



Council of the  
European Union

Brussels, 28 June 2016  
(OR. en)

10665/16

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**Interinstitutional File:  
2013/0409 (COD)**

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**LIMITE**

**DROIPEN 120  
COPEN 223  
CODEC 963**

**NOTE**

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From:	Presidency
To:	Permanent Representatives Committee
No. prev. doc.:	10213/1/16
No. Cion doc.:	17635/13
Subject:	Proposal for a Directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings = Confirmation of the final compromise text with a view to agreement

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This file was discussed in Coreper on Tuesday 22 June in view of the 9th trilogue on 23 June.

The final compromise text as it was discussed at the 9th trilogue is set out in the Annex to this note. Refinements made at the trilogue have been marked with **bold** in the text (and with underlining in the title of Article 9 and in recital 15b).

At the meeting of Coreper on 24 June, the Presidency gave an oral debriefing of the outcome of the trilogue and provided explanations as regards the refinements made.

The European Parliament has informed the Presidency that a large majority of its political groups can accept this text.

In these circumstances, Coreper is invited

- to confirm the final compromise text as set out in the Annex; and
- to allow its President to send the habitual letter to the European Parliament, with a view to reaching an agreement in first reading.

Subsequently to legal-linguist revision of the text, Coreper will again be invited to confirm the text so as to allow the Council and the European Parliament to formally adopt the Directive.

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**FINAL COMPROMISE TEXT**

**as resulting from the 9th trilogue on 23 June 2016**

*"ad referendum"*

(draft)

**DIRECTIVE (EU) .../... OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**of ...**

**on legal aid for suspects or accused persons in criminal proceedings and in European arrest  
warrant proceedings**

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 point (b) of Article 82(2) thereof,

Having regard to the proposal from the European Commission,

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

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

Having regard to the opinion of the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) The purpose of this Directive is to ensure the effectiveness of the right of access to a lawyer as provided for under Directive 2013/48/EU of the European Parliament and of the Council<sup>1</sup> by making available, in the circumstances and under the conditions set out in this Directive, assistance by a lawyer funded by the Member States for suspects and accused persons in criminal proceedings and for requested persons in surrender procedures pursuant to Council Framework Decision 2002/584/JHA<sup>2</sup> ('European arrest warrant proceedings').
- (2) (deleted)
- (3) By establishing common minimum rules on legal aid for suspects and accused persons in criminal proceedings, and for requested persons who are subject to European arrest warrant proceedings, this Directive aims to strengthen the trust of Member States in each other's criminal justice systems and thus to improve mutual recognition of decisions in criminal matters.
- (4) The third subparagraph of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), Article 6(3)(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') and Article 14(3)(d) of the International Covenant on Civil and Political Rights ('the ICCPR') enshrine the right to legal aid in criminal proceedings under the conditions laid down in those provisions. The Charter has the same legal value as the Treaties, and the Member States are parties to the ECHR and the ICCPR. However, 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.

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<sup>1</sup> Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ L 294, 6.11.2013, p. 1).

<sup>2</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.7.2002, p. 1).

- (5) On 30 November 2009, the Council adopted a Resolution on a Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings ('the Roadmap')<sup>3</sup>. Taking a step-by-step approach, the Roadmap calls for the adoption of measures regarding the right to translation and interpretation (measure A), the right to information on rights and information about the charges (measure B), the right to legal advice and legal aid (measure C), the right to communicate with relatives, employers and consular authorities (measure D), and special safeguards for suspects or accused persons who are vulnerable (measure E).
- (6) On 11 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).<sup>4</sup> The European Council invited the Commission to put forward the foreseen proposals in the Roadmap for its swift implementation, on the conditions laid down therein, to examine further elements of minimum procedural rights for suspects and accused persons, and to assess whether other issues, for instance the presumption of innocence, need to be addressed, to promote better cooperation in this area.

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<sup>3</sup> Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (OJ C 295, 4.12.2009, p. 1).

<sup>4</sup> OJ C 115, 4.5.2010, p.1.

