



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 4 October 2012

DS 1650/12

Friends of the Presidency

**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**

(Brussels, 8 October 2012)

WORKING DOCUMENT

In view of the meeting of the Friends of the Presidency on 8 October 2012, at which the third trilogue will be prepared, delegations will find in the Annex the text of the draft Directive as it currently stands, together with some questions (Q) and observations (OBS), set out in **bold** and underlined characters.

PREPARATION OF THIRD TRILOGUE

(draft)

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on the right of access to a lawyer in criminal proceedings and European arrest warrant proceedings and on the right to inform a third party upon deprivation of liberty

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

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

Having regard to the opinion of the European Economic and Social Committee ¹,

Having consulted the Committee of the Regions ²,

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.

¹ OJ C , , p. . [opinion given on 7 December 2011, SOC/424]

² The CoR decided not to give an opinion.

- (1a) The Union has set itself the objective of maintaining and developing an area of freedom, security and justice. According to the conclusions of the European Council in Tampere of 15 and 16 October 1999, and in particular point 33 thereof, the principle of mutual recognition of judgments and other decisions of judicial authorities should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union, because enhanced mutual recognition and the necessary approximation of legislation would facilitate cooperation between authorities and the judicial protection of individual rights. [AM 1]**
- (2) According to Article 82 of the Treaty on the Functioning of the European Union, judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions.
- (2a) The implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States trust in each other's criminal justice systems. The extent of the mutual recognition is very much dependent on a number of parameters, which include mechanisms for safeguarding the rights of suspects or accused persons and common minimum standards necessary to facilitate the application of the principle of mutual recognition. [AM 2]**
- (3) Mutual recognition can only operate effectively where there is mutual trust, which requires detailed rules on the protection of procedural rights and guarantees stemming from the Charter, the ECHR and the ICCPR. Common minimum rules should increase confidence in the criminal justice systems of all Member States, which in turn should lead to more efficient judicial cooperation in a climate of mutual trust and to the promotion of a fundamental rights culture in the Union. They should also remove obstacles to the free movement of citizens throughout the territory of the Member States. Such common minimum rules should apply to the right of access to a lawyer and the right to inform a third party upon deprivation of liberty.

- (4) Although the Member States are parties to the ECHR and the ICCPR, experience has shown that this in itself does not always provide a sufficient degree of trust in the criminal justice systems of other Member States.
- (4a) Strengthening mutual trust requires detailed rules on the protection of the procedural rights and guarantees arising from the Charter and from the ECHR. It also requires by means of this Directive and other measures, further development within the Union of the minimum standards set out in the ECHR and the Charter. [AM 3]**
- (4b) Article 82(2) of the Treaty on the Functioning of the European Union provides for the establishment of minimum rules applicable in the Member States so as to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension. That Article refers in point (b) to "the rights of individuals in criminal procedure" as one of the areas in which minimum rules may be established. [AM 4]**
- (4c) Common minimum rules should lead to increased confidence in the criminal justice systems of all Member States, which in turn should lead to more efficient judicial cooperation in a climate of mutual trust. Such common minimum rules should be established in the field of access to a lawyer in criminal proceedings. [AM 5]**

- (5) On 30 November 2009, the Council adopted the Roadmap for strengthening the procedural rights of suspected and accused persons in criminal proceedings ('the Roadmap')³. [...] Taking a step-by-step approach, the Roadmap calls for the adoption of measures regarding the right to obtain translation and interpretation, the right to receive information on rights and information about the charges, the right to receive legal advice and legal aid, the right to communicate with relatives, employers and consular authorities, and establishing special safeguards for suspected or accused persons who are vulnerable. The Roadmap emphasises that the order of the rights is indicative, implying that it may be changed according to priorities. It is designed to operate as a whole; only when all its components are implemented will its benefits be felt in full.
- (5a) On 10 December 2009, the European Council welcomed the Roadmap and made it part of the Stockholm programme - An open and secure Europe serving and protecting citizens (point 2.4). The European Council underlined the non-exhaustive character of the Roadmap, by inviting the Commission to examine further elements of minimum procedural rights for suspected and accused persons, and to assess whether other issues, for instance the presumption of innocence, need to be addressed, in order to promote better cooperation in that area. [AM 6]**
- (5b) Two measures included in the Roadmap have been adopted so far: Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and to translation in criminal proceedings⁴ and Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings⁵. [AM 7]**

³ OJ C 295, 4.12.2009, p. 1.

⁴ OJ L 280, 26.10.2010, p. 1.

⁵ OJ L 142, 1.6.2012, p.1.

