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THE EUROPEAN UNION**

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From : Presidency

To : Coreper

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Subject : Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest [First reading]  
- Questions on selected issues

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**Introduction**

1. After having reached a general approach on the draft Directive on 8 June,<sup>1</sup> and following the adoption by the LIBE Committee of the European Parliament of its orientation vote,<sup>2</sup> the Council started negotiations with the European Parliament in order to reach an agreement on the text of the draft Directive.

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<sup>1</sup> ST 10908/12.

<sup>2</sup> DS 1553/12.

2. Substantial progress has been made in the negotiations towards agreement on a text that may be acceptable to both Institutions. The text as presented to the European Parliament for the 6th trilogue on 19 March 2013 is set out in Annex 2. This text, which is very much a provisional one and which will be further examined at the next meeting of the Friends of the Presidency, reflects the negotiations to date.<sup>3</sup> It is understood that "nothing is agreed until everything is agreed."
3. The Presidency feels that it has come to a point in the negotiations where the guidance of COREPER is required on the following two points:

**A : Confidentiality of communications between lawyer and suspect/accused**

4. The Commission in its text, proposed that "*Member States shall ensure that the confidentiality of meetings between the suspect or accused person and his lawyer is guaranteed. They shall also ensure the confidentiality of correspondence, telephone conversations and other forms of communication permitted under national law between the suspect or accused person and his lawyer*".

There were no provisions for any derogation from this obligation.

5. The Council general approach stated, in paragraph 1, that "*Member States shall guarantee the confidentiality of communication between a suspect or accused person and his lawyer*". The Council allowed however, in paragraph 2, to make derogations to the principle of confidentiality, in exceptional circumstances, for one of two 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.*

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<sup>3</sup> The text does not yet take into account comments that have been provided by delegations after the last meeting of the Friends of the Presidency and the outcome of the last trilogue.

6. The Council also inserted two recitals in the text, which further clarify the scope of application of the provisions on confidentiality. They contain certain exclusions from the scope of the provisions on confidentiality, and read as follows:

(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. [...]*

(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.*

7. The European Parliament has made it clear from the outset that it would like to have complete confidentiality of communication between a lawyer and a suspect or accused person. Its text (amendment 55) provides that "*the confidentiality is absolute and shall not be subject to any exception.*". This point of view is also shared by the Commission and by several Member States.<sup>4</sup>

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<sup>4</sup> See in this context also the declarations set out in points 4 and 5 of the cover note accompanying the Council general approach (10908/12).

8. In view of the importance of this issue to both Council and the Parliament, and with a view to making further progress in the negotiations, the Presidency suggested to the Friends of the Presidency meeting on 13/14 March an alternative approach to the issue. The Presidency proposed a revised Article 4, as follows;

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

The Presidency proposal deleted paragraph 2, thereby removing the possibility of making derogations, while maintaining recital 24 (with some amendment) and recital 25.

By way of explanation of its proposal, the Presidency noted that the principle of lawyer/client confidentiality is not a new concept which is being created by this Directive. It considered the jurisprudence of the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ) on the matter. It noted that the ECtHR has identified the principle as being key to ensuring the effective exercise of the rights of defence and has stated that it is part of the basic requirements of a fair trial. It also noted that the ECJ, for its part, has recognized that lawyer/client confidentiality is part of the principles and concepts common to the laws of Member States.

9. The Presidency provided the following explanation for the change of obligation on Member States from "guarantee" to "respect":

*The Presidency believes that it would be impossible in practice for Member States to "guarantee" the confidentiality of communications between the lawyer and a suspect or accused person, as the communication may not be under the control of the Member States (for example, it may relate to a meeting in a lawyer's office) and the breach of confidentiality may come about via the lawyer himself or by accident (documents sent to the wrong address). We consider that what is intended is that Member States would "respect" the confidentiality of communication between the lawyer and the suspect or accused person, in the sense that Member States would honour this confidentiality and would refrain from interfering with the confidentiality of such communications. This is why we suggest the word "respect" which we think is prescriptive. We note that it has been used in that sense in some previous EU instruments <sup>5</sup>.*

The reference to "in the exercise of the right of access to a lawyer provided for under this Directive" is intended to clarify the scope of communications to which the obligation in relation the confidentiality in this Directive applies. The obligation extends only to communications which occur in the course of the exercise of the rights in the Directive.

10. While some Member States indicated that the Presidency approach was an improvement and that they could accept the text on confidentiality on this basis, other Member States remained in favour of a provision which allowed for derogations.
11. In view of the divergent positions within the Council, the Presidency is seeking the guidance of COREPER to establish a clear mandate for negotiations with the Parliament on this extremely important point.
12. The Presidency proposal for a revised text (option I) and the existing text on confidentiality (option II) are attached ([Annex 1](#)).