- (7) Five measures on procedural rights in criminal proceedings have been adopted to date, namely Directive 2010/64/EU of the European Parliament and of the Council<sup>5</sup>, Directive 2012/13/EU of the European Parliament and of the Council<sup>6</sup>, Directive 2013/48/EU, Directive (EU) 2016/343 of the European Parliament and of the Council<sup>7</sup> and Directive (EU) 2016/800<sup>8</sup>.
- (8) This Directive is concerned with the second part of measure C of the Roadmap, regarding "legal aid".
- (9) Legal aid should cover the costs of the defence for suspects or accused persons in criminal proceedings and requested persons in European arrest warrant proceedings. When granting legal aid, the competent authorities of the Member States should be able to require that suspects, accused persons or requested persons pay part of the costs themselves, depending on their financial resources.
- (10) Without prejudice to Article 6 of Directive (EU) 2016/800, this Directive should not apply when suspects, accused persons or requested persons have waived their right of access to a lawyer, in accordance with Article 9 or Article 10(3) respectively, of Directive 2013/48/EU, and have not revoked such waiver, or when Member States have applied the temporary derogations in accordance with Article 3(5) or (6) of that Directive, for the time of such derogation.
- (11) (moved to 15b)

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<sup>5</sup> 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 (OJ L 280, 26.10.2010, p. 1).

<sup>6</sup> Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ L 142, 1.6.2012, p. 1).

<sup>7</sup> Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ L 65, 11.3.2016, p. 1).

<sup>8</sup> Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (OJ L 132, 21.5.2016, p.1).

- (12) Where a person who was initially not a suspect or accused person, such as a witness, becomes a suspect or accused person, that person should be protected against self-incrimination and has the right to remain silent, in accordance with Union law and the ECHR, as interpreted in the case-law of the Court of Justice of the European Union ('Court of Justice') and of the European Court of Human Rights ('ECtHR'). This Directive therefore makes express reference to the practical situation where such a person becomes a suspect or accused person during questioning by the police or by another law enforcement authority in the context of criminal proceedings. Where, in the course of such questioning, a person other than a suspect or accused person becomes a suspect or accused person, questioning should be suspended immediately. However, questioning may be continued if the person concerned has been made aware that he or she has become a suspect or accused person and that person is able to fully exercise the rights provided for in this Directive.
- (13) In some Member States an authority other than a court having jurisdiction in criminal matters has competence 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 unreasonable to require that the competent authorities ensure all the rights under this Directive. Where the law of a Member State provides for the imposition of a sanction regarding minor offences by such an authority and there is either 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.
- (14) 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. In such situations, it would be unreasonable to require that the competent authorities ensure all the rights under this Directive. 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.

(14b) The application of this Directive to minor offences is subject to the conditions set out in this Directive. Member States may apply a means test, a merits test or both in order to determine whether legal aid has to be granted. Provided that this complies with the right to a fair trial, in respect of certain minor offences the merits test may be deemed not to have been met.

(15) 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 the right to a fair trial including obtaining legal assistance from a lawyer.

(15a) (deleted)

(15b) **Provided that this complies with the right to a fair trial, the following situations do not constitute a deprivation of liberty in the sense of this Directive: identifying the suspect or accused person; determining whether an investigation should be started; verifying the possession of weapons or other similar safety issues; carrying out investigative or evidence-gathering acts other than those specifically referred to in this Directive, such as body checks, physical examinations, blood, alcohol or similar tests, or the taking of photographs or fingerprints; bringing the suspect or accused person to appear before a competent authority, in accordance with national law.**

(15c) **This Directive sets minimum rules. Member States should be able to grant legal aid in situations which are not covered by this Directive, for example when investigative or evidence-gathering acts, other than those specifically referred to in this Directive, are carried out.**



