22 May 2012 (OJ L 142, 1.6.2012, p. 1).

2. On 8 June 2012, the Council reached a general approach on the text of the proposal.³
3. On 10 July 2012, the LIBE Committee of the European Parliament adopted 82 amendments in an orientation vote.
4. On 12 July 2012, an informal meeting was held between rapporteur Mrs. Antonescu, the Commission and the Presidency, in order to prepare negotiations in the context of the ordinary legislative procedure. It was agreed to hold five trilogues, two in September, one in October, two in November. In the beginning of October, however, the trilogue scheduled for that month was cancelled on request by the European Parliament.
5. During the same informal meeting of July 2012, it was also agreed that technical work in relation to work in trilogues could be carried out in technical meetings.
6. The positions that had to be taken on behalf of the Council by the Presidency in the trilogues and accompanying technical meetings were prepared during meetings of the Friends of the Presidency, which were held on 17 July, 3/4 and 18/19 September, and 8 and 29/30 October. The Presidency also had various informal contacts with delegations concerning the file.
7. During the 3rd Trilogue on 8 November 2012, it appeared that the negotiating team of the European Parliament was not ready, at that stage, to conclude the negotiations on the file, requiring more time to examine all documentation and to establish its position on the various issues. This was confirmed during an informal meeting of the Presidency with the rapporteur, which was held on 14 November 2012. In the light of this, it was decided that the 4th Trilogue – which was scheduled for 22 November 2012 – would not take place.⁴ Instead, an informal meeting was held on 29 November 2012 between the Parliaments' negotiating team, the Commission and the Cyprus Presidency to ensure transition of the file to the incoming Irish Presidency.

³ 10908/12.

⁴ See also 16290/12.

8. In the Annex, the text as it currently stands is set out. Please note that this is a provisional text, since various issues are still under examination in the Council and in the European Parliament ⁵, and since "nothing is agreed until everything is agreed."

9. The Presidency is grateful to all delegations for their constructive input, which has allowed to make substantial progress on the file. The Presidency is confident that this progress will allow to reach an agreement with the European Parliament in the near future.

⁵ In respect of some of the outstanding issues, footnotes have been inserted in the text. The absence of a footnote does not necessarily mean that the text concerned has been (provisionally) agreed.

PROVISIONAL TEXT

(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 inform a third party upon deprivation of liberty

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 Committee ⁶,

Having consulted the Committee of the Regions ⁷,

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.

⁶ OJ C , , p. . [opinion given on 7 December 2011, SOC/424]

⁷ The CoR decided not to give an opinion.

- (1a) The Union has set itself the objective of maintaining and developing an area of freedom, security and justice. According to the conclusions of the European Council in Tampere of 15 and 16 October 1999, and in particular point 33 thereof, the principle of mutual recognition of judgments and other decisions of judicial authorities should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union, because enhanced mutual recognition and the necessary approximation of legislation would facilitate cooperation between authorities and the judicial protection of individual rights. [AM 1]**
- (2) According to Article 82 of the Treaty on the Functioning of the European Union (TFEU), judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions.
- (2a) The implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States trust in each other's criminal justice systems. The extent of the mutual recognition is very much dependent on a number of parameters, which include mechanisms for safeguarding the rights of suspects or accused persons and common minimum standards necessary to facilitate the application of the principle of mutual recognition. [AM 2]**
- (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 throughout the territory of the Member States. Such common minimum rules should apply to the right of access to a lawyer and the right to inform a third party upon deprivation of liberty.

- (4) Although the 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.
- (4a) Strengthening mutual trust requires detailed rules on the protection of the procedural rights and guarantees arising from the Charter and from the ECHR. It also requires, by means of this Directive and other measures, further development within the Union of the minimum standards set out in the ECHR and the Charter. [AM 3]**
- (4b) Article 82(2) TFEU provides for the establishment of minimum rules applicable in the Member States so as to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension. That Article refers in point (b) to "the rights of individuals in criminal procedure" as one of the areas in which minimum rules may be established. [AM 4]**
- (4c) Common minimum rules should lead to increased 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. Such common minimum rules should be established in the field of access to a lawyer in criminal proceedings. [AM 5]**

