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REPORT

on the 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
(COM(2011)0326 – C7-0157/2011 – 2011/0154(COD))

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Elena Oana Antonescu

Symbols for procedures

- * Consultation procedure
- *** Consent procedure
- ***I Ordinary legislative procedure (first reading)
- ***II Ordinary legislative procedure (second reading)
- ***III Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

Amendments to a draft act

In amendments by Parliament, amendments to draft acts are highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the draft act which may require correction when the final text is prepared – for instance, obvious errors or omissions in a language version. Suggested corrections of this kind are subject to the agreement of the departments concerned.

The heading for any amendment to an existing act that the draft act seeks to amend includes a third line identifying the existing act and a fourth line identifying the provision in that act that Parliament wishes to amend. Passages in an existing act that Parliament wishes to amend, but that the draft act has left unchanged, are highlighted in **bold**. Any deletions that Parliament wishes to make in such passages are indicated thus: [...].

CONTENTS

	Page
DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION	5
EXPLANATORY STATEMENT.....	40
OPINION OF THE COMMITTEE ON LEGAL AFFAIRS	44
PROCEDURE	60

DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

**on the 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
(COM(2011)0326 – C7-0157/2011 – 2011/0154(COD))**

(Ordinary legislative procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to Parliament and the Council (COM(2011)0326),
 - having regard to Article 294(2) and Article 82(2) of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C7-0157/2011),
 - having regard to Article 294(3) of the Treaty on the Functioning of the European Union,
 - having regard to the contributions submitted by the Bulgarian Parliament, the Italian Senate and the Portuguese Parliament on the draft legislative act,
 - having regard to the opinion of the European Economic and Social Committee of 7 December 2011¹,
 - after consulting the Committee of the Regions,
 - having regard to the undertaking given by the Council representative by letter of 4 June 2013 to approve Parliament's position, in accordance with Article 294(4) of the Treaty on the Functioning of the European Union,
 - having regard to Rule 55 of its Rules of Procedure,
 - having regard to the report of the Committee on Civil Liberties, Justice and Home Affairs and the opinion of the Committee on Legal Affairs (A7-0228/2013),
1. Adopts its position at first reading hereinafter set out;
 2. Calls on the Commission to refer the matter to Parliament again if it intends to amend its proposal substantially or replace it with another text;
 3. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

¹ OJ C 43, 15.12.2012, p. 51.

Amendment 1

AMENDMENTS BY THE EUROPEAN PARLIAMENT*

to the Commission proposal

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of

on the right of access to a lawyer in criminal proceedings and *European arrest warrant proceedings, and on the rights to have a third party informed upon deprivation of liberty and to communicate, while deprived of liberty, with third persons and with consular authorities*

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 Committee¹,

After consulting the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure,

* Amendments: new or amended text is highlighted in bold italics; deletions are indicated by the symbol **■**.

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

Whereas:

- (1) Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter referred to as "the Charter"), Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the ECHR") and Article 14 of the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR") enshrine the right to a fair trial. Article 48 of the Charter guarantees respect for the rights of the defence.
- (2) *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.*
 - (2a) *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.*
 - (2b) *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.*
- (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 *have a third party informed* 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.

(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.

(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.

- (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')¹. ■ 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.*
- (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 proceedings² and Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings³.*
- (6) This Directive sets out minimum rules on the right of access to a lawyer and **on** the right to **have** a third party **informed 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,

¹ OJ C 295, 4.12.2009, p. 1.

² *OJ L 280, 26.10.2010, p. 1.*

³ *OJ L 142, 1.6.2012, p. 1.*

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.*

- (6a) *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.*
- (6b) *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.*
- (6c) *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.*
- (6d) *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.

- (6e) *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.*
- (6f) *The scope of application of this Directive in respect of certain minor offences should not affect the obligations of Member States under the ECHR to ensure fair trial rights, including obtaining legal assistance from a lawyer.*
- (6g) *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.*
- (6h) *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.*

(6i) *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, any questioning should be suspended immediately; however, questioning may be continued if the person has been made aware that he is a suspect or accused person and he is able to fully exercise the rights provided for under this Directive.*

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(11) *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.*

(11a) *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.

- (11b) 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.*
- (11c) Member States should ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when they are questioned by the investigating authorities, as well as during court hearings. Such participation should be in accordance with procedures in national law, which 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.*
- (11d) 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 as 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.

- (11e) Member States should be encouraged to make general information available, for instance on a website or by means of a leaflet that is available at police stations, to facilitate suspects or accused persons in obtaining a lawyer. However, Member States would not need to actively pursue that a 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. Such suspect or accused person concerned should be able to freely contact, consult or be assisted by that lawyer.*
- (11f) 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 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. The arrangements could include those on legal aid if applicable.*
- (11g) 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.*

