

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

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<p>European Commission COM(2011) 326 final</p> <p>08.06.2011</p>	<p>Council of the EU 7337/12 DROIPEN 9 COPEN 25 CODEC 229</p> <p>11.04. 2012</p>
<p>Article 1</p> <p>Objective</p> <p>The Directive lays down rules concerning the right of suspects and accused persons in criminal proceedings and of persons subject to proceedings pursuant to Council Framework Decision 2002/584/JHA to have access to a lawyer and to communicate upon arrest with a third party.</p>	<p><i>Article 1</i></p> <p>Objective</p> <p>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 ("European arrest warrant proceedings") to have access to a lawyer and to have a third party informed of the deprivation of liberty.</p>
<p>Article 2</p> <p>Scope</p> <p>1. This Directive applies from the time a person is 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 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.</p>	<p><i>Article 2</i></p> <p>Scope</p> <p>1. This Directive applies to suspects or accused persons in criminal proceedings from the time a person has been officially notified or informed otherwise by the competent authorities of a Member State that he is suspected or accused of having committed a criminal offence. It applies until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspected or accused person has committed the offence, including, where applicable, sentencing and the resolution of any</p>

<p>2. This Directive applies to persons subject to proceedings pursuant to Framework Decision 2002/584/JHA, from the time they are arrested in the executing State.</p>	<p>appeal.</p> <p>2. This Directive applies to persons subject to European arrest warrant proceedings from the time they are arrested in the executing State <u>in accordance with Article 9.</u></p> <p>3. <u>Where the law of a Member State provides for the imposition of a sanction regarding minor offences by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed to such a court, this Directive shall apply only to the proceedings before that court following such an appeal.</u></p> <p>4. In relation to minor offences, where the law of a Member State provides that only a fine can be imposed as the main sanction and deprivation of liberty cannot be imposed as such a sanction, this Directive shall only apply once the case is before a court having jurisdiction in criminal matters.</p>
<p>Article 3</p> <p>The right of access to a lawyer in criminal proceedings</p> <p>1. Member States shall ensure that suspects and accused persons are granted access to a lawyer <u>as soon as possible and in any event:</u></p> <p>(a) before the start of <u>any questioning</u> by the police or other law enforcement authorities;</p> <p>(b) upon carrying out any procedural or evidence-gathering act at which the person's presence is required or permitted as a right in accordance with national law, unless this would prejudice the acquisition of evidence;</p> <p>(c) <u>from the outset of deprivation of liberty.</u></p> <p>2. Access to a lawyer shall be granted in such a time and manner as to allow the suspect or accused person to exercise his rights of defence effectively.</p>	<p><i>Article 3</i></p> <p>The right of access to a lawyer in criminal proceedings</p> <p>1. Member States shall ensure that suspects and accused persons have the right of access to a lawyer <u>in such a time and manner as to allow the person concerned to exercise his rights of defence practically and effectively.</u></p> <p>2. The suspect or accused person shall have access to a lawyer <u>without undue delay.</u> In any event, the suspect or accused person shall have access to a lawyer from the following moments in time, whichever is the earliest:</p> <p>(a) before he <u>is officially</u> interviewed by the police or other law enforcement or judicial authorities;</p> <p>(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);</p> <p>(c) <u>as soon as practicably possible from the outset of deprivation of liberty [...].</u></p>

(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** communicate with the lawyer representing him, including prior to an official interview with the police or other law enforcement **or judicial** authorities. The duration, frequency and means of communications between the suspect or accused person and his lawyer may be regulated in national law and procedures, provided that the suspect or accused person is able to exercise his rights of defence effectively;

(b) Member States shall ensure that the suspect or accused person has the right for his lawyer to be present and, in accordance with procedures in national law, participate when he is officially interviewed. When a lawyer participates during an official interview this shall be recorded in accordance with national law;

(c) Member States shall determine in their national law in respect of which investigative or other evidence-gathering acts the suspect or accused person has the right for his lawyer to attend, provided that this does not unduly delay these acts and that it does not prejudice the acquisition of evidence. The suspect or accused person shall **as a minimum** have the right for his lawyer to attend the following investigative or other evidence-gathering acts, if they exist in the national law concerned:

i) identity parades;

ii) confrontations;

iii) experimental reconstructions of the scene of crime.

