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NOTE

from : Presidency
to : Working Party on Substantive Criminal Law

No. Prop. : 11497/11 DROIPEN 61 COPEN 152 CODEC 1018
No. Prev. doc. : 7337/12 DROIPEN 9 COPEN 25 CODEC 229

Subject : Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest
- Preparation of Coreper

Introductory remarks

At the meeting on 15/16 March 2012, the Working Party on Substantive Criminal Law resumed the work on the draft Directive on the basis of doc 7337/12. In the light of the discussions at the meeting, the Presidency made a revised text of the draft Directive, which is set out in the Annex. Modifications have been indicated by **bold** type and **[brackets]**. In view of various articles and recitals having been deleted and added in the course of the last meetings, the articles and recitals have been renumbered.

The Presidency considers it appropriate to submit the text in the near future to a higher (political) level. Therefore, the Presidency invites delegations to indicate at the next meeting of the Working Party which provisions they are willing to accept as they stand and which specific positions, if any, they would like to be reflected in footnotes (please provide text in writing where appropriate).

On the basis of the input by delegations, the Presidency will draft a new text with positions of delegations indicated in footnotes. Subsequently, it is the intention of the Presidency to submit the new text to Coreper.

Explicative remarks

In general, the Presidency has tried to make the text clearer, thus avoiding any doubt about its interpretation. The following points of explanation can be provided:

- Case-law of the ECtHR (recital 6)

Former recital 11¹ contained a "summary" of the case-law of the European Court on Human Rights. The wording of this recital was however contested by some delegations. In this light the Presidency added some words in recital 6, and deleted former recital 11.

- Pre-trial / trial phase (recital 15)

Following a suggestion by some delegations, it has been explained in recital 15 what has to be understood with the "pre-trial phase" and the "trial phase". Such explanation seems useful e.g. in the light of Articles 3(5) and 8(3).

- Distinction derogations / postponements (recital 22)

During the last meeting of the Working Party, it appeared that according to a majority of delegations, the term "postponements" should in fact be interpreted as "derogations". Since both terms have the same meaning, the Presidency suggests reverting back to using one single term, "temporary derogations".

¹ Former recital 11 read as follows:
"The European Court of Human Rights has consistently held that a suspect or accused person, at least when in police custody, has a general right of access to a lawyer from the first interrogation by the police in order to protect the right to a fair trial, and in particular the privilege against self-incrimination and to avoid ill treatment. The Court has also held that this right applies unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right."

It has been clarified in recital 22 that during a temporary derogation of the right of access to a lawyer, the competent authorities may i.a. officially interview a suspect or accused person without the lawyer being present, it being understood that he may avail himself of his right to remain silent.

- Scope of principle of confidentiality (recital 24)

Further to the discussions on Article 4(1) regarding the principle of confidentiality of communication between a lawyer and his client, it has been clarified in recital 24 that this Directive should be without prejudice to a breach of confidentiality which is incidental to a lawful surveillance operation carried out by competent authorities, and without prejudice to the work carried out by national intelligence services that fall within the scope of Article 72 of the Treaty.

- Waiver (recital 30)

It has been explained in recital 30 under which conditions a waiver can be revoked during the trial stage. The decision concerned has to be taken by a judge, who should take relevant factors into account, including the severity of the alleged crime and the specific conditions of the person concerned, such as the age of the person and his mental and physical condition. It has also been underlined that when the waiver has been revoked, 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.

- Right of access to a lawyer (Article 3.4 and recitals 16-17)

In view of the discussions at the Working Party meeting, the Presidency suggests that in Article 3(4) a distinction is made between merely two situations: the situation when the suspect or accused person is deprived of liberty, and the situation when such person is not deprived of liberty. The trial stage is not any more aligned to the situation of deprivation of liberty.

In order to avoid misunderstanding, the Presidency has clarified recitals 16 and 17 and has copied some text from recital 16 into Article 3(4).

The Presidency is of the opinion that the current text provides a good balance between the positions of the Member States and hopes that delegations are of the same opinion.