- (16) **In accordance with** Article 6(3)(c) of the ECHR, suspects and accused persons, who lack sufficient resources, are to have the right to legal aid when the interests of justice so require. This minimum rule allows Member States to apply a means test, a merits test or both. The application of those tests should not limit or derogate from the rights and procedural safeguards that are ensured under the Charter and the ECHR, as interpreted by the Court of Justice and the ECtHR.
- (17) Member States should lay down practical arrangements regarding the provision of legal aid. Such arrangements could determine that legal aid is granted following a request of the suspect, accused person or requested person. Such request, however, should not be a substantive condition for granting legal aid, taking into account the particular needs of vulnerable persons.
- (18) The competent authorities should grant legal aid without undue delay and at the latest before questioning of the person concerned by the police, by another law enforcement authority or by a judicial authority, or before the specific investigative or evidence-gathering acts mentioned in this Directive. If the authorities are not able to grant legal aid in a timely manner, they should at least grant emergency or provisional legal aid before such questioning or before such investigative or evidence-gathering acts take place.
- (19) Given the specificity of European arrest warrant proceedings, the interpretation of the provisions of this Directive relating solely to requested persons should take into account this specificity and not prejudice in any way the interpretation of the remaining provisions of this Directive.

- (20) In European arrest warrant proceedings, requested persons are to be entitled to legal aid in the executing Member State. In addition, requested persons, who are subject to European arrest warrant proceedings for the purpose of conducting a criminal prosecution, and who exercise the right to appoint a lawyer in the issuing Member State in accordance with Directive 2013/48/EU, should be entitled to legal aid in that Member State for the purpose of the European arrest warrant proceedings in the executing Member State, insofar as such aid is necessary to ensure effective access to justice, as stipulated in Article 47 of the Charter. This would be the case when the lawyer in the executing Member State cannot fulfil his or her tasks as regards the execution of a European arrest warrant effectively and efficiently without the assistance of a lawyer in the issuing Member State. Any decision as regards granting legal aid in European arrest warrant proceedings in the issuing Member State should be taken by an authority that is competent for taking decisions on legal aid in that State, **on the basis of criteria that are established by the relevant Member State when implementing the provisions of this Directive.**
- (21) To ensure the effective access to a lawyer for requested persons, Member States should ensure that such persons have access to legal aid until the surrender, or, in cases of non-surrender, until the decision on surrender has become final.
- (22) When implementing this Directive, Member States should ensure the respect of the fundamental right of legal aid as provided for by the Charter and the ECHR. In doing so, they should respect the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.
- (23) Without prejudice to provisions of national law concerning the mandatory presence of a lawyer, decisions on whether or not to grant legal aid should be made without undue delay by a competent authority, which should be an independent authority competent for taking decisions regarding legal aid, or a court, including a judge sitting alone. In urgent situations the temporary involvement of the police and the prosecution should however also be possible in so far as this is necessary for granting legal aid in a timely manner.

- (24) Where legal aid has been granted to a suspect, accused person or requested person, one way of ensuring the effectiveness and quality of that legal aid is to facilitate continuity in legal representation for that suspect, accused person or requested person. In that respect, Member States should facilitate continuity of legal representation throughout the criminal proceedings, including - where relevant - European arrest warrant proceedings.
- (25) Adequate training should be provided to staff involved in the decision-making on legal aid in criminal proceedings and in European arrest warrant proceedings. When courts or judges decide on the granting of legal aid, Member States should request, without prejudice to the judicial independence and differences in the organisation of the judiciary across the Member States, that those responsible for the training of judges provide such adequate training to courts and judges.
- (26) The principle of effectiveness of Union law requires that Member States put in place adequate and effective remedies in the event of a breach of a right conferred upon individuals by Union law. An effective remedy should be available, where the provision of legal aid has been undermined, delayed or refused in full or in part.
- (27) In order to monitor and evaluate the effectiveness of this Directive, there is a need for collection of relevant data, from available data, with regard to the implementation of the rights set out in this Directive. Such data include, where possible, the number of requests for legal aid in criminal proceedings, as well as for European arrest warrant proceedings when the Member State acts as issuing and executing State, the number of cases where legal aid was granted, and the number of cases where a request for legal aid was refused. Data on the costs for providing legal aid for suspects or accused persons and for requested persons should also be collected, in so far as this is possible.