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<sup>5</sup> See e.g. Directive 2011/95/EU (Article 21.1) and Directive 2009/140/EC (Article 1.1.b), as well as, precisely on confidentiality, Regulation (EC) No 1829/2003 (Article 31.7).

**Question 1 for Coreper :**

13. COREPER is invited to confirm that the Presidency proposal for a revised text (option I - no derogations) should be the Council's position for negotiations with the Parliament.

**B : The right to a lawyer in the issuing Member State in European Arrest Warrant (EAW) proceedings**

14. The Commission proposal had foreseen a right for the subjects of EAWs to have access to a lawyer in the **issuing** Member State in European Arrest Warrant proceedings in addition to the right of access to a lawyer in the **executing** state. The role of the lawyer in the **issuing** Member State would be to assist the lawyer in the **executing** Member State.
15. Council did not include any such provision in the text of the General Approach.
16. Since the European Parliament is very keen on including a provision on a lawyer in the issuing Member State in the text, the Presidency re-submitted this issue to Member States.
17. It appears that Member States are now favourably disposed to including a provision on the right to a lawyer in the issuing Member State, in which the role of this lawyer would be to assist the lawyer in the executing Member State by providing him with information and advice, provided that obligations of the issuing Member State in this respect are not disproportionately onerous.

**Question 2 for Coreper :**

18. In the light of the above, COREPER is invited to confirm that the Directive may include a provision for a lawyer in the issuing Member State, as set out in point 17 above, with the specific drafting of the relevant provisions to be further examined by the Working Party.

**Option I – no derogations***Article 4****Confidentiality***

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

**Recitals**

- (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 and is an essential part of the right to a fair trial. Member States should therefore respect the confidentiality of meetings and other forms of communication between the lawyer and the client in the exercise of the right of access to a lawyer provided for in this Directive. The obligation to respect confidentiality not only implies that Member States should refrain from interfering with or accessing such communication but also that, where the suspect or accused person is deprived of liberty or otherwise finds himself in a place under the control of the State, Member States should ensure that arrangements for communication uphold and protect confidentiality. This is without prejudice to mechanisms in place in detention facilities in order to avoid illicit enclosures being sent to detainees, such as screening correspondence, as long as such mechanisms do not allow the competent authorities to read the communication between the suspect or accused person and his lawyer. [...]
- (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.

## **Option II - with derogations**

### *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 of the case, this is justified by one of the following compelling reasons:*
  - (a) *an urgent need to prevent a particularly serious crime, such as terrorism;*
  
  - (b) *there is serious reason to believe, based on objective and factual circumstances, that the lawyer concerned is involved with the suspect or accused person in a criminal offence and criminal proceedings may be opened against this lawyer.*

#### **Recitals**

- (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.
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Draft 14 March 2013

**TEXT PROPOSED BY THE PRESIDENCY ON BEHALF OF THE COUNCIL IN VIEW**  
**OF THE SIXTH TRILOGUE ON 19 MARCH 2013**<sup>6</sup>

**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<sup>7</sup>,

After consulting the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure,

Whereas:

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

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<sup>6</sup> This is a provisional text on which all Member States still have a scrutiny reservation.

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

- (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 ('TFEU'), 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) TFEU provides for the establishment of minimum rules applicable in the Member States so as to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension. That Article refers in point (b) to "the rights of individuals in criminal procedure" as one of the areas in which minimum rules may be established. [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]**
- (4d) These common rules being minimum rules established at Union level in order to facilitate judicial cooperation in criminal matters, Member States remain free to apply higher standards of protection at national level, without however compromising the effectiveness of the judicial cooperation these common minimum rules are designed to achieve.**

- (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')<sup>8</sup>. [...] 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 proceedings<sup>9</sup> and Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings<sup>10</sup>. [AM 7]**

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<sup>8</sup> OJ C 295, 4.12.2009, p. 1.

<sup>9</sup> OJ L 280, 26.10.2010, p. 1.

<sup>10</sup> 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. **This case-law provides inter alia that the fairness of proceedings requires that a suspect or accused person be able to obtain the whole range of services specifically associated with legal assistance. In this regard, the lawyer should be able to secure without restriction the fundamental aspects of that person's defence. [AM 8]**<sup>11</sup>
- (6a) Member States may choose the form and methods to implement the rights provided for in this Directive in their national legal orders, including by making practical arrangements, based on their national law, pertaining to these rights, provided that such arrangements do not prejudice the effective exercise of the rights of the defence.**
- (6b) Without prejudice to the obligations of Member States under the ECHR to ensure fair trial rights, proceedings in relation to minor offending which takes place within a prison and proceedings in relation to offences committed in a military context which are dealt with by a commanding officer should not be considered to be criminal proceedings for the purposes of this Directive.**
- (7) [This Directive also sets minimum rules on the rights for persons who are deprived of liberty to have consular [...] authorities informed of their deprivation of liberty and to communicate with these authorities. [...]]<sup>12</sup>

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<sup>11</sup> 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*".

