

1. DEROGATIONS

European Commission	European Parliament	Council of Ministers	Suggestions from Law Society of England and Wales (LSEW) and Consejo General de la Abogacía Española (CGAE)	CCBE suggestions
		<p style="text-align: center;"><i>Article 3</i> The right of access to a lawyer in criminal proceedings</p> <p>5. In exceptional circumstances and in the pre-trial stage only Member States may temporarily derogate from the application of the rights provided for in this Article when this is justified by compelling reasons in the light of the particular circumstances of the case.</p>	<p>LSEW: <i>Insert:</i> pertaining to the urgent need to avert serious adverse consequences for the life or physical integrity of a person.</p>	

<p style="text-align: center;"><i>Article 8</i> Derogations</p> <p>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:</p> <p>(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;</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</p>	<p style="text-align: center;"><i>Article 8</i> Derogations</p> <p>1. 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, <i>and</i> Article 5. Any such derogation: <i>[AM 56]</i></p> <p>(a) shall be justified by compelling reasons <i>in the light of the particular circumstances of the case</i> pertaining to the urgent need to avert serious adverse consequences for the life, <i>liberty</i> or physical integrity of a person; <i>[AM 57]</i></p> <p>(b) shall not be based exclusively on the type or seriousness of the alleged offence;</p> <p>(c) shall not go beyond</p>	<p style="text-align: center;"><i>Article 7</i> 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 the overall 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><i>LSEW:</i></p> <p><i>Insert:</i> Any material or evidence obtained from derogation from client-lawyer confidentiality cannot be used as part of the case against the client.</p> <p><i>LSEW:</i> <u>Independent</u> <u>judicial authority</u> (Note: it is crucial that derogation cannot be authorised by someone involved in the</p>	
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<p>is necessary;</p> <p>(d) shall be limited in time as much as possible and in any event not extend to the trial stage;</p> <p>(e) shall not prejudice the fairness of the proceedings.</p> <p>Derogations may only be authorised by a duly reasoned decision taken by a judicial authority on a case-by-case basis.</p>	<p>what is necessary;</p> <p>(d) shall be <i>strictly [AM 59]</i> limited in time as much as possible and in any event not extend to the trial stage; <i>and [AM 58]</i></p> <p>(e) shall not prejudice the fairness of the proceedings.</p> <p>2. Derogations may only be authorised by a duly reasoned decision taken by <i>an independent</i> judicial authority on a case-by-case basis. <i>The duly reasoned decision shall be recorded in writing. [AM 60]</i></p> <p>3. <i>The grounds and criteria for derogations listed above must be clearly set out in national law. [AM 61]</i></p>		<p>case).</p>	
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2. DURATION AND FREQUENCY

European Commission	European Parliament	Council of Ministers	Suggestions from Law Society of England and Wales (LSEW) and Consejo General de la Abogacía Española (CGAE)	CCBE suggestions
<p style="text-align: center;"><i>Recitals</i></p> <p>(11) The duration and frequency of meetings between the suspect or accused person and their lawyer depend on the circumstances of every proceeding, notably on the complexity of the case and the procedural steps applicable. It should therefore not be limited in a general way, as this could prejudice the effective exercise of the rights of defence;</p>	<p style="text-align: center;"><i>Recitals</i></p> <p>(11) The duration and frequency of meetings between the suspect or accused person and their lawyer depend on the circumstances of every proceeding, notably on the complexity of the case and the procedural steps applicable. It should therefore not be limited in a general way, as this could prejudice the effective exercise of the rights of defence.</p>	<p style="text-align: center;"><i>Recitals</i></p> <p>(19) The right of the suspect or accused person to communicate with his lawyer should ordinarily include the opportunity of the person concerned to meet with his lawyer. This Directive does not prevent Member States from setting reasonable limitations in their national law 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</p>	<p>LSEW: Note: ‘minor’ needs to be defined clearly. We suggest: ‘access to a lawyer should be available for all matters defined as ‘criminal’. The classification of crime adopted should be that defined by the ECHR’.</p>	