- (28) This Directive should apply to suspects or accused persons regardless of their legal status, citizenship or nationality. This Directive should respect and guarantee the rights set out in this Directive, without any discrimination based on any ground such as race, colour, sex, sexual orientation, language, religion, political or other opinion, nationality, ethnic or social origin, property, disability or birth. This Directive upholds the fundamental rights and principles recognised by the Charter and the ECHR, 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 integrity of the person, the rights of the child, integration of persons with disabilities, the right to an effective remedy and the right to a fair trial, the presumption of innocence and the rights of the defence. This Directive should be implemented in accordance with those rights and principles.
- (29) This Directive sets out minimum rules. Member States may extend the rights set out in this Directive in order to provide a higher level of protection. Such higher level of protection should not constitute an obstacle to the mutual recognition of judicial decisions that those minimum rules are designed to facilitate. The level of protection should never fall below the standards provided by the Charter or the ECHR, as interpreted in the case-law of the Court of Justice and of the ECtHR.
- (30) Since the objectives of this Directive, namely setting common minimum rules for the right to legal aid for suspects or accused persons in criminal proceedings and in European arrest warrant proceedings, cannot be sufficiently achieved by the Member States but can rather, 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 of the 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 those objectives.

- (31) In accordance with Articles 1 and 2 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the Treaty on the European Union and to the Treaty on the Functioning of the European Union, and without prejudice to Article 4 of that Protocol, those Member States are not taking part in the adoption of this Directive and are not bound by it or subject to its application.
- (32) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the Treaty on the European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Directive, and is not bound by it or subject to its application,

*Article 1*

**Subject-matter**

1. This Directive lays down minimum rules concerning the right to legal aid for:
  - (a) suspects and accused persons in criminal proceedings; and
  - (b) persons who are subject to proceedings pursuant to Framework Decision 2002/584/JHA ('European arrest warrant proceedings') ('requested persons').
2. This Directive complements Directive 2013/48/EU and Directive (EU) 2016/800. Nothing in this Directive shall be interpreted as limiting the rights provided for in those Directives.

## *Article 2*

### **Scope**

1. This Directive applies to suspects and accused persons in criminal proceedings, who have a right of access to a lawyer pursuant to Directive 2013/48/EU and who are:
  - (a) deprived of liberty;<sup>9</sup>
  - (b) required to be assisted by a lawyer in accordance with Union or national law; or
  - (c) required or permitted to attend an investigative or evidence-gathering act, **including as a minimum the following**:
    - (i) identity parades;
    - (ii) confrontations;
    - (iii) reconstructions of the scene of a crime.
2. This Directive also applies, upon arrest in the executing Member State, to requested persons, who have a right of access to a lawyer pursuant to Directive 2013/48/EU.
3. This Directive also applies, under the same conditions as provided for in paragraph 1, to persons who were not initially suspects or accused persons but become suspects or accused persons in the course of questioning by the police or by another law enforcement authority.

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<sup>9</sup> Note for translators: it is understood that at this place an imaginative "or" should be placed, so that the three subparagraphs are optional: the fulfilment of subparagraph a) or b) or c) is sufficient to trigger the application of the Directive.

4. In respect of minor offences, and provided that this complies with the right to a fair trial,
- (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 only applies to the proceedings before a court having jurisdiction in criminal matters. In any event, this Directive shall apply when a decision on detention is taken, and during detention, at any stage of the proceedings until the conclusion of such proceedings.

5. **(deleted; see recitals 15b and 15c)**

### *Article 3*

#### **Definition**

For the purposes of this Directive, ‘legal aid’ means funding by a Member State of the assistance by a lawyer enabling the exercise of the right of access to a lawyer.



*Article 4*

**Legal aid in criminal proceedings**

1. Member States shall ensure that suspects or accused persons in criminal proceedings, who lack sufficient resources to pay for legal assistance, have the right to legal aid when the interests of justice so require.
  - 1a. Member States may apply a means test, a merits test or both to determine whether legal aid has to be granted in accordance with paragraph 1.
  - 1b. When Member States apply a means test, they shall take into account all relevant and objective factors, such as the income, capital and family situation of the person concerned, the costs of legal assistance and the standard of living in the relevant Member State, in order to determine whether, in accordance with the applicable criteria in the relevant Member State, suspects or accused persons lack sufficient resources to pay for legal assistance.
2. When Member States apply a merits test, they shall take into account the seriousness of the offence, the complexity of the case and the severity of the penalty at stake, in order to determine whether the interests of justice require granting legal aid. In any event, the merits test shall be deemed to have been met in the following situations:
  - (a) when suspects or accused persons are brought before a competent court or judge in order to decide on detention at any stage of the proceedings within the scope of this Directive; and
  - (b) during detention.