- (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')⁸. [...] Taking a step-by-step approach, the Roadmap calls for the adoption of measures regarding the right to obtain translation and interpretation, the right to receive information on rights and information about the charges, the right to receive legal advice and legal aid, the right to communicate with relatives, employers and consular authorities, and establishing 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.
- (5a) On 10 December 2009, the European Council welcomed the Roadmap and made it part of the Stockholm programme - An open and secure Europe serving and protecting citizens (point 2.4). The European Council underlined the non-exhaustive character of the Roadmap, by inviting the Commission to examine further elements of minimum procedural rights for suspected and accused persons, and to assess whether other issues, for instance the presumption of innocence, need to be addressed, in order to promote better cooperation in that area. [AM 6]**
- (5b) Two measures included in the Roadmap have been adopted so far: Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and to translation in criminal proceedings⁹ and Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings¹⁰. [AM 7]**

⁸ OJ C 295, 4.12.2009, p. 1.

⁹ OJ L 280, 26.10.2010, p. 1.

¹⁰ OJ L 142, 1.6.2012, p.1.

(6) This Directive sets out minimum rules on the right of access to a lawyer and on the right to inform a third party upon deprivation of liberty in criminal 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, which in its case-law sets standards on an ongoing basis on the right of access to a lawyer. *[AM 8]*¹¹

[(6a) Without prejudice to the obligations of Member States under the ECHR to ensure fair trial rights, proceedings in relation to minor offending which takes place within a prison and proceedings in relation to offences committed in a military context which are dealt with by a commanding officer should not be considered to be criminal proceedings for the purposes of this Directive.]¹²

(7) This Directive also sets minimum rules on the rights for persons who are deprived of liberty to have consular [...] authorities informed of their deprivation of liberty and to communicate with these authorities. [...]

(7a) This Directive should be implemented taking into account the provisions of the Directive 2012/13/EU on the right to information in criminal proceedings that provide that suspects or accused persons are provided promptly with information concerning the right of access to a lawyer, and that suspects or accused persons who are arrested or detained are provided promptly with a written Letter of Rights, which should contain information about the right of access to a lawyer. *[AM 11, first part]*

(8) The term lawyer in this Directive refers to any person who, in accordance with national law, is qualified and entitled, including by accreditation by an authorised body, to provide legal advice and assistance to suspects or accused persons. *[AM 9 and AM 39]*

¹¹ AM 8 has been accepted by deleting from the text the reference to "*excluding administrative proceedings leading to sanctions such as competition or tax proceedings*".

¹² Text suggestion following changes made in Article 2(3); this text has not yet been examined by the Member States.

- (9)¹³ In some Member States an authority other than a court having jurisdiction in criminal matters may be competent for imposing sanctions **other than deprivation of liberty** 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 such situations, it would be disproportionate to require that the competent authority should ensure all the rights granted 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 minor offences, including minor traffic offences such as parking infractions, speeding, ignoring traffic lights and tailgating, minor offences in general municipal regulations, such as nudism in non-designated public spaces, leaving litter in public spaces or mowing the grass late in the evening, and minor public order offences such as public drunkenness, are considered to be criminal offences. It would be disproportionate to require that the competent authorities should ensure all the rights granted under this Directive in respect of such minor offences. Where the law of a Member State provides in respect of minor offences that deprivation of liberty cannot be imposed as a sanction or where the offence does not give rise to the application of such a sanction, this Directive should therefore apply only to the proceedings before a court having jurisdiction in criminal matters.**
- (10a) **In any case, however, the Directive should fully apply when the suspect or accused person has been deprived of liberty, irrespective of the stage of the criminal proceedings. [AM 14]**

¹³ Recitals 9, 10 and 10a should be aligned with the final text of Article 2(3).

- (11) **The exclusion of certain minor offences from the scope of this Directive should not affect the obligations of Member States under the ECHR to ensure fair trial rights, including obtaining legal assistance from a lawyer.**
- (12) [deleted]
- (13) **Member States should ensure that suspects or accused persons have the right of access to a lawyer without undue delay. In any event, suspects or accused persons should have access to a lawyer before the person concerned is questioned by the police or other law enforcement authorities, upon the carrying out by investigative or other competent authorities of an investigative or other evidence-gathering act and without undue delay from the deprivation of liberty. In any case, suspects or accused persons should be granted access to a lawyer during criminal proceedings before a court, if they have not waived that right.**
- (14) **For the purposes of this Directive, questioning does not include preliminary questioning by the police or other law enforcement authorities whose purpose is any or all of the following: the identification of the person concerned; the verification of the possession of weapons or other similar safety issues; or the determination of whether an investigation should be started, for example in the course of a road-side check, or during regular random checks/controls when a suspect or accused person has not yet been identified. [compare AM 13]**