<p style="text-align: center;"><i>Article 4</i> Content of the right of access to a lawyer</p> <p>5. 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.</p>	<p style="text-align: center;"><i>Article 4</i> Content of the right of access to a lawyer</p> <p>5. Neither the duration and frequency of meetings between the suspect or accused person and his lawyer, nor the communication between them shall be limited in any way that may prejudice the exercise of his rights of defence. [AM 51]</p>	<p>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.</p> <p style="text-align: center;"><i>Article 3</i> The right of access to a lawyer in criminal proceedings</p> <p>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</p>	<p>LSEW: ‘The right of the suspect to communicate with his/her lawyer cannot be restricted where the person will be questioned by police or other law enforcement authorities’.</p>	
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		<p>national law and procedures, provided that the suspect or accused person is able to exercise his rights of defence effectively;...</p>	<p>LSEW: ... ‘and cannot be restricted where the person will be questioned by police or other law enforcement authorities’</p> <p>CGAE: In relation to the length of the meetings: Concerning the limitations of communication, we do believe that those are not negotiable. In practice, the length and frequency are already sufficiently limited by the prisons opening hours and by the fact that at the police station it is often difficult to have access to the detainee. In theory, the only two people that can decide on the length needed to organize the defense in an adequate manner are the lawyer itself or the Bar to which it belongs. A role to play for the Bar in this respect</p>	
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			may be therefore envisaged as an intermediate solution. Also the solution of the assistance by telephone – or any other distant advise- cannot be accepted in our system for different reasons, including the fact that a phone conversation may not provide any guarantee on the fact that the person providing an independent advice is a qualified lawyer.	
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3. EVIDENCE-GATHERING ACTS

European Commission	European Parliament	Council of Ministers	Suggestions from Law Society of England and Wales (LSEW) and Consejo General de la Abogacía Española (CGAE)	CCBE suggestions
	<p style="text-align: center;"><i>Recitals</i></p> <p>(9) A similar right to the presence of a lawyer should be granted every time that national law expressly allows or demands the presence of the suspected or accused person at a procedural step or evidence gathering such as a search; in these cases, in fact, the presence of the lawyer can strengthen the rights of the defence without affecting the need to preserve the confidentiality of certain investigative acts, since the presence of the person excludes the confidential nature of the acts in question. Once appointed, the lawyer should be able to</p>	<p style="text-align: center;"><i>Recitals</i></p> <p>(20) 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 the following acts, insofar as they are provided for in the national law concerned and insofar the suspect or accused person is required to attend: identity parades, at which the suspect or accused person figures among other persons in order to be identified by a victim or witness; confrontations, where a suspect or accused person is</p>	<p>LSEW: Note: It is not practical to have a lawyer present at every single investigative act, such as house searches, where the police are simply gathering evidence in order to decide whether the accused has a case to answer.</p> <p>CGAE: On the evidence gathering acts, the authorities may not revert the principle of the participation of the lawyer by giving a closed list of acts with possibility of attendance. This list would produce situations of legal uncertainty and</p>	

	<p>ask for the notification of the carrying out of such acts. [AM 15] This right should be without prejudice to the need to secure evidence which by its very nature is liable to be altered, removed or destroyed if the competent authority was to wait until the arrival of a lawyer.</p>	<p>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.</p> <p>(21) 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.</p>	<p>be misused in the choice of means by the enforcement bodies. If the general principle of participation is settled, we could afford some limited and proportionate criteria for exceptions.</p>	
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	<p style="text-align: center;"><i>Article 3</i></p> <p style="text-align: center;">The right of access to a lawyer in criminal proceedings</p> <p>1. Member States shall ensure that suspects and accused persons are promptly granted the right of access to a lawyer, at least: [AM 41]</p> <p>(b) upon carrying out any investigative or evidence-gathering act at which the person's presence is required or permitted as a right in accordance with national law, except where there is a concrete risk that the evidence to be gathered would be altered, removed or destroyed pending the lawyer's arrival; [AM 43]</p>	<p style="text-align: center;"><i>Article 3</i></p> <p style="text-align: center;">The right of access to a lawyer in criminal proceedings</p> <p>3. (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.</p> <p>The suspect or accused person shall as a minimum have the right for his lawyer to attend the following investigative or other evidence-gathering acts, if these acts are provided for in the national law concerned and if the suspect or accused person is required to attend the act concerned:</p> <ul style="list-style-type: none"> i) identity parades; ii) confrontations; iii) experimental reconstructions of the scene of 	<p>LSEW:</p> <p>This text appears to be satisfactory, as it provides flexibility for Member States to determine which investigative acts require the presence of a lawyer, but provides for three circumstances as a minimum.</p>	
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	<p style="text-align: center;"><i>Article 4</i></p> <p style="text-align: center;">Content of the right of access to a lawyer</p> <p>3. The lawyer shall have the right to be present and to be notified about any 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, except where there is a significant risk that the evidence to be gathered would be altered, removed, destroyed pending the lawyer's arrival.</p>	<p>crime.</p>		
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4. MINOR OFFENCES