- Right to communicate with consular or diplomatic authorities (Article 6 and recitals 7 and 26)

The text has been brought more in line with Article 36 of the 1963 Vienna Convention on consular relations.

- Right of access to a lawyer in European arrest warrant proceedings (Article 9 and recitals 25, 32 and 33)

Further to discussions in the DROIPEN Working Party on 15/16 March, the COPEN Working Party discussed on 28 March 2012 the issue of access to a lawyer in European arrest warrant proceedings on the basis of docs. 7794/12 and 8031/12. COPEN generally agreed with the indications by the Presidency, according to which the procedural rights referred to in Article 9(3) should also extend to European arrest warrant proceedings, but pointed out that account should be taken of the specificities of the European arrest warrant proceedings. In particular, COPEN indicated that the rights should not delay the surrender procedure of the European Arrest Warrant.

As a consequence, the Presidency has modified recitals 25 and 33, and has inserted a new recital 32.

Further, during the discussions in COPEN various delegations observed that they do not consider it appropriate to insert in Article 9(2), third indent, the words "during questioning, if any, and" after "participate". The observation was made that in European arrest warrant proceedings any questioning in the executing State, such as by the police, should normally only relate to the identification of the person concerned. In this light, the Presidency suggests to leave the text as it stands.

Concluding remarks

The Presidency would like to recall that the Directive is a minimum Directive: Member States who want to provide additional or stronger guarantees are allowed to do so (see also recital 39).

Further, the Presidency underlines the instrument of a Directive leaves Member States flexibility as to its implementation: the result to be achieved is binding, but the choice of form and methods is left to the Member States (see also Article 288 of the Treaty).

(DRAFT)

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**on the right of access to a lawyer in criminal proceedings and European arrest warrant proceedings and on the right to communicate upon arrest²****THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,**

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 82(2)(b) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee³,

Having consulted the Committee of the Regions⁴,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter referred to as "the Charter"), Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the ECHR") and Article 14 of the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR") enshrine the right to a fair trial. Article 48 of the Charter guarantees respect for the rights of the defence.

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

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

⁴ The CoR decided not to give an opinion.

- (2) The principle of mutual recognition of judgments and judicial decisions is the cornerstone of judicial cooperation in criminal matters in the Union.
- (3) Mutual recognition can only operate effectively where there is mutual trust, which requires detailed rules on the protection of procedural rights and guarantees stemming from the Charter, the ECHR and the ICCPR. Common minimum rules should increase confidence in the criminal justice systems of all Member States, which in turn should lead to more efficient judicial cooperation in a climate of mutual trust and to the promotion of a fundamental rights culture in the Union. They should also remove obstacles to the free movement of citizens. Such common minimum rules should apply to the right of access to a lawyer and the right to communicate upon arrest.
- (4) Although Member States are parties to the ECHR and the ICCPR, experience has shown that this in itself does not always provide a sufficient degree of trust in the criminal justice systems of other Member States.

- (5) On 30 November 2009, the Council adopted the Roadmap for strengthening the procedural rights of suspected and accused persons in criminal proceedings ('the Roadmap')⁵. In the Stockholm Programme, adopted on 11 December 2009⁶, the European Council welcomed the Roadmap and made it part of the Stockholm Programme (point 2.4.). Taking a step-by-step approach, the Roadmap calls for the adoption of measures regarding the right to translation and interpretation⁷, the right to information on rights and information about the charges⁸, the right to legal advice and legal aid, the right to communication with relatives, employers and consular authorities, and special safeguards for suspected or accused persons who are vulnerable. The Roadmap emphasises that the order of the rights is indicative, implying that it may be changed according to priorities. It is designed to operate as a whole; only when all its components are implemented will its benefits be felt in full.
- (6) This Directive sets out minimum rules on the right of access to a lawyer and the right to communicate upon arrest with a third party in criminal proceedings, excluding administrative proceedings leading to sanctions such as competition or tax proceedings, and in proceedings for the execution of an European Arrest Warrant. In doing so, it promotes the application of the Charter, in particular Articles 4, 6, 7, 47 and 48, by building upon Articles 3, 5, 6 and 8 of the ECHR, as interpreted by the European Court of Human Rights, **which in its case-law provides guidance on an ongoing basis on the right of access to a lawyer.**

⁵ OJ C 295, 4.12.2009, p. 1.