- (11h) In cases of 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, Member States are permitted to temporarily derogate from the right of the suspect or accused person to have access to a lawyer without undue delay after deprivation of liberty. During a temporary derogation on this ground, the competent authorities are not allowed to question the person concerned or to carry out any of the investigative or evidence-gathering acts foreseen in this Directive. 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.*
- (11i) Member States should be permitted to temporarily derogate from the right of access to a lawyer in the pre-trial phase when there is a need, in cases of urgency, to avert serious adverse consequences for the life, liberty or physical integrity of a person. During a temporary derogation on this ground, the competent authorities may question a suspect or accused person without the lawyer being present, it being understood that the suspect or accused person has been informed of his right to remain silent and can exercise that right, and that questioning does not prejudice the rights of the defence, including the privilege against self-incrimination. Questioning may be carried out for the sole purpose and to the extent necessary to obtain information that is essential to avert serious adverse consequences for the life, liberty or physical integrity of a person. Abuse of this derogation would in principle irretrievably prejudice the rights of the defence.*
- (11j) Member States should also be permitted to temporarily derogate from the right of access to a lawyer in the pre-trial phase where immediate action by the investigating authorities is imperative to prevent a substantial jeopardy to criminal proceedings, in particular to prevent destruction or alteration of essential evidence, or to prevent interference with witnesses. During a temporary derogation on this ground, the competent authorities may question a suspect or accused person without the lawyer being present, it being understood that the suspect or accused person has been informed of his right to remain silent and can exercise that right,*

and that questioning does not prejudice the rights of the defence, including the privilege against self-incrimination. Questioning may be carried out for the sole purpose and to the extent necessary to obtain information that is essential to prevent a substantial jeopardy to criminal proceedings. Abuse of this derogation would in principle irretrievably prejudice the rights of the defence.

(11k) 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 suspect or accused person in the exercise of the right of access to a lawyer provided for in this Directive, without derogation. This Directive is without prejudice to procedures that address the situation when there are objective and factual circumstances whereby the lawyer is suspected of being involved with the suspect or accused person in a criminal offence. Criminal activity of the lawyer should not be considered to be legitimate assistance to suspects or accused persons in the framework of 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. This Directive is also without prejudice to procedures in national law according to which forwarding correspondence may be rejected if the sender does not agree to the correspondence first being submitted to a competent court.

- (11) *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.*
- (12) *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.*

(13) 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 imperative requirements or proportionate operational requirements. These requirements can, for example, be 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.*

(13a) *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.*

(13b) *Member States should clearly set out in their national law the grounds and criteria for any temporary derogations from rights granted under this Directive, and they should make a restricted use of these derogations. Any temporary derogations allowed under this Directive should be proportional, strictly limited in time, not be based exclusively on the type or the seriousness of the alleged offence, and not prejudice the overall fairness of the proceedings. Member States should ensure that when a temporary derogation has been authorised under this Directive by a judicial authority which is not a judge or a court, the decision on authorising the temporary derogation can be assessed by a court, at least during the trial stage.*

- (13c)** *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.*
- (13d)** *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.*
- (13e)** *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. 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.*

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- (21) 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*.¹ *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.*
- (21a) *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.*
- (21b) *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.*
- (21c) *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*

¹ *OJ L 190, 18.7.2002, p. 1.*

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.

- (21d) *Without undue delay after being informed that the requested person wishes to appoint a lawyer in the issuing Member State, the competent authority of that Member State shall provide information to the requested person to facilitate him in appointing a lawyer there. Such information could, for example, include a current 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 could request that the appropriate bar association draw up such a list.*
- (21e) *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 requested persons should be able to fully exercise their rights under this Directive in proceedings for the execution of a European Arrest Warrant, those time limits should be respected.*

■

- (24) 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. ■
- (25) *In accordance with* the principle of effectiveness of *Union* law, Member States *should* put in place adequate *and* effective remedies *to protect the rights* conferred upon individuals by *this Directive*.

■

- (27) *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 respected; 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.*
- (27a) *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 have a third party informed upon deprivation of liberty, and by taking appropriate steps to ensure those rights are guaranteed.*

■

- (29) 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.

- (29a) *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.*
- (29b) *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. Such higher level of protection may not constitute an obstacle to mutual recognition of judicial decisions that these minimum rules are designed to facilitate. 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.*
- (30) 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 any specified authorities, institutions or individuals, in particular those which are responsible for the protection or welfare of children, should be informed of the deprivation of liberty of a child. Member States should refrain from limiting or deferring the exercise of the right to*

communicate with a third party in respect of suspected or accused children who are deprived of liberty, save in the most exceptional circumstances. Where a deferral is applied the child should nonetheless not be held incommunicado, but be permitted to communicate with, for example, an institution or individual responsible for the protection or welfare of children.

(30a) *In accordance with the Joint Political Declaration of Member States and the Commission on explanatory documents of 28 September 2011, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.*

█
(32) 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*.

(33) █ 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.

(34) 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/JHA¹ ("**European arrest warrant proceedings**") to have access to a lawyer and to **have** a third party **informed of the deprivation of liberty**.

Article 2

Scope

1. This Directive applies **to suspects or accused persons in criminal proceedings** from the time a person **has been** 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 11.**
- 2a. **This Directive also applies, under the same conditions as provided for in**

¹ **OJ L 190, 18.7.2002, p. 1.**

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.

2b. *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,

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.

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. ***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;***
 - (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.***

- 2a. ***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 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) *Member States shall ensure that the suspect or accused person has the right for his lawyer to be present and participate effectively when he is questioned. Such participation shall be in accordance with procedures in national law, provided these procedures do not prejudice the effective exercise and essence of the right concerned. When a lawyer participates during questioning this shall be recorded in accordance with national law;*
- (c) *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.*

2b. *Member States shall endeavour to make general information available to facilitate suspects or accused persons in obtaining a lawyer.*

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 9.