- (15) Any person other than a suspect or accused person, such as a witness, who is **questioned** by the police or other enforcement authority in the context of criminal proceedings, should be granted the rights for suspects and accused persons provided for under this Directive if, in the course of such **questioning**, he becomes suspected or accused of having committed a criminal offence. **This person has to be informed promptly that he or she is a suspect or accused person; alternatively, any questioning, interrogation or hearing should be suspended immediately. [AM 70]**
- (16a) **Suspects or accused persons should have the right to communicate and meet in private with the lawyer representing them, including prior to questioning by the police or other law enforcement or judicial authorities. Member States may set reasonable limitations on the requirement that such meetings should be in private, e.g. by providing that meetings should take place behind a glass window. Member States may in their national law and procedures regulate the duration and frequency of meetings between a suspect or accused person and his lawyer, taking into account the circumstances of every proceeding, notably the complexity of the case and the procedural steps applicable, provided such regulation does not prejudice the effective exercise and essence of the right of the suspect or accused person to meet with his lawyer.**
- (16b)¹⁴ **Member States may also regulate in their national law and procedures the duration, frequency and means of communication between the suspect or accused person and his lawyer, including concerning the use of videoconferencing and other communication technology in order to allow such communications to take place, provided such regulation does not prejudice the effective exercise and essence of the right of the suspect or accused person to communicate and meet with his lawyer.**

¹⁴ Recitals 16a, 16b and 16c replace former recital 19, linked to Article 3(3)(a).

- (16c) **In respect of certain minor offences, this Directive should not prevent Member States from organising the right of the suspect or accused person to legal assistance by telephone. However, limiting the right in this way should be restricted to cases where the person will not be questioned by the police or by other law enforcement authorities.**
- (17) In cases where a suspect or accused person is deprived of liberty, Member States should make the necessary arrangements to ensure that the person concerned is in a position to effectively exercise his right of access to lawyer, including by arranging for the assistance of a lawyer when the person concerned does not have one, unless he has waived this right. The [...] arrangements, including those on legal aid if applicable, **should be** governed by national law and could imply, inter alia, that the competent authorities arrange for the assistance of a lawyer on the basis of a list of available lawyers from which the suspect or accused person could choose. **In relation to requested persons under a European arrest warrant, only the executing Member State should be required to make these arrangements.** *[compare AM 31a]*
- (18) In cases where a suspect or accused person is not deprived of liberty, Member States [...] may help the person in obtaining a lawyer, but they would not need to actively pursue that the suspect or accused person who is not deprived of his liberty will be assisted by a lawyer if the person concerned has not himself arranged to be assisted by a lawyer. The **suspect or accused** person concerned should be able to freely contact, consult or be assisted by that lawyer. *[compare AM 31a]*
- (19) **[moved to recitals 16a-16c]**

(20) (ex 22) **Member States may regulate in their national laws and procedures the practical arrangements concerning the presence and participation of a lawyer during questioning of the suspect or accused person by the investigating authorities, as well as during court hearings, provided such regulation does not prejudice the effective exercise and essence of the rights concerned. When the lawyer participates in an interview by the investigating authorities of the suspect or accused person or in a court hearing, he may inter alia, in accordance with procedures provided for in national law, ask questions, request clarification and make statements, which shall be recorded in accordance with national law.**

(21) (ex 20) [...] The suspect or accused person has the right for his lawyer to attend at least the following **investigative or other evidence-gathering** acts, insofar as they are provided for in the national law concerned and insofar the suspect or accused person is required to attend: 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 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 at which the suspect or accused person is present and where the circumstances of a crime are reconstructed, in order to better understand the manner and circumstances under which a crime was committed and to be able to ask specific questions to the suspect or accused person. **Member States may regulate, in their national laws and procedures, the practical arrangements concerning the presence of the lawyer, provided such regulation does not prejudice the effective exercise and essence of the rights concerned. The lawyer's presence should be recorded in accordance with the recording procedure of the law of the Member State concerned.**

(former 21) [deleted]