- (6) This Directive sets out minimum rules on the right of access to a lawyer and on the right to inform a third party upon deprivation of liberty in criminal proceedings and in proceedings for the execution of an European Arrest Warrant. In doing so, it promotes the application of the Charter, in particular Articles 4, 6, 7, 47 and 48, by building upon Articles 3, 5, 6 and 8 of the ECHR, as interpreted by the European Court of Human Rights, which in its case-law sets standards on an ongoing basis on the right of access to a lawyer. *[AM 8]*⁶
- (7) This Directive also sets minimum rules on the rights 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.
- (7a) This Directive should be implemented taking into account the provisions of the Directive 2012/13/EU on the right to information in criminal proceedings that provide that suspects or accused persons are provided promptly with information concerning the right of access to a lawyer, and that suspects or accused persons who are arrested or detained are provided promptly with a written Letter of Rights, which shall contain information about the right of access to a lawyer. *[AM 11, first part]***
- (8) **The term lawyer in this Directive refers to any person who, in accordance with national law, is qualified and entitled, including by accreditation by an authorised body, to provide legal advice and assistance to suspects or accused persons. *[AM 9 and AM 39]***

⁶ AM 8 has been accepted by deleting from the text the reference to "*excluding administrative proceedings leading to sanctions such as competition or tax proceedings*".

- (9) In some Member States an authority other than a court having jurisdiction in criminal matters may be competent 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 within a prison, 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 disproportionate to require that the competent authority should ensure all the rights granted under this Directive. Where the law of a Member State provides for the imposition of a sanction regarding minor offences by such an authority and there is a right of appeal or the possibility for the case to be otherwise referred to a court having jurisdiction in criminal matters, this Directive should therefore apply only to the proceedings before that court following such an appeal or referral. *[AM 14]*
- (10) **In some Member States minor offences, including minor traffic offences such as parking infractions, speeding, ignoring traffic lights and tailgating, minor offences in general municipal regulations, such as nudism in non-designated public spaces, leaving litter in public spaces or mowing the grass late in the evening, and minor public order offences such as public drunkenness, are considered to be criminal offences. It would be disproportionate to require that the competent authorities should ensure all the rights granted under this Directive in respect of such minor offences. Where the law of a Member State provides in respect of minor offences that pre-trial detention is not possible and deprivation of liberty will not be imposed as a sanction, this Directive should therefore apply only to the proceedings before a court having jurisdiction in criminal matters.**
- (11) **The exclusion of certain minor offences from the scope of this Directive should not affect the obligations of Member States under the ECHR to ensure fair trial rights, including obtaining legal assistance from a lawyer.**

- [(12) Disciplinary proceedings do not fall within the scope of this Directive as it only applies to 'criminal proceedings' and to European arrest warrant proceedings.]⁷
- (13) 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 interviewed by the police or other law enforcement authorities and as soon as practicably possible after the person has been deprived of his 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.
- (14) **This Directive should not apply to preliminary questioning by the police or other law enforcement authorities whose primary purpose is to establish matters such as the identification of the person concerned or the verification of the possession of weapons or other similar safety issues. Nor does it cover questioning by the police or other law enforcement authorities whose primary purpose is to determine whether an investigation should be started. This could be the case, for example, in respect of questions put by police in the course of a road-side check. [AM 13]**
- (15) Any person other than a suspect or accused person, such as a witness, who is interviewed by the police or other enforcement authority in the context of criminal proceedings, should be granted the rights for suspects and accused persons provided for under this Directive if, in the course of such an interview, he becomes suspected or accused of having committed a criminal offence. [text GA]
- (16) **[merged with recital 14]**

⁷ COM suggested removed this recital as it might give rise to confusion given the absence of a harmonised concept of "criminal proceedings" and in light of the ECtHR Engel criteria providing that the national classification of a type of offence is not the sole determining factor as to whether it is criminal or not. According to COM, the recital is arguably redundant as genuine disciplinary proceedings will not fall with the scope of the Directive.

- (17) In cases where a suspect or accused person is deprived of liberty, Member States should make the necessary arrangements to ensure that the person concerned is in a position to effectively exercise his right of access to lawyer, including by arranging for the assistance of a lawyer when the person concerned does not have one, unless he has waived this right. The relevant arrangements, including those on legal aid if applicable, are governed by national law. Such practical arrangements could imply, inter alia, that the competent authorities arrange for the assistance of a lawyer on the basis of a list of available lawyers from which the suspect or accused person could choose. *[compare AM 31a]*
- (18) In cases where 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 effectively. The person concerned should be able to freely contact, consult or be assisted by that lawyer. The Member State may help the person in obtaining a lawyer, but it would not need to actively pursue that the suspect or accused person who is not deprived of his liberty will be assisted by a lawyer if the person concerned has not himself arranged to be assisted by a lawyer. *[compare AM 31a]*
- (19) **The suspect or accused person should have the right to communicate and meet with his lawyer , including prior to an interview with the police or other law enforcement or judicial authorities. Member States should be able to regulate in their national law and procedures the duration, frequency and means of communications and meetings between the suspect or accused person and his lawyer, including the use of videoconferencing and other communication technology in order to allow such communications and meetings to take place, provided that the suspect or accused person is able to exercise his rights of defence effectively.**