<sup>12</sup> Legal-linguists suggested to delete this recital, since it copies the content of Article 6, with no additional motivation.

- (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 should 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]**
- (9) In some Member States an authority other than a court having jurisdiction in criminal matters may be competent for imposing sanctions **other than deprivation of liberty** in relation to relatively minor offences. That may be the case, for example, in relation to traffic offences which are committed on a large scale and which might be established following a traffic control [...]. In such situations, it would be disproportionate to require that the competent authority should ensure all the rights granted under this Directive. Where the law of a Member State provides for the imposition of a sanction regarding minor offences by such an authority and there is a right of appeal or the possibility for the case to be otherwise referred to a court having jurisdiction in criminal matters, this Directive should therefore apply only to the proceedings before that court following such an appeal or referral.
- (10) **In some Member States certain minor offences, in particular minor traffic offences, minor offences in relation to general municipal regulations and minor public order offences, are considered to be criminal offences [...]. It would be disproportionate to require that the competent authorities should ensure all the rights granted under this Directive in respect of such minor offences. Where the law of a Member State provides in respect of minor offences that deprivation of liberty cannot be imposed as a sanction [...], this Directive should therefore apply only to the proceedings before a court having jurisdiction in criminal matters.**

- (10a) [ In any case, however, the Directive should fully apply when the suspect or accused person has been deprived of liberty, irrespective of the stage of the criminal proceedings. *[AM 14]* ]<sup>13</sup>
- (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) [deleted]
- (13) Member States should ensure that suspects or accused persons have the right of access to a lawyer without undue delay. In any event, suspects or accused persons should have access to a lawyer before the person concerned is questioned by the police or other law enforcement authorities and during any such questioning, upon the carrying out by investigative or other competent authorities of an investigative or other evidence-gathering act and without undue delay from the deprivation of liberty. In any case, suspects or accused persons should be granted access to a lawyer during criminal proceedings before a court, if they have not waived that right.
- (14) For the purposes of this Directive, questioning does not include preliminary questioning by the police or other law enforcement authorities whose purpose is any or all of the following: the identification of the person concerned; the verification of the possession of weapons or other similar safety issues; or the determination of whether an investigation should be started, for example in the course of a road-side check, or during regular random checks/controls when a suspect or accused person has not yet been identified. *[compare AM 13]*

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<sup>13</sup> Legal-linguists suggested to delete this recital, since it repeats the content of Article 2(3), without any additional motivation.



- (15) **When a person other than a suspect or accused person, such as a witness, becomes a suspect or accused person, he should be protected against self incrimination and has the right to remain silent, as confirmed in the case law of the European Court of Human Rights. It is therefore appropriate to make express reference to the practical situation where a person, other than a suspect or accused person, during questioning by the police or by another law enforcement authority in the context of criminal proceedings becomes suspected or accused of having committed a criminal offence. When, in the course of such questioning, a person other than a suspect or accused person becomes a suspect or accused person, he shall promptly be informed thereof; alternatively, any questioning shall be suspended immediately.**
- (16a) Suspects or accused persons should have the right to meet in private with the lawyer representing them, including prior to questioning by the police or other law enforcement or judicial authorities. Member States may **make practical arrangements concerning the duration and frequency of meetings between a suspect or accused person and his lawyer, taking into account the circumstances of every proceeding, notably the complexity of the case and the procedural steps applicable. [...] Member States may also make practical arrangements to ensure safety and security, in particular of the lawyer and of the suspect or accused person, in the place where the meeting between the lawyer and the suspect or accused person is conducted. All these arrangements should not prejudice the effective exercise and essence of the right of the suspect or accused person to meet with his lawyer.**

- (16b) **Suspects or accused persons should have the right to communicate with the lawyer representing them. Such communication can take place at any stage, including before any exercise of the right to meet with the lawyer. [...]** Member States may **make practical arrangements concerning** the duration, frequency and means of communication between the suspect or accused person and his lawyer, including concerning the use of videoconferencing and other communication technology in order to allow such communications to take place, **provided such arrangements do** not prejudice the effective exercise and essence of the right of the suspect or accused person to communicate with his lawyer.
- (16c) **In respect of certain minor offences, this Directive should not prevent Member States from organising the right of the suspect or accused person to legal assistance by telephone. However, limiting the right in this way should be restricted to cases where the person will not be questioned by the police or by other law enforcement authorities.**
- (17) (renumbered as recital 21a)
- (18) (renumbered as recital 21b)
- (19) [moved to recitals 16a-16c]
- (20) **Member States should ensure that suspects or accused persons have the right for their lawyer to be present and, in accordance with rules of procedure in national law, participate effectively when they are questioned by the investigating authorities, as well as during court hearings. The rules of procedure in national law may regulate [...]** the participation of a lawyer during questioning of the suspect or accused person by the investigating authorities, as well as during court hearings, **provided these rules do not prejudice the effective exercise and essence of the right concerned. During questioning** by the investigating authorities of the suspect or accused person or in a court hearing, **the lawyer** may inter alia, in accordance with such **rules**, ask questions, request clarification and make statements, which should be recorded in accordance with national law.