- 2c. *In exceptional circumstances and in the pre-trial stage only, Member States may temporarily derogate from the application of paragraph 2(c) when the geographical remoteness of a suspect or accused person makes it impossible to ensure the right of access to a lawyer without undue delay after deprivation of liberty.*
- 2d. *In exceptional circumstances and in the pre-trial stage only, Member States may temporarily derogate from the application of the rights provided for in paragraph 3 when and to the extent this is justified, in the light of the particular circumstances of the case, 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) immediate action by the investigating authorities is imperative to prevent a substantial jeopardy to criminal proceedings.*

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.

CHAPTER 3

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

Article 5

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.*
- 2a. *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.

2b. 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 without undue delay of the deprivation of liberty of the child.

Article 5a

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 imperative requirements or proportionate operational requirements.*

Article 6

The right to communicate with consular 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 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.***
 - 1a. 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.*

1b. 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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CHAPTER 4
Derogations and waiver

Article 8

General conditions for applying temporary derogations

1. ***Any temporary derogation under Articles 3(5), 3(6) and 5(3),***
 - (a) shall be ***proportionate and not go beyond what is necessary;***
 - (aa) ***shall be strictly limited in time;***
 - (b) shall not be based exclusively on the type or ***the*** seriousness of the alleged offence; ***and***

■
 - (e) shall not prejudice the ***overall*** fairness of the proceedings.

■

2. **Temporary derogations under Article 3(5) and 3(6)** 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.**
3. **Temporary derogations under Article 5(3)** may only be authorised 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.**

Article 9

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 11 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**
■
 - (c) 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 he 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. A revocation of a waiver shall come into effect from the point in time when the revocation was made.**

CHAPTER 5

European Arrest Warrant proceedings

Article 11

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 *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.*
- █**
- 2a. *The rights provided for in this Directive under Articles 4, 5, 5a, 6, 9 and - when a temporary derogation under Article 5(3) is applied - Article 8 shall apply, mutatis mutandis, to European arrest warrant proceedings in the executing Member State.*

- 2b. *The competent authority in the executing Member State shall, without undue delay after deprivation of liberty, inform the requested person that he has the right to appoint a lawyer in the issuing Member State. The role of that lawyer in the issuing Member State is to assist the lawyer in the executing Member State by providing him with information and advice with a view to the effective exercise of the rights of the requested person under Council Framework Decision 2002/584/JHA.*
- 2c. *Where the requested person wishes to exercise this right and does not already have a lawyer in the issuing Member State, the competent authority in the executing Member State shall promptly inform the competent authority in the issuing Member State. The competent authority of that Member State shall, without undue delay, provide information to the requested person to facilitate him in appointing a lawyer there.*
- 2d. *The right of a requested person to appoint a lawyer in the issuing Member State to assist his lawyer in the executing Member State is without prejudice to the time limits set out in Council Framework Decision 2002/584/JHA or the obligation on the executing judicial authority to decide, within those time limits and the conditions defined under that Framework Decision, whether the person is to be surrendered.*

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CHAPTER 6

General and final provisions

Article 12

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 13

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.

■

3. ***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(6)***, the rights of the defence ***and the fairness of the proceedings are respected.***

Article 13a

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 14

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 15

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.***

█

3. 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*** **█**.

3a. *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.*

Article 15a

Report

The Commission shall by [36 months after the deadline for implementation of the Directive mentioned in Article 15(1)] submit a report to the European Parliament and to the Council, assessing the extent to which the Member States have taken the necessary measures in order to comply with this Directive, including an evaluation of the application of Article 3(6) in conjunction with Article 8(1) and (2), accompanied, if necessary, by legislative proposals.

Article 16

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 17

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

EXPLANATORY STATEMENT

The European Parliament has called for a stronger protection of the rights of the victims of crime from one side and of the suspect and accused person from the other side for a long time. After the failure of the adoption of the Framework Decision on certain procedural rights in criminal proceedings tabled by the European Commission in 2004, with the Pagano report adopted on 7 May 2007, the Plenary strongly called for an ambitious legal instrument on procedural safeguards in criminal proceedings.

The message by the European Parliament was followed up and, on the initiative of the Swedish Presidency, in November 2009 the Council adopted a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings which changes the initial approach of the European Commission, aiming at the adoption of a horizontal and comprehensive instrument, to a less ambitious but maybe more realistic step by step approach covering the following measures:

- A. Translation and interpretation;
- B. Information on rights and information about the charges;
- C. Legal advice and legal aid;
- D. Communication with relatives, employers and consular authorities;
- E. Special safeguards for suspected or accused persons who are vulnerable;
- F. Green paper on pre-trial detention;

The Roadmap has become an integral part of the Stockholm Programme. It clearly states that the list of measures is not exhaustive.

The measures included in the Roadmap have partly already been put in place. The Directive on the right to interpretation and translation in criminal proceedings has been adopted on 20 October 2010 and the Directive on the right to information in criminal matters is now finalised awaiting to be published in the Official Journal.

The proposal for a Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest was adopted by the European Commission on 12 July 2011 and is the third step in the implementation of the Roadmap. It brings together the part of measure C concerning the right to legal advice and measure D on the right to communication with relatives, employers and consular authorities.