⁶ OJ C 115, 4.5.2010.

⁷ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the rights to interpretation and translation in criminal proceedings (OJ L 280, 26.10.2010, p. 1).

⁸ Directive 2011/XXX/EU of the European Parliament and of the Council on the right to information in criminal proceedings.

- (7) **This Directive also sets minimum rules on the right for persons who are deprived of liberty to have consular or diplomatic authorities informed of their deprivation of liberty and to communicate with these authorities. These rules build further on provisions of the 1963 Vienna Convention on Consular Relations, in particular Article 36 thereof.** This Directive should facilitate the practical application of these **provisions**, with a view to safeguarding the right to fair proceedings.
- (8) Reference to a lawyer in this Directive includes a reference to any person who is qualified (for example by accreditation by an authorised body) to provide legal advice and assistance to suspects or accused persons.
- (9) In some Member States an authority other than a court having jurisdiction in criminal matters has competence for imposing sanctions in relation to relatively minor offences. That may be the case, for example, in relation to traffic offences which are committed on a large scale and which might be established following a traffic control, in relation to minor offences which are committed in a prison context, or in relation to minor offences committed in a military context and dealt with in first instance by a commanding officer. In such situations, it would be unreasonable to require that the competent authority ensure all the rights under this Directive. Where the law of a Member State provides for the imposition of a sanction regarding minor offences by such an authority and there is a right of appeal or the possibility for the case to be otherwise referred to a court having jurisdiction in criminal matters, this Directive should therefore apply only to the proceedings before that court following such an appeal or referral.
- (10) In some Member States, relatively minor offences, such as minor traffic offences that are committed on a large scale, are considered to be criminal offences. Where, in relation to such an offence, the law of a Member State provides that only a fine can be imposed as the main sanction - that means, independent from any custodial sanction that may be imposed when the fine is not paid - and deprivation of liberty is not possible as such a sanction, this Directive should only apply once the case is before a court having jurisdiction in criminal matters.

- (11) Member States should ensure that suspects and accused persons have the right of access to a lawyer without undue delay before the person concerned is officially interviewed by the police or other law enforcement authorities and **as soon as practically possible** from the outset of deprivation of liberty. In any case, suspects and accused persons should be granted access to a lawyer during criminal proceedings before a court, if they wish to be assisted by a lawyer.
- (12) This Directive gives rights to suspects and accused persons: as long as a person is not, or not yet, suspected or accused of a criminal offence, it does not apply. Questioning by the police or other law enforcement authorities which has as its primary purpose to acquire elements for establishing whether an investigation should be started, is not covered by this Directive. This could be the case, for example, in respect of questions put by police in the course of a road-side check.
- (13) Any person other than a suspect or accused person, such as a witness, who is officially interviewed by the police or other enforcement authority in the context of a criminal procedure, should be granted the rights provided under this Directive for suspects and accused persons if, in the course of questioning, interrogation or hearing, he becomes suspected or accused of having committed a criminal offence.
- (14) An official interview means the official questioning by competent authorities of a suspect or accused person regarding his involvement in a criminal offence, irrespective of the place where it is conducted or the stage of the proceedings when it takes place. This notion should not encompass preliminary questioning by the police or other law enforcement authorities, such as when a person has been caught red-handed, and whose primary purpose is the identification of the person concerned or the verification of the possession of weapons or other similar safety issues.

