



**COUNCIL OF
THE EUROPEAN UNION**

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NOTE

From : Presidency
To : Coreper

No. Prop. : 11497/11 DROIPEN 61 COPEN 152 CODEC 1018
No. Prev. doc. : 7564/13 DROIPEN 29 COPEN 41 CODEC 606

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]
- Approval of the final compromise text

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. Following work carried out under the Polish and Danish Presidencies, the Council reached a general approach on the draft Directive on 8 June 2012.³
3. On 10 July 2012, the LIBE Committee of the European Parliament adopted its orientation vote.⁴ Subsequently, the Presidency entered into negotiations with the European Parliament in order to reach an agreement on the text of the draft Directive.
4. Nine trilogues were held, three under Cyprus Presidency and six under Irish Presidency. Further, various technical and other informal meetings took place. The Member States were regularly updated on the state of play of the negotiations during meetings of the Council, Coreper, the Friends of the Presidency and the JHA Counsellors. During these meetings, the Presidency verified in each case that it had a mandate for conducting the negotiations.
5. On 28 May 2013, the negotiating parties reached agreement on a final compromise text on the draft Directive. This text is set out in the Annex.
6. The Presidency considers that the text represents a well-balanced compromise that takes into account the major concerns and priorities of all parties involved. It therefore invites Coreper to approve the agreement and take the procedural decision, according to Article 19(7)(k) of the Council's rules of procedure, to inform the Parliament accordingly through a letter.
7. For these reasons, Coreper is invited:
 - a) to approve the final compromise text as set out in the Annex to this note;
 - b) to mandate the Presidency to inform the European Parliament that, should the European Parliament adopt its position at first reading in the exact form as set out in the final compromise text, the Council would approve the European Parliament's position and the Directive shall be adopted in the wording which corresponds to the European Parliament's position, subject to legal-linguist revision of the text.

³ ST 10908/12.

⁴ DS 1553/12.

(Final compromise text as agreed by the negotiating parties on 28 May 2013)

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 rights to have a third party informed upon deprivation of liberty and to communicate, while deprived of liberty, with third persons and with consular authorities

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 ⁵,

After consulting the Committee of the Regions,

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.

⁵ OJ C , , p. . [opinion given on 7 December 2011, SOC/424]

- (2) 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.
- (3) 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.
- (4) 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.
- (5) 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 have a third party informed upon deprivation of liberty.

- (6) 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.
- (7) 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.
- (8) 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.
- (9) 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.

- (10) On 30 November 2009, the Council adopted the Roadmap for strengthening the procedural rights of suspected and accused persons in criminal proceedings ('the Roadmap')⁶. 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.
- (11) 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.
- (12) 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 proceedings⁷ and Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings⁸.

⁶ OJ C 295, 4.12.2009, p. 1.

⁷ OJ L 280, 26.10.2010, p. 1.

⁸ OJ L 142, 1.6.2012, p.1.

- (13) This Directive sets out minimum rules on the right of access to a lawyer and on the right to have a third party informed 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. This case-law provides inter alia that the fairness of proceedings requires that a suspect or accused person be able to obtain the whole range of services specifically associated with legal assistance. In this regard, the lawyer should be able to secure without restriction the fundamental aspects of that person's defence.
- (14) 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.
- (15) 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.
- (16) 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.

- (17) 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.
- (18) In some Member States certain minor offences, in particular minor traffic offences, minor offences in relation to general municipal regulations and minor public order offences, 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, this Directive should therefore apply only to the proceedings before a court having jurisdiction in criminal matters.
- (19) The scope of application of this Directive in respect of certain minor offences should not affect the obligations of Member States under the ECHR to ensure fair trial rights, including obtaining legal assistance from a lawyer.

- (20) 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 and during any such questioning, 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.
- (21) 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 when a suspect or accused person has not yet been identified.
- (22) When a person other than a suspect or accused person, such as a witness, becomes a suspect or accused person, he should be protected against self incrimination and has the right to remain silent, as confirmed in the case law of the European Court of Human Rights. It is therefore appropriate to make express reference to the practical situation where a person, other than a suspect or accused person, during questioning by the police or by another law enforcement authority in the context of criminal proceedings becomes suspected or accused of having committed a criminal offence. When, in the course of such questioning, a person other than a suspect or accused person becomes a suspect or accused person, any questioning should be suspended immediately; however, questioning may be continued if the person has been made aware that he is a suspect or accused person and he is able to fully exercise the rights provided for under this Directive.