- (22) **Pre-trial detention and detention conditions should fully respect the standards set out by the ECHR, by the Charter, and by the case law of the European Court of Human Rights and of the European Court of Justice. When providing assistance under this Directive to a suspect or accused person who is in detention, the lawyer concerned should be able to raise a question to the competent authorities regarding the conditions under which that person is detained. [AM 16]**
- (23) Member States should be permitted to temporarily derogate from the right of access to a lawyer in the pre-trial phase in exceptional circumstances only where there are compelling reasons in the light of the particular circumstances of the case. Such compelling reasons could consist in an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person, or in an urgent need to prevent a substantial jeopardy to criminal proceedings where giving access to a lawyer or delaying the investigation would irretrievably prejudice an on-going investigation. **In certain exceptional circumstances, a temporary derogation could for example be justified if, due to the geographical remoteness of the suspect or accused person, e.g. in overseas territories or where the Member State undertakes or participates in military operations outside that Member State, ensuring the right of access to a lawyer within a reasonable time would be technically impossible or disproportionate in the circumstances.** During a temporary derogation from the right of access to a lawyer, the competent authorities may **question** a suspect or accused person without the lawyer being present, it being understood that the suspect or accused person may avail himself of his right to remain silent, and may also carry out, without the presence of a lawyer, any investigative or other evidence gathering act, provided that such **questioning**, or such investigative or other evidence gathering act, is necessary for a proper handling of the criminal proceedings and should not unduly prejudice the rights of the suspect or accused person.

- (24) 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 avoid illicit enclosures being sent to detainees, such as screening correspondence, as long as such mechanisms do not 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 temporarily derogate from the principle of confidentiality, unless there would 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.
- (25) This Directive should be without prejudice to a breach of confidentiality which is incidental to a lawful surveillance operation by competent authorities. This Directive should also be without prejudice to the work carried out, for example by national intelligence services, to safeguard national security in accordance with Article 4(2) of the Treaty on European Union or that falls within the scope of Article 72 of the Treaty on the Functioning of the European Union, according to which Title V on an area of Freedom, Security and Justice shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

- (26) 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 **without undue delay**, it being understood that this should not prejudice the due course of the criminal proceedings against the person concerned, nor any other criminal proceedings. Member States **may regulate** the practical arrangements in relation to the application of this right, **provided such regulation does not prejudice the effective exercise and essence of the right**. In limited, exceptional circumstances, however, it should be possible to temporarily derogate from this right when this is justified, in the light of the particular circumstances of the case, by a compelling reason **as specified in this Directive**.
- (26a) Suspects or accused persons who are deprived of liberty should also have the right to **communicate with at least one person of their choice, such as a family member or employer, named by them**. Member States should be able to regulate in their national law the practical arrangements in relation to the application of this right, provided such regulation does not prejudice the effective exercise and essence of this right. However, it should be possible to temporarily derogate from this right when this is justified by a compelling reason **as specified in this Directive**.
- (27) The rights of suspects and accused persons who are deprived of their liberty to consular assistance is enshrined in 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 a corresponding right on suspects or accused persons who are deprived of their liberty, subject to their wishes. **Consular protection may be exercised by diplomatic authorities when they act as consular authorities**.

- (28) **Member States should clearly set out in their national law the grounds and criteria for any temporary derogations from rights granted under this Directive [AM 61], and they should** make a restricted use of these derogations. Any temporary derogations allowed under this Directive should be proportional, **strictly** 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. Temporary derogations regarding the right of access to a lawyer 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 might be subject to judicial review. **However, temporary derogations regarding the principle of confidentiality may only be authorised by a duly reasoned decision taken on a case-by-case basis by a judicial authority.**
- (29) Without prejudice to national law requiring 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 **clear and** sufficient information **in simple and accessible language** [...] about the content of the right concerned and the possible consequences of waiving it. When 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.
- (30) 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.

- (31) It should be possible for a suspect or accused person to revoke a waiver at any point during the criminal proceedings, **and the person concerned should be informed about this possibility [AM 66]**. In case of revocation **the rights set out in** this Directive should apply from the point in time when then the waiver was revoked. Hence, it should not be necessary to proceed again with questioning and any procedural acts that have been carried out during the period when the right concerned was waived. If the suspect or accused person wishes to revoke a waiver during the trial stage, the judge can, depending on the specific circumstances of the case, decide to restrict the consequences of the revocation or even decide not to give any effect to the revocation at all, having regard to the overall fairness of the proceedings.
- (32) In relation to the functioning of judicial cooperation in the 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.¹⁵
- (33) In proceedings for the execution of a European Arrest Warrant, the competent authority of the executing Member State could ask the competent authority of the issuing Member State for assistance when a requested person wants to make use of his right to have a third person informed of his arrest or detention, and the competent authority of the executing Member State experiences difficulties, e.g. in contacting the third person concerned.
- (34) The surrender procedure is crucial for cooperation in criminal matters between the Member States. Observance of the time limits contained in Council Framework Decision 2002/584/JHA is essential for such cooperation. Therefore, Member States should ensure that application of the rights provided for in this Directive to proceedings for the execution of a European Arrest Warrant shall not jeopardize respecting those time limits.