4. Notwithstanding provisions of national law concerning the mandatory presence of a lawyer, in all cases where the suspect or accused person is deprived of liberty [...], Member States shall ensure that a suspect or accused person is in a position to effectively exercise his right of access to a lawyer, including by providing a lawyer when the person concerned

	<p><u>does not have one, unless he has waived this right in accordance with Article 8.</u></p> <p>In cases [...] when a suspect or accused person is not deprived of liberty, Member States shall not prevent a suspect or accused person from exercising his right of access to a lawyer</p> <p>5. <u>In exceptional circumstances and in the pre-trial stage only Member States may temporarily derogate from the application of the rights foreseen in this Article when this is justified by compelling reasons in the light of the particular circumstances of the case.</u></p>
<p>Article 4</p> <p>Content of the right of access to a lawyer</p> <p>1. The suspect or accused person shall have the right to meet with the lawyer representing him.</p> <p>2. <u>The lawyer shall have the right to be present at any questioning and hearing. He shall have the right to ask questions, request clarification and make statements, which shall be recorded in accordance with national law.</u></p> <p>3. The lawyer shall have the right to be present at any other investigative or evidence gathering act at which the suspect or accused person's presence is required or permitted as a right, in accordance with national law, unless this would prejudice the acquisition of evidence.</p> <p>4. <u>The lawyer shall have the right to check the conditions in which the suspect or accused person is detained and to this end shall have access to the place where the person is detained.</u></p> <p>5. <u>The duration and frequency of meetings between the suspect or accused person and his lawyer shall not be limited in any way that may prejudice the exercise of his rights of defence.</u></p>	
<p>Article 5</p> <p>The right <u>to communicate</u> upon arrest</p>	<p><i>Article 5</i></p> <p><u>The right to have a third person informed upon deprivation of liberty</u></p>

<p>1. Member States shall ensure that a person to whom Article 2 refers and who is deprived of his liberty has the right to communicate with at least one person named by him as soon as possible.</p> <p>2. Where the person is a child, Member States shall ensure that the child's legal representative or another adult, depending on the interest of the child, is informed as soon as possible of the deprivation of liberty and the reasons pertaining thereto, unless it would be contrary to the best interests of the child, in which case another appropriate adult shall be informed.</p>	<p>1. Member States shall ensure that a suspect or accused person who is deprived of his liberty has the right to have at least one person, such as a relative or employer, named by him, informed of the deprivation of liberty without undue delay, if he so wishes.</p> <p>2. If the person is a minor Member States shall ensure that the minor's legal guardian is informed as soon as possible of the deprivation of liberty and the reasons pertaining thereto, unless it would be contrary to the best interests of the minor, in which case another suitable adult shall be informed.</p> <p>3. Member States may temporarily derogate from the application of the rights set out in paragraphs 1 and 2 when this is justified by compelling reasons in the light of the particular circumstances of the case.</p>
<p>Article 6</p> <p>The right to communicate with consular or diplomatic authorities</p> <p>Member States shall ensure that persons to whom Article 2 refers, who are deprived of their liberty and who are non-nationals have the right to have consular or diplomatic authorities of their State of nationality informed of the detention as soon as possible and to communicate with the consular or diplomatic authorities.</p>	<p><i>Article 6</i></p> <p>The right to communicate with consular or diplomatic authorities</p> <p>Member States shall ensure that a suspect or accused person who is deprived of his liberty and who is a non-national has the right to have consular or diplomatic authorities of his State of nationality informed of the arrest or detention as soon as possible and to communicate with the consular or diplomatic authorities, if he so wishes. Member States may set the terms of such communication, provided the person concerned can exercise his right effectively.</p>
<p>Article 7</p> <p>Confidentiality</p> <p>Member States shall ensure that the confidentiality of meetings between</p>	<p><i>New Article 4</i></p> <p>Confidentiality</p> <p>1. Member States shall guarantee the confidentiality of communication</p>