- (23) Suspects or accused persons should have the right to 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 make practical arrangements concerning 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. Member States may also make practical arrangements to ensure safety and security, in particular of the lawyer and of the suspect or accused person, in the place where the meeting between the lawyer and the suspect or accused person is conducted. All these arrangements should not prejudice the effective exercise and essence of the right of the suspect or accused person to meet with his lawyer.
- (24) Suspects or accused persons should have the right to communicate with the lawyer representing them. Such communication can take place at any stage, including before any exercise of the right to meet with the lawyer. Member States may make practical arrangements concerning 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 arrangements do not prejudice the effective exercise and essence of the right of the suspect or accused person to communicate with his lawyer.
- (25) 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.

- (26) Member States should ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when they are questioned by the investigating authorities, as well as during court hearings. Such participation should be in accordance with procedures in national law, which may regulate the participation of a lawyer during questioning of the suspect or accused person by the investigating authorities, as well as during court hearings, provided these rules do not prejudice the effective exercise and essence of the right concerned. During questioning by the investigating authorities of the suspect or accused person or in a court hearing, the lawyer may *inter alia*, in accordance with such rules, ask questions, request clarification and make statements, which should be recorded in accordance with national law.
- (27) The suspect or accused person has the right for his lawyer to attend at least the following investigative or evidence-gathering acts, insofar as they are provided for in the national law concerned and insofar the suspect or accused person is required or permitted 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 make practical arrangements concerning the presence of a lawyer during investigative or evidence-gathering acts, provided such arrangements do not prejudice the effective exercise and essence of the rights concerned. Where the lawyer is present during an investigative or evidence-gathering act, this should be recorded in accordance with the recording procedure of the law of the Member State concerned.

- (28) Member States should be encouraged to make general information available, for instance on a website or by means of a leaflet that is available at police stations, to facilitate suspects or accused persons in obtaining a lawyer. However, Member States would not need to actively pursue that a 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. Such suspect or accused person concerned should be able to freely contact, consult or be assisted by that lawyer.
- (29) 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 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. The arrangements could include those on legal aid if applicable.
- (30) 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.

- (31) In cases of 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, Member States are permitted to temporarily derogate from the right of the suspect or accused person to have access to a lawyer without undue delay after deprivation of liberty. During a temporary derogation on this ground, the competent authorities are not allowed to question the person concerned or to carry out any of the investigative or evidence-gathering acts foreseen in this Directive. Where immediate access to a lawyer is not possible because of the geographical remoteness of the suspect or accused person, Member States should arrange for communication via telephone or video conference unless this is strictly impossible.
- (32) Member States should be permitted to temporarily derogate from the right of access to a lawyer in the pre-trial phase when there is a need, in cases of urgency, to avert serious adverse consequences for the life, liberty or physical integrity of a person. During a temporary derogation on this ground, the competent authorities may question a suspect or accused person without the lawyer being present, it being understood that the suspect or accused person has been informed of his right to remain silent and can exercise that right, and that questioning does not prejudice the rights of the defence, including the privilege against self-incrimination. Questioning may be carried out for the sole purpose and to the extent necessary to obtain information that is essential to avert serious adverse consequences for the life, liberty or physical integrity of a person. Abuse of this derogation would in principle irretrievably prejudice the rights of the defence.

(33) Member States should also be permitted to temporarily derogate from the right of access to a lawyer in the pre-trial phase where immediate action by the investigating authorities is imperative to prevent a substantial jeopardy to criminal proceedings, in particular to prevent destruction or alteration of essential evidence, or to prevent interference with witnesses. During a temporary derogation on this ground, the competent authorities may question a suspect or accused person without the lawyer being present, it being understood that the suspect or accused person has been informed of his right to remain silent and can exercise that right, and that questioning does not prejudice the rights of the defence, including the privilege against self-incrimination. Questioning may be carried out for the sole purpose and to the extent necessary to obtain information that is essential to prevent a substantial jeopardy to criminal proceedings. Abuse of this derogation would in principle irretrievably prejudice the rights of the defence.