- (15) **Unless provided otherwise in this Directive, the rights contained in this Directive apply both in the pre-trial phase, meaning the stage before which the suspect or accused person has appeared before a court considering the question of the merits of the accusation against him, and in the trial stage, meaning the stage when the suspect or accused person appears before a court considering that question onwards. The specific moments in time from which the rights of this Directive apply are set out in the relevant provisions thereof.**
- (16) In cases when a suspect or accused person is deprived of liberty [...], Member States should ensure that the person concerned is in a position to **effectively** exercise his right of access to lawyer, if he has not waived this right. To that end, the State should in such cases make all reasonable efforts, including by providing a lawyer when the person concerned does not have one, **it being understood that this does not imply that the State should pay where a person has the means to pay a lawyer himself. The practical arrangements for the provision of a lawyer under this Directive, including those on legal aid if appropriate, are governed by national law.**
- (17) In cases [...] when a suspect or accused person is not deprived of liberty, Member States should [...] **not prevent a suspect or accused person from exercising his right of access to a lawyer. The person concerned should be able to freely** contact or consult a lawyer, or to be assisted by that lawyer, although the State may help the person in obtaining a lawyer. However, Member States would not need to actively pursue that the suspect or accused person will be assisted by a lawyer if the person concerned has not himself arranged to be assisted by a lawyer.

- (18) The right of the suspect or accused person to communicate with his lawyer should ordinarily include the opportunity of the person concerned to meet his lawyer. Member States may in their national law set reasonable limitations on the right of the suspect or accused person to communicate with his lawyer, including the duration and frequency of any such communications, provided such limitations do not prejudice the effective exercise of the rights of defence. In respect of certain relatively minor cases, such limitations may include restricting the right to obtaining legal assistance by telephone. However, limiting the right in this way should be restricted to cases where there is very limited risk of self-incrimination, such as where the person will not be questioned by police or other law enforcement authorities.
- (19) Member States should determine in their national law in respect of which investigative or other evidence-gathering acts the suspect or accused person has the right for his lawyer to attend. The suspect or accused person has the right for his lawyer to attend at least any of the following acts, if they exist in the national law concerned: identity parades, at which the suspect or accused person figures among other persons in order to be identified by a victim or witness; confrontations, where a suspect or accused person [...] 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 of accused is present and** where the circumstances of a crime are reconstructed, in order to better understand the manner and conditions in which a crime was committed and be able to ask specific questions to the suspect or accused person.
- (20) The practical arrangements for the presence and participation of a lawyer at official interviews and at investigative and other evidence-gathering acts should be left to the Member States, including regarding the question whether, and if so, how long, the competent authorities should wait until the lawyer arrives before starting an interview or an investigative or other evidence-gathering act.

- (21) When the lawyer participates in an interview of the investigating authorities with the suspect or accused person, he may *inter alia*, in accordance with procedures in national law, ask questions, request clarification and make statements, which shall be recorded in accordance with national law.
- (22) 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 **temporary derogations** could in particular be justified when there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person, to prevent a substantial jeopardy to ongoing criminal proceedings, or when it is extremely difficult to provide a lawyer due to the geographical remoteness of the suspect or accused person, e.g. in overseas territories. **During such a temporary derogation, the competent authorities may officially interview 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.**

- (23) 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 don't allow the competent authorities to read the communication between the suspect or accused person and his lawyer. However, in limited, exceptional circumstances, it should be possible to **temporarily derogate** from the principle of confidentiality, it being understood that there should not be other, less restrictive means to achieve the same result, such as, in cases of collusion, replacement of the lawyer chosen by the suspect or accused person.
- (24) **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 by national intelligence services that fall within the scope of Article 72 of the Treaty, 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.**

- (25) Suspects or accused persons deprived of their liberty should have the right to have at least one person of their choice, such as a family member or employer, informed of the deprivation of liberty as soon as possible, it being understood that this should not prejudice the due course of the criminal proceedings against the person concerned, nor any other criminal proceedings. **Member States shall determine the practical arrangements in relation to the application of this right, it being understood that the suspect or accused person should have the possibility to effectively exercise this right.** In limited, exceptional circumstances, **however**, it should be possible to **temporarily derogate** from this right when this is justified by compelling reasons in the light of the particular circumstances of the case, in particular when the provision of information could prejudice the due course of the criminal proceedings against the suspect or accused person concerned or of any other criminal proceedings, or when the provision of information could have serious adverse consequences for the safety of a person.
- (26) **A suspect or accused person who is deprived of his liberty and who is a not a national of the Member State of arrest or detention should have the right to have consular or diplomatic authorities of his State of nationality informed of the arrest or detention as soon as possible and communicate with the consular or diplomatic authorities, if he so wishes.** The right 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 the right on **the arrested or** detained person, subject to his wishes. This right shall be exercised in conformity with the national law of the Member States, subject to the condition, however, that such national law must enable full effect to be given to the purposes for which this right are intended.