(21) [...] The suspect or accused person has the right for his lawyer to attend at least the following **investigative or [...] evidence-gathering** acts, insofar as they are provided for in the national law concerned and insofar the suspect or accused person is required **or permitted** to attend: identity parades, at which the suspect or accused person figures among other persons in order to be identified by a victim or witness; confrontations, where a suspect or accused person is brought together with one or more witnesses or victims when there is disagreement between them on important facts or issues; experimental reconstructions of the scene of crime at which the suspect or accused person is present and where the circumstances of a crime are reconstructed, in order to better understand the manner and circumstances under which a crime was committed and to be able to ask specific questions to the suspect or accused person. **Member States may make practical arrangements [...] concerning the presence of a lawyer during investigative or [...] evidence-gathering acts, provided such arrangements do not prejudice the effective exercise and essence of the rights concerned. Where the lawyer is present during an investigative or evidence-gathering act, this should be recorded in accordance with the recording procedure of the law of the Member State concerned.**

(21a) In cases where a suspect or accused person is deprived of liberty, Member States should make the necessary arrangements to ensure that the person concerned is in a position to effectively exercise his right of access to lawyer, including by arranging for the assistance of a lawyer when the person concerned does not have one, unless he has waived this right. The [...] arrangements, including those on legal aid if applicable, should be governed by national law. **They** could imply, inter alia, that the competent authorities arrange for the assistance of a lawyer on the basis of a list of available lawyers from which the suspect or accused person could choose. [*compare AM 19*]

(21b) In cases where a suspect or accused person is not deprived of liberty, Member States [...] may **provide that person with information so as to assist him in obtaining** a lawyer, but they 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. The **suspect or accused** person concerned should be able to freely contact, consult or be assisted by that lawyer. [*compare AM 19*]

- (22) **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 compelling reasons **are a need, in cases of urgency,** to avert serious adverse consequences for the life, liberty or physical integrity of a person or **where immediate action by the investigating authorities is imperative to prevent a substantial jeopardy to criminal proceedings, in particular to prevent alerting accomplices, interference with witnesses or the destruction or alteration of essential evidence.**
- (23a) Compelling reasons can also exist where, because of 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, it is impossible **in the particular circumstances of the case** to ensure the right of access to a lawyer in accordance with the provisions of this Directive **without undue delay. Where immediate access to a lawyer is not possible because of the geographical remoteness of the suspect or accused person Member States should arrange for communication via telephone or video conference unless this is strictly impossible. In accordance with the general conditions for temporary derogations set out in this Directive, Member States should ensure that the compelling reasons related to the geographical remoteness of the suspect or accused person end as soon as possible.**

(23b) During a temporary derogation from the right of access to a lawyer, the competent authorities may question 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 questioning, or such investigative or other evidence gathering act, is necessary for a proper handling of the criminal proceedings and should not unduly prejudice the rights of the suspect or accused person.

<sup>14</sup> [(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. ]

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<sup>14</sup> The Presidency has the intention to submit the issue of confidentiality to the attention of Ambassadors at the meeting of COREPER on 27 March 2013.

- (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 **may make** practical arrangements in relation to the application of this right, **provided such arrangements do not prejudice the effective exercise and essence of the right**. In limited, exceptional circumstances, however, it should be possible to temporarily derogate from this right when this is justified, in the light of the particular circumstances of the case, by a compelling reason **as specified in this Directive**. **When the competent authorities envisage making such a temporary derogation in respect of a specific third person, they should firstly consider whether another third person, nominated by the suspect or accused person, could be informed of his deprivation of liberty.**
- (26a) Suspects or accused persons, while deprived of liberty, should have the right to communicate **without undue delay with at least one third person, such as a relative, nominated by them. Member States may limit or defer the exercise of this right in view of operational or other imperative requirements, such as a need to avert serious adverse consequences for the life, liberty or physical integrity of a person, a need to prevent prejudice to criminal proceedings, a need to prevent a criminal offence, a need to await a court hearing, and a need to protect victims of crime. When the competent authorities envisage limiting or deferring the exercise of the right to communicate in respect of a specific third person, they should firstly consider whether the suspect or accused person could communicate with another third person nominated by him. Member States may make practical arrangements concerning the timing, means, duration and frequency of communication with third persons, taking account of the need to maintain good order, safety and security in the place where the person is being deprived of liberty. Arrangements might also be made to ensure the safety and security of the third person and of the suspect or accused person during meetings between them.**