The proposal lays down the main principle that every suspect or accused person should be given the right of access to a lawyer as soon as possible and in a manner that allows them to exercise their defence rights effectively. It also specifies that in any event these rights should

be granted before the start of any questioning, upon carrying out any procedural or evidence gathering act and in case of deprivation of liberty. The proposal further identifies the content of the right, stresses that meetings between the suspect or accused person and the lawyer should be confidential, lists the derogations allowed to the general principles and provides for rules in case of waiver of the right to a lawyer.

From the point of view of the remedies, the proposal aims to ensure that effective remedies are granted and in particular that in case of breach of the right of access to a lawyer, the suspect or accused person is placed in the same position as if the breach had not occurred and notably that every statement made or evidence gathered in breach of the right to a lawyer may not be used unless this would not prejudice the rights of the defence.

The same principle applies to persons other than suspects and accused persons, in case they become accused or suspected while heard by the police or the law enforcement authority.

The proposal of the Commission does not set out specific rules on legal aid. It contains only a general reference to legal aid and a provision which states that Member States shall not apply less favourable provisions on legal aid than those currently in place in respect of access to a lawyer provided pursuant to this Directive.

Two provisions deal with the right to communicate upon arrest and the right to communicate with consular or diplomatic authorities.

POSITION OF THE RAPPORTEUR

Despite the existence of common principles and minimum standards stemming both from the ECHR and the EU Charter, provisions governing access to a lawyer vary significantly from one Member State another.

Access to effective defence in criminal proceedings has a different extension in the Member States depending both on the specific legal system and its practical application and this has an indirect but significant implication on the EU policy of mutual trust and recognition.

The provisions of the European Convention on Human Rights and the case law of the European Court of Human Rights are not uniformly implemented and respected by the Member States which gives rise to diverging standards throughout the European Union.

The Parliament has called several times for the need of strengthening procedural rights of the suspect and accused persons, stressing out the need to strike the right balance between freedom justice and security.

The need to enhance mutual trust became even more imperative with the implementation of the mutual recognition programme of judicial decision in criminal proceedings. Legislation adopted at EU level over the last few years has improved the effectiveness of prosecutions and enforcement of sentences across the EU, yet there is a consensus that the absence of measures at EU level to promote the rights of citizens as suspects or accused in criminal proceedings in another Member State has created a sense of imbalance in EU justice policies.

In my view such instruments should have been adopted before the implementation of the principle of mutual recognition and of the measures linked to it.

Citizens have to be confident that their rights are fully respected and their security is provided when they are travelling and that they have the same guarantees in all the Member States.

The scope of this Directive should be broad enough in order to avoid any abuses but at the same time to ensure that the effective and efficient administration of justice is not affected. The right of access to a lawyer for suspects and accused persons should be an overarching principle since the earliest stage of criminal proceedings.

The need for a suspect or accused person to have access to a lawyer and for that legal access to be effective is a key element in placing suspected or accused citizens in a position to defend themselves properly in front of the investigating authorities and at trial.

Without proper access to a lawyer, the effective exercise of other defence rights may remain illusory.

The Directive will be implemented in all the Member States irrespective of their legal systems ensuring the same standards all over Europe.

In the implementation of this Directive Member States should not in any event fall below the standards set out in the Convention and the Charter as developed by the case-law of the European Court of Human Rights.

My draft report builds on the following ideas:

- a certain level of consistency should be kept with the already adopted measures A and B, that is the reason why I proposed the amendment to Article 2.3.

- the right to a lawyer should be broad and should be granted at an early stage of the proceedings without entailing the carrying over of the investigation. As stressed within the amendments proposed on Article 3, it should be granted irrespective of the deprivation of liberty, in case the person is questioned by law enforcement or other competent authorities and, in any case from the moment the person is summoned to appear before a court having jurisdiction in criminal matters. In addition, the suspect or accused person should have the right to meet and to communicate with the lawyer (amendment to Article 4.1).

- as concerns the participation of the lawyer at any investigative or evidence gathering acts at which the person's presence is required or permitted as a right in accordance with national law, whenever the lawyer has been appointed, he should be able to ask for the notification of carrying out of such acts, which shall be recorded using the recording procedure in accordance with the law of the Member State. The absence of the lawyer should not however avert the competent authorities from carrying out such acts, once the notification has been correctly done.

- in the view of the effective exercise of the rights of defence of a suspect or accused person, there shouldn't be any limitation in the duration and the frequency of the meetings between him/her and his/her lawyer (amendment to Article 4.5) as well as to their confidentiality (amendment to Article 7). The same principle should apply to Article 8, while at the same

time authorising a competent authority other than judicial to derogate from the right of access to a lawyer on condition that the decision is subject to judicial review. The right to inform consular authorities should not be open to derogations.

- with regard to the provisions referring to the waiver, the draft report aims to eliminate the prior legal advice on the consequences of the waiver, which might be excessive and could lead to delays in the proceedings.

- the duty to check the detention conditions should be exercised by the public authorities and not by the lawyer, as stressed with the amendment tabled on Article 4.4.

- for the sake of clarification, for the purposes of this Directive, a child should be considered as somebody less than 18 (amendment to Article 5). Mainstreaming the rights of vulnerable suspects and accused persons in this proposal is of utmost importance, therefore the rights applicable to children in accordance with the provisions of this Directive should be extended to this particular category of persons.