¹⁵ OJ L 190, 18.7.2002, p. 1.

(35) 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 provided for under national law, ask questions, request clarification and make statements. The fact of participation should be recorded in accordance with national law.

(35a) The requested person should have the right in the executing State to meet and communicate with the lawyer representing him in that Member State. The duration and frequency of meetings between a requested person and his lawyer should depend on the circumstances of the case. Member States may regulate such duration and frequency in their national law and procedures, provided such regulation does not prejudice the effective exercise and essence of the right of the requested person to meet with his lawyer.

(35b) Member States may also regulate in their national law and procedures the duration, frequency and means of communication between the requested person and his lawyer, including concerning the use of videoconferencing and other communication technology in order to allow such communications to take place, provided such regulation does not prejudice the effective exercise and essence of the right of the suspect or accused person to communicate and meet with his lawyer.

- (35c) Member States should ensure that a requested person also has the right of access to a lawyer without undue delay after his arrest pursuant to a European arrest warrant in the issuing Member State. In application of this right, which should be without prejudice to the time limits set out in Council Framework Decision 2002/584/JHA, the lawyer in the issuing Member State should be able to assist the lawyer in the executing Member State by providing him with information and advice with a view to allowing the requested person to exercise his rights under Council Framework Decision 2002/584/JHA, in particular regarding the grounds of refusal set out under Articles 3 and 4 of that Framework Decision. The right, if any, for the lawyer in the issuing Member State to participate in the proceedings in the executing Member State should be a matter of national law.**
- (36) In the absence to-date of a legislative act of the Union on legal aid, Member States should apply their national law in relation to legal aid, which should be in line with the Charter, the ECHR and the case-law of the European Court of Human Rights. The rights conferred in this Directive do not [...] create obligations for Member States as far as their respective legal aid systems are concerned, including in relation to minor offences.
- (37) The principle of effectiveness of Union law should require that Member States put in place adequate, effective remedies in the event of a breach of a right conferred upon individuals by Union law.

(38) Member States should ensure that in the assessment of any value to be given to statements made by a suspect or accused person or to evidence obtained in breach of his right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 3(5), the rights of the defence and the fairness of the proceedings should be taken into account ; in this context, regard should be had at the case-law of the European Court of Human Rights, which has established that the rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction. This should be without prejudice to the use of statements for other purposes permitted under national law, such as the need to execute urgent investigative acts to avoid the perpetration of other offences or serious adverse consequences for any person or related to an urgent need to prevent a substantial jeopardy to criminal proceedings where access to a lawyer or delaying the investigation would irretrievably prejudice the on-going investigations regarding a serious crime. Further, this should be without prejudice to national rules or systems regarding admissibility of evidence, and should not prevent Member States from maintaining a system whereby all existing evidence can be adduced before a court or a judge, without there being any separate or prior assessment as to admissibility of such evidence. [compare AM 30]

(38a) The duty of care towards suspected or accused persons who are in a potentially weak position underpins a fair administration of justice. The prosecution, law enforcement and judicial authorities should therefore facilitate that such persons are able to exercise effectively the rights provided for in this Directive, for example by taking into account any potential vulnerability that affects their ability to exercise the right of access to a lawyer and to communicate with a third party, and by taking appropriate steps to ensure those rights are guaranteed.

- (39) This Directive upholds the fundamental rights and principles recognised by the Charter, 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.
- (40) 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.
- (41) 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. 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 Justice and the European Court of Human Rights.
- (42) This Directive promotes the rights of **children** and takes into account the Guidelines of the Council of Europe on child friendly justice, in particular its provisions on information and advice to be given to **children**. The Directive ensures that suspects and accused persons, including **children**, should be provided with adequate information to understand the consequences of waiving a right under this Directive and that the waiver should be given voluntarily and unequivocally. [...] The **holder of the parental responsibility** of a suspect or accused **child** should always be notified as soon as possible of his deprivation of liberty and the reasons pertaining thereto. If providing such information to the **holder of the parental responsibility** of the **child** is contrary to the best interests of the **child**, another suitable adult such as a relative should be informed instead. This should be without prejudice to provisions of national law which require that specified authorities **and individuals** which are responsible for the protection of **children** should also be informed of the deprivation of liberty of a **child**.