- (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 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.
- (21) The practical arrangements for the presence and participation of a lawyer at 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.
- (22) When the lawyer participates in an interview by the investigating authorities of the suspect or accused person, he may inter alia, in accordance with procedures provided for in national law, ask questions, request clarification and make statements, which shall be recorded in accordance with national law.
- (22a) Pre-trial detention and detention conditions should fully respect the standards set out by the ECHR, by the Charter, and by the case law of the European Court of Human Rights and of the European Court of Justice. When providing assistance under this Directive to a suspect or accused person who is in detention, the lawyer concerned should be able to raise a question to the competent authorities regarding the conditions under which that person is detained. [AM 16]**

- (23) Member States should be permitted to temporarily derogate from the right of access to a lawyer in the pre-trial phase in exceptional circumstances only where there are compelling reasons in the light of the particular circumstances of the case. Such 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 or where the Member State undertakes or participates in military operations outside that Member State. 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, provided that such official interview, or such investigative or other evidence gathering act, is necessary for a proper handling of the criminal proceedings and does not unduly prejudice the rights of the suspect or accused person.
- (24) Confidentiality of communication between a suspect or accused person and his lawyer is key to ensuring the effective exercise of the rights of the defence. Member States should therefore be required to uphold and safeguard the confidentiality of meetings between the lawyer and the client and of any other form of communication permitted under national law, it being understood that rules on confidentiality under this Directive should be without prejudice to mechanisms in place in detention facilities in order to avoid illicit enclosures being sent to detainees, such as screening correspondence, as long as such mechanisms do not allow the competent authorities to read the communication between the suspect or accused person and his lawyer. However, in limited, exceptional circumstances, it should be possible to temporarily derogate from the principle of confidentiality, unless there would be other, less restrictive means to achieve the same result, such as, in cases of collusion, replacement of the lawyer chosen by the suspect or accused person.

- (25) This Directive should be without prejudice to a breach of confidentiality which is incidental to a lawful surveillance operation by competent authorities. This Directive should also be without prejudice to the work carried out, for example by national intelligence services, to safeguard national security in accordance with Article 4(2) of the Treaty on European Union or that falls within the scope of Article 72 of the Treaty on the Functioning of the European Union, according to which Title V on an area of Freedom, Security and Justice shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.
- (26) Suspects or accused persons deprived of their liberty should have the right to have at least one person of their choice, such as a family member or employer, informed of the deprivation of liberty **without undue delay**, it being understood that this should not prejudice the due course of the criminal proceedings against the person concerned, nor any other criminal proceedings. Member States should 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 third person.

- (26a) **As soon as suspects or accused persons have been the subject of a decision on detention by a judge, they should also have the right to communicate with at least one person, such as a relative or employer, named by them. Member States should 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 exercise of the right 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 exercise of this right could have serious adverse consequences for the safety of a third person.**⁸
- (27) **The rights of suspects and accused persons who are deprived of their liberty to consular assistance is enshrined in Article 36 of the 1963 Vienna Convention on Consular Relations where it is a right conferred on States to have access to their nationals. This Directive confers a corresponding right on the arrested or detained person, subject to their wishes.**⁹

⁸ Text of this recital may need to be further aligned with the final text of Article 5.

⁹ New text as provisionally agreed by the negotiating parties, the old text reading as follows:

(27) Suspects or accused persons who are deprived of their liberty and who are not nationals of the Member State of arrest or detention should have the right to have consular or diplomatic authorities of their State of nationality informed of the arrest or detention as soon as possible and to communicate with these authorities, if they so wish. 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 a corresponding right on the arrested or detained person, subject to his wishes. This right should be exercised in conformity with the national law of the Member States, subject, however, to the condition that such national law may not render that right ineffective.