- in order to ensure consistency with the relevant provisions of the Directive on the right to information in criminal proceedings the right to communicate upon arrest has been replaced with the right to have a third party informed. Therefore the suspect or accused person who is deprived of liberty shall have the right to have at least one person, such as a relative or employer named by him informed of the deprivation of liberty.

- Taking in consideration that paragraph 2 of Article 12 which refers to legal aid might have an important impact on the legal systems of a number of Member States, it seems more appropriate to deal with this issue in the context of the future measure on legal aid.

In the absence of substantial rules on legal aid in this Directive it should in fact be avoided to set principles that could prejudice such substantial rules that would be the object of a future instrument. The Commission has stated that the issue of legal aid is extremely complex and current information is very patchy. Therefore, it would have required much more time to present the proposal if legal aid had been included, which would have not been appropriate, given the need for action on the substantive right.

20.12.2011

OPINION OF THE COMMITTEE ON LEGAL AFFAIRS

for the Committee on Civil Liberties, Justice and Home Affairs

on the 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 (COM(2011)0326 – C7-0157/2011 – 2011/0154(COD))

Rapporteur: Jan Philipp Albrecht

SHORT JUSTIFICATION

Introduction

While the European Convention on Human Rights and the EU Charter of Fundamental Rights enshrine core defence rights, such as the right to have access to a lawyer, the right to interpretation and translation, the right to be informed of the charge, the right to a regular review of detention and the right to be brought before a court, they offer limited detail about how those rights should be protected in practice.

The Commission proposal currently before the Committee seeks to improve the rights of suspected or accused persons as regards the right of access to a lawyer in criminal proceedings (Articles 3, 4) and on the right to communicate upon arrest with a third person such as a relative, employer or consular authority (Articles 5, 6). A limited number of derogations to these rights are contained in Article 8. The draft directive also covers the right of access to a lawyer in European Arrest Warrant proceedings (Article 11).

It constitutes the third measure of the "Roadmap" for strengthening procedural rights of suspected or accused persons in criminal proceedings¹, which also includes the right to translation and interpretation², to information about rights in criminal proceedings³, to legal aid and special safeguards for suspected or accused persons who are vulnerable and a green paper on pre-trial detention.⁴

¹ European Council conclusions, 10-11 December 2009; Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, 2009/C 295/01, 4.12.2009, OJ C 295/1.

² Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, 26.10.2010, OJ L 280/1.

³ COM (2010) 392

⁴ 14.6.2011, COM(2011) 327 final, Green Paper on Strengthening mutual trust in the European judicial area – A

Having common minimum standards in relation to the right to have access to a lawyer and the right to communicate upon arrest should provide a proper basis for mutual recognition of judicial decisions in criminal matters, prevent coercion on the part of the investigating authorities, ensure the equality of arms between prosecution and defence and avoid miscarriages of justice.

Position of the rapporteur for opinion

Your rapporteur for opinion welcomes the Commission's proposal. Prompt access to a lawyer is essential to allow the suspect or accused person to effectively exercise his or her rights of defence and ensure compatibility with the fundamental rights laid down in the Charter and the European Convention on Human Rights.

Access to a lawyer should be granted in person before the start of any questioning by the police or other law-enforcement authorities, since that is the moment from which the suspect or accused person's defence rights may be adversely affected¹. Your rapporteur also stresses the importance of allowing access to a lawyer before evidence-gathering acts such as the taking of blood or DNA samples or the carrying-out of cavity searches.

Your rapporteur cannot accept the argument according to which the presence of a lawyer and the granting to him or her of a right to meet with suspects, to make representations and to check their welfare is seen as obstructing the investigation. Your rapporteur stresses that any derogations to these rights should be justified by compelling reasons, not solely based on the seriousness of the alleged offence, proportionate, limited in time and should not prejudice the fairness of the proceedings. Furthermore, such derogations should be subject to a duly reasoned decision taken by a judicial authority on a case-by-case basis. Statements made by the suspect or accused person or evidence obtained in breach of his or her right of access to a lawyer, or in case a derogation to this right was authorised, should not be used at any stage of the procedure as evidence against him or her.

The right to communicate upon arrest implies the possibility for a third party to take care of the suspect or accused person's affairs whilst they are in detention. Children should be entitled to the presence of their parent, guardian or appropriate adult to help them understand what is happening. Where appropriate this right should be extended to other vulnerable suspects. All communications between the suspect or accused person and his or her lawyer should be confidential, with no scope for derogations.

Over the last years, the Parliament has frequently expressed its discontent with European Arrest Warrants issued for petty crimes or hearings instead of investigations, and the resulting extended periods of unnecessary pre-trial detention in other Member States.² Your rapporteur strongly supports the system of "dual defence" foreseen by Article 11 to make sure minor cases are clarified or settled at the earliest possible stage.

Green Paper on the, application of EU criminal justice legislation in the field of detention.

¹ See *Salduz v Turkey* [2008] ECHR 1542.

² Plenary debate of 8 June 2011 on the European Arrest Warrant available [here](#).