- (43) Since the objectives of this Directive, namely setting common minimum rules for the right of access to a lawyer and the right to have a third person informed of the deprivation of liberty, cannot be sufficiently achieved by the Member States, and can, by reason of the scale of the measure, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve these objectives.
- (44) 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.
- (45) 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:

CHAPTER 1

Objective, Scope

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 States ¹⁶ ("European arrest warrant proceedings") to have access to a lawyer and to have a third party informed of the deprivation of liberty.

¹⁶ 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 made aware** by the competent authorities of a Member State, by official notification or otherwise, that he is suspected or accused of having committed a criminal offence [, **and irrespective of whether he is deprived of liberty or not**¹⁷]. 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 Member State in accordance with Article 9.

2a.¹⁸ **This Directive also applies, under the same conditions as provided for in paragraph 1, to persons other than suspects or accused persons who in the course of questioning by the police or other law enforcement authorities become suspects or accused persons.**

¹⁷ Member States are examining whether this addition, which does not figure in measures A and B, would be acceptable in the framework of an overall compromise.

¹⁸ Text addressing former Article 10 CP, to be read with recital 15 as modified.

3.¹⁹ **Without prejudice to the right to a fair trial, in respect of minor offences**

- a) **where the law of a Member State provides for the imposition of a sanction by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed or referred to such a court; or**
- b) **where deprivation of liberty cannot be imposed as a sanction or where the offence does not give rise to the application of such a sanction,²⁰**

this Directive shall only apply to the proceedings before a court having jurisdiction in criminal matters.

However, the Directive shall in any case fully apply when the suspect or accused person is deprived of liberty, irrespective of the stage of the criminal proceedings.

¹⁹ Text to be read together with recitals 9, 10, 10a, and 11. See also the suggestion for a new recital 6a.

²⁰ The last part of the text ("*or ...such a sanction*") is stemming from Article 27(3)(b) and (c) of the Framework Decision on the EAW (agreed language) and replaces the words "*deprivation of liberty shall not be imposed as a sanction*" in Article 2(4) GA.

CHAPTER 2
Right of access to a lawyer

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 so as to allow the person concerned to exercise his rights of defence practically and effectively.

- 2.²¹ 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 **as** from the following moments in time, whichever is the earliest:
 - (a) before he is **questioned** by the police or other law enforcement or judicial authorities; *[AM 42 and AM 45]*

 - (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 deprivation of liberty;

 - (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. *[AM 46]*

²¹ See also recital 13.

3. The right of access to a lawyer shall entail the following:

- (a)²² Member States shall ensure that a suspect or accused person has the right to communicate **and meet in private** with the lawyer representing him, including prior to **questioning by** the police or other law enforcement or judicial authorities. [...]
- (b)²³ 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 **questioned**. When a lawyer participates during **questioning** this shall be recorded in accordance with national law;
- (c)²⁴ Member States shall ensure that the suspect or accused person shall as a minimum have the right for his lawyer to attend the following investigative or other evidence-gathering acts, if these acts are provided for in the national law concerned and if the suspect or accused person is required to attend the act concerned:
- i) identity parades;
 - ii) confrontations;
 - iii) experimental reconstructions of the scene of crime.

²² See also recitals 16a-16c.

²³ See also recital 20.

²⁴ See also recital 21.

4. Notwithstanding provisions of national law concerning the mandatory presence of a lawyer, [...] Member States shall make the necessary arrangements to ensure that a suspect or accused person is in a position to effectively exercise his right of access to a lawyer, **taking into account the specific situation of the person concerned including whether he is deprived of liberty or not**, unless he has waived this right in accordance with Article 8.²⁵

[...]

5. **In exceptional circumstances and in the pre-trial stage only Member States may temporarily derogate from the application of the rights provided for in this Article when, in the light of the particular circumstances of the case, this is justified by one or more of the following compelling reasons:**
- (a) **an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;**
 - (b) **an urgent need to prevent a substantial jeopardy to criminal proceedings where giving access to a lawyer or delaying the investigation would irretrievably prejudice an on-going investigation.**

²⁵ See also recitals 17 and 18.