- (28) Member States should make restricted use of the possibility provided in this Directive to temporarily derogate from a right granted under this Directive. Any temporary derogations allowed under this Directive should be proportional, limited in time as much as possible, not based exclusively on the type of the alleged offence, and not prejudice the overall fairness of the proceedings. All temporary derogations regarding the right of access to a lawyer and regarding the principle of confidentiality should be authorised by a duly reasoned decision taken on a case-by-case basis, either by a judicial authority, or by another competent authority on condition that the decision might be subject to judicial review.
- (29) Without prejudice to national law requiring the mandatory presence or assistance of a lawyer, the suspect or accused person should be allowed to waive a right granted under this Directive, as long as he has been given sufficient information enabling him to obtain adequate knowledge about the content of the right concerned and the possible consequences of waiving it. When providing the information, the specific conditions of the person concerned should be taken into account, including the age of the person, and his mental and physical condition.
- (30) A waiver and the circumstances in which it was given should be noted, using the recording procedure in accordance with the law of the Member State concerned. This should not lead to any additional obligation for Member States to introduce new mechanisms or to any additional administrative burden.
- (31) It should be possible for a suspect or accused person to revoke a waiver at any point during the criminal proceedings, **and the person concerned should be informed about this possibility [AM 66]**. In case of revocation this Directive should apply from the point in time when then the waiver was revoked. Hence, it should not be necessary to proceed again with questioning and any procedural acts that have been carried out during the period when the right concerned was waived. If the suspect or accused person wishes to revoke a waiver during the trial stage, the judge can, depending on the specific circumstances of the case, decide to restrict the consequences of the revocation or even decide not to give any effect to the revocation at all, having regard to the overall fairness of the proceedings.

- (32) In relation to the functioning of judicial cooperation in the Union, certain rights provided for in this Directive should also apply, *mutatis mutandis*, to proceedings for the execution of a European Arrest Warrant according to the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States.¹⁰
- (33) In proceedings for the execution of a European Arrest Warrant, the competent authority of the executing Member State could ask the competent authority of the issuing Member State for assistance when a requested person wants to make use of his right to have a third person informed of his arrest or detention, and the competent authority of the executing Member State experiences difficulties, e.g. in contacting the third person concerned.
- (34) The surrender procedure is crucial for cooperation in criminal matters between the Member States. Observance of the time limits contained in Council Framework Decision 2002/584/JHA is essential for such cooperation. Therefore, Member States should ensure that application of the rights provided for in this Directive to proceedings for the execution of a European Arrest Warrant shall not jeopardize respecting those time limits.
- (35) The person subject to a European Arrest Warrant should have the right of access to a lawyer in the executing Member State in order to allow him to exercise his rights effectively under the Council Framework Decision 2002/584/JHA. When the lawyer participates in a hearing of the requested person by an executing judicial authority, he may *inter alia*, in accordance with procedures provided for under national law, ask questions, request clarification and make statements. The fact of participation should be recorded in accordance with national law.

¹⁰ OJ L 190, 18.7.2002, p. 1.

- (36) In the absence to-date of a legislative act of the Union on legal aid, Member States should apply their national law in relation to legal aid, which should be in line with the Charter, the ECHR and the case-law of the European Court of Human Rights. The rights conferred in this Directive do not intend to create obligations for Member States as far as their respective legal aid systems are concerned, including in relation to minor offences.
- (37) The principle of effectiveness of Union law should require that Member States put in place adequate, effective remedies in the event of a breach of a right conferred upon individuals by Union law.
- (38) Once a case has been referred to a court having jurisdiction in criminal matters, Member States should ensure that the question as to which value should 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 derogation of this right was authorised in accordance with this Directive, should be determined by that court. The court concerned should be responsible for ensuring the overall fairness of the proceedings, in accordance with the applicable national legal procedures.
- (39) This Directive upholds the fundamental rights and principles recognised by the Charter, including the prohibition of torture and inhuman and degrading treatment, the right to liberty and security, respect for private and family life, the right to the integrity of the person, the rights of the child, integration of persons with disabilities, the right to an effective remedy and to a fair trial, the presumption of innocence and the right of defence. This Directive must be implemented according to these rights and principles.
- (40) Member States should ensure that the provisions of this Directive, where they correspond to rights guaranteed by the ECHR, are implemented consistently with those of the ECHR and as developed by case law of the European Court of Human Rights.

- (41) This Directive sets minimum rules. Member States may extend the rights set out in this Directive in order to afford a higher level of protection. The level of protection should never go below the standards provided by the Charter and by the ECHR, as interpreted in the case law of the European Court of Justice and the European Court of Human Rights.
- (42) This Directive promotes the rights of **children** and takes into account the Guidelines of the Council of Europe on child friendly justice, in particular its provisions on information and advice to be given to **children**. The Directive ensures that suspects and accused persons, including **children**, should be provided with adequate information to understand the consequences of waiving a right under this Directive and that the waiver should be given voluntarily and unequivocally. [...] The **holder of the parental responsibility** of a suspect or accused **child** should always be notified as soon as possible of his deprivation of liberty and the reasons pertaining thereto. If providing such information to the **holder of the parental responsibility** of the **child** is contrary to the best interests of the **child**, another suitable adult such as a relative should be informed instead. This should be without prejudice to provisions of national law which require that specified authorities which are responsible for the protection of **children** should also be informed of the deprivation of liberty of a **child**.
- (43) Since the objectives of this Directive, namely setting common minimum rules for the right of access to a lawyer and the right to have a third person informed of the deprivation of liberty, cannot be sufficiently achieved by the Member States, and can, by reason of the scale of the measure, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve these objectives.