AMENDMENTS

The Committee on Legal Affairs calls on the Committee on Civil Liberties, Justice and Home Affairs, as the committee responsible, to incorporate the following amendments in its report:

Amendment 1

Proposal for a directive

Title 1

Text proposed by the Commission

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

Amendment

does not affect the English version

Amendment 2

Proposal for a directive

Title 1

Text proposed by the Commission

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

Amendment

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 **in the event of** arrest

Amendment 3

Proposal for a directive

Article 2 – paragraph 1

Text proposed by the Commission

1. This Directive applies **from the time** a person is made aware by the competent authorities of a Member State, by official notification or otherwise, that he is suspected or accused of having committed a criminal offence until the conclusion of

Amendment

1. This Directive applies **in cases where** a person is made aware by the competent authorities of a Member State, by official notification or otherwise, that he is suspected or accused of having committed a criminal offence until the conclusion of

the proceedings, which is understood to mean the final determination of the question whether the suspected or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal.

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.

Amendment 4

Proposal for a directive Article 2 a (new)

Text proposed by the Commission

Amendment

Article 2a

Definitions

1a. The following definitions apply for the purpose of this Directive:

(a) 'child' means a suspect or accused person below the age of 18 years or, where there is no clear evidence relating to age, a suspect or accused person who appears to be below the age of 18;

(b) 'lawyer' means a person who is authorised to pursue his or her professional activities under one of the following professional titles:

Belgium - Avocat/Advocaat/Rechtsanwalt

Bulgaria - Адвокат

Denmark - Advokat

Germany - Rechtsanwalt

Ireland - Barrister/Solicitor

Greece - Δικηγόρος

*Spain - Abogado/Advocat/Avogado/
Abokatu*

France - Avocat

*Italy - Avvocato/praticante avvocato
abilitato*

Luxembourg - Avocat

Netherlands - Advocaat

Austria - Rechtsanwalt

Portugal - Advogado

Romania - Avocat

Finland - Asianajaja/Advokat

Sweden - Advokat

*United Kingdom -
Advocate/Barrister/Solicitor*

(c) 'interview' means the official questioning of a person regarding their involvement or suspected involvement in a criminal offence or offences by appropriate law enforcement authorities, in a police station or another appropriate place.

This Directive does not cover preliminary questioning by the police or other law enforcement officers, immediately after the apprehension of a suspect, the purpose of which is to determine whether an investigation should be started or if there are any safety issues.

Amendment 5

Proposal for a directive

Article 3 – paragraph 1 – introductory part

Text proposed by the Commission

1. Member States shall ensure that ***suspects and accused persons are granted access to a lawyer*** as soon as possible and in any event:

Amendment

1. ***If and to the extent that suspects or accused persons request access to a lawyer***, Member States shall ensure that ***they have such access*** as soon as possible and in any event:

Amendment 6

Proposal for a directive

Article 3 – paragraph 1 – point a

Text proposed by the Commission

(a) before the start of any ***questioning*** by the police or other law enforcement

Amendment

(a) before the start of any ***interview***

authorities;

whether the person is detained or not;

Amendment 7

Proposal for a directive Article 3 – paragraph 1 – point b

Text proposed by the Commission

Amendment

(b) upon carrying out any procedural or evidence-gathering act ***at which the person's presence is required or permitted as a right in accordance with national law, unless this would prejudice the acquisition of evidence;***

(b) upon carrying out any procedural or evidence gathering act, ***save where and only in so far as the person carrying out that procedural or evidence gathering act reasonably believes that evidence will be altered, removed or destroyed pending the lawyer's arrival;***

Justification

Certain evidence gathering acts such as taking blood or DNA samples or doing cavity searches are highly intrusive, in these cases access to a lawyer cannot be made subject to national law.

Amendment 8

Proposal for a directive Article 3 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. This Directive does not affect the provision of legal advice by telephone in very limited cases relating to non-imprisonable offences, where there is no risk of self-incrimination or police coercion;

Amendment 9

Proposal for a directive Article 4 – paragraph 2

Text proposed by the Commission

Amendment

2. The lawyer shall have the right to be

2. The lawyer shall have the right to be

present at any **questioning** and hearing. He shall have the right to ask questions, request clarification and make statements, which shall be recorded in accordance with national law.

present at any **interview** and hearing, **whether the person is detained or not**. He **or she** shall have the right to ask questions, request clarification and make statements, which shall be recorded in accordance with national law.

Amendment 10

Proposal for a directive Article 4 – paragraph 3

Text proposed by the Commission

3. The lawyer shall have the right to be present at any other investigative or evidence-gathering act **at which the suspect or accused person's presence is required or permitted as a right, in accordance with national law, unless this would prejudice the acquisition of evidence.**

Amendment

3. The lawyer shall have the right to be present at any other investigative or evidence gathering act, **save where and only in so far as the person carrying out that investigative or evidence gathering act reasonably believes that evidence will be altered, removed or destroyed pending the lawyer's arrival.**

Justification

Certain evidence gathering acts such as taking blood or DNA samples or doing cavity searches are highly intrusive, in these cases access to a lawyer cannot be made subject to national law.

Amendment 11

Proposal for a directive Article 4 – paragraph 4

Text proposed by the Commission

4. **The lawyer shall have the right to check the conditions in which the suspect or accused person is detained and to this end shall have access to the place where the person is detained.**

Amendment

4. **If he or she receives indications of maltreatment, the lawyer shall have the right to examine the specific conditions in which the suspect or accused person is detained and to that end shall have access to the place where the person is detained.**

Amendment 12

Proposal for a directive Article 5 – paragraph 2

Text proposed by the Commission

2. Where the person is a child, Member States shall ensure that the child's legal representative or another adult, depending on the interest of the child, is informed as soon as possible of the deprivation of liberty and the reasons pertaining thereto, unless it would be contrary to the best interests of the child, in which case another appropriate adult shall be informed.