<p><u>the suspect or accused person and his lawyer is guaranteed. They shall also ensure the confidentiality of correspondence, telephone conversations and other forms of communication permitted under national law between the suspect or accused person and his lawyer.</u></p>	<p>between a suspect or accused person and his lawyer, including meetings, correspondence, telephone conversations and any other forms of communication permitted under national law.</p> <p>2. <u>In exceptional circumstances only Member States may temporarily derogate from paragraph 1, when, in the light of the particular circumstances, this is justified by one of the following compelling reasons:</u></p> <p>(a) <u>there is an urgent need to prevent [...] serious crime; or</u></p> <p>(b) <u>there is sufficient reason to believe that the lawyer concerned is involved in a criminal offence with the suspect or accused person.</u></p>
<p>Article 8</p> <p>Derogations</p> <p><u>Member States shall not derogate from any of the provisions of this Directive save, in exceptional circumstances, from Article 3, Article 4 paragraphs 1 to 3, Article 5 and Article 6. Any such derogation:</u></p> <p><u>(a) shall be justified by compelling reasons pertaining to the urgent need to avert serious adverse consequences for the life or physical integrity of a person;</u></p> <p>(b) shall not be based exclusively on the type or seriousness of the alleged offence;</p> <p>(c) shall not go beyond what is necessary;</p> <p>(d) shall be limited in time as much as possible <u>and in any event not extend to the trial stage;</u></p> <p>(e) shall not prejudice the <u>fairness</u> of the proceedings.</p> <p><u>Derogations may only be authorised by a duly reasoned decision taken by a judicial authority on a case-by-case basis.</u></p>	<p>New Article 7</p> <p>General conditions for applying temporary derogations</p> <p>1. Any temporary derogation under Articles 3(5), 4(2) and 5(3),</p> <p>(a) shall not go beyond what is necessary;</p> <p>(b) shall be limited in time as much as possible;</p> <p>(c) shall not be based exclusively on the type of the alleged offence; and</p> <p>(d) shall not prejudice <u>the overall</u> fairness of the proceedings.</p>

	<p>2. Temporary derogations under Articles 3(5) and 4(2) may only be authorised by a duly reasoned decision taken on a case-by-case basis, either by a judicial authority, or by another competent authority on condition that the decision may be subject to judicial review.</p>
<p>Article 9</p> <p>Waiver</p> <p>1. Without prejudice to national law that requires the mandatory presence or assistance of a lawyer, any waiver of the right to a lawyer referred to in this Directive shall be subject to the following conditions:</p> <p>(a) the suspect or accused person has <u>received prior legal advice</u> on the consequences of the waiver or has otherwise obtained full knowledge of these consequences;</p> <p>(b) he has the necessary capacity to understand these consequences and</p> <p>(c) the waiver is given voluntarily and unequivocally.</p> <p>2. The waiver and the circumstances in which it was given <u>shall be recorded in accordance with the law of the Member State concerned</u>.</p> <p>3. Member States shall ensure that a waiver can be subsequently revoked <u>at any stage of the proceedings</u>.</p>	<p><i>New Article 8</i></p> <p>Waiver</p> <p>1. Without prejudice to national law that requires the mandatory presence or assistance of a lawyer, Member States shall ensure that, in relation to any waiver of a right referred to in Articles 3 and 9 of this Directive:</p> <p>(a) the suspect or accused person has been provided <u>with sufficient information so</u> as to allow him to have adequate knowledge about the content of the right concerned and the possible consequences of waiving it; and</p> <p>(b) the waiver is given voluntarily and unequivocally.</p> <p>2. The waiver and the circumstances in which it was given <u>shall be noted, using the recording procedure in accordance with the law of the Member State concerned</u>.</p> <p>3. <u>Member States shall ensure that a waiver can be subsequently revoked at any point during the pre-trial stage or, subject to judicial discretion, during the trial stage. In case of revocation this Directive shall apply from that point in time onwards.</u></p>

<p>Article 10</p> <p>Persons other than suspects and accused persons</p> <p>1. Member States shall ensure that any person other than a suspect or accused person who is heard by the police or other enforcement authority in the context of a criminal procedure is granted access to a lawyer if, in the course of questioning, interrogation or hearing, he becomes suspected or accused of having committed a criminal offence.</p> <p>2 Member States shall ensure that any statement made by such person before he is made aware that he is a suspect or an accused person may not be used against him.</p>	
<p>Article 11</p> <p>The right of access to a lawyer in European Arrest Warrant proceedings</p> <p>1. Member States shall ensure that any person subject to proceedings pursuant to Council Framework Decision 2002/584/JHA has the right of access to a lawyer promptly upon arrest pursuant to the European Arrest Warrant in the executing Member State.</p> <p>2. With regard to the content of the right of access to a lawyer, this person shall have the following rights in the executing Member State:</p> <ul style="list-style-type: none"> – the right of access to a lawyer in such a time and manner as to allow him to exercise his rights effectively; – the right to meet with the lawyer representing him; – the right that his lawyer is present at any questioning and hearing, including the right to ask questions, request clarification and make statements, which shall be recorded in accordance with national law; 	<p><i>New Article 9</i></p> <p>The right of access to a lawyer in European Arrest Warrant proceedings</p> <p>1. Member States shall ensure that a person requested for surrender in accordance with Council Framework Decision 2002/584/JHA has the right of access to a lawyer promptly upon arrest pursuant to the European Arrest Warrant in the executing Member State.</p> <p>2. <u>With regard to the content of the right of access to a lawyer, the requested person shall have the following rights in the executing Member State:</u></p> <ul style="list-style-type: none"> – <u>the right of access to a lawyer in such a time and manner as to allow him to exercise his rights effectively and in any event as soon as practically possible from the outset of deprivation of liberty;</u> – the right <u>to communicate</u> with the lawyer representing him. The duration, frequency and means of communications between the requested person and his lawyer <u>may be regulated in national law and procedures</u>, provided the requested person shall have the possibility to exercise his rights of defence under Council Framework Decision 2002/584/JHA effectively;