- (27) In accordance with the case-law of the European Court of Justice, Member States should make a restricted use of the possibility provided in this Directive to [...] **temporarily** derogate from a right set out in this Directive. Any [...] **temporary** derogations allowed under this Directive should be proportional, be limited in time as much as possible, not be based exclusively on the type of the alleged offence, and not prejudice the overall fairness of the proceedings. All **temporary** derogations should be authorised by a duly reasoned decision taken on a case-by-case basis, either by a judicial authority, or by another competent authority on condition that the decision **should be** subject to judicial review.
- (28) Without prejudice to national law that requires the mandatory presence or assistance of a lawyer, the suspect or accused person should be allowed to waive a right granted under this Directive, as long as he has been given sufficient information enabling him to obtain adequate knowledge about the content of the right concerned and the possible consequences of waiving it. While providing the information, the specific conditions of the person concerned should be taken into account, including the age of the person, and his mental and physical condition.
- (29) 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.
- (30) **It should be possible for a suspect or accused person to revoke a waiver at any point. However, during the trial stage the decision concerning the question whether a waiver can be revoked should be subject to judicial discretion. In this context, the judge should take relevant factors into account, e.g. the severity of the alleged crime and the specific conditions of the person concerned, such as the age of the person and his mental and physical condition. In case of revocation this Directive should apply from the point in time when 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.**

- (31) In order to improve the functioning of judicial cooperation in the European Union, certain rights provided for in this Directive should also apply, *mutatis mutandis*, to proceedings for the execution of a European Arrest Warrant according to the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States.⁹
- (32) **In proceedings for the execution of a European Arrest Warrant, the competent authorities of the executing State could ask the competent authorities of the issuing State for assistance when a requested person wants to make use of his right to have a person informed of his arrest or detention.**
- (33) **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.**
- (34) The person subject to a European Arrest Warrant should have the right of access to a lawyer in the executing Member State in order to allow him to exercise his rights effectively under the Council Framework Decision 2002/584/JHA. When the lawyer participates in a hearing of the requested person by an executing judicial authority, he may *inter alia*, in accordance with procedures in national law, ask questions, request clarification and make statements, which shall be recorded in accordance with national law.
- (35) In the absence to-date of **an** EU legislative instrument on legal aid, Member States should continue to apply their domestic provisions on legal aid, which should be in line with the Charter, the ECHR and the case-law of the European Court of Human Rights.

⁹ OJ L 190, 18.7.2002, p. 1.

- (36) The principle of effectiveness of EU 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.
- (37) Once a case has been referred to a court having jurisdiction in criminal matters, Member States should ensure that the question of which value to be given to statements obtained from a suspect or accused person in breach of his right of access to a lawyer, or in cases where a temporary postponement or derogation of this right was authorised in accordance with this Directive, should be determined by that court being responsible for ensuring the overall fairness of the proceedings, in accordance with national legal procedures.
- (38) Disciplinary proceedings do not fall within the scope of this Directive as it only applies to 'criminal proceedings' and to European arrest warrant proceedings.
- (39) This Directive sets minimum rules. Member States may extend the rights set out in this Directive in order to afford a higher level of protection in situations not explicitly dealt with in this Directive. The level of protection should never go below the standards provided by the Charter and by the ECHR, as interpreted in the case law of the European Court of Human Rights.
- (40) This Directive upholds the fundamental rights and principles recognised by the Charter of Fundamental Rights of the European Union, including the prohibition of torture and inhuman and degrading treatment, the right to liberty and security, respect for private and family life, the right to the integrity of the person, the rights of the child, integration of persons with disabilities, the right to an effective remedy and to a fair trial, the presumption of innocence and the right of defence. This Directive must be implemented according to these rights and principles.