- (44) Without prejudice to Article 4 of the Protocol on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, the United Kingdom and Ireland will not participate in the adoption of this Directive and will not be bound by or be subject to its application.
- (45) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark will not participate in the adoption of this Directive, and is therefore not bound by it or subject to its application,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER 1

Objective, Scope

Article 1

Objective

This Directive lays down minimum rules concerning the rights of suspects and accused persons in criminal proceedings and of persons subject to proceedings pursuant to Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States ¹¹ ("European arrest warrant proceedings") to have access to a lawyer and to have a third party informed of the deprivation of liberty.

¹¹ OJ L 190, 18.7.2002, p. 1.

Article 2

Scope

1. This Directive applies to suspects or accused persons in criminal proceedings from the time a person has been 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 [, **irrespective of whether he is deprived of liberty or not**]. It applies until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspected or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal.

Q1: EP requested adding the text between brackets ('irrespective of whether he is deprived of liberty or not').

OBS: These words figure neither in the Commission proposal, nor in measures A and B. Adding the words may therefore entail a consistency problem. Since EP insisted however much on this addition, PRES would like to know from delegations whether these words would be acceptable in the context of an overall compromise.

2. This Directive applies to persons subject to European arrest warrant proceedings from the time they are arrested in the executing Member State in accordance with Article 9.

3.¹² **In respect of minor offences**

- **where the law of a Member State provides for the imposition of a sanction by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed or referred to such a court, or**

- **where pre-trial detention is not possible and deprivation of liberty will not be imposed as a sanction,**

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

There was a lengthy discussion in the trilogue and in the TM 's on this provision regarding minor offences.

In order to find a solution, PRES would like to know from MS what they think about the following alternative texts:

¹² Text as proposed to EP during the second trilogue, to be read together with recitals 9, 10 and 11.

OPTION 1 (heading made more precise):

3. *Without prejudice to the right of a fair trial, in respect of minor offences where there is limited risk of self-incrimination and where no deprivation of liberty is possible and where national law does not provide for deprivation of liberty as a sanction*

- *where the law of a Member State provides for the imposition of a sanction by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed or referred to such a court,*
- *where the sanction is imposed by a court having jurisdiction in criminal matters,*

this Directive shall only apply when the proceedings come before the court having jurisdiction in criminal matters.

Possible recitals accompanying option 1:

9. *Recognising that there should be proportionality in relation to the granting of the rights in this Directive, it is considered that, while the Directive should always apply to offences when they come before a court having jurisdiction in criminal matters, it should not apply before this stage in respect of offences that have all of the following characteristics; they are minor; they do not attract deprivation of liberty neither as a sanction nor at any stage; they require very limited reliance on admissions for conviction.*

- 10.** *In some Member States an authority other than a court having jurisdiction in criminal matters may be competent for imposing sanctions in relation to these offences 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. In other Member States these offences are considered to be criminal offences. The types of offences envisaged in this provision could include minor traffic offences committed on large scale such as parking infractions, speeding, ignoring traffic lights and tailgating, minor offences in general municipal regulations, such as nudism in non-designated public spaces, leaving litter in public spaces or mowing the grass late in the evening, and minor public order offences such as public drunkenness, are considered to be criminal offences*
- 11.** *The exclusion of certain minor offences from the scope of this Directive should not affect the obligations of Member States under the ECHR to ensure fair trial rights, including obtaining legal assistance from a lawyer.*

OPTION 2 (old model, but text of second indent being inspired by Article 27(3)(b) and (c) of Framework Decision 2002/584/JHA on the European Arrest Warrant):

3. Without prejudice to the right to a fair trial, in respect of minor offences

- **where the law of a Member State provides for the imposition of a sanction by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed or referred to such a court, or**
- **where the offence is not punishable by a custodial sanction or where the criminal proceedings do not give rise to the application of any measure restricting personal liberty,**

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

Q : what do delegations think about these options 1 and 2 ?

CHAPTER 2
Right of access to a lawyer

Article 3

The right of access to a lawyer in criminal proceedings

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

- 2.¹³ 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 interviewed by the police or other law enforcement or judicial authorities; *[AM 42 and AM 45]*

 - (b) upon the carrying out by investigative or other competent authorities of an investigative or other evidence-gathering act in accordance with paragraph 3(c);

 - (c) as soon as practicably possible after the deprivation of liberty;

Q: EP considers that “as soon as practically possible” is rather broad, and requested for more stringent language. PRES stressed that some flexibility should be maintained to take account of practicalities. EP will verify with shadows whether “without undue delay” could be acceptable. PRES stated that this term is already in the heading, but if this would satisfy EP, and subject to agreement by Member States, it might probably be acceptable in the framework of an overall compromise. MS are invited to confirm this.