Article 4
Confidentiality²⁶

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.

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

 - (b) there is **serious** reason to believe, **based on objective and factual circumstances**, that the lawyer concerned is involved with the suspect or accused person in a criminal offence **and criminal proceedings may be opened against this lawyer**.

²⁶ See also recitals 24 and 25.

²⁷ Text under discussion.

Article 5

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

1. Member States shall ensure that suspects or accused persons who are deprived of their liberty have the right to have at least one person, such as a relative or employer, named by them, informed of the deprivation of liberty, without undue delay, if they so wish.
2. If the suspect or accused person is a child, Member States shall ensure that the holder of the parental responsibility of the child is informed as soon as possible of the deprivation of liberty and of the reasons pertaining thereto, unless it would be contrary to the best interests of the child, in which case another appropriate adult shall be informed. For the purposes of this paragraph, a person below the age of 18 years shall be considered to be a child.
- [3. **As soon as the particular circumstances of the case so permit, but at the latest 48 hours after suspects or accused persons have been deprived of liberty, they shall also have the right to communicate with at least one person, such as a relative or employer, named by them.]**²⁸
4. **Member States may temporarily derogate from the application of the right set out in paragraph 1 when this is justified, in the light of the particular circumstances of the case, by one of the following compelling reasons:**
 - **an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;**
 - **an urgent need to prevent a jeopardy to criminal proceedings where informing a third person could [substantially] prejudice an on-going investigation.**

²⁸ Member States are currently scrutinising this text.

5. Member States may temporarily derogate from the application of the right set out in paragraph 2 when this is justified, in the light of the particular circumstances of the case, by one of the following compelling reasons:
- an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;
 - an urgent need to prevent a substantial jeopardy to criminal proceedings where informing the holder of the parental responsibility of the child or another appropriate adult would irretrievably prejudice an on-going investigation. ²⁹
6. Member States may temporarily derogate from the application of the right set out in paragraph 3 when this is justified by one of the following reasons:
- a need to avert serious adverse consequences for the life, liberty or physical integrity of a person;
 - a need to prevent criminal offences;
 - a need to prevent prejudice to criminal proceedings;
 - a need in prisons to maintain good order, safety and security;
 - a need to protect victims of crime.

²⁹ Following a comment by EP, Member States are invited to reflect whether this derogation is really needed, since Article 5(2) allows to inform "another appropriate adult" instead of the holder of the parental responsibility when a suspected or accused child is deprived of liberty.

Article 6

The right to communicate with consular authorities³⁰

- 1. 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 authorities of their State of nationality informed of the deprivation of liberty without undue delay and to communicate with those authorities, if the suspects or accused persons so wish. When suspects or accused persons have two or more nationalities, they may choose which consular authorities, if any, are to be informed of the deprivation of liberty and with whom they wish to communicate.**

- 2. Suspects or accused persons also have the right to be visited by their consular authorities, the right to converse and correspond with them and the right to have legal representation arranged for by their consular authorities, subject to the agreement of these authorities and the wishes of the suspects or accused persons concerned.**

- 3. The exercise of the rights in this Article may be regulated in national law and procedures, provided such law and procedures shall enable full effect to be given to the purposes for which these rights are intended.**

³⁰ See also recital 27.

CHAPTER 4
Derogations and waiver

*Article 7*³¹

General conditions for applying temporary derogations

1. Any temporary derogation under Articles 3(5), 4(2), 5(4), **5(5) and 5(6)**,
 - (a) shall **be proportionate and** not go beyond what is necessary;
 - (b) shall be **strictly** [AM 59] 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. Temporary derogations under Article 3(5) 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. **The duly reasoned decision shall be recorded in accordance with the law of the Member State concerned.** [compare AM 60]

3. **Temporary 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.**

³¹ See also recital 28 as modified.

Article 8

Waiver

1. Without prejudice to national law requiring the mandatory presence or assistance of a lawyer, Member States shall ensure that, in relation to any waiver of a right referred to in Articles 3 and 9 of this Directive:
 - (a) the suspect or accused person has been provided with **clear and** sufficient information **in simple and accessible language** [...] about the content of the right concerned and the possible consequences of waiving it; and [*compare AM 62*]
 - (b) the waiver is given voluntarily and unequivocally.
2. The waiver, **which can be made in writing or orally, shall be noted, as well as** the circumstances under which the waiver was given, using the recording procedure in accordance with the law of the Member State concerned.
3. Member States shall ensure that a waiver can be subsequently revoked at any point during the criminal proceedings **and that the suspect or accused person is informed about this possibility** [*AM 66*]. In case of revocation **the rights set out in** this Directive shall apply from the point in time when the waiver was revoked.