- (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 suspects or accused persons who are deprived of their liberty, subject to their wishes. Consular protection may be exercised by diplomatic authorities when they act as consular authorities.**
- (28) **Member States should clearly set out in their national law the grounds and criteria for any temporary derogations from rights granted under this Directive [AM 61], and they should** make a restricted use of these derogations. Any temporary derogations allowed under this Directive should be proportional, **strictly** limited in time as much as possible, not be based exclusively on the type **or the seriousness** of the alleged offence, and not prejudice the overall fairness of the proceedings. [...]
- (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, **orally or in writing, clear and** sufficient information **in simple and understandable language** [...] about the content of the right concerned and the possible consequences of waiving it. When providing the information, the specific conditions of the person concerned should be taken into account, including the age of the person, and his mental and physical condition.
- (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]. A revocation of a waiver should come into effect from the point in time when the revocation was made.** Hence, it should not be necessary to proceed again with questioning and any procedural acts that have been carried out during the period when the right concerned was waived. If the suspect or accused person wishes to revoke a waiver during the trial stage, **the judge shall decide how to proceed,** having regard to the overall fairness of the proceedings.
- (32) (renumbered as 35d)
- (33) (renumbered as 35e)
- (34) (renumbered as 35f)
- (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 **of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States.**<sup>15</sup> 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.

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<sup>15</sup> OJ L 190, 18.7.2002, p. 1.



- (35a) Requested persons should have the right to meet in private with the lawyer representing them in the executing State. Member States may make practical arrangements concerning the duration and frequency of such meetings, taking into account the particular circumstances of the case. Member States may also make practical arrangements to ensure safety and security, in particular of the lawyer and of the requested person, in the place where the meeting between the lawyer and the requested person is conducted. All these arrangements should not prejudice the effective exercise and essence of the right of the requested person to meet with his lawyer.
- (35b) Requested persons should have the right to communicate with the lawyer representing them in the executing Member State. Such communication can take place at any stage, including before any exercise of the right to meet with the lawyer. Member States may make practical arrangements concerning the duration, frequency and means of communication between the requested person and his lawyer, including concerning the use of videoconferencing and other communication technology in order to allow such communications to take place, provided such arrangements do not prejudice the effective exercise and essence of the right of the requested person to communicate with his lawyer.
- (35c) Executing Member States should make the necessary arrangements to ensure that a requested person is in a position to effectively exercise his right of access to lawyer in the executing Member State, including by arranging for the assistance of a lawyer when the person concerned does not have one, unless he has waived this right. The arrangements, including those on legal aid if applicable, should be governed by national law. They could imply, inter alia, that the competent authorities arrange for the assistance of a lawyer on the basis of a list of available lawyers from which the requested person could choose.

- (35d) Upon his request, a requested person should have the right to be assisted by a lawyer in the issuing Member State. In application of this right, which should be without prejudice to the time limits set out in Council Framework Decision 2002/584/JHA, the lawyer in the issuing Member State should be able to assist the lawyer in the executing Member State by providing him with information and advice with a view to allowing the requested person to exercise his rights under Council Framework Decision 2002/584/JHA. The right, if any, for the lawyer in the issuing Member State to participate in the proceedings in the executing Member State should be a matter of national law.
- (35e) When the issuing judicial authority has received a request by a requested person to be assisted by a lawyer in issuing Member State, that authority, or the central authority in the issuing Member State as the case may be, should provide information to facilitate the requested person in obtaining this assistance. To that end, the issuing judicial authority could for example provide the requested person or his lawyer in the executing Member State, where appropriate through the executing judicial authority or through central authority in the executing Member State, a list of lawyers or the name of a lawyer on duty in the issuing State that can provide information and advice in European Arrest Warrant cases. Member States should endeavour to keep the list of lawyers as current as possible; they may delegate this task to another body, such as a bar association.
- (35f) Certain other 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. Since a requested person only has the right to be assisted by a lawyer in the issuing Member State upon request, it is not necessary to provide that such a person has the right to waive his right in that State.