¹³ See also recital 13.

(d) in due time before the suspect or accused person, who has been summoned to appear before a court having jurisdiction in criminal matters, appears before that court. *[AM 46]*

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 **and meet in private** with the lawyer representing him, including prior to an [...] interview with the police or other law enforcement or judicial authorities. [The duration, frequency and means of communications **and meetings** 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;]¹⁴

Q1: EP requested putting “in private” after "meet", so that the person can meet alone with his lawyer (distinct issue from the issue of confidentiality). Would this be acceptable?

Q2: EP requested putting the second sentence on modalities (“The duration ... effectively”) in a recital. COM supported this request.PRES would invite MS to indicate whether it would in principle be acceptable to put the language regarding the modalities in the recitals, it being understood that the content of the provision would remain the same.

¹⁴ See also recital 19.

- (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 [...] interviewed. When a lawyer participates during an [...] interview this shall be recorded in accordance with national law;

O: EP requested if "in accordance with national law" could be deleted, or put in the recitals.

OBS: In view of past discussions, this request may be difficult to satisfy. PRES suggests offering EP a deal, consisting in that the Council would accept to move the second sentence of Article 3(3)(a) to the recitals, while in this Article 3(3)(b) the text would be left as it stands. Would this be acceptable?

EP also requested adding the last part of its proposal in AM 48, according to which "The lawyer shall also have the right to present evidence in connection with the charges and to request the investigating authority or the court to gather any evidence relevant to the charges." PRES objected however that this would go beyond the scope of the Directive, and was supported on this point by COM.

- (c) ¹⁵ Member States shall ensure that the suspect or accused person shall as a minimum have the right for his lawyer to attend the following investigative or other evidence-gathering acts, if these acts are provided for in the national law concerned and if the suspect or accused person is required to attend the act concerned:

- i) identity parades;
- ii) confrontations;
- iii) experimental reconstructions of the scene of crime.

¹⁵ See also recitals 20 and 21.

EP observed that the list is rather short, and wondered whether it is "future-proof" (ECHR case-law may evolve).

O: PRES would like to invite MS to see whether the following texts would be acceptable:

OPTION 1:

"Member States shall ensure that the suspect or accused person shall as a minimum have the right for his lawyer to attend the following investigative or other evidence-gathering acts, if these acts are provided for in the national law concerned and if the suspect or accused person is required or is permitted as a right in accordance with national law to attend the act concerned:

- i) identity parades;*
- ii) confrontations;*
- iii) experimental reconstructions of the scene of crime,*
- iv) searches of premises, land and means of transport.]"*

Possible accompanying recital:

[20] 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 or is permitted as a right in accordance with national law to attend: identity parades, at which the suspect or accused person figures among other persons in order to be identified by a victim or witness; confrontations, where a suspect or accused person is brought together with one or more witnesses or victims when there is disagreement between them on important facts or issues; experimental reconstructions of the scene of crime at which the suspect or accused person is present and where the circumstances of a crime are reconstructed, in order to better understand the manner and circumstances under which a crime was committed and to be able to ask specific questions to the suspect or accused person; searches of premises land and means of transport.

OPTION 2:

Leave the text as it currently stands, but add a paragraph along the following line, which is partly inspired by AM 43:

"In addition, Member States shall ensure that a suspect or accused person has the right for his lawyer not to be prevented to attend a search of premises or land, if in accordance with national law the person himself is required or permitted to attend such search, except where there is a concrete risk that the evidence to be gathered would be altered, removed or destroyed [pending the lawyer's arrival]."

4. ¹⁶ 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 make the necessary arrangements to ensure that a suspect or accused person is in a position to effectively exercise his right of access to a lawyer, unless he has waived this right in accordance with Article 8. ¹⁷

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. ¹⁸

OBS: this provision has not been discussed yet.

¹⁶ Compare AM 82.

¹⁷ See recital 17.

¹⁸ See recital 18.

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.

OBS: EP and COM stated that they would prefer a closed list, since it would be more restrictive and provide added value.

PRES invites MS to indicate whether the following text could constitute a compromise for a closed list:

5. In exceptional circumstances and in the pre-trial stage only Member States may temporarily derogate from the application of the rights provided for in this Article when, in the light of the particular circumstances of the case, this is justified by one or more of the following compelling reasons:

- (a) *an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;*
- (b) *an urgent need to prevent a substantial jeopardy to criminal proceedings.*

OBS: MS in the past insisted on having point b) ('an urgent need to prevent a substantial jeopardy to criminal proceedings'). In order to be able to explain the need for this derogation better, PRES would like MS to give examples of when this point b) could come into play.¹⁹

¹⁹ The following examples were already given:

- If the lawyer is in liaison with the criminal organisation to which the suspect belongs, the suspect could give information/messages via the lawyer to the organisation.
- If the suspects wants to cooperate with the police, such a lawyer should not know that.
- If the lawyer acts in a way that disturbs the interrogation so that it's not possible to go through with it.