3. Member States shall ensure that legal aid is granted without undue delay, and at the latest before questioning by the police, by another law enforcement authority or by a judicial authority, or before the investigative or evidence-gathering acts referred to in point (c) of Article 2(1).
4. Legal aid shall be granted for the purposes of the criminal proceedings in which the person concerned is suspected or accused of having committed a criminal offence.

*Article 5*

**Legal aid in European arrest warrant proceedings**

1. The executing Member State shall ensure that requested persons have the right to legal aid upon arrest pursuant to a European arrest warrant until they are surrendered, or, in cases of non-surrender, until the decision on non-surrender has become final.
2. The issuing Member State shall ensure that requested persons, who are subject to European arrest warrant proceedings for the purpose of conducting a criminal prosecution, and who exercise their right to appoint a lawyer in the issuing Member State to assist the lawyer in the executing Member State in accordance with Article 10(4) and (5) of Directive 2013/48/EU, have the right to legal aid in the issuing Member State for the purpose of the European arrest warrant proceedings in the executing Member State, insofar as such legal aid is necessary to ensure effective access to justice.
3. The right to legal aid referred to in paragraphs 1 and 2 may be subject to a means test in accordance with Article 4(1b), which shall apply *mutatis mutandis*.

*Article 6*

**Decisions on the granting of legal aid**

1. Decisions on whether or not to grant legal aid, and the assignment of lawyers, shall be made without undue delay by a competent authority. Member States shall take appropriate measures to ensure that any such authority takes its decisions diligently, and in respect of the rights of defence.
2. Member States shall take necessary measures to ensure that suspects or accused persons in criminal proceedings, and requested persons in European arrest warrant proceedings, are informed in writing if their application for legal aid is rejected in full or in part.

*Article 7*

**Quality of legal aid services and training**

1. Member States shall take the necessary action, including with regard to funding, with the aim of ensuring that:
  - (a) there is an effective and qualitative legal aid system; and
  - (b) legal aid services are of a quality that is adequate to safeguard the fairness of the proceedings, with due respect for the independence of the legal profession.
2. Member States shall ensure that adequate training is provided to staff involved in the decision-making on legal aid in criminal proceedings and in European arrest warrant proceedings.
3. With due respect for the independence of the legal profession and for the role of those responsible for the training of lawyers, Member States shall take appropriate measures to promote the provision of adequate training to lawyers providing legal aid services.
4. Member States shall take the necessary measures to ensure that suspects or accused persons in criminal proceedings, and requested persons in European arrest warrant proceedings, have the right, upon their request, to have the lawyer providing legal aid services assigned to them replaced, where the specific circumstances so justify.

*Article 8*  
**Remedies**

Member States shall ensure that suspects and accused persons in criminal proceedings, as well as requested persons in European arrest warrant proceedings, have an effective remedy under national law in the event of a breach of their rights under this Directive.

*Article 8a*  
**Vulnerable persons**

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

*Article 9*  
**Provision of data and report**

1. By ... [2 years after the date mentioned in Article 11(1)] and every three years thereafter, Member States shall send to the Commission available data showing how the rights laid down in this Directive have been implemented.
2. Three years after the date mentioned in Article 11(1), and every three years thereafter, the European Commission shall submit a report on the implementation of this Directive to the European Parliament and Council. **In this report, the Commission shall assess the implementation of this Directive as regards the right to legal aid in criminal proceedings and in European arrest warrant proceedings.**

*Article 10*

**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 of Fundamental Rights of the European Union, the European Convention for the Protection of Human Rights and Fundamental Freedoms, or other relevant provisions of international law or the law of any Member State which provides a higher level of protection.

*Article 11*

**Transposition**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by ... [**30 months** after publication of this *Directive*]. They shall immediately inform the Commission thereof.
2. When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.
3. Member States shall communicate to the Commission the text of the measures of national law which they adopt in the field covered by this Directive.

*Article 12*

**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 13*

**Addressees**

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

Done at .....,

*For the European Parliament*

*The President*

*For the Council*

*The President*

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