Amendment

2. Where the ***suspect or accused*** person is a child, Member States shall ensure that the child's legal representative or another adult, depending on the interest of the child, is informed as soon as possible of ***any*** deprivation of liberty and the reasons pertaining thereto, ***may visit the child and may attend any interview of the child and any proceedings***, unless it would be contrary to the best interests of the child, in which case another appropriate adult shall be informed ***and granted the right to visit the child and be present during questioning and proceedings***.

Justification

The paragraph should specify the right of assistance by an appropriate adult in accordance with Article 24 of the Charter of Fundamental Rights on the rights of the child.

Amendment 13

Proposal for a directive Article 5 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. Where appropriate, the rights of a child under paragraph 2, shall be extended to other vulnerable suspects or accused persons needing similar assistance, such as persons with physical or mental disabilities.

If a police officer is told in good faith or suspects that the suspect or accused person has a physical or mental disability that would prevent him from being treated as an adult, the police officer shall treat that person in accordance with paragraph 2 in the absence of any clear evidence to

the contrary.

Justification

I support the rapporteur's amendment to Article 5 (2) (a); however, it could be strengthened by widening the protection it provides to people who are suspected of having a physical or mental disability but are unable to prove it immediately, resulting in them being treated as an adult.

Amendment 14

**Proposal for a directive
Article 6**

Text proposed by the Commission

Member States shall ensure that persons **to whom Article 2 refers**, who are deprived of their liberty and who are non-nationals have the right to have consular or diplomatic authorities of their State of nationality informed of the detention as soon as possible and to **communicate** with the consular or diplomatic authorities.

Amendment

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 detention as soon as possible and to **meet** the consular or diplomatic authorities.

Justification

In accordance with Article 36(c) of the Vienna Convention on Consular Relations, the consular official has a right to visit suspects or accused persons thus enabling a check on their physical and detention conditions.

Amendment 15

**Proposal for a directive
Article 6 a (new)**

Text proposed by the Commission

Amendment

Article 6a

Information

1. Member States shall ensure that suspects and accused persons are informed, without delay and in an understandable form, about their right of access to a lawyer and the fact that the

right continues to apply at all subsequent stages of the proceedings even if they did not exercise it at an earlier stage.

Without prejudice to national law that requires the mandatory presence or assistance of a lawyer, any waiver of the right to a lawyer referred to in this Directive shall be subject to the following conditions:

(a) the suspect or accused person has received prior legal advice on the consequences of the waiver or has otherwise obtained full knowledge of those consequences;

(b) he has the necessary capacity to understand these consequences; and

(c) the waiver is given voluntarily and unequivocally.

2. A record shall be kept, in accordance with the law of the Member State concerned, of the suspect's or accused person's having been informed about the right of access to a lawyer. The waiver and the circumstances in which it was given shall be recorded in accordance with the law of the Member State concerned.

3. Member States shall ensure that a waiver can be subsequently revoked at any stage of the proceedings.

Justification

Use of the instrument of waiver raises potential further issues and a need for regulation to cover the eventuality of the suspect or accused person changing his mind at a later stage. The relevant article therefore needs to be re-titled, reworded and repositioned in the text.

Amendment 16

Proposal for a directive Article 7

Text proposed by the Commission

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.

Amendment

Member States shall ensure that the confidentiality of meetings between the suspect or accused person and his lawyer is guaranteed **without exception**. They shall also, **without exception**, 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.

Justification

All communications between the suspect or accused person and his or her lawyer should be confidential, with no scope for derogations.

Amendment 17

Proposal for a directive Article 8 – paragraph 1 – introductory part

Text proposed by the Commission

Member States shall not derogate from any of the provisions of this Directive save, in exceptional circumstances, from Article 3, Article 4 paragraphs 1 to 3, Article 5 **and Article 6**. Any such derogation:

Amendment

Member States shall not derogate from any of the provisions of this Directive save, in exceptional circumstances, from Article 3, Article 4(1), (2) and (3) **and** Article 5. Any such derogation:

Amendment 18

Proposal for a directive Article 8 – point d

Text proposed by the Commission

(d) shall be limited in time as much as possible and in any event not extend to the trial stage;

Amendment

(d) shall be limited in time as much as possible and in any event not extend to the trial stage; **and**

Justification

These requirements should be cumulative.

Amendment 19

**Proposal for a directive
Article 9**

Text proposed by the Commission

Amendment

1. Without prejudice to national law that requires the mandatory presence or assistance of a lawyer, any waiver of the right to a lawyer referred to in this Directive shall be subject to the following conditions:

deleted

a) the suspect or accused person has received prior legal advice on the consequences of the waiver or has otherwise obtained full knowledge of these consequences;

b) he has the necessary capacity to understand these consequences and

c) the waiver is given voluntarily and unequivocally.

2. The waiver and the circumstances in which it was given shall be recorded in accordance with the law of the Member State concerned.

3. Member States shall ensure that a waiver can be subsequently revoked at any stage of the proceedings.

Justification

This article, with certain changes, should be repositioned before Article 7.