- (35g) 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.
- (35h) The surrender procedure is crucial for cooperation in criminal matters between the Member States. Observance of the time limits contained in Council Framework Decision 2002/584/JHA is essential for such cooperation. Therefore, **while the procedural rights of suspects or accused person should be fully respected**, Member States should **make all reasonable efforts to** ensure that application of the rights provided for in this Directive to proceedings for the execution of a European Arrest Warrant **should** not jeopardize respecting those time limits.
- (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 [...] 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) Member States should ensure that in the assessment of [...] statements made by a suspect or accused person or of evidence obtained in breach of his right to a lawyer or in cases where a derogation to this right was authorised in accordance with this Directive, the rights of the defence and the fairness of the proceedings should be taken into account; in this context, regard should be had at the case-law of the European Court of Human Rights, which has established that the rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction. This should be without prejudice to the use of statements for other purposes permitted under national law, such as the need to execute urgent investigative acts to avoid the perpetration of other offences or serious adverse consequences for any person or related to an urgent need to prevent a substantial jeopardy to criminal proceedings where access to a lawyer or delaying the investigation would irretrievably prejudice the on-going investigations regarding a serious crime. Further, this should be without prejudice to national rules or systems regarding admissibility of evidence, and should not prevent Member States from maintaining a system whereby all existing evidence can be adduced before a court or a judge, without there being any separate or prior assessment as to admissibility of such evidence. [compare AM 30]
- (38a) The duty of care towards suspected or accused persons who are in a potentially weak position underpins a fair administration of justice. The prosecution, law enforcement and judicial authorities should therefore facilitate that such persons are able to exercise effectively the rights provided for in this Directive, for example by taking into account any potential vulnerability that affects their ability to exercise the right of access to a lawyer and to communicate with a third party, and by taking appropriate steps to ensure those rights are guaranteed.

- (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 [...] 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, **institutions or individuals** which are responsible for the protection **or welfare** 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 <sup>16</sup> ("European arrest warrant proceedings") to have access to a lawyer and to have a third party informed of the deprivation of liberty.

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<sup>16</sup> 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 made aware** by the competent authorities of a Member State, by official notification or otherwise, that he is suspected or accused of having committed a criminal offence, **and irrespective of whether he is deprived of liberty or not**. It applies until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspected or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal.
2. This Directive applies to persons subject to European arrest warrant proceedings from the time they are arrested in the executing Member State in accordance with Article 9.
- 2a. This Directive also applies, under the same conditions as provided for in paragraph 1, to persons other than suspects or accused persons who in the course of questioning **by the police or by another law enforcement authority** become suspects or accused persons.<sup>17</sup>

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<sup>17</sup> Text to be read together with recital 15.



3.<sup>18</sup> **Without prejudice to the right to a fair trial, in respect of minor offences**

- (a) **where the law of a Member State provides for the imposition of a sanction by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed or referred to such a court; or**
- (b) **where deprivation of liberty cannot be imposed as a sanction;**<sup>19</sup>

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

**However, the Directive shall in any case fully apply when the suspect or accused person is deprived of liberty, irrespective of the stage of the criminal proceedings.**

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<sup>18</sup> Text to be read together with recitals 9, 10, [10a,] and 11. See also the suggestion for a new recital 6a.

<sup>19</sup> The Council could accept the deletion of former point c) ("*where the offence does not give rise to the application of such a sanction*"), on condition that agreement is reached in a satisfactory manner on the text of Article 3(4) and of recitals 21a and 21b ("*level of obligations*").

**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.<sup>20</sup> The suspect or accused person shall have access to a lawyer without undue delay. In any event, the suspect or accused person shall have access to a lawyer **as** from the following moments in time, whichever is the earliest:
  - (a) before he is **questioned** by the police or other law enforcement or judicial authorities; *[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) **without undue delay from** the deprivation of liberty;
  
  - (d) in due time before the suspect or accused person, who has been summoned to appear before a court having jurisdiction in criminal matters, appears before that court. *[AM 46]*

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<sup>20</sup> See also recital 13.

3. The right of access to a lawyer shall entail the following:

(a)<sup>21</sup> Member States shall ensure that a suspect or accused person has the right to **meet in private** and communicate with the lawyer representing him, including prior to **questioning by** the police or other law enforcement or judicial authorities. [...]

(b)<sup>22</sup> 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 **effectively** when he is **questioned**. When a lawyer participates during **questioning** this shall be recorded in accordance with national law;

(c)<sup>23</sup> Member States shall ensure that the suspect or accused person shall as a minimum have the right for his lawyer to attend the following investigative or evidence-gathering acts, if these acts are provided for in the national law concerned and if the suspect or accused person is required **or permitted** to attend the act concerned:

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

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<sup>21</sup> See also recitals 16a-16c.

<sup>22</sup> See also recital 20.

<sup>23</sup> See also recital 21.

4. <sup>24</sup> Notwithstanding provisions of national law concerning the mandatory presence of a lawyer, Member States shall make the necessary arrangements to ensure that suspects or accused persons who are deprived of liberty shall be in a position to effectively exercise their right of access to a lawyer, unless they have waived this right in accordance with Article 8.