- (41) This Directive promotes the rights of minors and takes into account the Guidelines of the Council of Europe on child friendly justice, in particular its provisions on information and advice. The Directive ensures that minors cannot waive their rights under this Directive when they lack the capacity to understand the consequences of the waiver. Member States should determine in their national law who is considered to be a minor for the purpose of this Directive. The legal guardian of a suspect or accused minor should always be notified as soon as possible of his deprivation of liberty and the reasons pertaining thereto. If providing such information to the minor's legal guardian is contrary to the best interests of the minor, another suitable adult **such as** a relative should be informed instead. This should be without prejudice to provisions of national law which require that specified authorities with competence for the protection of minors should also be informed of the deprivation of liberty of a minor.
- (42) 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.
- (43) Since the aim of achieving common minimum standards cannot be achieved by Member States acting unilaterally, either at national, regional or local level, and can only be achieved at European Union level, the European Parliament and the Council may adopt measures in accordance with the principle of subsidiarity as referred to in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in the latter Article, this Directive does not go beyond what is necessary in order to achieve that objective.

- (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.¹⁰
- (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:

¹⁰ UK and IE announced their decision not to opt-in to the Directive, at this stage, in application of Article 3 of Protocol 21 to the Lisbon Treaty, although they may consider opting in at a later stage under Article 4 of the Protocol and are participating fully in the negotiations.

Article 1

Objective

This Directive lays down minimum rules concerning the rights of suspects and accused persons in criminal proceedings and of persons subject to proceedings pursuant to Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States¹¹ ("European arrest warrant proceedings") to have access to a lawyer and to have a third party informed of the deprivation of liberty.

Article 2

Scope

1. This Directive applies to suspects or accused persons in criminal proceedings from the time a person has been officially notified or informed otherwise by the competent authorities of a Member State that he is suspected or accused of having committed a criminal offence. It applies until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspected or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal.
2. This Directive applies to persons subject to European arrest warrant proceedings from the time they are arrested in the executing State in accordance with Article 9.
3. Where the law of a Member State provides for the imposition of a sanction regarding minor offences by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed to such a court, this Directive shall apply only to the proceedings before that court following such an appeal.
4. In relation to minor offences, where the law of a Member State provides that only a fine can be imposed as the main sanction and deprivation of liberty cannot be imposed as such a sanction, this Directive shall only apply once the case is before a court having jurisdiction in criminal matters.¹²

¹¹ OJ L 190, 18.7.2002, p. 1.

¹² See also recital 10.

Article 3

The right of access to a lawyer in criminal proceedings

1. Member States shall ensure that suspects and accused persons have the right of access to a lawyer in such a time and manner as to allow the person concerned to exercise his rights of defence practically and effectively.

2. The suspect or accused person shall have access to a lawyer without undue delay. In any event, the suspect or accused person shall have access to a lawyer from the following moments in time, whichever is the earliest:
 - (a) before he is officially interviewed by the police or other law enforcement **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) as soon as practicably possible from the outset of 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** 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) ¹³ Member States shall determine in their national law in respect of which investigative or other evidence-gathering acts the suspect or accused person has the right for his lawyer to attend, provided that this does not unduly delay these acts and that it does not prejudice the acquisition of evidence. The suspect or accused person shall **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.

¹³ Provision to be read in conjunction with recital 19.

4. Notwithstanding provisions of national law concerning the mandatory presence of a lawyer, in all cases where the suspect or accused person is deprived of liberty [...], 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 does not have one**, unless he has waived this right in accordance with Article 8.¹⁴

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.¹⁵

5. 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.¹⁶

¹⁴ Provision to be read in conjunction with recital 16.

¹⁵ Provision to be read in conjunction with recital 17.

¹⁶ Provision to be read in conjunction with recital 15 and 22.

Article 4
Confidentiality

1. Member States shall guarantee the confidentiality of communication between a suspect or accused person and his lawyer, including meetings, correspondence, telephone conversations and any other forms of communication permitted under national law.¹⁷

- 2.¹⁸ 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:
 - (a) there is an urgent need to prevent [...] serious crime; or

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

¹⁷ Provision to be read in conjunction with recital 24.