(34) 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 and is an essential part of the right to a fair trial. Member States should therefore respect the confidentiality of meetings and other forms of communication between the lawyer and the suspect or accused person in the exercise of the right of access to a lawyer provided for in this Directive, without derogation. This Directive is without prejudice to procedures that address the situation when there are objective and factual circumstances whereby the lawyer is suspected of being involved with the suspect or accused person in a criminal offence. Criminal activity of the lawyer should not be considered to be legitimate assistance to suspects or accused persons in the framework of this Directive. The obligation to respect confidentiality not only implies that Member States should refrain from interfering with or accessing such communication but also that, where the suspect or accused person is deprived of liberty or otherwise finds himself in a place under the control of the State, Member States should ensure that arrangements for communication uphold and protect confidentiality. This is 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. This Directive is also without prejudice to procedures in national law according to which forwarding correspondence may be rejected if the sender does not agree to the correspondence first being submitted to a competent court.

- (35) 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.
- (36) 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 make practical arrangements in relation to the application of this right, provided such arrangements do 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. When the competent authorities envisage making such a temporary derogation in respect of a specific third person, they should firstly consider whether another third person, nominated by the suspect or accused person, could be informed of his deprivation of liberty.

- (37) Suspects or accused persons, while deprived of liberty, should have the right to communicate without undue delay with at least one third person, such as a relative, nominated by them. Member States may limit or defer the exercise of this right in view of imperative requirements or proportionate operational requirements. These requirements can, for example, be a need to avert serious adverse consequences for the life, liberty or physical integrity of a person, a need to prevent prejudice to criminal proceedings, a need to prevent a criminal offence, a need to await a court hearing, and a need to protect victims of crime. When the competent authorities envisage limiting or deferring the exercise of the right to communicate in respect of a specific third person, they should firstly consider whether the suspect or accused person could communicate with another third person nominated by him. Member States may make practical arrangements concerning the timing, means, duration and frequency of communication with third persons, taking account of the need to maintain good order, safety and security in the place where the person is being deprived of liberty.
- (38) 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.

- (39) Member States should clearly set out in their national law the grounds and criteria for any temporary derogations from rights granted under this Directive, and they should make a restricted use of these derogations. Any temporary derogations allowed under this Directive should be proportional, strictly limited in time, not be based exclusively on the type or the seriousness of the alleged offence, and not prejudice the overall fairness of the proceedings. Member States should clearly set out in their national law the grounds and criteria for any temporary derogations from rights granted under this Directive, and they should make a restricted use of these derogations. Any temporary derogations allowed under this Directive should be proportional, strictly limited in time, not be based exclusively on the type or the seriousness of the alleged offence, and not prejudice the overall fairness of the proceedings. Member States should ensure that when a temporary derogation has been authorised under this Directive by a judicial authority which is not a judge or a court, the decision on authorising the temporary derogation can be assessed by a court, at least during the trial stage.
- (40) 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, orally or in writing, clear and sufficient information in simple and understandable 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.
- (41) 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.

- (42) 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. A revocation of a waiver should come into effect from the point in time when the revocation was made. 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.
- (43) 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 of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States.⁹ 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.
- (44) Requested persons should have the right to meet in private with the lawyer representing them in the executing State. Member States may make practical arrangements concerning the duration and frequency of such meetings, taking into account the particular circumstances of the case. Member States may also make practical arrangements to ensure safety and security, in particular of the lawyer and of the requested person, in the place where the meeting between the lawyer and the requested person is conducted. All these arrangements should not prejudice the effective exercise and essence of the right of the requested person to meet with his lawyer.

⁹ OJ L 190, 18.7.2002, p. 1.

- (45) Requested persons should have the right to communicate with the lawyer representing them in the executing Member State. Such communication can take place at any stage, including before any exercise of the right to meet with the lawyer. Member States may make practical arrangements concerning 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 arrangements do not prejudice the effective exercise and essence of the right of the requested person to communicate with his lawyer.
- (46) Executing Member States should make the necessary arrangements to ensure that a requested person is in a position to effectively exercise his right of access to lawyer in the executing Member State, 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. They 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 requested person could choose.
- (47) Without undue delay after being informed that the requested person wishes to appoint a lawyer in the issuing Member State, the competent authority of that Member State shall provide information to the requested person to facilitate him in appointing a lawyer there. Such information could, for example, include a current list of lawyers, or the name of a lawyer on duty in the issuing State, that can provide information and advice in European Arrest Warrant cases. Member States could request that the appropriate bar association draw up such a list.
- (48) 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, while requested persons should be able to fully exercise their rights under this Directive in proceedings for the execution of a European Arrest Warrant, those time limits should be respected.