**In cases where a suspect or accused person is not deprived of liberty, Member States may provide that person with information so as to assist him in obtaining a lawyer.** <sup>25</sup>

5. <sup>26</sup> 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) **where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person ;**
- (b) **where immediate action by the investigating authorities is imperative to prevent a substantial jeopardy to criminal proceedings [...] ;**
- (c) **where, because of the geographical remoteness of the suspect or accused person, it is not possible to ensure the right of access to a lawyer in full compliance with this Article.**

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<sup>24</sup> See also recitals 21a and 21b.

<sup>25</sup> This issue of the level of obligations is linked to the issue of minor offences, see under Article 2(3).

<sup>26</sup> See also recitals 23, 23a and 23b.

*Article 4*  
**Confidentiality**<sup>27 28</sup>

- [ 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 of the case, this is justified by one of the following compelling reasons:
- (a) an urgent need to prevent a **particularly** serious crime, such as **terrorism**;
  - (b) there is **serious** reason to believe, **based on objective and factual circumstances**, that the lawyer concerned is involved with the suspect or accused person in a criminal offence **and criminal proceedings may be opened against this lawyer.** ]

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<sup>27</sup> See also recitals 24 and 25.

<sup>28</sup> Text under discussion in the Council. The Presidency has the intention to submit the issue of confidentiality to the attention of Ambassadors at the meeting of COREPER on 27 March 2013.

## CHAPTER 3

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

#### *Article 5*<sup>29</sup>

#### **The right to have a third person informed of the deprivation of liberty**

1. Member States shall ensure that suspects or accused persons who are deprived of their liberty have the right to have at least one person, such as a relative or employer, nominated by them, informed of the deprivation of liberty, without undue delay, if they so wish.
2. If the suspect or accused person is a child, Member States shall ensure that the holder of the parental responsibility of the child is informed as soon as possible of the deprivation of liberty and of the reasons pertaining thereto, unless it would be contrary to the best interests of the child, in which case another appropriate adult shall be informed. For the purposes of this paragraph, a person below the age of 18 years shall be considered to be a child.
3. **Member States may temporarily derogate from the application of the rights set out in paragraphs 1 and 2 when this is justified, in the light of the particular circumstances of the case, by one of the following compelling reasons:**
  - (a) **an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person ;**
  - (b) **an urgent need to prevent a situation where there could be a substantial jeopardy to criminal proceedings [...].**

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<sup>29</sup> See also recitals 26 and 42.

4. When Member States temporarily derogate from the application of the right set out in paragraph 2, they shall ensure that an authority responsible for the protection or welfare of children is informed as soon as possible of the deprivation of liberty of the child.

*Article 5a*<sup>30</sup>

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

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

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<sup>30</sup> See also recital 26a.

*Article 6*

**The right to communicate with consular authorities**<sup>31</sup>

- 1. Member States shall ensure that suspects or accused persons who are deprived of their liberty and who are non-nationals have the right to have consular authorities of their State of nationality informed of the deprivation of liberty without undue delay and to communicate with those authorities, if the suspects or accused persons so wish. However, when suspects or accused persons have two or more nationalities, they may choose which consular authorities, if any, are to be informed of the deprivation of liberty and with whom they wish to communicate.**
- 2. Suspects or accused persons also have the right to be visited by their consular authorities, the right to converse and correspond with them and the right to have legal representation arranged for by their consular authorities, subject to the agreement of these authorities and the wishes of the suspects or accused persons concerned.**
- 3. The exercise of the rights in this Article may be regulated in national law or procedures, provided such law and procedures shall enable full effect to be given to the purposes for which these rights are intended.**

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<sup>31</sup> See also recital 27.



## CHAPTER 4

### Derogations and waiver

#### *Article 7*<sup>32</sup>

#### **General conditions for applying temporary derogations**

1. Any temporary derogation under Articles 3(5) [, 4(2)<sup>33</sup>] and 5(3),
  - (a) shall **be proportionate and** not go beyond what is necessary;
  - (b) shall be **strictly** [AM 59] limited in time as much as possible;
  - (c) shall not be based exclusively on the type **or the seriousness** of the alleged offence;  
and
  - (d) shall not prejudice the overall fairness of the proceedings.
  
2. Temporary derogations under Article 3(5) may only be authorised by a duly reasoned decision taken on a case-by-case basis, either by a judicial authority, or by another competent authority on condition that the decision **can be submitted to judicial review**. **The duly reasoned decision shall be recorded in accordance with the law of the Member State concerned.**  
[compare AM 60]
  
- 2a. Temporary derogations under Article 5(3) may only be taken on a case-by-case basis, either by a judicial authority, or by another competent authority. If the temporary decision is taken by another competent authority and lasts for more than 48 hours, it is required that this decision can be submitted 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. ]<sup>34</sup>

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<sup>32</sup> See also recital 28 as modified.