¹⁸ Provision to be read in conjunction with recital 23.

Article 5

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

1. Member States shall ensure that a suspect or accused person who is deprived of his liberty has the right to have at least one person, such as a relative or employer, named by him, informed of the deprivation of liberty without undue delay, if he so wishes.
2. If the person is a minor Member States shall ensure that the minor's legal guardian is informed as soon as possible of the deprivation of liberty and the reasons pertaining thereto, unless it would be contrary to the best interests of the minor, in which case another suitable adult shall be informed. ¹⁹
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. ²⁰

Article 6

The right to communicate with consular or diplomatic authorities

Member States shall ensure that a suspect or accused person ²¹ 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. ²²

¹⁹ Provision to be read in conjunction with recital 41.

²⁰ Provision to be read in conjunction with recital 25.

²¹ The plural has been modified to the singular (in the entire Article).

²² Provision to be read in conjunction with recital 26.

Article 7

General conditions for applying temporary derogations²³

1. Any **temporary derogation** under Articles 3(5), 4(2) and 5(3),
 - (a) shall not go beyond what is necessary;
 - (b) shall be limited in time as much as possible;
 - (c) shall not be based exclusively on the type of the alleged offence; and
 - (d) shall not prejudice the overall fairness of the proceedings.

2. **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.

²³ Provision to be read in conjunction with recital 27.

Article 8

Waiver

1. Without prejudice to national law that requires the mandatory presence or assistance of a lawyer, Member States shall ensure that, in relation to any waiver of a right referred to in Articles 3 and 9 of this Directive:
 - (a) the suspect or accused person has been provided with sufficient information so as to allow him to have adequate knowledge about the content of the right concerned and the possible consequences of waiving it; and ²⁴
 - (b) the waiver is given voluntarily and unequivocally.
2. The waiver and the circumstances in which it was given shall be noted, using the recording procedure in accordance with the law of the Member State concerned. ²⁵
3. Member States shall ensure that a waiver can be subsequently revoked at any point during the pre-trial stage or, subject to judicial discretion, during the trial **stage**. In case of revocation this Directive shall apply from that point in time onwards. ²⁶

²⁴ Provision to be read in conjunction with recital 28.

²⁵ Provision to be read in conjunction with new recital 29

²⁶ Provision to be read in conjunction with new recital 30.

Article 9

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

1. Member States shall ensure that a person requested for surrender in accordance with Council Framework Decision 2002/584/JHA has the right of access to a lawyer promptly upon arrest pursuant to the European Arrest Warrant in the executing Member State.
2. With regard to the content of the right of access to a lawyer, the requested person shall have the following rights in the executing Member State:
 - the right of access to a lawyer in such a time and manner as to allow him to exercise his rights effectively and in any event as soon as practically possible from the outset of deprivation of liberty;
 - the right to communicate with the lawyer representing him. The duration, frequency and means of communications between the requested person and his lawyer may be regulated in national law and procedures, provided the requested person shall have the possibility to exercise his rights of defence under Council Framework Decision 2002/584/JHA effectively;
 - the right for his lawyer to be present and, in accordance with procedures in national law, participate during a hearing of the requested person by the executing judicial authority. When the lawyer participates during the hearing this shall be recorded in accordance with national law.
3. The rights provided for in this Directive under Articles 4, 5, 6, **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.

Article 10

Legal aid

This Directive is without prejudice to domestic provisions on legal aid, which shall apply in accordance with the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights.

Article 11

Remedies

Member States shall ensure that a suspected or accused person has an effective remedy in instances where his right of access to a lawyer has been breached.

Article 12

Non-regression clause

Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards enshrined in the Charter of Fundamental Rights of the European Union, the European Convention of Human Rights and Fundamental Freedoms, other relevant provisions of international law or the laws of any Member State that provides a higher level of protection.

Article 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. They shall communicate the text of those provisions and a correlation table between those provisions and this Directive to the Commission.
3. When Member States adopt these provisions they shall contain a reference to this Directive or be accompanied by such a reference when the provisions are officially published.
Member States shall determine how such reference is to be made.

Article 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*.

Article 15

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