The issue of the remoteness of a lawyer could possibly be addressed in a recital, explaining that when it is extremely difficult to provide a lawyer due to the geographical remoteness of the suspect or accused person, this should be addressed either by the requirement to provide access to a lawyer "as soon as practically possible" or "without undue delay" (see Article 3(2)(c)), or by a derogation under point (b) in Article 3(5) ("urgent need to prevent a substantial jeopardy to criminal proceedings").

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.

2. 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.

PRES explained this Article in the TM, and representatives of EP posed questions in order to understand it better. In the light of the amendments of EP and the exchange of views with EP, PRES would like to submit the following alternative text for this Article:

"Article 4

Confidentiality

(alternative text)

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

2. *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) *to prevent a serious crime, by monitoring documents or other items in relation to a suspect or accused person who is deprived of liberty and who is suspected or accused of having committed a crime of terrorism;*

 - (b) *there is sufficient reason to believe, based on concrete indications, that the lawyer concerned is colluding with the suspect or accused person in a criminal offence."*

This text would be accompanied by a modification in Article 7(2), stating that a decision on derogating to the principle of confidentiality can only be taken by a judicial authority.

O: Would this alternative text, which has been made more restrictive compared to the text of the GA, be acceptable ?

Article 5

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

This Article has been discussed at length with the EP. Two possible options lay on the table. paragraphs 1 and 2 of these options being identical and reading as follows:

1. *Member States shall ensure that suspects or accused persons who are deprived of their liberty have the right to have at least one person, such as a relative or employer, named by them, informed of the deprivation of liberty, without undue delay, if they so wish.*
2. *If the suspect or accused person is a child, Member States shall ensure that the holder of the parental responsibility of the child is informed as soon as possible of the deprivation of liberty and of the reasons pertaining thereto, unless it would be contrary to the best interests of the child, in which case another appropriate adult shall be informed. For the purposes of this paragraph, a person below the age of 18 years shall be considered to be a child.*

As for the rest of the text, there are two options:

OPTION 1:

3. *Suspects or accused persons who are deprived of their liberty shall also have the right to communicate and meet with at least one person, such as a relative or employer, named by them.*
4. *Member States may temporarily derogate from the application of the right set out in paragraph 1 when this is justified by compelling reasons in the light of the particular circumstances of the case pertaining to the urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person.*

5. *Member States may temporarily derogate from the application of the rights set out in paragraph 3 when this is justified by an urgent need to avoid serious prejudice to the criminal proceedings against the suspect or accused person concerned or of any other criminal proceedings or when the exercise of the rights could have serious adverse consequences for the life, liberty or physical integrity of a third person.*
6. *Member States shall ensure that when providing the rights in this Article, the particular needs of vulnerable suspects or vulnerable accused persons shall be taken into account.*

Possible recitals accompanying option 1:

1. *Suspects or accused persons deprived of their liberty should have the right to have at least one person of their choice, such as a family member or employer, informed of the deprivation of liberty without undue delay and to communicate and meet with at least one person named by them. In the very limited exceptional circumstances of the urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person it should be possible to temporarily derogate from this right to have a third party informed. Recognising that in very limited cases communication with a third party could seriously prejudice criminal proceedings against the suspect or accused person concerned or of any other criminal proceedings, or have serious adverse consequences for the life, liberty or physical integrity of a third person, it should be possible in such circumstances to temporarily derogate from the right to communicate with a named third party.*
2. *The duty of care towards suspected or accused persons who are in a potentially weak position, underpins a fair administration of justice. The prosecution, law enforcement and judicial authorities should therefore ensure that such persons are able to exercise effectively the rights provided for in this Directive, for example by taking into account any potential vulnerability that affects their ability to exercise the right of access to a lawyer and to communicate with a third party, and by taking appropriate steps to ensure those rights are guaranteed.*

3. *This Directive promotes the rights of children and takes into account the Guidelines of the Council of Europe on child friendly justice, in particular its provisions on information and advice to be given to children. [Sentence in respect of Waiver removed as – yet to be discussed] The holder of the parental responsibility of a suspect or accused child should always be notified without undue delay of his deprivation of liberty and the reasons pertaining thereto. If providing such information to the holder of the parental responsibility of the child is contrary to the best interests of the child, another appropriate adult such as a relative should be informed instead. In accordance with the provisions of national law Member States may ensure that specified authorities which are responsible for the protection of children should also be informed of the deprivation of liberty of a child.*

OPTION 2:

3. *Suspects or accused persons who are deprived of their liberty by a judge shall have the right to communicate and meet with at least one person, such as a relative or employer, named by them.*
4. *Member States may temporarily derogate from the application of the rights set out in this Article when this is justified, in the light of the particular circumstances of the case, by one of the following compelling reasons:*
- *there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;*
 - *there is an urgent need to avoid serious prejudice to criminal proceedings.*

This derogation of paragraph 4 would be subject to the general conditions set out in Article 7(1), but would not fall under the "judicial review" condition of Article 7(2) (as in the GA).