- (49) 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.
- (50) In accordance with the principle of effectiveness of Union law, Member States should put in place adequate and effective remedies to protect the rights conferred upon individuals by this Directive.
- (51) Member States should ensure that in the assessment of statements made by a suspect or accused person or of evidence obtained in breach of his right to a lawyer or in cases where a derogation to this right was authorised in accordance with this Directive, the rights of the defence and the fairness of the proceedings should be respected; 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.

- (52) 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 have a third party informed upon deprivation of liberty, and by taking appropriate steps to ensure those rights are guaranteed.
- (53) 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.
- (54) 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.
- (55) 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. Such higher level of protection may not constitute an obstacle to mutual recognition of judicial decisions that these minimum rules are designed to facilitate. 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.

- (56) 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 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 any specified authorities, institutions or individuals, in particular those which are responsible for the protection or welfare of children, should be informed of the deprivation of liberty of a child. Member States should refrain from limiting or deferring the exercise of the right to communicate with a third party in respect of suspected or accused children who are deprived of liberty, save in the most exceptional circumstances. Where a deferral is applied the child should nonetheless not be held incommunicado, but be permitted to communicate with, for example, an institution or individual responsible for the protection or welfare of children.
- (57) In accordance with the Joint Political Declaration of Member States and the Commission on explanatory documents of 28 September 2011, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.

- (58) 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.
- (59) 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.
- (60) 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 ¹⁰ ("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 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. 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 10.
3. 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 by another law enforcement authority become suspects or accused persons.

¹⁰ OJ L 190, 18.7.2002, p. 1.

4. 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,

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.

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. 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;

 - (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.

3. The right of access to a lawyer shall entail the following:
- (a) Member States shall ensure that a suspect or accused person has the right to meet in private and communicate with the lawyer representing him, including prior to questioning by the police or other law enforcement or judicial authorities;
 - (b) Member States shall ensure that the suspect or accused person has the right for his lawyer to be present and participate effectively when he is questioned. Such participation shall be in accordance with procedures in national law, provided these procedures do not prejudice the effective exercise and essence of the right concerned. When a lawyer participates during questioning this shall be recorded in accordance with national law;
 - (c) 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 evidence-gathering acts, if these acts are provided for in the national law concerned and if the suspect or accused person is required or permitted to attend the act concerned:
 - i) identity parades;
 - ii) confrontations;
 - iii) experimental reconstructions of the scene of crime.

4. Member States shall endeavour to make general information available to facilitate suspects or accused persons in obtaining a lawyer.

Notwithstanding provisions of national law concerning the mandatory presence of a lawyer, Member States shall make the necessary arrangements to ensure that suspects or accused persons who are deprived of liberty shall be in a position to effectively exercise their right of access to a lawyer, unless they have waived this right in accordance with Article 9.

5. In exceptional circumstances and in the pre-trial stage only, Member States may temporarily derogate from the application of paragraph 2(c) when the geographical remoteness of a suspect or accused person makes it impossible to ensure the right of access to a lawyer without undue delay after deprivation of liberty.
6. In exceptional circumstances and in the pre-trial stage only, Member States may temporarily derogate from the application of the rights provided for in paragraph 3 when and to the extent this is justified, in the light of the particular circumstances of the case, 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) immediate action by the investigating authorities is imperative to prevent a substantial jeopardy to criminal proceedings.

Article 4

Confidentiality

Member States shall respect the confidentiality of communication between a suspect or accused person and his lawyer in the exercise of the right of access to a lawyer provided for under this Directive. This shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law.

CHAPTER 3

Informing a third person of deprivation of liberty and communication with third persons and consular authorities

Article 5

The right to have a third person informed of the 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, nominated 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. Member States may temporarily derogate from the application of the rights set out in paragraphs 1 and 2 when this is justified, in the light of the particular circumstances of the case, by one 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 situation where there could be a substantial jeopardy to criminal proceedings.