<p>– the right that his lawyer has access to the place where the person is detained in order to check the conditions of detention. The duration and frequency of meetings between the person and his lawyer shall not be limited in any way that may prejudice the exercise of his rights under Council Framework Decision 2002/584/JHA.</p> <p>3. Member States shall ensure that any person subject to proceedings pursuant to Council Framework Decision 2002/584/JHA, upon request, also has the right of access to a lawyer promptly upon arrest pursuant to a European Arrest Warrant in the issuing Member State, in order to assist the lawyer in the executing Member State in accordance with § 4. This person shall be informed of that right.</p> <p>4. The lawyer of this person in the issuing Member State shall have the right to carry out activities limited to what is needed to assist the lawyer in the executing Member State, with a view to the effective exercise of the person's rights in the executing Member State under that Council Framework Decision, in particular under its Articles 3 and 4.</p> <p>5. Promptly upon arrest pursuant to a European Arrest Warrant, the executing judicial authority shall notify the issuing judicial authority of the arrest and of the request by the person to have access to a lawyer also in the issuing Member State.</p>	<p>– 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.</p> <p>3. 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(3) is applied - Article 7 shall apply, mutatis mutandis, to European arrest warrant proceedings.</p>
<p>Article 12</p> <p>Legal aid</p> <p>1. This Directive is without prejudice to domestic provisions on legal aid, which shall apply in accordance with the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights.</p> <p>2. Member States shall not apply less favourable provisions on legal aid than those currently in place in respect of access to a lawyer provided pursuant to this Directive.</p>	<p><i>New Article 10</i></p> <p>Legal aid</p> <p>This Directive is without prejudice to domestic provisions on legal aid, which shall apply in accordance with the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights.</p>
<p>Article 13</p> <p>Remedies</p> <p>1. Member States shall ensure that a person to whom Article 2 refers has</p>	<p><i>New Article 11</i></p> <p>Remedies</p> <p>Member States shall ensure that a suspected or accused person has an</p>

<p>an effective remedy in instances where his right of access to a lawyer has been breached.</p> <p>2. <u>The remedy shall have the effect of placing the suspect or accused person in the same position in which he would have found himself had the breach not occurred.</u></p> <p>3. <u>Member States shall ensure that statements made by the suspect or accused person or 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 8, may not be used at any stage of the procedure as evidence against him, unless the use of such evidence would not prejudice the rights of the defence.</u></p>	<p>effective remedy in instances where his right of access to a lawyer has been breached.</p>
<p>Article 14</p> <p>Non-regression clause</p> <p>Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards enshrined in the Charter of Fundamental Rights of the European Union, the European Convention of Human Rights and Fundamental Freedoms, other relevant provisions of international law or the laws of any Member State that provides a higher level of protection.</p>	<p><i>New Article 12</i></p> <p>Non-regression clause</p> <p>Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards enshrined in the Charter of Fundamental Rights of the European Union, the European Convention of Human Rights and Fundamental Freedoms, other relevant provisions of international law or the laws of any Member State that provides a higher level of protection.</p>
<p>Article 15</p> <p>Transposition</p> <p>1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [24 months after publication of this Directive in the Official Journal] at the latest.</p> <p>2. They shall communicate the text of those provisions and a correlation table between those provisions and this Directive to the Commission.</p> <p>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.</p>	<p><i>New Article 13</i></p> <p>Transposition</p> <p>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 <i>Official Journal</i>] at the latest.</p> <p>2. They shall communicate the text of those provisions and a correlation table between those provisions and this Directive to the Commission.</p> <p>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.</p>