As regards the strong wish of EP to pay particular attention to vulnerable persons, PRES has insisted that this is something that should be dealt with in measure E. Given the strong insistence of EP, however, PRES wonders whether it would be acceptable to address this issue in a horizontal way through a provision on the following line, it being understood of course that EP would make adequate concessions on other points:

"Article 11a

Vulnerable persons

Member States shall endeavour to ensure that in the application of this Directive the particular needs of vulnerable suspects and vulnerable accused persons shall be taken into account."

Article 6

The right to communicate with consular or diplomatic authorities

1. **Member States shall ensure that suspects or accused persons who are deprived of their liberty and who are non-nationals have the right to have consular or diplomatic authorities of their State of nationality informed of the deprivation of liberty without undue delay, and to communicate with those authorities if the suspects or accused persons so wish.**

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

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

Accompanying recital:

(27) The rights of suspects and accused persons who are deprived of their liberty to consular assistance is enshrined in Article 36 of the 1963 Vienna Convention on Consular Relations where it is a right conferred on States to have access to their nationals. This Directive confers a corresponding right on the arrested or detained person, subject to their wishes.

Without prejudice to the need to consult Member States, and subject to an overall agreement being reached on the draft Directive, there was provisional agreement among the negotiating partners on this text.²⁰

²⁰ To be noted however that FR has recently submitted a note in which it is suggested to reword Article 6 and the accompanying recital 27, see DS 1646/12.

CHAPTER 4
Derogations and waiver

Article 7

General conditions for applying temporary derogations

1. Any temporary derogation under Articles 3(5), 4(2) and 5(4-5),
 - (a) shall **be proportionate and** not go beyond what is **strictly** 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 Article 3(5) may only be authorised by a duly reasoned decision taken on a case-by-case basis, either by a judicial authority, or by another competent authority on condition that the decision may be subject to judicial review.

3. **Temporary derogations under Article 4(2) may only be authorised by a duly reasoned decision taken on a case-by-case basis by a judicial authority.**

This new text in paragraph 3 accompanies the proposal for an alternative text in Article 4(2).

Article 8
Waiver ²¹

1. Without prejudice to national law requiring the mandatory presence or assistance of a lawyer, Member States shall ensure that, in relation to any waiver of a right referred to in Articles 3 and 9 of this Directive:
 - (a) the suspect or accused person has been provided with 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 [*compare AM 62*]
 - (b) the waiver is given voluntarily and unequivocally.
2. The waiver and the circumstances under which it was given shall be noted, using the recording procedure in accordance with the law of the Member State concerned.
3. Member States shall ensure that a waiver can be subsequently revoked at any point during the criminal proceedings **and that the suspect or accused person is informed about this possibility [AM 66]**. In case of revocation this Directive shall apply from the point in time when the waiver was revoked. [In exceptional cases during the trial stage, the consequences of a revocation may be subject to judicial discretion.]

OBS: EP requested deleting the last sentence in brackets, since it refers to cases of abuse, which should not be dealt with in the text, at maximum in a recital.

Q: Could MS accept to organise this issue in a recital?

²¹ See recitals 29-31 and 42.

CHAPTER 5
European Arrest Warrant proceedings

*Article 9*²²

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 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 so as to allow him to exercise his rights effectively and in any event as soon as practically possible after the 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 has the possibility to exercise his rights 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, as well as Article 3(4).

²² Articles 9-15 have not yet been discussed.

CHAPTER 6

General and final provisions

Article 10

Legal aid

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

Article 11

Remedies

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

Article 12

Non-regression clause

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

Article 13

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [36 months after publication of this Directive in the *Official Journal*] at the latest.
- [2. Member States shall forthwith communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive, accompanied by a correlation table between those provisions and this Directive.
3. When Member States adopt these provisions they shall contain a reference to this Directive or be accompanied by such a reference when the provisions are officially published.
Member States shall determine how such reference is to be made.]²³

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*.

²³ Text of paragraphs 2 and 3 is to be finalised pending justification by the Commission according to the inter-institutional agreement/joint political declaration.

Article 15
Addressees

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

Done at Brussels,

For the European Parliament
The President

For the Council
The President