4. When Member States temporarily derogate from the application of the right set out in paragraph 2, they shall ensure that an authority responsible for the protection or welfare of children is informed without undue delay of the deprivation of liberty of the child.

Article 6

The right to communicate, while deprived of liberty, with third persons

1. Member States shall ensure that suspects or accused persons who are deprived of liberty have the right to communicate without undue delay with at least one third person, such as a relative, nominated by them.
2. Member States may limit or defer the exercise of this right in view of imperative requirements or proportionate operational requirements.

Article 7

The right to communicate with consular authorities

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. However, 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 or procedures, provided such law and procedures shall enable full effect to be given to the purposes for which these rights are intended.

CHAPTER 4
Derogations and waiver

Article 8

General conditions for applying temporary derogations

1. Any temporary derogation under Articles 3(5), 3(6) and 5(3),
 - (a) shall be proportionate and not go beyond what is necessary;
 - (b) shall be strictly limited in time;
 - (c) shall not be based exclusively on the type or the seriousness of the alleged offence; and
 - (d) shall not prejudice the overall fairness of the proceedings.

2. Temporary derogations under Article 3(5) and 3(6) 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 can be submitted to judicial review. **The duly reasoned decision shall be recorded in accordance with the law of the Member State concerned.**

3. Temporary derogations under Article 5(3) may only be authorised on a case-by-case basis, either by a judicial authority, or by another competent authority on condition that the decision can be submitted to judicial review.

Article 9

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 10 of this Directive:
 - (a) the suspect or accused person has been provided, orally or in writing, with clear and sufficient information in simple and understandable language about the content of the right concerned and the possible consequences of waiving it; and
 - (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. A revocation of a waiver shall come into effect from the point in time when the revocation was made.

CHAPTER 5
European Arrest Warrant proceedings

Article 10

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:
 - (a) 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;

 - (b) the right to meet and communicate with the lawyer representing him;

 - (c) 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, 7, 9 and - when a temporary derogation under Article 5(3) is applied - Article 8 shall apply, *mutatis mutandis*, to European arrest warrant proceedings in the executing Member State.

4. The competent authority in the executing Member State shall, without undue delay after deprivation of liberty, inform the requested person that he has the right to appoint a lawyer in the issuing Member State. The role of that lawyer in the issuing Member State is to assist the lawyer in the executing Member State by providing him with information and advice with a view to the effective exercise of the rights of the requested person under Council Framework Decision 2002/584/JHA.
5. Where the requested person wishes to exercise this right and does not already have a lawyer in the issuing Member State, the competent authority in the executing Member State shall promptly inform the competent authority in the issuing Member State. The competent authority of that Member State shall, without undue delay, provide information to the requested person to facilitate him in appointing a lawyer there.
6. The right of a requested person to appoint a lawyer in the issuing Member State to assist his lawyer in the executing Member State is without prejudice to the time limits set out in Council Framework Decision 2002/584/JHA or the obligation on the executing judicial authority to decide, within those time limits and the conditions defined under that Framework Decision, whether the person is to be surrendered.

CHAPTER 6
General and final provisions

Article 11

Legal aid

This Directive is without prejudice to national law in relation to legal aid, which shall apply in accordance with the Charter and the ECHR.

Article 12

Remedies

1. Member States shall ensure that suspects or accused persons in criminal proceedings as well as requested persons in European Arrest Warrant proceedings have an effective remedy under national law in instances where their rights under this Directive have been breached.

2. Without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in criminal proceedings, in the assessment of statements made by a suspect or accused person or of 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(6), the rights of the defence and the fairness of the proceedings are respected.

Article 13

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.

Article 14

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 ECHR, and other relevant provisions of international law or the law of any Member States which provide 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*]. They shall immediately inform the Commission thereof.
2. When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.
3. Member States shall communicate to the Commission the text of the measures of national law which they adopt in the field covered by this Directive.

Article 16

Report

The Commission shall by [36 months after the deadline for implementation of the Directive mentioned in Article 15(1)] submit a report to the European Parliament and to the Council, assessing the extent to which the Member States have taken the necessary measures in order to comply with this Directive, including an evaluation of the application of Article 3(6) in conjunction with Article 8(1) and (2), accompanied, if necessary, by legislative proposals.

Article 17

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 18

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