Amendment 20

Proposal for a directive Article 10 – paragraph 2

Text proposed by the Commission

2. Member States shall ensure that any statement made by such person before he is made aware that he is a suspect or an accused person may not be used against him.

Amendment

2. ***Without prejudice to national rules on the admissibility of evidence***, Member States shall ensure that any statement made by such person before he ***or she*** is made aware that he is a suspect or an accused person may not be used against him ***or her***.

Justification

This directive should not seek to impose a choice between a legalistic system on the admissibility of evidence or a more flexible system where courts have the right to assess the evidence in the light of how it was produced and value it accordingly.

Amendment 21

Proposal for a directive Article 11 – paragraph 5 a (new)

Text proposed by the Commission

Amendment

5a. Where appropriate, the right of access to a lawyer under paragraph 1 shall be extended to other types of judicial cooperation in criminal matters which adversely affect the rights of suspects or accused persons.

Justification

The same need for dual representation will exist once the European Supervision Order and Transfer of Sentenced Persons are implemented as well as future instruments like the European Investigation Order.

Amendment 22

Proposal for a directive Article 13 – paragraph 3

Text proposed by the Commission

3. Member States shall ensure that ***statements made by the suspect or accused person or evidence obtained*** in breach of his right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 8, may not be used at any stage of the procedure as evidence against him, ***unless the use of such evidence would not prejudice the rights of the defence.***

Amendment

3. ***Without prejudice to national rules on the admissibility of evidence,*** Member States shall ensure that ***evidence obtained*** in breach of his ***or her*** right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 8, may not be used at any stage of the procedure as evidence against him ***or her.***

Justification

This directive should not seek to impose a choice between a legalistic system on the admissibility of evidence or a more flexible system where courts have the right to assess the evidence in the light of how it was produced and value it accordingly.

PROCEDURE

Title	The right of access to a lawyer in criminal proceedings and the right to communicate upon arrest
References	COM(2011)0326 – C7-0157/2011 – 2011/0154(COD)
Committee responsible Date announced in plenary	LIBE 5.7.2011
Committee(s) asked for opinion(s) Date announced in plenary	JURI 15.9.2011
Rapporteur(s) Date appointed	Jan Philipp Albrecht 11.7.2011
Discussed in committee	10.10.2011
Date adopted	20.12.2011
Result of final vote	+: 21 -: 0 0: 0
Members present for the final vote	Raffaele Baldassarre, Luigi Berlinguer, Sebastian Valentin Bodu, Françoise Castex, Christian Engström, Marielle Gallo, Lidia Joanna Geringer de Oedenberg, Klaus-Heiner Lehne, Antonio López-Istúriz White, Antonio Masip Hidalgo, Alajos Mészáros, Bernhard Rapkay, Evelyn Regner, Francesco Enrico Speroni, Alexandra Thein, Diana Wallis, Rainer Wieland, Cecilia Wikström, Tadeusz Zwiefka
Substitute(s) present for the final vote	Jan Philipp Albrecht, Jean-Marie Cavada, Luis de Grandes Pascual, Vytautas Landsbergis, Kurt Lechner, Eva Lichtenberger, Arlene McCarthy

PROCEDURE

Title	The right of access to a lawyer in criminal proceedings and the right to communicate upon arrest			
References	COM(2011)0326 – C7-0157/2011 – 2011/0154(COD)			
Date submitted to Parliament	8.6.2011			
Committee responsible Date announced in plenary	LIBE 5.7.2011			
Committee(s) asked for opinion(s) Date announced in plenary	JURI 15.9.2011			
Rapporteur(s) Date appointed	Elena Oana Antonescu 12.7.2011			
Discussed in committee	11.10.2011	28.2.2012	26.4.2012	10.7.2012
	27.11.2012	19.6.2013		
Date adopted	19.6.2013			
Result of final vote	+: -: 0:	49 2 0		
Members present for the final vote	Jan Philipp Albrecht, Rita Borsellino, Emine Bozkurt, Arkadiusz Tomasz Bratkowski, Salvatore Caronna, Philip Claeys, Carlos Coelho, Ioan Enciu, Tanja Fajon, H�el�ene Flautre, Kinga G�al, Kinga G�oncz, Nathalie Griesbeck, Sylvie Guillaume, �Agnes Hankiss, Anna Hedh, Salvatore Iacolino, Sophia in 't Veld, Livia J�ar�oka, Teresa Jim�enez-Becerril Barrio, Timothy Kirkhope, Juan Fernando L�opez Aguilar, Baroness Sarah Ludford, Svetoslav Hristov Malinov, V�eronique Mathieu Houillon, Anthea McIntyre, Nuno Melo, Roberta Metsola, Antigoni Papadopoulou, Georgios Papanikolaou, Carmen Romero L�opez, Judith Sargentini, Birgit Sippel, Csaba S�ogor, Renate Sommer, Rui Tavares, Nils Torvalds, Kyriacos Triantaphyllides, Axel Voss, Renate Weber, Josef Weidenholzer, Tatjana Zdanoka, Auke Zijlstra			
Substitute(s) present for the final vote	Elena Oana Antonescu, Anna Maria Corazza Bildt, Dimitrios Droutsas, Monika Hohlmeier, Jan Mulder, Marco Scurria			
Substitute(s) under Rule 187(2) present for the final vote	J�urgen Creutzmann, Jelko Kacin			
Date tabled	24.6.2013			