CHAPTER 5
European Arrest Warrant proceedings

*Article 9*³²

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 **in the executing Member State** upon arrest pursuant to the European Arrest Warrant.

2. With regard to the content of the right of access to a lawyer in the executing Member State, the requested person shall have the following rights in **that** Member State:
 - the right of access to a lawyer in such a time and manner so as to allow him to exercise his rights effectively and in any event **without undue delay from** deprivation of liberty;

 - the right to communicate **and meet** with the lawyer representing him; [...]

 - 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.

³² See also recitals 32-35c.

- [3. The issuing Member State shall ensure that a requested person also has the right of access to a lawyer in that Member State without undue delay after his arrest in the executing Member State pursuant to a European arrest warrant. The lawyer in the issuing Member State may assist the lawyer in the executing Member State by providing him with information and advice with a view to allowing the requested person to exercise his rights under Council Framework Decision 2002/584/JHA. The requested person shall be informed of this right.
4. Without undue delay after arrest of a requested person pursuant to a European arrest warrant, the executing judicial authority shall inform the issuing judicial authority of this arrest and of the wish, if any, of the requested person to have access to a lawyer also in the issuing Member State.]³³
5. The rights provided for in this Directive under Articles 4, 5, 6, 8, 11 and - when a temporary derogation under Article 4(2) or Article 5(4), 5(5) or 5(6) is applied - Article 7 shall apply, *mutatis mutandis*, to European arrest warrant proceedings, as well as Article 3(4). **However, the rights provided for in this Directive under Articles 5, 6 and 8 shall only apply in the executing Member State.**

³³ Member States are scrutinising whether such provisions on the right of access to a lawyer in the issuing State, including accompanying recital 35c and the additions to Articles 9(5) and recital 17, would be acceptable in the framework of an overall compromise.

Member States are also examining whether the right of access to a lawyer in the issuing State is really necessary in all cases. It could in particular be discussed whether it is possible to grant this right only in the more difficult cases, notably cases where the person has not (yet) consented to his surrender. This could for example be done by putting at the beginning of paragraph 3 the following words: "**Save where the requested person has consented to his surrender in accordance with Article 13 of Framework Decision 2002/584/JHA, Member States ...**". Paragraph 4 may need to be adapted accordingly.

It could also be examined whether the right of access to a lawyer in the issuing State could be granted only in prosecution cases, and/or whether it should be left to judicial discretion whether the right should be granted.

CHAPTER 6

General and final provisions

Article 10

Legal aid

This Directive is without prejudice to national law in relation to 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 11 ³⁴

Remedies

1. Member States shall ensure that a suspected or accused person has an effective remedy under national law in instances where his right of access to a lawyer has been breached.
- [2. **Without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that in the assessment of any value to be given to statements made by a suspect or accused person or to evidence obtained in breach of his right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 3(5), the rights of the defence and the fairness of the proceedings are taken into account.**] ³⁵

³⁴ See also recital 38 as modified.

³⁵ Member States are examining the issue of remedies, which is very sensitive for several of them in the light of their legal systems. The text provided is a tentative proposal by the Presidency to find a solution on this issue; the text has not yet been scrutinised by Member States.

[*Article 11a*

Vulnerable persons

Member States shall ensure that in the application of this Directive the particular needs of vulnerable suspects and vulnerable accused persons are taken into account.] ³⁶

Article 12

Non-regression clause

Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the Charter, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and other relevant provisions of international law or the law of any Member States which provide a higher level of protection.

³⁶ Member States generally consider that all amendments of Parliament regarding vulnerable persons should find a place in the future measure E, and not in this Directive. In a spirit of compromise, however, Member States are reflecting whether this new Article, together with the accompanying recital 38a, could be acceptable in the context of an overall agreement on the text.

Article 13

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. Member States shall forthwith communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive, accompanied by a correlation table between those provisions and this Directive.

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.]³⁷

Article 14

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*.

³⁷ Text of paragraphs 2 and 3 is to be finalised pending justification by the Commission according to the inter-institutional agreement/joint political declaration.

Article 15

Addressees

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

Done at Brussels,

For the European Parliament

For the Council

The President

The President