European Commission	European Parliament	Council of Ministers	Suggestions from Law Society of England and Wales (LSEW) and Consejo General de la Abogacía Española (CGAE)	CCBE suggestions
	<p style="text-align: center;"><i>Recitals</i></p> <p>8a) 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 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</p>		<p>CGAE: On minor offences, we can live with the approach of the Parliament.</p>	

	<p>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. [AM 14]</p> <p>(17a) 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. In respect of certain relatively minor cases however, the right to obtain legal assistance can be by telephone. [AM 23]</p> <p style="text-align: center;"><i>Article 2</i> Scope</p> <p>3. Where the law of a Member State provides for the imposition of a sanction regarding minor offences by an authority other than a</p>	<p style="text-align: center;"><i>Article 2</i> Scope</p> <p>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</p>		
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	<p>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. [AM 40]</p>	<p>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.</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 or shall not 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>LSEW:</p> <p>In respect of certain relatively minor cases however, the right to obtain legal assistance can be by telephone (nb: subject to a satisfactory definition of 'minor' case).</p> <p>Note: fines can be significant and the offences that incur them can be serious. Such a penalty can have a serious impact on a person's life. It is important that the accused person has access to legal advice at the start of the case, even if it is only by telephone.</p>	
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5. DETENTION CONDITIONS

European Commission	European Parliament	Council of Ministers	Suggestions from Law Society of England and Wales (LSEW) and Consejo General de la Abogacía Española (CGAE)	CCBE suggestions
	<p style="text-align: center;"><i>Recitals</i></p> <p>(10) To be effective, access to a lawyer should entail the possibility for the lawyer to carry out all the wide range of activities which pertain to legal counselling, as the European Court of Human Rights has held. This should include [...] [AM 17] participation in any interrogation, with the possibility, once the law-enforcement or judicial authorities have completed their work, of putting additional questions, requesting clarification or making statements, and active participation in court hearings, [AM 18] meetings</p>		<p>CGAE:</p> <p>In relation with the conditions and circumstances of detention, the CGAE would like to suggest the inclusion of a "European habeas corpus Order" in the draft proposed by CCBE.</p>	

	<p>with the client to discuss the case and prepare the defence, the search for exculpatory evidence, support to a distressed client and control of detention conditions;</p> <p>(10a) In order to ensure a fair trial, pre-trial detention and detention conditions should fully respect the standards set out by the EU Charter on fundamental rights, by the European Convention on Human Rights and by the case law of the European Court of Human Rights. As poor detention conditions may have a negative impact on the fair trial rights, the lawyer should have the right to examine the specific detention conditions in which the suspect or accused person is detained. In addition, the lawyer should also have the right to submit a request to the competent authority in order to ask the examination of the detention conditions.</p>			
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<p style="text-align: center;"><i>Article 4</i> 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. 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.</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>[AM 16]</p> <p style="text-align: center;"><i>Article 4</i> Content of the right of access to a lawyer</p> <p>4. To the extent necessary to ensure a fair trial the suspect or accused person shall have the right for his lawyer to be allowed to examine the specific conditions in which the suspect or accused person is detained and to that end shall have access to the place where the person is detained. In addition, the lawyer shall also have the right to submit a request to the competent authority in order to ask the examination of the detention conditions.</p> <p>[AM 50]</p>			
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<p>4. 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.</p> <p>5. 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.</p>				
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