<sup>33</sup> The Presidency has the intention to submit the issue of confidentiality to the attention of Ambassadors at the meeting of COREPER on 27 March 2013.

<sup>34</sup> Idem.

Article 8<sup>35</sup>

**Waiver**

1. Without prejudice to national law requiring the mandatory presence or assistance of a lawyer, Member States shall ensure that, in relation to any waiver of a right referred to in Articles 3 and 9 of this Directive:
  - (a) the suspect or accused person has been provided, **orally or in writing**, with **clear and sufficient information in simple and understandable language** about the content of the right concerned and the possible consequences of waiving it; and *[compare AM 62]*
  - (b) the waiver is given voluntarily and unequivocally.
2. The waiver, **which can be made in writing or orally, shall be noted, as well as** the circumstances under which the waiver was given, using the recording procedure in accordance with the law of the Member State concerned.
3. Member States shall ensure that a waiver can be subsequently revoked at any point during the criminal proceedings **and that the suspect or accused person is informed about this possibility [AM 66]. A revocation of a waiver shall come into effect from the point in time when the revocation was made.**

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<sup>35</sup> See also recitals 29-31.

**CHAPTER 5**  
**European Arrest Warrant proceedings**

*Article 9*<sup>36</sup>

**The right of access to a lawyer and the right to be assisted by a lawyer in  
European Arrest Warrant proceedings**

1. Member States shall ensure that a person requested for surrender in accordance with Council Framework Decision 2002/584/JHA has the right of access to a lawyer **in the executing Member State** upon arrest pursuant to the European Arrest Warrant.
  
2. With regard to the content of the right of access to a lawyer in the executing Member State, the requested person shall have the following rights in **that** Member State:
  - (a) the right of access to a lawyer in such a time and manner so as to allow him to exercise his rights effectively and in any event **without undue delay from** deprivation of liberty;
  
  - (b) the right to **meet and** communicate with the lawyer representing him; [...]
  
  - (c) the right for his lawyer to be present and, in accordance with procedures in national law, participate during a hearing of the requested person by the executing judicial authority. When the lawyer participates during the hearing this shall be recorded in accordance with national law.

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<sup>36</sup> See also recitals 32-35h.

3. Upon request, a requested person also has the right to be assisted by a lawyer in the issuing Member State. In application of this right, the lawyer in the issuing Member State may assist the lawyer in the executing Member State by providing him with information and advice with a view to allowing the requested person to exercise his rights under Council Framework Decision 2002/584/JHA. The executing Member State shall inform the requested person of this right.
4. In case a requested person does not yet have a lawyer in the issuing Member State, the executing judicial authority, promptly after the requested person has made a request to be assisted by a lawyer in the issuing Member State, shall inform the issuing judicial authority of this request. Promptly after receipt of such a request, the issuing judicial authority shall provide information to facilitate the requested person in obtaining this assistance.
5. The rights provided for in this Directive under Articles 4, 5, **5a**, 6, 8 and - when a temporary derogation under [Article 4(2) or <sup>37</sup>] Article **5(3)** is applied - Article 7 shall apply, *mutatis mutandis*, to European arrest warrant proceedings in the executing Member State.
- [ 6. Member States shall respect the confidentiality of communication, if any, between a requested person and his lawyer in the issuing Member State. ] <sup>38</sup>

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<sup>37</sup> The Presidency has the intention to submit the issue of confidentiality to the attention of Ambassadors at the meeting of COREPER on 27 March 2013.

<sup>38</sup> Idem.

## 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 and the ECHR.

#### *Article 11* <sup>39</sup>

#### **Remedies**

1. Member States shall ensure that suspects or accused persons **in criminal proceedings as well as requested persons in European Arrest Warrant proceedings** have an effective remedy under national law in instances where **their** rights **under this Directive** have been breached.
2. **Without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in criminal proceedings, in the assessment of [...] statements made by a suspect or accused person or of evidence obtained in breach of his right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 3(5), the rights of the defence and the fairness of the proceedings are respected.**

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<sup>39</sup> See also recital 38 as modified.

*Article 11a*

**Vulnerable persons**

**Member States shall ensure that in the application of this Directive the particular needs of vulnerable suspects and vulnerable accused persons are taken into account.**

*Article 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 ECHR, 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*]. They shall immediately inform the Commission thereof.
- [2. When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.
3. Member States shall communicate to the Commission the text of the measures of national law which they adopt in the field covered by this Directive, (accompanied by a correlation table between those provisions and this Directive). ]<sup>40</sup>

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<sup>40</sup> 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 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*